
NO. 23-_____

IN THE UNITED STATES SUPREME COURT

TERM

RICK JOHN MORALES, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Appendix

Elizabeth T. Musick
Musick & Tierney Law, PLLC
CJA Panel Attorney
P.O. Box 726
Bozeman, MT 59771
(406) 235-1456

Counsel for the Petitioner

WARNING: AT LEAST ONE DOCUMENT COULD NOT BE INCLUDED!

You were not billed for these documents.

Please see below.

Selected docket entries for case 22-30053

Generated: 04/04/2023 09:58:55

Filed	Document Description	Page	Docket Text
04/03/2023	<u>33</u>		FILED MEMORANDUM DISPOSITION (MARY H. MURGUIA, DANIELLE J. FORREST and JENNIFER SUNG) AFFIRMED. FILED AND ENTERED JUDGMENT. [12687271] (EHC)
	<u>33</u> Memorandum	2	
	33 Post Judgment Form DOCUMENT COULD NOT BE RETRIEVED!		

FILED**NOT FOR PUBLICATION****UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**APR 3 2023
MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,

No. 22-30053

Plaintiff-Appellee,

D.C. No.
4:20-cr-00058-BMM-2

v.

RICK JOHN MORALES, Jr.,

MEMORANDUM*

Defendant-Appellant.

Appeal from the United States District Court
for the District of Montana
Brian M. Morris, District Judge, Presiding

Submitted February 10, 2023**
Portland, Oregon

Before: MURGUIA, Chief Judge, and FORREST and SUNG, Circuit Judges.

Rick John Morales, Jr., appeals the district court's denial of his (1) motion in limine to exclude evidence under Federal Rule of Evidence 404(b), and (2) motion to dismiss the indictment for a violation of his Sixth Amendment right to a speedy trial. We have jurisdiction under 28 U.S.C. § 1291. For the reasons below, we

* 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).*

affirm.

1. The district court did not abuse its discretion in denying Morales's motion in limine to exclude "other bad act" evidence under Rule 404(b).¹ *United States v. Ramos-Atondo*, 732 F.3d 1113, 1121 (9th Cir. 2013). Under that rule, evidence of other acts is not admissible to prove character but may be admissible for other purposes, including proving motive and identity. Fed. R. Evid. 404(b). Other-act evidence is admissible under Rule 404(b) if "(1) the evidence tends to prove a material point; (2) the prior act is not too remote in time; (3) the evidence is sufficient to support a finding that defendant committed the other act; and (4) (in cases where knowledge and intent are at issue) the act is similar to the offense charged." *United States v. Mayans*, 17 F.3d 1174, 1181 (9th Cir. 1994); *see also United States v. Lague*, 971 F.3d 1032, 1038 (9th Cir. 2020).

In this case, the district court permitted the government to introduce evidence of an altercation between Morales, the victim, and a third party that occurred at the victim's home on the day before the charged assault in this case. Morales contends that the district court abused its discretion because, in Morales's view, this evidence of the prior altercation did not tend to prove any material point.

¹ The government also contends that the district court properly admitted the other-act evidence because it is inextricably intertwined with the charged crimes. We need not decide that issue because we conclude the evidence was admissible under Rule 404(b).

We disagree. We “afford broad discretion to a district court’s evidentiary rulings,” and that is “particularly true with respect to Rule 403 since it requires an ‘on-the-spot balancing of probative value and prejudice, potentially to exclude as unduly prejudicial some evidence that already has been found to be factually relevant.’”

Sprint/United Mgmt. Co. v. Mendelsohn, 552 U.S. 379, 384 (2008) (quoting 1 S. Childress & M. Davis, *Federal Standards of Review* § 4.02, p. 4–16 (3d ed. 1999)).

The evidence of the prior altercation was relevant to proving Morales’s motive and involvement in the crime, which Morales disputed. *See, e.g., United States v. Bowman*, 720 F.2d 1103, 1105 (9th Cir. 1983) (“Although the victim in the prior case was not involved here, there was a sufficient factual relationship between the two incidents to render the prior conviction relevant to the issue of [the defendant’s] motive for the assault upon [the victim].”). The evidence makes it more probable that Morales participated in the alleged assault because he felt he had been “set up” by the victim. Morales also contends that the evidence of the prior altercation was dissimilar to the charged crime of assault. Even assuming that knowledge and intent are at issue, so that similarity is required, the prior altercation and the charged crime of assault are sufficiently similar because they involved some of the same parties at the same location. *See United States v. Berckmann*, 971 F.3d 999, 1002 (9th Cir. 2020).

Morales alternatively contends that the district court abused its discretion by

failing to determine whether the prior-altercation evidence’s probative value was “substantially outweighed” by the risk of undue prejudice. Fed. R. Evid. 403. We disagree. Although the district court did not explicitly “recite the Rule 403 test when balancing the probative value of evidence against its potential for unfair prejudice,” it did not need to, because we “can conclude, based on a review of the record, that the district court considered Rule 403’s requirements.” *United States v. Gomez*, 725 F.3d 1121, 1129 (9th Cir. 2013) (internal quotation marks and citation omitted). During the hearing on Morales’s motion in limine, counsel for Morales thoroughly argued that the evidence was unduly prejudicial and should be excluded under Rule 403, and the court expressly discussed both the probative value of the evidence, and its potential for undue prejudice.²

The district court acted within its broad discretion when it concluded that the evidence’s probative value was not “substantially outweighed” by the risk of undue prejudice. Fed. R. Evid. 403. The evidence was highly probative of Morales’s motive and state of mind at the time of the charged assault. Additionally, the court mitigated any risk of unfair prejudice by offering to give a limiting instruction to the jury explaining that the evidence could be considered only for proper purposes.

See Berckmann, 971 F.3d at 1004 (evidence of prior acts of domestic violence was

² Morales argued only that the evidence was prejudicial and did not raise any of the other Rule 403 factors.

not unfairly prejudicial when court gave limiting instruction on three separate occasions).

2. The district court did not err in denying Morales's motion to dismiss the indictment for violation of the Speedy Trial Act.³ The Speedy Trial Act excepts from the seventy-day speedy trial clock “[a]ny period of delay resulting from the . . . unavailability of . . . an essential witness.” 18 U.S.C. § 3161(h)(3)(A). A witness is unavailable when “his whereabouts are known but his presence for trial cannot be obtained by due diligence . . .” 18 U.S.C. § 3161(h)(3)(B). The district court found that Dr. Richardson was an essential witness and that the government acted with due diligence in attempting to procure his presence for trial. We review those factual findings for clear error. *United States v. Mincoff*, 574 F.3d 1186, 1192 (9th Cir. 2009).

The district court did not clearly err in finding that Dr. Richardson was an essential witness. Dr. Richardson performed life-saving surgery on the victim after the assault and would testify about the severity of his injuries, which is relevant to proving the element of serious bodily injury. Morales argues that Dr. Richardson was not an essential witness because his testimony would be cumulative to that of another witness, Physician Assistant (PA) Hansen. We disagree. Although both

³ Morales does not argue on appeal that the continuance of the trial violated his constitutional right to speedy trial. See *Barker v. Wingo*, 407 U.S. 514, 536 (1972).

witnesses would testify to the same element (serious bodily injury), Dr. Richardson's testimony was qualitatively different from PA Hansen's because PA Hansen only provided care to the victim during his stay at a rehabilitation clinic. Morales cites no authority that two witnesses' overlapping testimony disqualifies either as an essential witness for purposes of the Speedy Trial Act. *Cf. United States v. Miles*, 290 F.3d 1341, 1350 (11th Cir. 2002) ("A witness may be deemed essential for the purposes of the Act, even though the government could obtain a conviction without his testimony." (collecting cases)).

The district court also did not clearly err in finding that Dr. Richardson was "unavailable" under the Act. The record establishes that the government promptly communicated with Dr. Richardson about his availability to testify, and that Dr. Richardson's staff represented that he was not available until certain weeks in October because of his surgery and on-call schedule.⁴ Morales contends that the government failed to exercise due diligence because it accepted the staff's representation about Dr. Richardson's availability without further inquiry, but Morales does not dispute that Dr. Richardson was, in fact, unavailable. The record sufficiently supports the district court's finding that the government exercised due diligence.

⁴ The government then offered two October trial dates, and Morales rejected the earlier date.

Because we conclude that no violation of the Speedy Trial Act occurred, we need not address Morales's contention that the statute required dismissal with prejudice.

AFFIRMED.

UNITED STATES DISTRICT COURT
DISTRICT OF MONTANA GREAT FALLS DIVISION

UNITED STATES OF AMERICA

v.

RICK JOHN MORALES, JR.

JUDGMENT IN A CRIMINAL CASE

Case Number: CR 20-58-GF-BMM-2
USM Number: 08587-046

Elizabeth T. Musick
Defendant's Attorney

THE DEFENDANT:

<input checked="" type="checkbox"/>	pleaded guilty to count(s)	1 of the Superseding Indictment
<input type="checkbox"/>	pleaded nolo contendere to count(s) which was accepted by the court	
<input type="checkbox"/>	was found guilty on count(s) after a plea of not guilty	

The defendant is adjudicated guilty of these offenses:

<u>Title & Section / Nature of Offense</u>	<u>Offense Ended</u>	<u>Count</u>
18 U.S.C. §§ 113(a)(6), 1153(a) and 2 Assault Resulting In Serious Bodily Injury	11/19/2019	1

The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

The defendant has been found not guilty on count(s)
 Count(s) 2 is are dismissed on the motion of the United States

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

March 28, 2022
Date of Imposition of Judgment


Signature of Judge

Brian Morris, Chief Judge
United States District Court
Name and Title of Judge

March 28, 2022
Date

DEFENDANT: RICK JOHN MORALES, JR.
CASE NUMBER: CR 20-58-GF-BMM-2

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of:

54 months, concurrent to any other sentence including ADC-16-654 in Cascade County District Court and TK-2018-13101 in Judith Basin County Justice Court. The Defendant shall receive credit for 125 days custody.

- The court makes the following recommendations to the Bureau of Prisons:
 - (1) Defendant shall participate in the Bureau of Prisons' 500-hour Residential Drug Treatment Program (RDAP) if eligible.
 - (2) Defendant shall be placed at the Bureau of Prisons' facility at FMC Rochester for medical care for his spinal injury.
- The defendant is remanded to the custody of the United States Marshal.
- The defendant shall surrender to the United States Marshal for this district:
 - at a.m. p.m. on
 - as notified by the United States Marshal.
- The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:
 - before 2 p.m. on
 - as notified by the United States Marshal.
 - as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to

at _____, with a certified copy of this judgment.

UNITED STATES MARSHAL

By: _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: RICK JOHN MORALES, JR.
CASE NUMBER: CR 20-58-GF-BMM-2

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of : **three (3) years.**

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.
 - The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. *(check if applicable)*
4. You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution. *(check if applicable)*
5. You must cooperate in the collection of DNA as directed by the probation officer. *(check if applicable)*
6. You must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, et seq.) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which you reside, work, are a student, or were convicted of a qualifying offense. *(check if applicable)*
7. You must participate in an approved program for domestic violence. *(check if applicable)*

You must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

DEFENDANT: RICK JOHN MORALES, JR.
CASE NUMBER: CR 20-58-GF-BMM-2

STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. I understand additional information regarding these conditions is available at <https://www.mtp.uscourts.gov/post-conviction-supervision>.

Defendant's Signature _____

Date _____

DEFENDANT: RICK JOHN MORALES, JR.
CASE NUMBER: CR 20-58-GF-BMM-2

SPECIAL CONDITIONS OF SUPERVISION

1. You must have no contact with victim in the instant offense.
2. You must make a good faith effort to obtain a G.E.D./HiSET or high school diploma within the first year of supervision.
3. You must participate in a program for mental health treatment as approved by the probation officer. You must remain in the program until you are released by the probation officer in consultation with the treatment provider. You must pay part or all of the costs of this treatment as directed by the probation officer.
4. You must comply with violent offender registration requirements for convicted offenders in any state in which you reside.
5. You must submit your person, residence, place of employment, vehicles, and papers, to a search, with or without a warrant by any probation officer based on reasonable suspicion of contraband or evidence in violation of a condition of release. Failure to submit to search may be grounds for revocation. You must warn any other occupants that the premises may be subject to searches pursuant to this condition. You must allow seizure of suspected contraband for further examination.
6. You must abstain from the consumption of alcohol and are prohibited from entering establishments where alcohol is the primary item of sale.
7. You must participate in substance abuse testing to include not more than 104 urinalysis tests, not more than 104 breathalyzer tests, and not more than 36 sweat patch applications annually during the period of supervision. You must pay part or all of the costs of testing as directed by the probation officer.
8. You must participate in and successfully complete a program of substance abuse treatment as approved by the probation officer. You must remain in the program until you are released by the probation officer in consultation with the treatment provider. You must pay part or all of the costs of this treatment as directed by the probation officer.
9. The defendant must surrender to a facility, as directed and approved by the U.S. Probation Office and presiding judge, to participate in the Confined Treatment Alternative Program, for a period of time to be determined by the probation office and presiding judge, not to exceed 96 consecutive hours.
10. You must not purchase, possess, use, distribute or administer marijuana, including marijuana that is used for recreational or medicinal purposes under state law.
11. You must not possess, ingest or inhale any psychoactive substances that are not manufactured for human consumption for the purpose of altering your mental or physical state. Psychoactive substances include, but are not limited to, synthetic marijuana, kratom and/or synthetic stimulants such as bath salts and spice.
12. You must pay restitution in the amount of \$13,505.63 joint and severally with your codefendant. You are to make monthly payments or as otherwise directed by United States Probation. Payment shall be made to the Clerk, United States District Court, Missouri River Courthouse, 125 Central Avenue West, Ste. 110, Great Falls, MT 59404 and shall be disbursed to:
 - Carson Buck Elk (\$977.18)
 - Montana Crime Victim Compensation Fund (\$12,528.45)
PO Box 201410
Helena, MT 59620-1410

DEFENDANT: RICK JOHN MORALES, JR.
 CASE NUMBER: CR 20-58-GF-BMM-2

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments.

	<u>Assessment</u>	<u>JVTA Assessment**</u>	<u>AVAA Assessment*</u>	<u>Fine</u>	<u>Restitution</u>
TOTALS	\$100.00	\$ 0.00	\$ 0.00	\$.00	\$13,505.63

The determination of restitution is deferred until *An Amended Judgment in a Criminal Case* (AO245C) will be entered after such determination.

The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Restitution of \$13,505.63, joint and severally with co-defendant Harry B. Azure (4:20-cr-00058-1), to:

CARSON BUCK ELK
 \$977.18

MONTANA CRIME VICTIM COMPENSATION FUND*
 \$12,528.45

*provider of compensation to be paid after all other victims receive full restitution.

Restitution amount ordered pursuant to plea agreement \$

The defendant must pay interest on restitution and a fine of more than \$2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

The court determined that the defendant does not have the ability to pay interest and it is ordered that:

<input checked="" type="checkbox"/> the interest requirement is waived for the	<input type="checkbox"/> fine	<input checked="" type="checkbox"/> restitution
<input type="checkbox"/> the interest requirement for the	<input type="checkbox"/> fine	<input type="checkbox"/> restitution is modified as follows:

*Amy, Vicky, and Andy Child Pornography Victim Assistance Act of 2018, Pub. L. No. 115-299.

**Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.

*** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: RICK JOHN MORALES, JR.
 CASE NUMBER: CR 20-58-GF-BMM-2

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

- A Lump sum payments of \$ _____ due immediately, balance due
 - not later than _____, or
 - in accordance with C, D, E, or F below; or
- B Payment to begin immediately (may be combined with C, D, or F below); or
- C Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or
- D Payment in equal 20 (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or
- E Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or
- F Special instructions regarding the payment of criminal monetary penalties:

Special assessment shall be immediately due and payable. While incarcerated, criminal monetary penalty payments are due during imprisonment at the rate of not less than \$25 per quarter, and payment shall be through the Bureau of Prisons' Inmate Financial Responsibility Program. Criminal monetary payments shall be made to the Clerk, United States District Court, Missouri River Courthouse, 125 Central Avenue West, Suite 110, Great Falls, MT 59404 or online at <https://www.pay.gov/public/form/start/790999918>. Please see www.mtd.uscourts.gov/criminal-debt for more information..

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

- Joint and Several

See above for Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

 - Defendant shall receive credit on his restitution obligation for recovery from other defendants who contributed to the same loss that gave rise to defendant's restitution obligation.
 - The defendant shall pay the cost of prosecution.
 - The defendant shall pay the following court cost(s):
 - The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) AVAA assessment, (5) fine principal, (6) fine interest, (7) community restitution, (8) penalties, and (9) costs, including cost of prosecution and court costs.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
GREAT FALLS DIVISION

UNITED STATES OF AMERICA,

Cause No. CR 20-58-GF-BMM

Plaintiff,

vs.

ORDER

RICK JOHN MORALES, JR.,

Defendant.

Defendant Rick John Morales, Jr. (“Morales”) filed a motion to dismiss for violation of his right to a speedy trial under 18 U.S.C. § 3162(a)(2). (Doc. 102.) The Court held a hearing on the motion to dismiss on October 20, 2021. (Doc. 127.)

BACKGROUND

The Government filed the Sealed Indictment against Harry Azure (“Azure”) on August 21, 2020. (Doc. 1.) The Indictment charged Azure with one count of Assault Resulting in Serious Bodily Injury. (*Id.*) Azure was arrested and arraigned on September 1, 2020. (Doc. 4.) The Court initially set Azure’s trial for November 3, 2020. (Doc. 11.)

The Government filed a Sealed Superseding Indictment on October 8, 2020, that added a second count for Burglary and added Morales as a co-defendant on both

counts. (Doc. 17.) The Court arraigned Azure on the Superseding Indictment on October 15, 2020. (Doc. 26.) The Court re-set the trial for December 15, 2020. *Id.* Morales was brought before the Court on a Writ of Habeas Corpus ad Prosequendum. (Doc. 37.) The Court arraigned Morales on December 8, 2020. *Id.*

Numerous continuances ensued. Azure requested the first continuance on November 13, 2020. (Doc. 34.) The Court granted Azure's request and re-set the trial date for February 16, 2021. (Docs. 36 and 40.) Morales requested his own continuance of trial and pretrial deadlines on January 5, 2021. (Doc. 42.) The Court granted Morales's request on January 13, 2021, and re-set trial for March 30, 2021. (Doc. 43.) Morales requested a third continuance on February 26, 2020, which the Court granted on March 2, 2021. (Docs. 44 and 45.) The Court re-set trial for May 4, 2021. (Doc. 45.) Azure requested a fourth continuance on April 2, 2021. (Doc. 46.) The Court granted Azure's request and re-set trial for June 8, 2021. (Doc. 48.)

Morales and Azure filed a pretrial Motion in Limine on May 10, 2021. (Doc. 50.) Morales and Azure again requested that the Court continue the trial for the fifth time while they litigated the Motion in Limine. (Docs. 58 and 59.) The Court resolved the Motion in Limine on June 7, 2021. (Doc. 63.) The Court re-set the trial for July 27, 2020. (Doc. 59.) The Defendants filed their sixth and final Motion to Continue on June 11, 2021. (Doc. 65.) The Court re-set the trial for August 10, 2021.

(Doc. 66.)

On July 29, 2021, the Court, *sua sponte*, ordered that the trial for both Defendants be re-set for August 24, 2021. (Doc. 83.) The Government filed its only Motion to Continue Trial Due to Unavailability of Essential Witness on July 30, 2021. (Doc. 86.) The Government requested that the trial be re-set to either the week of October 5, 2021, or October 26, 2021. (*Id.*) The Government reported that an expert witness, Dr. Dusty Richardson, would not be available during the week of August 24. (*Id.*) Dr. Richardson, a neurosurgeon, treated the victim's injuries that the Government alleges were caused by the Defendants striking the victim in the head. (*Id.*) The Court granted the Government's motion and re-set the trial for October 25, 2021. (Doc. 87.)

LEGAL STANDARD

The Speedy Trial Act, 18 U.S.C. § 3161, requires that a defendant be brought to trial within seventy (70) days of the indictment or of his initial appearance before a judicial officer, whichever is later. 18 U.S.C. § 3161(c)(1). The Speedy Trial Act provides for “periods of delay” that are excluded from computing the time within which a trial must commence. *See Id.* § 3161(h). A court may exclude periods of time for a variety of reasons, including delay resulting from pretrial motions; delay transporting the defendant from another district; a reasonable period of delay when

the defendant is joined for trial with a codefendant; any period of delay resulting from the absence or unavailability of the defendant or an essential witness; and periods of delay granted by a judge “at the request of the defendant or his counsel.”

Id.

To determine whether a Sixth Amendment speedy trial violation occurred, the Court applies the four-factor test articulated in *Barker v. Wingo*, 407 U.S. 514 (1972). Those factors are: (1) length of delay, (2) reason for the delay, (3) the defendant's assertion of his speedy trial rights, and (4) prejudice to the defendant. *Id.* at 530. “A court balances all four of these factors in a practical, case-by-case analysis under Barker.” *United States v. Myers*, 930 F.3d 1113, 1120 (9th Cir. 2019) (citation omitted). No single factor is “either a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial.” *Barker*, 407 U.S. at 533.

ANALYSIS

Morales asserts that 110 non-excludable days will have passed by the October 25, 2021 trial date. Morales claims that 27 days elapsed from Morales's arraignment on December 8, 2020, through the day the Government filed its Motion to Continue Trial Due to Unavailability of Essential Witness on July 30, 2021. (Doc. 103 at 4.) Morales contends that another 73 non-excludable days will have elapsed by the time of his scheduled trial on October 25, 2021. (*Id.*) Morales argues that Dr. Richardson

does not qualify as an essential witness under the Speedy Trial Act. Morales argues, as a result, that the time following the Government's motion to continue trial should count toward, and, thus, surpass the statutorily required 70 days between Morales's appearance before this Court and his trial date. (*Id.* at 5.)

I. Dr. Richardson qualifies as an essential witness under the Speedy Trial Act.

Morales's motion to dismiss hinges upon whether the Speedy Trial Act excludes the time resulting from the Government's Motion to Continue Trial Due to Unavailability of Essential Witness. (Doc. 86.) If Dr. Richardson qualifies as an essential witness for the purposes of the trial, then the period of time related to the Government's motion to continue would be excluded from consideration under the Speedy Trial Act. 18 U.S.C. § 3161(h)(3)(A). Morales would thus not have been denied a speedy trial. The Court finds that Dr. Richardson qualifies as an essential witness under the Speedy Trial Act for the reasons discussed below.

The Speedy Trial Act excludes “[a]ny period of delay resulting from the absence or unavailability of the defendant or an essential witness.” 18 U.S.C. § 3161(h)(3)(A). The Senate Judiciary Committee Report accompanying the bill that became the Speedy Trial Act stated as follows:

By an “essential witness” the Committee means a witness so essential to the proceeding that continuation without the witness would either be impossible or would likely result in a miscarriage of justice. For

example, a chemist who has identified narcotics in the defendant's possession would be an "essential witness"

S. Rep. No. 1021, 93d Cong., 2d Sess. 37 (1974). Morales argues that Dr. Richardson was not essential because another witness, Physician's Assistant Amy Hansen, was available and could provide "the Government with necessary testimony regarding the elements of serious bodily injury." (Doc. 103 at 7.)

Morales cites no authority for the assertion that a witness's testimony may not be essential because it is similar in nature to the testimony of another witness. Some Courts of Appeal have concluded the opposite. *See United States v. Miles*, 290 F.3d 1341, 1350 (11th Cir. 2002) ("A witness may be deemed essential for the purposes of the Act, even though the government could obtain a conviction without his testimony."); *also United States v. Roy Hamilton*, 46 F.3d 271, 277 (3d Cir.1995); *United States v. Tedesco*, 726 F.2d 1216, 1222 (7th Cir.1984); *United States v. Marrero*, 705 F.2d 652, 656-57 (2d Cir.1983). There may be an instance where a witness's testimony proves duplicative to the extent that, where it might otherwise be essential in isolation, the quantity and quality of other witness's testimony renders that testimony unessential. This is clearly not such a case.

Dr. Richardson was the victim's first medical provider after his injury. (Doc. 84 at 2.) Dr. Richardson performed the surgery that prevented the victim's death by eliminating pressure upon the victim's brain. (*Id.*) No witness could be more

essential to describe the victim's injury. PA Hansen is incapable of providing the same type testimony. PA Hansen's experience is limited to the victim's rehabilitation process. PA Hansen's purported testimony relates to the victim's rehabilitation. (Doc. 85.) Dr. Richardson and PA Hansen are the only expert witnesses for the victim's injury, and they would provide distinct testimony. Both Dr. Richardson and PA Hansen would provide testimony for necessary elements of the crime, specifically serious bodily injury. Both witnesses would attest to the same element of the crime, but that alone does not constitute sufficient grounds to render either unessential for the Government to prove the crime alleged. Dr. Richardson qualifies as an essential witness.

II. Dr. Richardson was unavailable on August 24, 2021.

Morales also argues that Dr. Richardson was not determined unavailable for the purposes of the Speedy Trial Act. "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." 18 U.S.C. § 3161(h)(3)(B). Morales argues that the Government did not identify sufficient reasons when it stated that Dr. Richardson was unavailable "except the week[s] of] October 5 [or] October 26, 2021." (Doc. 103 at 8.) Morales asserts that the Government's failure to identify earlier dates does not comport with the "due diligence" required by the Speedy Trial

Act. The Court disagrees.

Due diligence requires “reasonable” efforts on the Government’s part to bring the witness to trial. *See United States v. Burrell*, 634 F.3d 284, 290 (5th Cir. 2011). The Fifth Circuit in *Burrell* contrasted the government’s “reasonable” efforts to procure a witness in *United States v. Patterson*, 277 F.3d 709 (4th Cir. 2002), with the efforts in the case before it. Many commentators have endorsed *Patterson* as the proper application of the “reasonable” efforts requirement of § 3161(h)(3). *Burrell*, 634 F.3d at 291. The government presented testimony in *Patterson* that that it had attempted to arrange for a witness’s transportation to trial, but that to ensure the witness would be in time for trial “would require chartering a plane or driving [the witness from] South Carolina” to the trial in Norfolk, Virginia. *Patterson*, 277 F.3d at 711. These efforts would have created a hardship for the U.S. Marshals Service.

Id.

The Government filed its motion to Continue Trial Due to Unavailability of Essential Witness the day after the Court set the trial for August 24, 2021. (Doc. 86.) The Government provided the first two dates that Dr. Richardson would be available to testify at trial, given Dr. Richardson’s substantial commitments as a neurosurgeon. (Doc. 121 at 19.) Dr. Richardson attests that the dates provided by the Government were the first that he was available. (Doc. 125-1 at 2-3.) Dr. Richardson attests that

COVID-19 virus has made scheduling uniquely burdensome. (*Id.* at 4.)

To ensure that patients are not carrying COVID-19 at the time of surgery, patients must quarantine prior to their scheduled surgery, which makes rescheduling surgeries particularly difficult. (*Id.*) Patients must quarantine both to reduce the spread of the virus and reduce post-operative risk. *See* Francesco Doglietto et al., *Factors Associated With Surgical Mortality and Complications Among Patients With and Without Coronavirus Disease 2019 (COVID-19) in Italy*, 155 JAMA SURGERY 691, 692 (June 12, 2020) (demonstrating that the 30-day risk of mortality, pulmonary complications, and thrombotic complications for patients with COVID-19 undergoing surgery, compared with patients without COVID-19, was significantly higher.) These factors highlight the burden of procuring Dr. Richardson for trial before October 25, 2021. The Government exerted reasonable efforts to make Dr. Richardson available for trial. Dr. Richardson was unavailable for the purposes of the Speedy Trial Act.

III. Morales Sixth Amendment right to a speedy trial was not violated.

The length of delay represents a threshold factor. Morales must show the total delay is “presumptively prejudicial” for the court to then consider and weigh the other three speedy trial factors. *See United States v. Myers*, 930 F.3d 1113, 1119 (9th Cir. 2019). The Court notes that one year usually constitutes the presumptively

prejudicial threshold. *United States v. Gregory*, 322 F.3d 1157, 1161-62 (9th Cir. 2003). Morales has been in federal custody for slightly more than 10 months. The Court nevertheless out of an abundance of caution will examine the remaining factors despite Morales's failure to qualify for a presumption of prejudice. The Court also notes that the Government obtained Morales's presence in federal custody through a Writ of Habeas Corpus ad Prosequendum as he was in state custody at the time of his indictment in this case. (Doc. 37.)

The second factor focuses on “the reason the government assigns to justify the delay.” *Myers*, 930 F.3d at 1119 (citation omitted). The Government contributed to only one delay when it filed its sole motion to continue the trial on July 30, 2021, due to the unavailability of Dr. Richardson for the August 24, 2021 trial date. (Doc. 86.) By comparison, Morales and his co-defendant Azure filed six motions to continue the trial. (Docs. 34, 42, 44, 46, and 58.) The Government justified its single request for a continuance based upon the unavailability of Dr. Richardson as an essential witness. (Doc. 86.) Dr. Richardson had performed surgery on the victim after the attack. (*Id.*) Dr. Richardson’s obligations at the hospital in Billings, including his on-call duties and previously scheduled surgeries, left him unavailable to make the 220-mile drive to testify in Great Falls on August 24, 2021. (*Id.*) These hardships, when viewed in light of the COIVD-19 restrictions faced by medical

facilities, compare favorably with the factors deemed reasonable in *Patterson*, 277 F.3d at 711 (travel from South Carolina to Norfolk, Virginia). The Court finds the Government's reasons for the delay to be warranted based on the need for Dr. Richardson to testify as to the nature and extent of the injuries suffered by the victim in the attack, including details of the surgery that he performed on the victim after the attack. The Government in no way acted in bad faith in seeking the continuance. *See Barker*, 407 U.S. at 529.

Morales argues that the delay from the Government's motion for continuance proved prejudicial because of the anxiety caused to him and because some witnesses may not be available in the future if the Court were to grant the motion to dismiss without prejudice. The U.S. Supreme Court recognizes that an unreasonable delay can prejudice a defendant in three ways: (1) "oppressive pretrial incarceration," (2) "anxiety and concern of the accused," and (3) "the possibility that the defense will be impaired." *Barker*, 407 U.S. at 532. The fact that Morales was in state custody at the time of his indictment undermines his claim that he suffered oppressive pretrial delay and anxiety and concern arising from the Government's sole request for a continuance. Morales argues that he would have completed his state sentence but for his transfer to federal custody. Morales fails to explain how this fact contributed to any oppressive pretrial delay or increased anxiety or concern. Morales has failed to

persuade the Court that he has suffered actual prejudice in that he would have been in custody on his state sentence even if he had not faced pretrial incarceration in this case.

Finally, Morales has failed to demonstrate any impairment to his defense caused by the Government's sole request for a continuance. Morales asserted, without any accompanying support, that his elderly father may be unavailable to testify at his trial and that another potential witness has been in and out of jail during the ten months of Morales's pretrial incarceration and also could be unavailable to testify. These claims constitute mere speculation and fail to support any impairment of Morales's defense. The Court finds that Morales suffered no actual prejudice that would violate his Sixth Amendment rights. The Court's analysis comports with due process requirements and the Sixth Amendment.

CONCLUSION

Dr. Richardson is an essential witness who was unavailable for the purposes of the Speedy Trial Act. Even accepting as true Morales's assertion that 27 days had elapsed from Morales's December 8, 2020 arraignment through July 30, 2021, the time until trial has not exceeded the statutory requirements of the Speedy Trial Act. Morales alleged no actual prejudice, and his Sixth Amendment right to a Speedy Trial was not violated.

Accordingly, **IT IS ORDERED** that:

1. Morales's Motion to Dismiss on Speedy Trial, (Doc. 102), is **DENIED**.
2. Morales's Motion to Vacate the Trial currently set for October 25, 2021, (Doc. 104), is **DENIED**.

DATED this 21st day of October, 2021.



Brian Morris, Chief District Judge
United States District Court