No. _____

IN THE SUPREME COURT OF THE UNITED STATES

_____

DAVID ANTHONY BATTLE, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent.*

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

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Under Appointment by the Criminal
Justice Act

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

CASES **PAGE**

TABLE OF AUTHORITIES (Cont'd)

CASES **PAGE**

TABLE OF AUTHORITIES (Cont'd)

CASES **PAGE**

TABLE OF AUTHORITIES (Cont'd)

FEDERAL STATUTES **PAGE**

FEDERAL RULES

QUESTIONS PRESENTED

1. Whether the district court failed to make proper ends of justice findings to justify a sixteen month delay in the trial based upon pronouncements contained in the court's general orders addressing COVID-19.

2. Whether it was possible to hold a jury trial safely where the presence of COVID-19 was otherwise uncontrolled in local contract jail facilities where Mr. Battle was in pretrial custody in what constituted oppressive pretrial incarceration within the meaning of the Sixth Amendment and the Speedy Trial Act.

3. Whether a district court must dismiss an indictment with prejudice as a remedy for the lower court's violation of defendant's constitutional and statutory rights to a Speedy Trial.

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

The petitioner David Anthony Battle respectfully prays that a writ of certiorari issue to review the United States Court of Appeals for the Ninth Circuit's decision affirming his conviction and sentence.

OPINION BELOW

On February 22, 2023, the United States Court of Appeals for the Ninth Circuit filed a unpublished memorandum decision in United States v. David Anthony Battle, No. 21-50221, affirming the conviction and sentence. A copy of

the opinion is attached hereto as Appendix "A".

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254. The District Court had jurisdiction pursuant to 18 U.S.C. § 3231. The Ninth Circuit Court of Appeals had jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE CASE

Mr. Battle plead guilty to six counts of interference with commerce by robbery in violation of Title 18 U.S.C. § 1951. Prior to acceptance of his pleas, Battle preserved his right to appeal the denial of his right to a speedy trial as part of a conditional plea agreement. (ER 11-30).[1]

On October 4, 2021, the district court sentenced Battle to a term of 110 months. (ER 39, 387). On October 6, 2021, Battle filed a timely notice of appeal. (ER 38, 388).

On February 22, 2023, in an unpublished memorandum decision, the United States Court of Appeals for the Ninth Circuit affirmed Battle's conviction and sentence. (App. "A").

[1] "ER" refers to Mr. Battle's excerpts of record filed in the Ninth Circuit. "SER" refers to the government's supplemental excerpts of record.

STATEMENT OF FACTS

On August 10, 2020, Mr. Battle was arrested in this case. He thereafter spent seven and half months in pretrial custody at various county jail facilities, including the Robert Presley Detention Center in Riverside County and the West Valley and Central Detention Centers in San Bernardino County. (ER-143).

On October 7, 2020, Battle was indicted on six counts of interference with commerce by robbery of pharmacies and one count of attempted robbery of a pharmacy, all in violation of 18 U.S.C. § 951(a). (ER-132-39, 142).

On November 10, 2020, the government moved to continue the trial from November 30, 2020 to February 15, 2021. On November 13, 2020, Battle filed an opposition to that motion. On January 8, 2021, Battle filed a motion to dismiss the indictment, alleging violation of his constitutional and statutory rights to a speedy trial. On January 26, 2021, the government filed the last of its requests to continue the trial, which was granted and trial was set for April 6, 2021. On February 2, 2021, without a hearing, the district court denied the motion to dismiss. In its denial, the court observed that it had previously continued the trial due to the "ongoing COVID-19 pandemic." In support, the court relied upon General Order No. 20-09 ("G.O. 20-09") of the Chief Judge for the Central District of California ("CDCA"), dated August 6, 2020. G.O. 20-09 declared that "Until further notice,

no jury trials will be conducted in criminal cases." In addition to G.O. 20-09, the lower court found excludable time under Title 18, United States Code, Section 3161(h)(7)(B)(I) which states, in pertinent part, that " . . . . the failure to grant such a continuance in the proceeding would be likely to make a continuance of such proceeding impossible, or result in a miscarriage of justice." Id. Jury trials did not resume in the district until the Chief Judge's executive committee lifted the ban more than a year later on February 22, 2022. (App. "B"; ER-31-41, 67, 69, 79-80, 102-106, 130, 145-46, 148; SER-44).

On February 25, 2021, the government filed a Fed. R. Crim. P. 11(a)(2) conditional plea agreement, preserving Mr. Battle's right to pursue the instant appeal. (ER-10-11, 30, 63, 146, 148).

Battle's motion to dismiss was based in part upon the district court case of United States v. Jeffrey Olsen, 494 F.Supp.3d 722 (C.D. Cal. 2020). In that case, Judge Carney from the Southern Division granted a defense motion to dismiss based on Olsen's constitutional right to a speedy trial. Judge Carney's ruling was later overturned in United States v. Olsen, 21 F.4th 1036 (9th Cir. 2022), cert. denied, — S.Ct.-—, 2022 WL 1528431 (May 16, 2022). Unlike Battle, Olsen was never in pretrial custody. (ER-77-96).

G.O. 20-09, and the remaining G.O.'s which came before and after, contained no guidance for finding discernable end dates for what became authority to grant *sine die* continuances for the duration of the pandemic. Yet, since March 2020, jurors in the California state courts were reporting for duty and returning trial verdicts in at least 50 criminal cases in Riverside County alone, not to mention numerous jury trials that occurred in the superior courts for the remaining six counties that comprise the CDCA. United States v. Olsen, No. SACR 17-00076-CJC, 2022 WL 4493853, at *12 (C.D. Cal. August 22, 2022) ("[D]uring the first year of the pandemic, the state courts for the seven counties within the Central District held at least 491 jury trials. The Central District held none.").

There were also some federal courts that conducted criminal jury trials during this period, as well. See United States v. Allen, 34 F.4th 789, 794-95, 798 n.5 (9th Cir. 2022) (identifying thirteen federal jury trials, including two in the Ninth Circuit – not including Allen itself – which took place in "late 2020"). Additionally, during the same period, federal grand juries, often convening in small rooms, returned indictments in the same courthouses where jury trials were suspended. Criminal defendants also made initial appearances, guilty pleas were taken, and criminal sentencings and revocation hearings were called to completion. Other court-related business, including the housing of federal pretrial

defendants in local contract jail facilities, continued uninterrupted despite the presence of COVID-19, a highly contagious disease which invaded the confined spaces of these facilities with few options for prevention or escape. (ER-65-101, 115-18).

REASONS FOR GRANTING THE PETITION

1. The Sixth Amendment and Statutory Right to a Speedy Trial Were Violated under the four factor test of Barker v. Wingo and the seven factor test in COVID-19 cases under United States v. Olsen

The U.S. Constitution and the Speedy Trial Act, 18 U.S.C. § 3161 et seq., require mandatory dismissal of an indictment where a defendant requests to be brought to trial within 70 days of his initial appearance, or the filing of an indictment, whichever last occurs. U.S. Const. amend. VI; 18 U.S.C. 3161(c)(1). Since the CDCA's ban on jury trials lasted until at least February 2022, delay in this case exceeded approximately sixteen months.

A four factor test found in this Court's decision in Barker include the length of the delay, the reasons for the delay, whether the right has been asserted, and whether there was actual prejudice. Barker v. Wingo, 407 U.S. 514, 531-532 (1972) (A claim to one's speedy trial right is "entitled to strong evidentiary weight in determining whether the defendant is being deprived of the right."). Congress enacted the Speedy Trial Act to give further effect to the constitutional right.

While it requires trial to begin within seventy days of the filing of an indictment, it allows for excludable time in cases involving competency examinations, interlocutory appeals, pretrial motions, missing essential witnesses, or findings under the catchall "ends of justice" provision, with the intention that this last justification be "rarely used." United States v. Nance, 666 F.2d 353, 355 (9th Cir. 1982) (discussing the Act's legislative history); United States v. Clymer 25 F.3d 824, 828 (9th Cir. 1994); United States v. Jordan, 915 F.2d 563, 565 (9th Cir. 1990).

A continuance beyond the statutory deadline must also satisfy two additional requirements, namely, that it be both "specifically limited in time" and "justified with reference to the facts as of the time the delay is ordered." Clymer, 25 F.3d at 828. Courts are required to look to numerous factors in determining whether "ends of justice" continuances are appropriate and, in the context of Battle's case, "[w]hether the failure to grant such a continuance in the proceeding would be likely to make a such a proceeding impossible, or result in a miscarriage of justice." 18 U.S.C. § 3161(h)(7)(B)(I).

During the COVID-19 pandemic, in the 9th Circuit, seven additional factors were used to evaluate whether ends of justice concerns outweighed the best interests of the defendant and the public, in addition to Barker's enumerated factors. United States v. Olsen, 21 F.4th 1036, 1047 (9th Cir. 2022). They include:

(1) whether a defendant is detained pending trial; (2) how long a defendant has been detained; (3) whether the defendant has invoked speedy trial rights since the inception; (4) whether the defendant, if detained, belongs to a population that is particularly susceptible to complications if infected with the virus; (5) the seriousness of the charges; (6) whether recidivism may occur if charges are dismissed; and (7) whether the district court has the ability to safely conduct a trial. Id. at 1046.

Of the seven factors, the two most relevant in this case, both of which were overlooked by the district court, include the fourth factor dealing with susceptibility to complications if infected, and the seventh factor addressing whether trial can proceed in a manner considered safe for all participants.

The issue of safety itself, however, is not limited to conditions in the courtroom and Olsen's fourth factor seeks to identify inmates who are more susceptible to complications associated with the virus. The Sixth Amendment also protects such defendants against prolonged exposure to oppressive pretrial incarceration. See Klopfer v. North Carolina, 386 U.S. 213, 222 (1967); United States v. Loud Hawk, 474 U.S. 302, 312 (1986). Consistent with the fourth factor, a finding of actual prejudice is found in Battle's case since he was exposed to "oppressive pretrial incarceration" based upon actual conditions of confinement.

Barker, 407 U.S. at 532 (poor prison conditions can result in oppressive pretrial incarceration); Doggett v. United States, 505 U.S. 647, 651, 654 (1992); United States v. Tigano, 880 F.3d 602, 618 (2nd Cir. 2018) (local jails where federal prisoner held offered little or no recreational or rehabilitative programs).

2. Proper Ends of Justice Findings to Allow Suspension of Jury Trials for Sixteen Months Did Not Occur

The burden of showing that the ends of justice continuances were warranted was with the government. Their reliance upon G.O. 20-09's ban on jury trials required that the ban itself not be in conflict with either the Constitution or the Speedy Trial Act. 28 U.S.C. § 2071(a) (court rules shall be "consistent with Acts of Congress"); Fed. R. Crim. P. 57(a)(1) (same); Stern v. U.S. Dist. Ct. For the Dist. Of Mass., 214 F.3d 4, 13 (1st Cir. 2000) ("Local Rules should cover only interstitial matters. They may not create or affect substantive rights.") (further citations omitted); Marshall v. Gates, 44 F.3d 722, 724-25 (9th Cir. 1995); Williams v. United States District Court, 658 F.2d 430, 435 (6th Cir. 1981) (local rule may not be followed when it "alters those aspects of the litigation process which bear upon the ultimate outcome of the litigation, thereby frustrating federal policies.").

G.O. 20-09, and the remaining general orders, were "violative of the [Speedy Trial] Act which required that any ends of justice continuance be specifically

limited in time and that there be findings supported by the record to justify each ends of justice continuance." Olsen, 21 F.4th at 1073 (Collins, J., dissenting) (internal citation and quotations omitted). The general orders failed to discuss any of the Barker or Olsen factors which were key to the analysis. Yet, G.O. 20-09, by its terms, ordered trials to be suspended indefinitely despite the ends of justice requirement that continuances be limited in time. The G.O.'s relied upon information both outdated and incomplete in terms of whether a trial could be conducted in a safe manner, turning to the most drastic step of suspending trials without any meaningful balancing of the Barker and Olsen factors. The district court was therefore misguided in relying upon general orders to "create an ends of justice exclusion for all continuances subsequently entered, regardless of any change in circumstance, and without the need for further findings." United States v. Jordan, 915 F.2d 563, 565-66 (9th Cir. 1990) (internal quotations omitted).

G.O. 20-09 referred to California Governor Newsom's declaration of a public-health emergency due to COVID-19 and the best practices of the Centers for Disease Control as its two primary sources. These pronouncements did not address, must less mention, criminal court operations. Neither the G.O.'s nor the official state and federal responses considered safety measures that could be taken in the trial courts, which included staggered jury times, use of face masks, social

distancing, reduced seating capacity, gloved handling of exhibits, proper ventilation, hand sanitizers, plexiglass barriers, questionnaires for deferral of jury service, or any other precautionary steps. Determining whether it was safe to hold a trial, or whether it was physically or logistically impractical, required the district court to make a "case-by-case review rather than . . . categorical pronouncements." United States v. Shellef, 718 F.3d 94, 105 (2nd Cir. 2013), quoted in United States v. Henning, 513 F.Supp.3d 1193, 1204 (C.D. Cal. 2021). Without such factual and legal findings, the court-imposed waiver of criminal defendant's speedy trial rights was clearly improper. (CR 32; ER-31-32, 146).

Oppressive pretrial incarceration was also shown due to the presence of COVID-19 where Battle was housed in pretrial confinement since "[t]he risk posed by infectious diseases in jails and prisons is significantly higher than in the community, both in terms of risk of transmission, exposure, and harm to individuals who become infected." Martinez-Brooks v. Easter, 459 F.Supp. 3d 411, 418 (D.Conn. 2020); see also Rangel v. California Rehabilitation Center, No. 5:21-cv-00466-DMG, 2021 WL 4706712, at *4 (C.D. Cal. March 25, 2021) (Inmates tested positive for COVID-19 at Robert Presley Detention Center where Battle was housed and the disease was found to pose "a substantial risk of serious harm to prisoners in general.").

Social distancing in the jails is found to be "virtually impossible." Martinez-Brooks, Id. at 418; see also United States v. Skinner, No. 3:19cr19, 2021 WL 1725543, at *29 (E.D. Va. April 29, 2021) ("Skinner has faced oppressive pretrial incarceration and heightened anxiety due to the COVID-19 pandemic"); compare United States v. Olsen, 21 F.4th 1036, 1065 (9th Cir. 2022) ("COVID-19 does not put the Constitution on hold . . . . Yet, because Olsen was not under pretrial detention, I do not believe he suffered a deprivation of his Sixth Amendment speedy trial right.") (Bumatay, J., concurring).

Based on a study of the effects of COVID-19 in prisons during the period April 5, 2020 through April 3, 2021, inmates like Battle who were in pretrial custody during this time were more than three times as likely to contract COVID-19 and more than 2.5 times as likely to die. Marquez et al., *COVID-19 Incidence and Mortality in Federal and State Prisons Compared With the US Population, April 5, 2020, to April 3, 2021*, Journal of the American Medical Association (JAMA) (Oct. 6, 2021), available at https://jamanetwork.com/journals/jama/fullarticle/2784944; see also Toblin, R. and Hagan, L., *COVID-19 Case and Mortality Rates in the Federal Bureau of Prisons*, 61(1) Am. J. Preventive Medicine 120-123 (2021), available at https://www.ncbi.nlm.nih.gov/ pmc/articles/PMC7905372 ("The Federal Bureau of Prisons COVID-19 case rates and standard

mortality ratio were approximately 5 and 2.5 times those in U.S. adults, respectively, consistent with those of prisons nationwide.").

In relation to the fourth Olsen factor, the local jails where Mr. Battle was housed fell within the ambit of the JAMA study, making him ". . . . particularly susceptible to complications if infected with the virus." Olsen, 21 F.3d at 1046-1077; see also Hill, L. and Artiga, S. *COVID-19 Cases and Deaths by Race/ Ethnicity: Current Data and Changes Over Time*, Kaiser Family Foundation (Feb. 22, 2022), available at https://tinyurl.com/4jht942c ("[O]verall, Black, Hispanic, and AIAN people have experienced higher rates of COVID-19 infection and death compared to White people, particularly when accounting for age differences across racial and ethnic groups.") (Battle is African-American).

In addition to the fourth and seventh Olsen factors, at least three of the remaining five factors supported Mr. Battle's position, as well. Battle remained detained at all times, had remained detained well beyond the time limits set forth under the Speedy Trial Act, and had consistently and repeatedly invoked his rights to a speedy trial.

While the decision is left to the "guided discretion of the district court," the presence of actual prejudice to the defendant is a relevant factor, as is the length of the delay and any responsibility the defendant has for the delay. United States v.

Taylor, 487 U.S. 326, 332, 335, 339-41 (1988); United States v. Ramirez, 973 F.2d 36, 39 (1st Cir. 1992) ("When an STA violation is caused by the court or the prosecutor, it weighs in favor of granting a dismissal with prejudice.").

Actual prejudice is demonstrated due to the length of the delay when, as in this case, oppressive pretrial confinement is shown. United States v. Gregory, 322 F.3d 1157, 1163 (9th Cir. 2003) (further citation omitted). In G.O. 20-09, the Chief District Court Judge acknowledged increased rates of infection, as well as a rise in hospitalizations and deaths in the seven counties that make up the CDCA, including Riverside and San Bernardino counties. This meant that changed circumstances made pretrial confinement more, not less, oppressive than at other times during the pandemic. (SER-44-45).

Unlike the prosecution in Olsen, the government here sought every continuance while Battle opposed them all. The open-ended nature of the continuances which followed were guided by the a series of G.O.'s which meant that no cases were tried in the CDCA before February 2022 when petit juries were finally summoned to serve. Until then, the suspensions remained unchecked so long as a majority of judges in the CDCA continued to support them. These events "seriously distorted" the process of making ends of justice findings as part of the process of granting continuances of the trial. United States v. Clymer, 25 F.3d at

828-829 (9th Cir. 1994) (continuances must be "specifically limited in time" and "justified with reference to the facts as of the time the delay is ordered"); United States v. Jordan, 915 F.2d at 565-66 (indefinite continuances "could exempt the entire case from the requirements of the Speedy Trial Act altogether, and open up the door for wholly unnecessary delays in contravention of the Act's purpose."). (SER-33-50).

Failure to grant the continuances did not make trial of Battle's case "impossible," nor would it have resulted in a miscarriage of justice. After Battle invoked his right to proceed to trial within the prescribed time limits, the four to five day trial of this case should have proceeded once precautionary measures were taken. Ample evidence exists to support this claim, particularly since 16 or more grand jurors continued to do their work in confined spaces, contributing to what became a backlog of pending indictments. Moreover, trial delay in this case was a prolonged one, significantly so when compared to the two oft-cited cases allowing suspension of trials based upon ends of justice findings due to impossibility and the miscarriage of justice. Furlow v. United States, 644 F.2d 764, 769 (9th Cir. 1981) (two week suspension due to the volcanic eruption of Mt. Saint Helens); United States v. Correa, 182 F.Supp. 2d 326, 327 (S.D.N.Y. 2001) (twenty day delay

following the terrorist attack at the World Trade Center). Rather, the delay here spanned a period well in excess of one year.

3. The District Court May Dismiss the Indictment With Prejudice

When a violation of a defendant's rights to a speedy trial are shown, and in the absence of proper excludable time findings, the district court must dismiss an indictment not tried within the 70 day limit. 18 U.S.C. § 3162(a) (1)-(2). The dismissal may either be with or without prejudice for refiling the charges. In deciding between these two alternatives, courts consider a number of factors, including the seriousness of the offense, the circumstances which led to the dismissal, the impact of a second prosecution, and the administration of justice generally. The length of the delay is also considered. Id.

While COVID-19 is the chief source of actual prejudice in this case as it led to oppressive pretrial confinement, it was not the only source. The uncontrolled presence of the virus in the local jails comes alongside other forms of prejudice due to restrictions on liberty and the ability to prepare for trial. United States v. Clymer, 25 F.3d 824, 832 (9th Cir. 1994) ([E]ven a delay of five months strongly implicates the serious concerns articulated by Justice White in his concurring opinion in Barker v. Wingo . . . .").

Clearly the deprivation of Battle's liberty, while under the presumption of innocence (and beyond), did "disrupt his employment", did "drain his financial resources" due to the loss of his job as a truck driver, an essential service during the pandemic, did "curtail his associations", did "subject him to public obloquy", and did "create anxiety in him" and in "his family." See United States v. Taylor, 487 U.S. 326, 340 (1988).

Combining actual prejudice in its various forms with Battle's loss of opportunity to contact witnesses essential to his defense explains, in part, the timing of his conditional plea allowing him to proceed with the direct appeal on an expedited basis, and provides additional support for finding that he has "paid a significant debt to society." This Court can therefore find that the government "should not be permitted to reprosecute" him. United States v. Clymer, 25 F.3d at 833.

4. Inter-Circuit Splits Support Grant of the Petition

The petition for certiorari in Olsen identified differences in treatment among the circuits regarding ends of justice findings and the burden of proof when finding exceptions to the 6th Amendment and the Speedy Trial Act. Brief of Petitioner-Appellee at *28-29, Olsen v. United States, No. 21-1336 (9th Cir. Apr. 5, 2022), 2022 WL 1057005. They include the following:

The Ninth Circuit stands alone in requiring the defendant to bear the burden of proof when opposing a government motion to continue the trial. Other circuits which have addressed this issue find that the movant, regardless of who that party is, bears the burden of showing that the ends of justice prevail over the rights of the defendant and the public. Brief of the Petitioner (Olsen), Id. at *28; see United States v. Burrell, 634 F.3d 284, 287 (5th Cir. 2011); United States v. Gonzalez, 137 F.3d 1431, 1435 (10th Cir. 1998); United States v. Kelly, 36 F.3d 1118, 1126 n.5 (D.C. Cir. 1994); United States v. New Buffalo Amusement Corp., 600 F.2d 368, 375 (2nd Cir. 1979).

While the Ninth Circuit permits ends of justice findings based upon a district court's pronouncements in general orders or local rules, every other circuit to address this issue calls for case-specific findings. Brief of the Petitioner (Olsen), Id. at *28; see United States v. Huete-Sandoval, 668 F.3d 1, 5 (1st Cir. 2011); United States v. Dignam, 716 F.3d 915, 921 (5th Cir. 2013); United States v. Henry, 538 F.3d 300, 303 (4th Cir. 2008).

Open-ended trial continuances under certain conditions have been found to be acceptable in some circuits. See United States v. Barnes, 159 F.3d 4, 13 n.5 (5th Cir. 1995); United States v. Lattany, 982 F.2d 866, 881 (3rd Cir. 1992); United States v. Jones, 56 F.3d 581, 585-86 (5th Cir. 1995); United States v. Spring, 80

F.3d 1450, 1458 (10th Cir. 1996). Yet none have gone so far as to permit a district-wide ban without discernable end dates. Brief of the Petitioner (Olsen), Id. at *29; see also United States v. Gambino, 59 F.3d 353, 358 (2nd Cir. 1995) (ends of justice continuance must be "limited in time" at which point the "trial court should set at least a tentative trial date.").

Finally, contrary to the position taken in Battle's circuit, when a violation is shown, the majority view permits dismissal of the indictment with prejudice regardless of whether the prosecution or the district court is at fault for the delay. Brief of Petitioner (Olsen), Id. at *29; United States v. Bert, 814 F.3d 70, 80-81 (2nd Cir. 2016); United States v. Blank, 701 F.3d 1084, 1089 (5th Cir. 2012); United States v. Ramirez, 973 F.2d 36, 39 (1st Cir. 1992).

A uniform ruling from this Court is appropriate and timely since any delay of decision will adversely effect those, including Battle, who have languished in pretrial custody since the pandemic.

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CONCLUSION

For the foregoing reasons petitioner respectfully submits that the petition for writ of certiorari should be granted.

Dated: May 19, 2023

Respectfully Submitted,

_____

Thomas P. Sleisenger
Attorney for Petitioner

APPENDIX “A”

NOT FOR PUBLICATION

FILED

FEB 22 2023

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. DAVID ANTHONY BATTLE, Defendant-Appellant.	No. 21-50221 D.C. No. 5:20-cr-00190-JGB-1 MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
Jesus G. Bernal, District Judge, Presiding

Submitted February 14, 2023**
Pasadena, California

Before: O'SCANNLAIN, HURWITZ, and BADE, Circuit Judges.

David Anthony Battle pleaded guilty to violating the Hobbs Act, 18 U.S.C. § 1951(a), reserving the right to appeal the district court's denial of his motion to dismiss the indictment for pretrial delay. We have jurisdiction over Battle's appeal under 28 U.S.C. § 1291 and affirm.

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* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

1. Under the Speedy Trial Act, Battle's trial was originally required to commence by December 16, 2020, seventy days after the indictment was filed. *See* 18 U.S.C. § 3161(c)(1). The district court twice continued trial, first from November 30, 2020, to February 16, 2021, and then to April 6, 2021, each time finding that the ends of justice outweighed the public and Battle's interest in a speedy trial. *See id.* § 3161(h)(7)(A).

"A district court's finding of an ends of justice exception will be reversed only if there is clear error." *United States v. Henry*, 984 F.3d 1343, 1350 (9th Cir. 2021) (cleaned up). We find none. Although the continuances were granted before we identified various factors that "in the context of the pandemic, facilitate[] the proper balancing" for an ends-of-justice continuance, *United States v. Olsen*, 21 F.4th 1036, 1046–47 (9th Cir. 2022) (per curiam), the district court's orders recognized the most relevant factors. In particular, the orders "acknowledge the importance of the right to a speedy and public trial both to criminal defendants and the broader public, and conclude that, considering the continued public health and safety issues posed by COVID-19, proceeding with such trials would risk the health and safety of those involved, including prospective jurors, defendants, attorneys, and court personnel." *Id.* at 1049.

Moreover, neither continuance was "open-ended." *United States v. Clymer*, 25 F.3d 824, 828 (9th Cir. 1994). Each was of fixed duration and cited Central

District of California General Order 20-09, which provided for resumption of jury trials "based on 14-day trends of facility exposure, community spread, and community restrictions." Even if, as Battle argues, other courts were resuming trial during part of the relevant period, that "does not mean that they [were] necessarily holding them safely. It is unknown whether jurors, witnesses, court staff, litigants, attorneys, and defendants [were] subject to serious risks and illness." *Olsen*, 21 F.4th at 1047 n.10.

2. "[I]t will be an unusual case in which the time limits of the Speedy Trial Act have been met but the sixth amendment right to speedy trial has been violated." *United States v. King*, 483 F.3d 969, 976 (9th Cir. 2007) (cleaned up). Applying the factors identified in *Barker v. Wingo*, 407 U.S. 514, 530 (1972), we conclude that this is not such a case. Battle's plea hearing was 183 days after his federal arrest, and most courts treat eight months as "the threshold minimum to initiate the full *Barker* inquiry." *United States v. Lonich*, 23 F.4th 881, 893 (9th Cir. 2022) (cleaned up). Battle does not claim prosecutorial culpability in the delay, *see Olsen*, 21 F.4th at 1048, and the only prejudice he claims flows from his six-month incarceration during the delay. However, even ten months of pretrial detention does not establish "serious prejudice." *Barker*, 407 U.S. at 534. And, even crediting Battle's contention that the COVID-19 pandemic made detention more difficult than normal, he does not claim to have been infected before pleading guilty or to have faced

different conditions than other pretrial detainees.

AFFIRMED.

APPENDIX “B”

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
CRIMINAL MINUTES—GENERAL

Case No. **EDCR 20-00190-JGB** Date February 2, 2021

Title ***United States of America v. David Anthony Battle***

Present: The Honorable JESUS G. BERNAL, UNITED STATES DISTRICT JUDGE

MAYNOR GALVEZ	Not Reported
Deputy Clerk	Court Reporter

Attorney(s) Present for Plaintiff(s):	Attorney(s) Present for Defendant(s):
None Present	None Present

Proceedings: Order (1) DENYING Defendant's Motion to Dismiss (Dkt. No. 26); and (2) VACATING the February 5, 2021 Hearing (IN CHAMBERS)

Before the Court is a Motion to Dismiss filed by Defendant David Anthony Battle ("Battle"). ("Motion," Dkt. No. 26.) The Court finds the Motion appropriate for resolution without a hearing. See Fed. R. Crim. P. 12. After considering the papers filed in support of and in opposition to the Motion, the Court DENIES the Motion. The Court vacates the hearing set for February 5, 2021.

I. BACKGROUND

Battle was arraigned on September 24, 2020; ordered detained on September 30, 2020; and indicted on October 7, 2020, on eight counts of Interference with Commerce by Robbery and Attempted Interference with Commerce by Robbery in violation of 18 U.S.C. § 1951(a). (Dkt. Nos. 5, 11, 14.) On November 18, 2020, the Court continued Battle's trial from November 30, 2020 to February 16, 2021, due to the ongoing COVID-19 pandemic, and found the elapsed time to be excluded from computing the time within which a trial must commence under the Speedy Trial Act. ("November Continuance," Dkt. No. 24 at 5.)

Battle moved to dismiss the indictment with prejudice for violations of the Speedy Trial Act and Sixth Amendment on January 8, 2021. (See Motion.) The government opposed on January 15, 2021. ("Opposition," Dkt. No. 28.) Battle replied in support of his Motion on January 22, 2021. ("Reply," Dkt. No. 29.)

II. LEGAL STANDARD

Pursuant to the Speedy Trial Act ("STA"), in any criminal case in which a defendant pleads not guilty, the trial must commence within 70 days from the filing of the indictment or from the date the defendant first appears before a judicial officer in connection with the indictment, whichever date occurs last. 18 U.S.C. § 3161(c)(1). "If a defendant's trial does not begin within the requisite time period and the defendant moves for dismissal prior to trial, the court must dismiss the indictment." United States v. Messer, 197 F.3d 330, 336 (9th Cir. 1999) (citing 18 U.S.C. § 3162(a)(2)). However, time may be excluded from the 70-day requirement if the reason for the delay meets certain criteria enumerated in 18 U.S.C. § 3161(h). In a motion to dismiss premised upon violations of the Speedy Trial Act, the defendant bears the burden of proving an STA violation. See 18 U.S.C. § 3162(a)(2).

III. DISCUSSION

Battle urges this Court to find that the November Continuance was legally improper, and therefore that his Speedy Trial Act rights have been violated. (Motion at 2.) Battle argues that the November Continuance was wrongly decided because, at the time the November Continuance issued, it was not impossible to hold trial. (Id.)

The November Continuance found that closing the courts due to the COVID-19 pandemic followed the Central District of California's August 6, 2020 General Order regarding COVID-19, which complied with California Governor Gavin Newsom's declaration of a public-health emergency and the Center for Disease Control's best practices. (November Continuance at ¶¶ 6-7). The November Continuance also found that local governments have adopted similar policies; that Riverside and San Bernardino Counties continue to show significant community spread of COVID-19; and that holding a trial would place parties, witnesses, jurors, counsel, and court personnel at unnecessary risk. (Id. ¶¶ 8, 9, 12.) The November Continuance therefore held that a continuance would serve the ends of justice and that good causes existed for a finding of excludable time pursuant to the Speedy Trial Act. (Id. at 5.)

The Court declines to find that the November Continuance was wrongly decided. And absent such a finding, continuing Battle's trial has not violated his Speedy Trial Act rights. As the government points out, gathering a jury, defendant, witnesses, and counsel in a single room for a trial remains unfeasible in a region with 0.0% ICU bed availability. (Opposition at 6.)

IV. CONCLUSION

For the reasons above, the Court DENIES Defendant's Motion. The February 5, 2021 hearing is VACATED.

IT IS SO ORDERED.