

NO. _____

In The

Supreme Court of the United States

TOMMIE DOWARD WEATHERS, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

APPENDIX

Louis H. Lang
CALLISON, TIGHE & ROBINSON, LLC
1812 Lincoln Street, Suite 200
P. O. Box 1390
Columbia, SC 29202
803-404-6900
louislang@callisontighe.com
Counsel of Record for Petitioner

TABLE OF CONTENTS

	<u>Page</u>
Final Order of the United States Court of Appeals for the Fourth Circuit, filed March 13, 2023	A1
Judgment of the United States Court of Appeals for the Fourth Circuit, filed March 13, 2023	A2
Opinion of the United States District Court for the District of South Carolina, Charleston Division, filed January 31, 2023	A3
Order on Rehearing of the United States Court of Appeals for the Fourth Circuit, filed May 23, 2023.....	A14

FILED: March 13, 2023

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 23-4074
(2:22-cr-00192-DCN-1)

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

TOMMIE DOWARD WEATHERS, JR.

Defendant - Appellant

O R D E R

Upon review of submissions relative to the motion to dismiss, the court denies the motion.

Upon review of memoranda relative to this bail appeal, the court affirms the district court's order regarding release and dismisses this appeal.

Entered at the direction of Judge Niemeyer, with the concurrence of Judge Wilkinson and Judge Diaz.

For the Court

/s/ Patricia S. Connor, Clerk

FILED: March 13, 2023

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 23-4074
(2:22-cr-00192-DCN-1)

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

TOMMIE DOWARD WEATHERS, JR.

Defendant - Appellant

JUDGMENT

In accordance with the decision of this court, the district court's order regarding release is affirmed.

This judgment shall take effect upon issuance of this court's mandate in accordance with Fed. R. App. P. 41.

/s/ PATRICIA S. CONNOR, CLERK

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION**

UNITED STATES OF AMERICA,)	
)	
vs.)	
)	No. 2:22-cr-00192-DCN
TOMMIE DOWARD WEATHERS, JR.,)	
)	ORDER
Defendant.)	
)	

This matter is before the court on defendant Tommie Doward Weathers, Jr.’s (“Weathers”) motion for release from custody pursuant to the Speedy Trial Act, 18 U.S.C. § 3164 et seq. ECF Nos. 55, 63. For the reasons set forth below, the court denies the motion.

I. BACKGROUND

On March 8, 2022, a federal grand jury charged Weathers in a three-count indictment. Count One charged Weathers with knowingly possessing a firearm and ammunition after a previous conviction for a crime punishable by imprisonment for more than one year in violation of 18 U.S.C. §§ 922(g)(1), 924(a)(2), and 924(e). Count Two charged Weathers with possession with intent to distribute a quantity of fentanyl and cocaine base (commonly known as “crack cocaine”), both Schedule II controlled substances in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(C). Count Three charged Weathers with knowingly using and carrying firearms during and in relation to a drug trafficking crime in violation of 18 U.S.C. § 924(c)(1)(A)(i). Weathers made his initial appearance before Magistrate Judge Molly H. Cherry on March 21, 2022, when he entered a plea of not guilty. ECF No. 13. During the proceedings, the government moved for detention, and Weathers waived his detention hearing without prejudice. Id.

On October 24, 2022, Weathers filed a pro se motion for pretrial release pursuant to 18 U.S.C. § 3164. ECF No. 55. On November 21, 2022, Weathers, through counsel, supplemented his motion. ECF No. 63. The United States of America (the “government”) responded in opposition on November 29, 2022, ECF No. 66, and Weathers replied in support of his motion on December 5, 2022, ECF No. 68. The court held a hearing on the motion on December 20, 2022. ECF No. 71. During the hearing, the court requested supplemental briefing on the timeline of excludable and non-excludable days, and on December 29, 2022, Weathers filed a supplement to his motion. ECF No. 72. On January 29, 2023, Weathers filed a second supplemental brief. ECF No. 73. As such, the motion has been fully briefed and is now ripe for review.

II. DISCUSSION

Weathers argues that he is entitled to release from pretrial detention pursuant to the Speedy Trial Act, 18 U.S.C. § 3164. Weathers argues that he is entitled to immediate release and does not argue that the court should dismiss the indictment; therefore, § 3164 exclusively governs. See United States v. Adams, 2022 WL 6751435, at *2 n.1 (N.D. Ohio Oct. 11, 2022) (determining that § 3164 applied where the defendant disclaimed an intent to move for dismissal for a violation of the seventy-day speedy trial limit found in § 3161(c)(1)). The Speedy Trial Act provides, in relevant part, that the trial of a defendant “who is being held in detention solely because he is awaiting trial . . . shall commence not later than ninety days following the beginning of such continuous detention.” 18 U.S.C. §§ 3164(a)(1), (b). “The periods of delay enumerated in section 3161(h) are excluded” from the ninety-day period. 18 U.S.C. § 3164(b). Such excludable periods in § 3164(h) include delay resulting from the grant of a continuance

where the district court finds that “the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial,” delay resulting from the filing of any pretrial motion, and delay attributable to when such motions are “actually under advisement by the court.” 18 U.S.C. §§ 3161(h)(1)(D), (H), (7)(A). If the defendant is not brought to trial within ninety non-excludable days through no fault of his own, a court shall “automatic[ally] review . . . the conditions of release” and release the detained defendant from custody until the time when his trial commences. 18 U.S.C. § 3164(c).

Weathers argues that he is entitled to release from custody because more than ninety non-excludable days have passed since he made his initial appearance in this case. To determine the number of non-excludable days that have elapsed, the court finds that an accounting of the relevant dates in this case is instructive. The timeline, as agreed upon by the parties, proceeds as follows:

Date	Event
March 21, 2022	Weathers makes his initial appearance before Magistrate Judge Cherry. ECF No. 13.
57 non-excludable days elapse	
May 17, 2022	<ul style="list-style-type: none"> • Weathers files a motion to appoint new counsel, ECF No. 28, and the clock stops, 18 U.S.C. § 3161(h)(1)(D). • Weathers’s motion is under advisement for three excludable days. 18 U.S.C. § 3161(h)(1)(H).
May 20, 2022	The court grants Weathers’s motion to appoint counsel, and the clock resumes
32 non-excludable days elapse (total: 89 days)	
June 21, 2022	<ul style="list-style-type: none"> • Weathers files a motion for an order permitting him to use a laptop to review discovery at his detention center, ECF No. 33, and the clock stops, 18 U.S.C. § 3161(h)(1)(D).

	<ul style="list-style-type: none"> • Weathers's motion is under advisement for one excludable day. 18 U.S.C. § 3161(h)(1)(H).
June 22, 2022	The court grants Weathers's motion to review discovery, and the clock resumes
6 non-excludable days elapse (total: 95 days)	
June 28, 2022	<ul style="list-style-type: none"> • Weathers files a second motion to appoint new counsel, ECF No. 35, and the clock stops, 18 U.S.C. § 3161(h)(1)(D). • Weathers's motion is under advisement for 7 excludable days. 18 U.S.C. § 3161(h)(1)(H).
July 5, 2022	The court grants Weathers's second motion to appoint counsel, and the clock resumes
49 non-excludable days elapse (total: 144 days)	
August 23, 2022	<ul style="list-style-type: none"> • Weathers files a motion to suppress, ECF No. 43, and the clock stops. • Additionally, the court grants an ends-of-justice continuance, ECF No. 42, and the order remains in effect, 18 U.S.C. § 3161(h)(7)(A).

According to Weathers, the timeline suggests that the deadline to commence trial had elapsed even before Weathers filed his second motion to appoint new counsel, as ninety-five non-excludable days had passed by June 28, 2022. Weathers further argues that even if the court considers the time between when he filed his second motion to appoint new counsel and when the court granted an ends-of-justice continuance, the number of non-excludable days unquestionably exceeded the ninety-day limit, for a total of 144 non-excludable days.

The government does not dispute this timeline of relevant events. Rather, the government focuses on the provision in § 3164(c) which states that the failure to commence trial must be “through no fault of the accused or his counsel.” 18 U.S.C. § 3164(c). Relying on that provision, the government argues that Weathers is at fault because his motions to relieve counsel and appoint new counsel “inevitably delayed the

case resolution.” ECF No. 66 at 3. For example, the government argues that following the appointment of new counsel, Weathers’s new attorneys needed time to review discovery and familiarize themselves with the case. The government also had to meet with the new counsel and “start over.” Id. Accordingly, the government suggests that the failure to commence Weathers’s trial within the ninety-day period was “entirely” attributable to the fault of Weathers. Id. at 3.

In reply, Weathers argues that § 3161(h) already provides a recognized list of delays that may be excluded from the calculation of the ninety-day period; therefore, recognizing additional exclusions to the period based on when the defendant is at fault would essentially render the § 3161(h) exclusions meaningless. As a preliminary matter, Weathers’s position does not accord with the law. As the Tenth Circuit has explained, “a defendant seeking release under § 3164(c) must show both that the 90-day clock has run and that the delay was ‘through no fault of the accused or his counsel.’” United States v. Derman, 779 F. App’x 497, 504 (10th Cir. 2019) (emphasis added). Thus, the requirements are conjunctive, and Weathers must satisfy the “no fault” provision in addition to showing that more than ninety non-excludable days have elapsed.

Having established that Weathers must independently satisfy § 3164(c)’s “no fault” language in addition to reaching the ninety non-excludable days, the court turns to the substance of the parties’ arguments, ultimately concluding that both the government and Weathers are partially at fault. Nevertheless, because at least a portion of the delay is attributable to Weathers, the court finds that he cannot meet the requirement that the delay be “through no fault” of the defendant and denies Weathers’s motion.

First, the court notes that the government shoulders some of the blame here. In Derman, the Tenth Circuit affirmed the district court's conclusion that the defendant's ninety-day clock had not run. In calculating the number of non-excludable days that had elapsed, the court recognized that among other delays, the district court had granted a continuance to give counsel for two new codefendants adequate time to prepare for trial. Id. at 505. The court noted that under §§ 3161(h)(7)(B)(ii) and (iv), courts may consider the provision of "adequate trial preparation time for all parties as a factor to be considered in deciding whether to grant an ends-of-justice continuance." Id. Such allowances are sensible and reflect the very arguments that the government presents in opposition to the instant motion: both the government and new defense counsel should be given time to become familiar with a case before proceeding to trial. See also United States v. Tomkins, 2011 WL 4840949, at *12 (N.D. Ill. Oct. 12, 2011) (explaining that a delay caused by the defendant changing lawyers, "which required new counsel to . . . get up to speed[,] . . . is an appropriate basis for the [] judge to have excluded time under the ends of justice exception" (emphasis added)).

If, however, the government believed it would have encountered issues with its ability to prepare for trial following the appointment of new counsel, it could have moved for a continuance. The government did not do so.¹ Thus, given that § 3161(h)(7) provides methods to stay a case to allow for adequate preparation time, the government is

¹ And the government may not now argue that the time following the appointment of new counsel should warrant a continuance. The decision to grant an ends-of-justice continuance "may not be made after the fact." United States v. Hill, 197 F.3d 436, 441 (10th Cir. 1999) (internal quotation marks and citation omitted). "Instead, the balancing must occur contemporaneously with the granting of the continuance because Congress intended that the decision to grant an ends-of-justice continuance be prospective, not retroactive." Id. (cleaned up).

at least partially at fault for not requesting a continuance at the appropriate time. Had the government timely moved for a continuance, that time would have been considered a period of excusable days. See 18 U.S.C. § 3161(h)(1)(7)(A).

Of course, even if the government is partially liable, Weathers could still be considered “at fault” for presenting the motion to relieve counsel in the first place.

Derman, for instance, does not answer the question of whether a defendant may be faulted for a delay because in that case, the Tenth Circuit determined that the period for the continuance was properly excluded and ultimately did not reach the issue of fault on the part of the defendant. Derman, 779 F. App’x at 505–06. At the hearing, the parties mutually agreed that there is scant caselaw concerning when a failure to commence trial is through the fault of the accused or his counsel.

The court has similarly found a dearth of recent cases that have defined the term “fault,” and almost certainly none have analyzed whether a delay caused by a defendant’s motion to appoint new counsel constitutes the same. But guidance on the matter is not entirely lacking. Of note, one district court in this circuit has explained that the term “fault” in the context of § 3164(c) “refers to a causal nexus between the delay in commencing trial and the actions of the defendants and their counsel.” United States v. Howard, 440 F. Supp. 1106, 1109 (D. Md. 1977), aff’d, 590 F.2d 564 (4th Cir. 1979); see also United States v. Cafaro, 1988 WL 138180, at *14 (S.D.N.Y. Dec. 14, 1988) (citing Howard with favor). Thus, “[i]f the delay is occasioned by the accused’s counsel, the defendant’s release is not compelled.” Howard, 440 F. Supp. at 1108–09 (citing United States v. Martinez, 538 F.2d 921 (2d Cir. 1976)).

Applying the definition established by the court in Howard, the court finds that Weathers is at least partially “at fault” for causing the delay by filing the motions to relieve counsel. It is unreasonable for Weathers to claim that a new attorney assigned to his case would have been ready to proceed to trial almost immediately. For example, if Weathers filed a motion to appoint new counsel on the eighty-ninth day following his initial appearance, it would bely reason to hold that his new attorney must be ready to proceed with trial on the very next day after the court grants the motion. To find otherwise would also mean that a defendant could simply file renewed motions to appoint new counsel as a dilatory tactic until the ninety-day window for trial had elapsed. Moreover, the court agrees that government needs additional time to work with new counsel.

In his motion, Weathers contends that there is no rigid requirement that defense counsel must confer with the government prior to trial, suggesting that he is not to blame for the decision not to proceed to trial following the appointment of new counsel. But Weathers’s argument ignores the practicalities of the trial-preparation process, and the process was invariably delayed upon the filing of not one but two motions for new counsel during the relevant period.² Additionally, Weathers argues that any “delay” caused by the filing of his “three justifiable motions” has “already been counted against him” based on the enumerated delays found in § 3161(h). ECF No. 73 at 2. Not so. The excluded days account for the time that the court spent reviewing his motions, not on the

² This does not include a third motion to appoint counsel that Weathers filed on October 11, 2022. ECF No. 51. Since that motion was filed after the court granted the ends-of-justice continuation, it is not relevant to the issue presented in this order. Weathers also filed a fourth motion on November 28, 2022, ECF No. 65, but he later withdrew the motion at a status conference.

delay caused by the motions themselves. And even if Weathers filed his motions with the best intentions, he may still be considered “at fault” for purposes of § 3164(c) because the motions were the causal nexus for the delay in reaching trial. As the court in Howard aptly explained, “[f]ault in the context of § 3164(c) has no perjorative connotation.” Howard, 440 F. Supp. at 1109. In other words, Weathers’s practices need not be condemnable for the court to find that he caused the delay. The court concludes that the delay was caused by Weathers’s motions such that he is partially at “fault” for purposes of the statute.

Having determined that Weathers was at least partially at fault for the trial delay, the court turns to deciding whether the Speedy Trial Act was implicated after more than ninety days elapsed. Some courts choose to analyze whether delays caused by the accused or his counsel are excludable from the calculation of time, much like they do for the list of excludable periods found in § 3161(h). See Tomkins, 2011 WL 4840949, at *8 (“Two general categories of time are excluded from the computation of time under § 3164—(1) period of delay excluded by § 3161(h) . . . , and (2) time attributed to the fault of the accused or his counsel.”). But other cases suggest that there is no requirement that the court must carve out a defined period caused by the delay. In Howard, the court did not define the precise amount of time that was attributable to the defendant; it simply noted that the failure to commence trial within ninety days was not without the fault of the accused and his counsel. Howard, 440 F. Supp. at 1109. Indeed, the language of the statute broadly states that a failure to commence trial in a timely manner shall result in a review of the conditions of release only if it is “through no fault of the accused or his counsel.” 18 U.S.C. § 3164(c).

Weathers appears to urge the court to adopt the Tomkins approach if it were to find that Weathers contributed to the delay. See ECF No. 73 at 1 (“[N]either [d]efendant nor his counsel are at fault for any of those 144 days . . .”). However, the court finds the approach adopted in Howard to be more instructive, given that it is the ruling of a sister court, and the Fourth Circuit ultimately affirmed the district court’s judgment. Howard, 590 F.2d at 568–69. Under that approach, there is no need to calculate which days are attributable to Weathers and which are not; it only matters that the court cannot say that the delay in this case was through no fault of Weathers. Alternatively, even if the court were to adopt the Tomkins approach and evaluate how much of the delay is attributable to Weathers, the court would still find that he cannot show that ninety “non-excludable” days passed. Here, Weathers filed his first motion to appoint counsel prior to the expiration of the ninety-day statutory period, and thirty-two non-excludable days passed before the clock was stopped. The court finds that the delay caused by the appointment of new counsel encompassed at least those thirty-two days, if not more. Similarly, for the reasons discussed before, the forty-nine days that elapsed after Weathers filed his second motion to appoint counsel are attributable to that motion. Accordingly, the court finds that Weathers is not entitled to the relief he seeks.

III. CONCLUSION

For the reasons set forth above, the court **DENIES** the motion for release from custody.

AND IT IS SO ORDERED.

A handwritten signature in black ink, appearing to read "DAVID C. NORTON".

**DAVID C. NORTON
UNITED STATES DISTRICT JUDGE**

**January 31, 2023
Charleston, South Carolina**

FILED: May 23, 2023

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 23-4074
(2:22-cr-00192-DCN-1)

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

TOMMIE DOWARD WEATHERS, JR.

Defendant - Appellant

O R D E R

The court denies the petition and supplemental petition for rehearing and rehearing en banc. No judge requested a poll under Fed. R. App. P. 35 on the petition for rehearing en banc.

Entered at the direction of the panel: Judge Wilkinson, Judge Niemeyer, and Judge Diaz.

For the Court

/s/ Patricia S. Connor, Clerk