
NO. 23-_____

IN THE UNITED STATES SUPREME COURT

TERM

RICK JOHN MORALES, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to
The United States Court of Appeals
For the Ninth Circuit

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QUESTION PRESENTED FOR REVIEW

1. Whether sending an email asking if there is a “better” date for an expert witness qualifies as the Government’s requirement to act with “due diligence” for purposes of timely securing the witness’s appearance at trial for Speedy Trial purposes.

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- B. Judgment In A Criminal Case, United States District Court for the District of Montana at Great Falls Division, *United States of America v. Rick John Morales, Jr.*, District Court No. 4:20-cr-00058-BMM, March 28, 2022.
- C. Court Order Denying Motion to Dismiss Indictment with Prejudice for Violation of the Speedy Trial Act, United States District Court at Great Falls Division, *United States of America v. Rick John Morales, Jr.*, District Court No. 4:20-cr-00058-BMM, October 21, 2021.

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1. Memorandum, United States Court of Appeals for the Ninth Circuit, *United States of America v. Rick John Morales, Jr.*, Court of Appeals No. 22-30053, affirming the district court, April 3, 2023.
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JURISDICTIONAL STATEMENT

Mr. Morales pled guilty to Count I of the Superseding Indictment, 18 U.S.C. §§ 113(a)(6) and 1153(a), for Assault Resulting in Serious Bodily Injury. APP009 – APP015. The District Court for the District of Montana (District Court) sentenced him pursuant to the Sentencing Reform Act of 1984 to fifty-four (54) months imprisonment with the Bureau of Prisons on Count I, with three (3) years of supervision to follow. *Id.* He appealed, challenging the denial of his pretrial Motion to Dismiss Indictment with Prejudice for Violation of the Speedy Trial Act, amongst other issues. APP016 – APP028. Oral Argument was scheduled for February 10, 2023, in Portland, Oregon; however, on January 19, 2023, the Clerk of Court for the United States Court of Appeals for the Ninth Circuit (Ninth Circuit) filed an Order indicating that it was the unanimous opinion that the decisional process would not be significantly aided by oral argument, and therefore the matter was submitted on the briefs.

Thereafter, the Ninth Circuit entered its Memorandum, affirming the Judgment of the District Court on April 3, 2023. APP001 – APP008. This Court's jurisdiction is invoked under Title 28, U.S.C. § 1254(1). Rule 13(1) of the Supreme Court allows for ninety days within which to file a Petition for a Writ of Certiorari after entry of the Judgment of the Court of Appeals. Accordingly, this Petition is timely filed.

Pursuant to Rule 29.4(a) of the Supreme Court, appropriate service is made to the Solicitor General of the United States and to Assistant United States Attorney Timothy A. Tatarka, who appeared in the Ninth Circuit on behalf of the United States Attorney's Office, a federal office which is authorized by law to appear before this Court on its own behalf.

Petitioner Morales respectfully prays that a Writ of Certiorari issues to review the Memorandum of the Ninth Circuit. In that Opinion, the Ninth Circuit affirmed the District Court's determination that the Government acted with due diligence in attempting to procure his presence for trial. APP001 – APP008. Mr. Morales challenges those findings.

STATUTORY PROVISIONS INVOLVED

Speedy Trial Act, 18 U.S.C. § 3161(c)(1):

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

Time Limits and Exclusions, 18 U.S.C. § 3161(h)(1)(D):

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

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

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

Time Limits and Exclusions, 18 U.S.C. § 3161(h)(3):

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

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

(B) For purposes of subparagraph (A) of this paragraph, a defendant or an essential witness shall be considered absent when his whereabouts

are unknown and, in addition, he is attempting to avoid apprehension or prosecution or his whereabouts cannot be determined by due diligence. For purposes of such subparagraph, a defendant or an essential witness shall be considered unavailable whenever his whereabouts are known but his presence for trial cannot be obtained by due diligence or he resists appearing at or being returned for trial.

Sanctions, 18 U.S.C. § 3162(a)(2):

If a defendant is not brought to trial within the time limit required by section 3161(c) as extended by section 3161(h), the information or indictment shall be dismissed on motion of the defendant. The defendant shall have the burden of proof of supporting such motion but the Government shall have the burden of going forward with the evidence in connection with any exclusion of time under subparagraph 3161(h)(3). In determining whether to dismiss the case with or without prejudice, the court shall consider, among others, each of the following factors: the seriousness of the offense; the facts and circumstances of the case which led to the dismissal; and the impact of a reprocsecution on the administration of this chapter and on the administration of justice. Failure of the defendant to move for dismissal prior to trial or entry of a plea of guilty or nolo contendere shall constitute a waiver of the right to dismissal under this section.

18 U.S.C. § 113(a)(6):

(a) Whoever, within the special maritime and territorial jurisdiction of the United States, is guilty of an assault shall be punished as follows:

(6) Assault resulting in serious bodily injury, by a fine under this title or imprisonment for not more than ten years, or both.

18 U.S.C. § 1153(a):

(a) Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder, manslaughter, kidnapping, maiming, a felony under chapter 109A, incest, a felony assault under section 113, an assault against an individual who has not attained the age of 16 years, felony child abuse or neglect, arson, burglary, robbery, and a felony under section 661 of

this title within the Indian country, shall be subject to the same law and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States.

§ 45-6-204(1)(a), Montana Code Annotated:

Burglary. (1) A person commits the offense of burglary if the person knowingly enters or remains unlawfully in an occupied structure and:

- (a) the person has the purpose to commit an offense in the occupied structure.

STATEMENT OF THE CASE AND FACTS

On November 19, 2019, at approximately 11:15 p.m., Carson Buckelk (“Buckelk”) called 911 after being hit in the head multiple times with a small bat by unknown assailants. Present in the Buckelk home on the evening of November 19, 2019, were Carson Buckelk, his wife Keidra Bigleggins (“Bigleggins”), and their minor child. Buckelk claimed that one to three individuals kicked in his front door and assaulted him. Buckelk was unable to give any information regarding the identity of the persons who might have assaulted him. He was unable to provide any descriptions of clothing or physical descriptions of his assailants.

Buckelk was transported to Billings Clinic where he was treated for his injuries. Special Agent Harry Murphy (“SA Murphy”) began to investigate the assault on Buckelk to attempt to ascertain the identity of Buckelk’s assailants.

On December 13, 2019, almost one month after the assault, Buckelk allegedly identified his assailants to a family member for the first time, whom he claimed to be the Defendants. However, he initially reported to family that his assailant was Brandon Azure, Harry Azure, or Larry Azure. A family member also told SA Murphy that he believed Bigleggins was involved in the assault and that Buckelk was covering for her. Additionally, Bigleggins was reportedly selling Buckelk’s belongings during his hospitalization and pocketing the money to purchase pills and methamphetamine. SA Murphy interviewed Buckelk at Laurel Health and

Rehabilitation Center on January 29, 2020, where he identified the Defendants as his assailants.

On August 21, 2020, Mr. Morales' Co-Defendant, Harry Azure, was charged in a one-count Indictment. Count I alleged a violation of 18 U.S.C. §§ 1153(a) and 113(a)(6) – Assault Resulting in Serious Bodily Injury. It stated:

That on or about November 19, 2019, at Wolf Point, within Roosevelt County, in the State and District of Montana, and within the exterior boundaries of the Fort Peck Indian Reservation, being Indian Country, the defendant, HARRY B. AZURE, an Indian person, intentionally assaulted John Doe, said assault resulting in serious bodily injury, in violation of 18 U.S.C. §§ 1153(a) and 113(a)(6).

Thereafter, on October 8, 2020, the Government filed a Superseding Indictment, which charged Morales and Azure in a two-count Indictment. Count I alleged a violation of 18 U.S.C. §§ 1153(a) and 113(a)(6) – Assault Resulting in Serious Bodily Injury. It stated:

That on or about November 19, 2019, at Wolf Point, within Roosevelt County, in the State and District of Montana, and within the exterior boundaries of the Fort Peck Indian Reservation, being Indian Country, the defendants, HARRY B. AZURE and RICK JOHN MORALES, JR. Indian persons, intentionally assaulted John Doe, said assault resulting in serious bodily injury, and aided and abetted the same, in violation of 18 U.S.C. §§ 1153(a), 113(a)(6), and 2.

Count II, which was dismissed by the Government pre-trial, pursuant to a Plea Agreement, alleged a violation of 18 U.S.C. §§ 1153(b) and 2 – Burglary. It stated:

That on or about November 19, 2019, at Wolf Point, within Roosevelt County, in the State and District of Montana, and within the exterior boundaries of the Fort Peck Indian Reservation, being Indian Country,

the defendants, HARRY B. AZURE AND RICK JOHN MORALES, JR. Indian persons, knowingly entered and remained unlawfully within the residence of John Doe, an occupied structure with the purpose to commit the offense of assault therein, and aided and abetted the same, in violation of 18 U.S.C. §§ 1153(b) and 2, and Mont. Code Ann. § 45-6-204(1)(a).

Azure moved to continue the trial and pretrial deadlines on November 13, 2020, which the Court granted on November 16, 2020. On December 8, 2020, Morales was arraigned on the Superseding Indictment. The Court entered a Scheduling Order which set Morales' trial on the same date as Azure's previously set trial. On January 5, 2021, Morales moved to continue the trial and pretrial deadlines, which the Court granted on January 13, 2021. On February 26, 2021, Morales again moved to continue the trial and pretrial deadlines, which the Court granted on March 2, 2021. On April 2, 2021, Azure moved to continue the trial and pretrial deadlines, which the Court granted on April 5, 2021.

Thereafter, on June 11, 2021, Morales moved the Court to continue the trial and pretrial deadlines for the final time, which the Court granted on June 14, 2021. Trial was set for August 10, 2021. On July 27, 2021, Morales filed a Notice of Intent to Proceed to Trial.

On July 29, 2021, the Government filed two Expert Witness Disclosures. One was for PA Amy Hansen and one was for Dr. Marlin Dustin (Dusty) Richardson.

In its Expert Witness Disclosure for Dr. Richardson, the Government stated,

Dr. Richardson will explain the life-saving surgery he performed on the victim on November 20, 2019, and will further explain his continued treatment of the victim to the jury. Dr. Richardson will explain that the victim suffered from a brain herniation upon his arrival in Billings, which would likely have resulted in death had he not performed the surgery. Dr. Richardson will walk the jury through the 2 to 2.5 hour surgery that took place on November 20, 2019, explaining that the ultimate goal was to eliminate the pressure upon the victim's brain from swelling/bleeding/trauma.

Dr. Richardson will explain how and why the victim's severe traumatic brain injury resulted in serious bodily injury. The victim's injuries resulted in all four factors of serious bodily injury: (1) a substantial risk of death; (2) extreme physical pain; (3) protracted and obvious disfigurement; and (4) protracted loss or impairment of the function of a body part, organ, or mental faculty.

Also on July 29, 2021, the Court *sua sponte* issued an Order resetting the Final Pretrial Conference and Jury Trial for August 24, 2021. Counsel for the Government contacted her expert witnesses via email to inform them of the change in trial date, and she was informed by Dr. Richardson's staff that he was not available for the August 24, 2021 trial. In response, Counsel for the Government sent an email to his staff which stated, "This may sound like a stupid question, but is there a week/time that is better?" In response, Dr. Richardson's staff indicated that he was available either October 5-6 or October 26-27, 2021. Counsel for the Government made no further inquiry into why Dr. Richardson was "not available" between July 30, 2021, which was the date of inquiry, and the dates in October 2021, when the doctor's staff indicated that he was "available."

Counsel for the Government then informed Counsel for both Defendants that

one of her expert witnesses was not available during the week of August 24. She inquired if the Defendants objected to a continuance. Counsel for Mr. Morales responded that Mr. Morales did object to a continuance of his trial, and he requested that Counsel for the Government indicate his objection on a Motion for Continuance.¹

Thereafter, Counsel for the Government filed its Motion to Continue Trial Due to Unavailability of Essential Witness, requesting that the trial be re-set to either the week of October 5 or October 26, 2021, which is when Dr. Richardson's staff indicated he was "available."² The Court granted that Motion and re-set the trial for October 25, 2021.

On October 12, 2021, Azure filed a Motion to Change Plea. The Court vacated the October 25, 2021 trial date with respect to Azure, but not Morales. Thereafter, Morales filed a Motion to Dismiss Indictment with Prejudice for Speedy Trial Violation. On October 20, 2021, the Court held a hearing on Morales' Motion. On October 21, 2021, the Court issued a written Order denying Morales' Motion to Dismiss Indictment with Prejudice for Speedy Trial Violation. APP016 – APP028.

Thereafter, Morales pled guilty to Count I, pursuant to a conditional Plea

¹ Although Mr. Morales requested that the Government indicate his objection in its Motion, the Government failed to do so.

² Counsel for Mr. Morales was not available the week of October 5, 2021, due to a scheduling conflict with an Oral Argument at the Ninth Circuit Court of Appeals in another matter on October 4, 2021.

Agreement. Sentencing was set for March 28, 2022. The Government dismissed Count II of the Superseding Indictment. Morales was sentenced to fifty-four (54) months in the custody of the Bureau of Prisons on Count I with three (3) years of supervised release to follow. APP009 – APP015. No fine was imposed. *Id.* A timely Notice of Appeal was filed on March 31, 2022. The Ninth Circuit entered its Memorandum, affirming the Judgment of the District Court on April 3, 2023. APP001 – APP008. Mr. Morales timely filed this Petition.

REASONS FOR GRANTING OF THE WRIT

I. Whether sending an email asking if there is a “better” date for an expert witness qualifies as the Government’s requirement to act with “due diligence” for purposes of timely securing the witness’s appearance at trial for Speedy Trial purposes.

Pursuant to the Speedy Trial Act, 18 U.S.C. § 3161(c)(1), a defendant must be brought to trial within seventy (70) days of the indictment or of his initial appearance before a judicial officer, whichever is later. The Act provides a number of exceptions – or periods of excusable delay – to the strict application of the seventy (70) day period.³ However, even the application of the exceptions does not excuse the delay that occurred in this case.

The procedural history of this matter is set forth above. From the date of Mr. Morales appearance on the Superseding Indictment, and October 25, 2021, the date which the case was ultimately set for trial, there were one hundred ten 110 nonexcludable days.

As set forth above, there were a number of continuances requested by the Defendants, as well as a pretrial Motion *in Limine* filed by the Defendants, which tolled the running of the Speedy Trial Clock for much of the time while this matter was pending. However, instead of proceeding to trial on August 10, 2021, the Court

³ The exception applicable to this case is: (1) 18 U.S.C. § 3161(h)(1)(D): delay resulting from any pretrial motion from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion.

re-set the trial in this matter to August 24, 2021. This triggered the Government's filing of the Motion to Continue Trial Due to Unavailability of Essential Witness, which ultimately resulted in the trial being reset for October 25, 2021. As set forth above, this date falls well outside the seventy (70) day Speedy Trial Clock for Mr. Morales; therefore, his statutory right to a Speedy Trial was violated.

18 U.S.C. § 3161(h)(3) excludes from consideration a delay caused by "the absence or unavailability of ... an essential witness." A witness is "considered unavailable whenever his whereabouts are known but his presence for trial cannot be obtained by due diligence." 18 U.S.C. § 3161(h)(3)(B).

Here, the Government claimed that Dr. Richardson was unavailable for the August 24, 2021 trial "due to previously scheduled work obligations – he [was] both on-call and ha[d] numerous, lengthy surgeries already scheduled that week." However, the Government did not identify any reason why Dr. Richardson was "unavailable" any other time except the week October 5 or October 26, 2021 for trial. Indeed, in filing its Motion to Continue Trial Due to Unavailability of Essential Witness, the Government provided no information to the District Court whatsoever concerning its efforts to procure Dr. Richardson's presence at a trial date that was within the timeframe of Mr. Morales' Speedy Trial Clock.

"Due diligence," as used in the Speedy Trial Act, is not defined in the statute. However, case law and commentary have consistently indicated that the term should

be given its plain meaning, that to satisfy 18 U.S.C. § 3161(h)(3)'s "due diligence" requirement, the Government must present evidence that the witness's presence could not be obtained through its "reasonable" efforts. *United States v. Burrell*, 634 F.3d 284, 290 (5th Cir. 2011). Rather than offering an explanation of its efforts to procure Dr. Richardson's presence at a date within Mr. Morales' Speedy Trial deadline, the Government boldly relied on the assertion that "any delay is excludable under 18 U.S.C. § 3161(h)(3)(A), (B)," simply because the witness was not available on August 24. The Government provided no additional evidence of any sort of due diligence or reasonable efforts to obtain the doctor's presence prior to October 5 or October 26, 2021, both of which fell outside of Mr. Morales' Speedy Trial deadline. The Government sent one email, asking the expert witness if there was a "better" date for him. This is not "due diligence" for purposes of the Speedy Trial Act. Due diligence requires more than an inquiry into what is "better" for a witness that the Government deems to be essential.

United States v. Burrell provides a helpful discussion of what efforts may or may not qualify as due diligence for purposes of the Speedy Trial Act. *United States v. Burrell*, 634 F.3d 284, 291 (5th Cir. 2011). There, the Government sought exclusion of time for Speedy Trial purposes while a law enforcement officer that the Government deemed essential attended a re-certification training that had already been paid for by the Government. *Id.*, at 288. The District Court ordered a

continuance based on the witness's unavailability and ordered that the time be excluded for Speedy Trial purposes. *Id.*, at 289. The Fifth Circuit reversed, finding that "the Government did not demonstrate the applicability of the unavailable witness exclusion." *Id.*, at 290. In reaching that conclusion, the Court looked to a Fourth Circuit case, *United States v. Patterson*, for an example of proper due diligence on behalf of the Government. There, the Government showed that they had attempted to arrange for testimony of their essential witness through the U.S. Marshals, but that it would have "require[d] chartering a plane or driving [the witness] from South Carolina . . . [which] would [have] create[d] a hardship for the United States Marshals Service." *Id.*, at 291, quoting *United States v. Patterson*, 277 F.3d 709 (4th Cir. 2002).

In Mr. Morales' case, the Government did nothing to inquire as to sooner availability of their witness, but simply took at face value the staff member's email response providing two sets of dates that Dr. Richardson was "available," both of which were months after the previously scheduled trial date. There was no showing whatsoever that the doctor could not have been made available at some point between July 30, 2021, on the date of the inquiry, and October 5-6, 2021 or October 26-27, 2021, which were the dates that were convenient to him, according to his staff. Sending an email and inquiring about a "better" time for a witness hardly qualifies as the type of due diligence or reasonable effort contemplated by the Court

in *Patterson* where the United States Marshals Service would have been required to charter a plane or drive a witness across state lines. It would not have been a hardship for the Government to make further inquiries into the doctor's availability or ask him to reschedule surgeries that were still weeks, if not months, away.

While the undersigned Counsel is sympathetic with the fact that a neurosurgeon's time is valuable and that he has a very busy schedule, there is simply no excuse that has been provided to demonstrate that he could not have been made available at a sooner date. Surgeries that are scheduled months in advance can be moved, and in fact, are moved frequently. "Due diligence" requires more than accommodating the convenience of one witness.

For these reasons, the Government did not demonstrate that they acted with "due diligence" for Speedy Trial purposes, and the delay caused by the Government's Motion to Continue Trial Due to Unavailability of Essential Witness should not have been excluded pursuant to 18 U.S.C. § 3161(h)(3) for Speedy Trial purposes. Because this time should not have been excluded, Mr. Morales' right to a Speedy Trial was violated. 18 U.S.C. § 3162(a)(2).

CONCLUSION

This case presents a question of exceptional importance. The burden to bring a Defendant to trial within the seventy (70) day Speedy Trial period rests with the Government. In consideration of the foregoing, Petitioner urges the Court to grant certiorari review in order to resolve the important question of whether the Government's actions in this case – sending one email inquiring if there is a “better” date for an expert witness – qualifies as the Government's requirement to act with “due diligence” for purposes of securing the witness's appearance at trial for Speedy trial purposes. Petitioner respectfully submits that the Petition for Certiorari should be granted.

Dated this 29th day of June, 2023.

Respectfully submitted,

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