

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

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

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

TOMMY LEE WALKER,

Defendant-Appellant.

Nos. 21-10364, 21-10365

D.C. No.

2:20-cr-00039-KJM-1

Eastern District of California,
Sacramento

ORDER

Before: S.R. THOMAS and BENNETT, Circuit Judges, and MOSKOWITZ,*
District Judge.

Appellant Tommy Lee Walker filed a petition for rehearing en banc on August 11, 2023 (Dkt. No. 40). The panel has voted to deny the petition for rehearing en banc. Judge Bennett has voted to deny the petition for rehearing en banc, and Judges Thomas and Moskowitz so recommend.

The full court has been advised of the petition for rehearing en banc, and no judge of the court has requested a vote on whether to rehear the matter en banc.

Fed. R. App. P. 35.

The petition for rehearing en banc is **DENIED**.

* The Honorable Barry Ted Moskowitz, United States District Judge for the Southern District of California, sitting by designation.

[United States v. Walker](#)

United States Court of Appeals for the Ninth Circuit

November 14, 2022, Argued and Submitted, San Francisco, California; May 30, 2023,
Filed

Nos. 21-10364, 21-10365

Reporter

68 F.4th 1227 *; 2023 U.S. App. LEXIS 13224 **

UNITED STATES OF AMERICA,
Plaintiff-Appellee, v. TOMMY LEE
WALKER, Defendant-Appellant.

Prior History: **[**1]** Appeal from the United States District Court for the Eastern District of California. D.C. Nos. 2:20-cr-00039-KJM-1, 2:20-cr-00206-KJM-1. Kimberly J. Mueller, Chief District Judge, Presiding.

[United States v. Walker, 2021 U.S. Dist. LEXIS 126703, 2021 WL 2823107 \(E.D. Cal., July 6, 2021\)](#)

Core Terms

district court, ends of justice, factors, pandemic, speedy trial, jury trial, public health, interstate commerce, courthouses, possessed, trial date, indictment, firearm, continuances, detained, gun, general order, convictions, detention, excluding, handgun, courts, rea, traveled, parties, felony, cases, felon, possession of a firearm, speedy trial right

Case Summary

Overview

HOLDINGS: [1]-Under the ends of justice provision of the Speedy Trial Act, 18 U.S.C.S. § 3161(h)(7)(A), defendant was not entitled to relief from his felon in possession of a firearm conviction due to the 557 day trial delay from the closure of courts during the COVID-19 pandemic because the district court could not have safely conducted a trial during the challenged period; [2]-Although defendant was insistent about his right to a speedy trial and the time between his arrest and conviction was substantial, his [Sixth Amendment](#) speedy trial rights were not violated under the Barker v. Wingo factors due to the reason for the delay and the lack of legal prejudice to defendant; [3]-Defendant was properly denied a requested mens rea jury instruction because there was no mens rea for the affecting commerce element of the felon-in-possession statute, [18 U.S.C.S. § 922\(g\)\(1\)](#).

Outcome

Decision affirmed.

LexisNexis® Headnotes

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

[HNI\[↓\]](#) **Unregistered Firearm, Elements**

United States v. Stone held that the interstate commerce element of [18 U.S.C.S. § 922\(g\)](#), the felon in possession of a firearm statute, was purely jurisdictional and does not contain a mens rea requirement. The U.S. Supreme Court's decision in Rehaif v. United States does not overrule Stone, and Stone is not clearly irreconcilable with Rehaif.

Criminal Law &
 Procedure > ... > Accusatory
 Instruments > Dismissal > Appellate
 Review

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

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

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

Criminal Law &

Procedure > ... > Accusatory
 Instruments > Indictments > Appellate
 Review

[HN2\[↓\]](#) **Dismissal, Appellate Review**

Appellate courts review de novo a district court's decision to deny a motion to dismiss an indictment based on its interpretation of the Speedy Trial Act. But they review the district court's findings of fact and its ends of justice determinations for clear error. Appellate courts review de novo whether a defendant's [Sixth Amendment](#) rights were violated. Appellate courts also review de novo whether jury instructions accurately defined the elements of the statutory offense.

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

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

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

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

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

[HN3](#) **Criminal Process, Speedy Trial**

The [Sixth Amendment](#) guarantees that in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial. [U.S. Const. amend. VI](#). To give effect to this right, Congress enacted the Speedy Trial Act, which sets time limits between an accused's arraignment or indictment and when that person's criminal trial must commence. The Speedy Trial Act requires that a criminal trial begin within seventy days from either the date on which an indictment was filed, or the date on which a defendant makes an initial appearance, whichever is later. [18 U.S.C.S. § 3161\(c\)\(1\)](#). But the Act contains a long and detailed list of periods of delay that are excluded in computing the time within which trial must start. See [§ 3161\(h\)](#). The ends of justice provision allows for the exclusion of time if a district court finds that the ends of justice served by taking such action in continuing a trial and excluding time outweigh the best interest of the public and the defendant in a speedy trial. [§ 3161\(h\)\(7\)\(A\)](#).

Criminal Law &
 Procedure > Preliminary
 Proceedings > Pretrial Motions &
 Procedures > Continuances

Criminal Law &
 Procedure > Trials > Continuances

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

[HN4](#) **Pretrial Motions & Procedures, Continuances**

In determining whether the ends of justice outweigh the best interest of the public and the defendant in a speedy trial, the district court must evaluate, among others, several enumerated factors, each of which can be sufficient to warrant an exclusion of time if present. [18 U.S.C.S. § 3161\(h\)\(7\)\(B\)](#). The first enumerated factor is whether the failure to grant such a continuance in the proceeding would be likely to make a continuation of such proceeding impossible, or result in a miscarriage of justice. [§ 3161\(h\)\(7\)\(B\)\(i\)](#).

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

Criminal Law &
 Procedure > Trials > Continuances

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

[HN5](#) **Criminal Process, Speedy Trial**

Olsen held that nothing in the Speedy Trial Act limits district courts to granting ends of justice continuances only when holding jury trials is impossible. In the context of the COVID-19 pandemic, the following non-exhaustive factors are relevant: (1) whether a defendant is detained pending trial; (2) how long a defendant has been detained; (3) whether a defendant has invoked speedy trial rights since the case's inception; (4)

whether a defendant, if detained, belongs to a population that is particularly susceptible to complications if infected with the virus; (5) the seriousness of the charges a defendant faces, and in particular whether the defendant is accused of violent crimes; (6) whether there is a reason to suspect recidivism if the charges against the defendant are dismissed; and (7) whether the district court has the ability to safely conduct a trial. The Olsen factors are not exhaustive when applied to pandemic-related continuances, and the ultimate touchstone is still the statute—[18 U.S.C.S. § 3161\(h\)\(7\)](#).

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

Criminal Law & Procedure > Preliminary Proceedings > Bail > Dangerousness

Criminal Law & Procedure > Preliminary Proceedings > Bail > Risk of Flight

Criminal Law & Procedure > Preliminary Proceedings > Bail > Denial of Bail

Criminal Law & Procedure > Preliminary Proceedings > Bail > Hearings

[HN6](#) [↓] **Criminal Process, Speedy Trial**

The [Sixth Amendment's](#) speedy trial provision is an important safeguard to prevent undue and oppressive incarceration

prior to trial. At some point, pretrial detention can become excessively prolonged, and therefore punitive, resulting in a due process violation. The point at which detention constitutes a due process violation requires a case-by-case analysis. And when evaluating whether a due process violation has occurred, courts must weigh the following factors: (1) the length of the defendant's pretrial detention; (2) the prosecution's contribution to the delay; and (3) the evidence supporting detention under the Bail Reform Act. The Bail Reform Act requires courts to consider: (1) the nature and circumstances of the offense charged; (2) the weight of the evidence against the person; (3) the history and characteristics of the person; and (4) the nature and seriousness of the danger to any person or the community that would be posed by the person's release. [18 U.S.C.S. § 3142\(g\)](#). Under the [Sixth Amendment](#), courts also conduct ad hoc balancing of factors including the length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant.

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

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

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

[HN7](#) **Criminal Process, Speedy Trial**

In general, under the [Sixth Amendment's](#) speedy trial provision, delays of one year are presumptively prejudicial. But courts have found that longer periods do not necessarily weigh heavily in a defendant's favor.

Criminal Law & Procedure > Criminal Offenses > Weapons Offenses > Possession of Weapons

[HN8](#) **Weapons Offenses, Possession of Weapons**

The federal felon-in-possession statute makes it unlawful for any person who has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year to possess in or affecting commerce, any firearm or ammunition. [18 U.S.C.S. § 922\(g\)\(1\)](#). [18 U.S.C.S. § 924](#) provides that any person who knowingly violates [§ 922\(g\)](#) shall be fined under this title, imprisoned for not more than 15 years, or both. [§ 924\(a\)\(8\)](#).

Criminal Law & Procedure > Criminal Offenses > Weapons Offenses > Possession of Weapons

Criminal Law & Procedure > ... > Acts & Mental States > Mens Rea > Specific Intent

[HN9](#) **Weapons Offenses, Possession of Weapons**

United States v. Stone held that there is no

mens rea for the affecting commerce element of the felon-in-possession statute, [18 U.S.C.S. § 922\(g\)\(1\)](#).

Criminal Law & Procedure > Criminal Offenses > Weapons Offenses > Possession of Weapons

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

[HN10](#) **Weapons Offenses, Possession of Weapons**

In *Rehaif*, the U.S. Supreme Court held that in a prosecution under [18 U.S.C.S. §§ 922\(g\)](#) and [924\(a\)\(2\)](#), the government must prove both that the defendant knew he possessed a firearm and that he knew he belonged to a category of persons barred from possessing a firearm. But *Rehaif* explicitly disclaims imposing any mens rea requirement on the federal jurisdictional requirement. Jurisdictional elements do not describe the evil Congress seeks to prevent, but instead simply ensure that the Federal Government has the constitutional authority to regulate the defendant's conduct. *Rehaif*, thus, did not overrule *Stone*.

Summary:

SUMMARY**

Criminal Law

The panel affirmed Tommy Walker's conviction for being a felon in possession of

** This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

a firearm in violation of [18 U.S.C. § 922\(g\)\(1\)](#) and the revocation of his supervised release in a prior case.

Walker was not tried until 557 days after his indictment largely because of the COVID-19 pandemic. Over Walker's objection, the district court excluded much of this time from the Speedy Trial Act calculation using the "ends of justice" provision of the Act, [18 U.S.C. § 3161\(h\)\(7\)\(A\)](#), and, as a result, denied Walker's [Sixth Amendment](#) and Speedy Trial Act motions to dismiss his indictment.

The panel held that the district court properly excluded time under the ends of justice provision. The panel held that the non-exhaustive factors set forth in *United States v. Olsen*, 21 F.4th 1036 (9th Cir. 2022), support the district court's exclusion of time, and that the district court did not err—much less clearly err—in its ends of justice determination. The panel wrote that the district court acted commendably in doing its best to balance speedy trial rights and public safety in the face of what is hopefully a once-in-a-lifetime pandemic. **[**2]** Weighing the factors set forth in [United States v. Torres](#), 995 F.3d 695 (9th Cir. 2021), and [Barker v. Wingo](#), 407 U.S. 514, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972), the panel held that Walker's [Sixth Amendment](#) claim based on his pretrial detention also fails.

The panel held that the district court did not err by refusing to give Walker's requested mens rea instruction—that to convict, the jury had to find that he *knew* the handgun he possessed had traveled in or affected

interstate commerce. The panel wrote that this court rejected this precise argument in [United States v. Stone](#), 706 F.3d 1145 (9th Cir. 2013). The panel rejected Walker's argument that *Stone* is distinguishable because of the facts of this case. The panel also rejected Walker's arguments that [Rehaif v. United States](#), 139 S. Ct. 2191, 204 L. Ed. 2d 594 (holding that the government must prove both that the defendant knew he had the firearm and that he knew he belonged to a category of persons barred from possessing a firearm), effectively overruled, and is clearly irreconcilable with, *Stone*. The panel wrote that *Rehaif* explicitly disclaims imposing any mens rea requirement on [§ 922\(g\)](#)'s federal jurisdictional requirement, and that the concern animating *Rehaif*—whether Congress intended to impose felony criminal penalties upon those who do not know that they belong to a category of persons barred from possessing a firearm—does not apply here.

Because the panel rejected Walker's **[**3]** challenges to his conviction, and his challenge to the revocation of his supervised release was based only upon the supposed infirm conviction, the panel necessarily rejected his challenge to the revocation of supervised release.

Counsel: Ann C. McClintock (argued), Assistant Federal Public Defender; Heather E. Williams, Federal Public Defender; Federal Public Defenders' Office; Sacramento, California; for Defendant-Appellant.

Aaron D. Pennekamp (argued), Assistant

United States Attorney; Camil A. Skipper, Assistant United States Attorney, Appellate Chief; Phillip A. Talbert, United States Attorney, Eastern District of California; Office of the United States Attorney; Sacramento, California; for Plaintiff-Appellee.

Judges: Before: Sidney R. Thomas and Mark J. Bennett, Circuit Judges, and Barry Ted Moskowitz, * District Judge. Opinion by Judge Bennett.

Opinion by: Mark J. Bennett

Opinion

[*1229] BENNETT, Circuit Judge:

On February 20, 2020, Tommy Walker was indicted for possessing a Jimenez Arms .380 semiautomatic handgun in violation of [18 U.S.C. § 922\(g\)](#), the felon in possession of a firearm statute. He was not tried until August 30, 2021—557 days after his indictment—largely because of the COVID-19 pandemic. Over Walker's objection, the district court [**4] excluded much of this time from Walker's Speedy Trial Act calculation using the "ends of justice" provision of the Act, [18 U.S.C. § 3161\(h\)\(7\)\(A\)](#), and, as a result, denied Walker's [Sixth Amendment](#) and Speedy Trial Act motions to dismiss his indictment.

At trial, the district court rejected Walker's request for a jury instruction requiring the jury to find that he knew that the handgun

he possessed had traveled in interstate commerce. Jurors were instead instructed that they needed to find beyond a reasonable doubt that: (1) Walker knowingly possessed the Jimenez Arms handgun; (2) this particular Jimenez Arms handgun had previously traveled in interstate or foreign commerce; (3) Walker had at least one prior conviction for an offense punishable by more than one year in prison; and (4) Walker knew that he had at least one such felony conviction.

[*1230] Walker timely appeals both the speedy-trial and jury-instruction issues. The district court properly excluded time under the ends of justice provision of the Speedy Trial Act, which gives effect to the [Sixth Amendment](#) right to a speedy and public trial. In *United States v. Olsen*, 21 F.4th 1036, 1046 (9th Cir. 2022), we outlined non-exhaustive factors that are relevant in deciding whether continuances caused by the COVID-19 pandemic should be granted under the Speedy Trial Act's ends of justice [**5] provision. The *Olsen* factors support the district court's exclusion of time. Walker's [Sixth Amendment](#) claim also fails.

The district court also properly denied Walker's requested jury instruction. [HNI](#) [↑] In *United States v. Stone*, we held that the interstate commerce element of [18 U.S.C. § 922\(g\)](#) was "purely jurisdictional" and does not contain a mens rea requirement. [706 F.3d 1145, 1146-47 \(9th Cir. 2013\)](#). The Supreme Court's decision in [Rehaif v. United States, 139 S. Ct. 2191, 204 L. Ed. 2d 594 \(2019\)](#), does not overrule *Stone*, and *Stone* is not "clearly irreconcilable" with *Rehaif*. See [Miller v.](#)

* The Honorable Barry Ted Moskowitz, United States District Judge for the Southern District of California, sitting by designation.

Gammie, 335 F.3d 889, 893 (9th Cir. 2003) (en banc). Accordingly, we affirm Walker's conviction.¹

I.

On November 22, 2019, Daisy Gutierrez recognized her neighbor Tommy Walker standing in the street with a gun in his hand, arguing with his partner or girlfriend. Walker was holding a bottle of alcohol, screaming profanities, and threatening to kill someone. Gutierrez called 911. Sacramento Police Department officers arrived at Walker's residence, and when Walker answered the door, they searched his home for the gun.

The officers found a loaded Jimenez Arms .380 caliber handgun in a dresser drawer next to papers with Walker's name on them. Because Walker was on probation for prior felony convictions—including a 2018 felon in possession of a firearm conviction—the police arrested him for [**6] being a felon in possession of a firearm.

Walker was charged with a single count of being a felon in possession of a firearm in violation of [§ 922\(g\)\(1\)](#). He was arrested on February 10, 2020, and made an initial appearance that same day. Walker was detained and remained detained until his trial some eighteen months later. On February 20, 2020, the grand jury returned

an indictment charging Walker with the [§ 922\(g\)\(1\)](#) violation. At the February 24, 2020 arraignment, Walker did not object to Speedy Trial Act exclusions of time until April 20, 2020—and then later, June 15, 2020—to give defense counsel reasonable time to prepare, pursuant to [18 U.S.C. § 3161\(h\)\(7\)\(B\)\(iv\)](#).

COVID-19 then hit. On March 12, 2020, Chief Judge Mueller entered the first of many Eastern District General Orders concerning the pandemic. By March 18, 2020, all federal courthouses in the Eastern District were closed.

On April 17, 2020, Chief Judge Mueller entered General Order No. 617, which stated that all Eastern District courthouses would remain closed, and that in criminal cases, judges could continue matters:

to a date after June 1, 2020, excluding time under the Speedy Trial Act with reference to . . . the Ninth Circuit Judicial [*1231] Council's Order of April 16, 2020 continuing this court's judicial [**7] emergency for an additional one-year period and suspending the time limits of [18 U.S.C. § 3161\(c\)](#) until May 2, 2021, with additional findings to support the exclusion in the Judge's discretion; if any criminal matters are maintained on calendar, to the full extent possible they shall be conducted by telephone or videoconference

On May 13, 2020, Chief Judge Mueller entered General Order No. 618, which superseded prior orders and declared that all courthouses in the Eastern District would be

¹Walker also appeals from the district court's revocation of his supervised release in a prior case. But his challenge is based only upon the supposed infirm conviction at issue here, which was one basis for the revocation. Because we reject Walker's challenges to his conviction, we necessarily reject his challenge to the revocation of supervised release.

closed until further notice. General Order No. 618 also stated that district judges could continue criminal cases because of the pandemic and could exclude time under the Speedy Trial Act with appropriate findings to support such exclusions.

Walker's first hearing following his arraignment was held on June 15, 2020. He demanded a speedy trial. The United States orally moved to exclude certain time under the Speedy Trial Act. The court denied the motion without prejudice and required the government to file a written motion. The United States filed such a motion on June 17, 2020, which the court granted at the July 7, 2020 hearing. The court first excluded the time from the filing of the motion (June 17) to the hearing (July 7) under [18 U.S.C. § 3161\(h\)\(1\)\(D\)](#) (pretrial **[**8]** motions exclusion). The court set the trial for September 29, 2020, and excluded the time between July 7 and September 29, 2020 under the Speedy Trial Act's ends of justice provision—[§ 3161\(h\)\(7\)](#).

[T]he Court cannot see any path forward to trial on the current date given that all of the public health data is going the wrong direction, including in many counties within the Eastern District of California. . . . Again, we will have to wait and see what's occurring with the public health data. The county health officer is currently saying no -- no gatherings, and under these circumstances the Court can't expect witnesses and potential jurors to come to the courthouse. . . .

. . . .

. . . With a jury trial you have many

bodies in a courtroom for many hours a day, and that is a distinguishing aspect of a jury trial. There are -- there would be complicated logistics to allow proceeding in some way, but it's the number of hours in a day that people would be congregating that currently makes even considering going to a jury trial impossible. . . . [I]t may be that we aren't ultimately bound by the county health officer's orders, but the county health officer's and the state health orders the Court believes are based on sound **[**9]** public health information that this Court cannot ignore.

On August 21, 2020, Walker filed two pretrial motions: one for disclosure of a confidential informant and one for a pretrial deposition. At a status conference held soon after, the court and parties agreed that a September trial was unlikely to occur given public health concerns, so the court vacated the September 29, 2020 trial date. Over Walker's objection, the court set his motions for hearing on September 28, 2020 and excluded time through that date under [§ 3161\(h\)\(7\)\(B\)\(iv\)](#) (giving counsel reasonable time to prepare) and [\(h\)\(1\)\(D\)](#) (pretrial motions exclusion) of the Act.

During the September 28, 2020 hearing, the court noted that "our Facility Security Committee, is meeting again Every two weeks we check the public health data for each courthouse." The court then directed the parties to meet and confer regarding a trial date and to present a joint proposal with a timeline to the court at an **[*1232]** October 5, 2020 status conference. The parties submitted their joint statement

on October 2, 2020.² The court excluded the time between September 28 and October 5, again relying on [§ 3161\(h\)\(7\)\(B\)\(iv\)](#) (giving counsel reasonable time to prepare).

The court set a November 16, 2020 **[**10]** trial date at the October 5, 2020 status conference (while also setting an October 26 "Trial Confirmation Hearing"). The court took judicial notice of public health data shared with the court's Facility Security Committee and excluded time between October 5, 2020 and October 26, 2020 under [§ 3161\(h\)\(7\)\(A\)](#) and [\(B\)](#).

So I'm excluding time through the new trial date of November 16th, and I am basing that on the persistence of the coronavirus pandemic in the Sacramento division of our court. . . . I'll place on the docket in this case as well the public health data that our court considers and closely reviews every two weeks. The last data reviewed by the Court's facility security committee on Friday shows no downward trend in coronavirus cases. The data is -- it comes from Johns Hopkins, a reputable public health institution. It's compiled for this Court by the Administrative Office of the U.S. Courts, and I'm taking notice of that information. I've referenced it in the past, but in the interest of full transparency, I am not putting it on the

²In the joint statement, the government proposed a set of safety protocols, conditionally consented to a bench trial, and created a timeline for exploring the prospect of a jury trial. Walker agreed to some safety recommendations, but he disagreed with the government suggestion that "every individual in the courtroom [should] wear a mask," and was unwilling to waive his right to a jury trial. Walker also noted that while he did "not object to the government's proposed timeline," he believed "that the Court should also set a tentative trial date in this matter," an action the government felt was premature.

docket. This is the kind of data I have looked at each time when I have had to reach a decision in an individual case.

. . . .

For the time being that COVID-19 persists, **[**11]** there are some positive signs that if every member of society does his and her part that we may be able to suppress the virus as a community as a whole, but we are not there yet. And so the Court is applying a principle of first do no harm, and that is applied to Mr. Walker as the defendant, all the people needed to carry out a trial, and especially --not only but especially members of the jury pool who would be coming from many counties in Northern California many of which have not moved into an orange or yellow zone under the state's measurements. Those maps will be a part of what I put on the docket here.

So I'm finding that the Court cannot safely conduct a jury trial between now and the trial confirmation at least and likely until the time of the jury trial date that we've just set.

On October 26, 2020, the court continued the trial to February 9, 2021. The court acknowledged that the Eastern District's general orders did "not preclude a judge from convening a jury," and instead directed judges to make "a case-by-case" determination. The court then explained that it was "making such a [case-by-case] decision," and although it was "concerning" that Walker was "detained pending trial **[**12]** for a lengthy period of time," an "ends of justice" continuance was still

appropriate based on, among other things, "[t]he most recent data," which showed that "the coronavirus pandemic . . . ha[d] not been suppressed" in the Sacramento division of the District, the area from which the court would call jurors. The court excluded the [*1233] time through the new trial date—February 9, 2021—under [§ 3161\(h\)\(7\)\(A\)](#) and [\(B\)](#).

On December 23, 2020, the parties stipulated to continue the trial confirmation hearing to January 11, 2021. But then a COVID outbreak occurred at the jail where Walker was housed, and Walker's counsel sought and obtained a continuance of the trial confirmation hearing until January 25, 2021. The court clarified that while the time previously excluded had been pursuant to [§ 3161\(h\)\(7\)](#), the time from January 11 through 25, 2021 was excluded pursuant to [§ 3161\(h\)\(3\)\(A\)](#)—unavailability of defendant or an essential witness.

On January 25, 2021, over Walker's objection, the court vacated the February 9, 2021 trial date and set a status conference for May 10, 2021.

And I'm excluding time through that date based on [3161\(h\)](#) generally, and I'm finding that it continues to be the case that the state of the coronavirus pandemic, which has not [**13] in any way been brought under control, precludes the ability to convene a jury trial with the attorneys and a jury pool summoned from all of the Northern California counties that feed into the Sacramento courthouse. So I'm finding that this is a reason solely to exclude

time, and I'm not relying on any impermissible condition. I'm assuming the government is ready to go, the defense is ready to go, and I regret that we can't move sooner at this point.

On March 26, 2021, Walker filed a second motion for disclosure of a confidential informant and a motion to dismiss for violation of his speedy trial rights. The motion to dismiss was set for argument on May 10, 2021.

At the May 10, 2021 hearing on the motion to dismiss,³ the court set a new trial confirmation date of June 28, 2021, and a new trial date of August 3, 2021. The court excluded time through June 1, 2021, based on [§ 3161\(h\)\(1\)\(D\)](#), the pretrial motions exclusion, as well as [§ 3161\(h\)\(7\)\(A\)](#).

I would, at this point, also exclude time through June 1st based on the interest of justice exclusion that [the government] is referencing. And to clarify my thinking about that, at that earliest date in the Court's mind if the courthouses may open to the public. And at this [**14] point, although the Court had considered an evidentiary hearing in May, but it has been continued to June, the Court has not been prepared to -- this Court has not been prepared to convene a full jury trial up to the June 1st date given the trends and the infection rates in Sacramento and the surrounding counties.

It may be that June 15th is the correct date when the state has indicated it will

³The court denied the motion on July 7, 2021.

lift the tier system unless the public health data ends up frustrating that goal. But at this point this Court is comfortable, I believe the bench will be considering a recommendation through the facility security committee. And it may be by June 1st the Court is satisfied that the pandemic no longer provides a basis for an interest of justice exclusion. So, through June 1st for now, but if the government wants to move between June 1st supplementing the record for information on witnesses, it will consider whether or not an interest of justice exclusion should continue past June 1st up until the trial date of August 3rd.

On May 26, 2021, Chief Judge Mueller entered General Order No. 631, which [*1234] stated that since issuance of the District's prior orders, effective COVID-19 vaccines had been developed [**15] and made available to the public. General Order No. 631 also noted that, given the improvement in the public health landscape, some judges had begun to schedule jury trials and request that jury pools be summoned, with the first jury trial scheduled to begin on June 2, 2021. The Order also stated that effective June 14, 2021, all courthouses in the Eastern District would be open to the public. But the Order clarified that district judges overseeing criminal cases could still continue matters, excluding time under the Speedy Trial Act based on COVID-19, if accompanied by findings to support exclusion.

On June 16, 2021, Walker and the United States stipulated to exclude certain time and

to move the trial date from August 3, 2021 to August 24, 2021. The court approved the stipulation, excluding the time between June 17, 2021 and August 24, 2021 under [§ 3161\(h\)\(7\)\(B\)\(iv\)](#) (giving counsel reasonable time to prepare).

The court denied the speedy trial motion to dismiss on July 7, 2021. The court applied *Olsen* and found that while two of the *Olsen* factors—the fact of detention and length of detention—favored Walker, all other factors did not. As to Walker's speedy trial claim based on the [Sixth Amendment](#), the court listed the relevant factors, [**16] and found that "[o]n balance, the relevant factors weigh against finding Mr. Walker's due process rights were violated."

On August 2, 2021, the court continued the trial to August 31, 2021 and excluded the time from August 2 to August 31 under [§ 3161\(h\)\(7\)\(B\)\(iv\)](#) (giving counsel reasonable time to prepare) and [\(h\)\(3\)\(A\)](#) (unavailability of a defendant or essential witness).⁴

Walker submitted a proposed jury instruction requiring the government to prove that he "knew the firearm had been transported in interstate commerce (or was willfully blind) or knew the firearm was manufactured outside of California." At the appropriate time during the trial, Walker argued that such an instruction was warranted, in part "because the gun says California on it." The trial judge refused to give the instruction, and the jury was instructed as to the elements of [§ 922\(g\)](#)

⁴ The docket notes that defense witnesses were unavailable.

described above.

The jury found Walker guilty, and the court sentenced him to a term of 46 months. The court also found that Walker violated the terms and conditions of supervision and ordered him to serve 24 months consecutively to the 46 months imposed for the new conviction. Walker timely appealed.

II.

We have jurisdiction pursuant to [28 U.S.C. § 1291](#). [HN2](#)^[↑] We review de novo a district court's [**17](#) decision to deny a motion to dismiss an indictment based on its interpretation of the Speedy Trial Act. See [United States v. Gorman, 314 F.3d 1105, 1110 \(9th Cir. 2002\)](#). But we review the district court's findings of fact and its "ends of justice" determinations for clear error. [United States v. Olsen, 21 F.4th 1036, at 1040](#). We review de novo whether a defendant's [Sixth Amendment](#) rights were violated. [United States v. Torres, 995 F.3d 695, 701 \(9th Cir. 2021\)](#). We also review de novo whether jury instructions accurately defined the elements of the statutory offense. [United States v. Perdomo-Espana, 522 F.3d 983, 986 \(9th Cir. 2008\)](#).

[\[*1235\]](#) III.

A. The Exclusions Under the Speedy Trial Act Were Proper and Walker's [Sixth Amendment](#) Rights Were Not Violated

We first address whether Walker's Speedy Trial Act and constitutional rights were violated.

1. Walker's Speedy Trial Act claim

[HN3](#)^[↑] The [Sixth Amendment](#) guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial." [U.S. Const. amend. VI](#). To give effect to this right, Congress enacted the Speedy Trial Act, which sets time limits between an accused's arraignment or indictment and when that person's criminal trial must commence. [Pub. L. No. 93-619, 88 Stat. 2076 \(1975\)](#); see [Furlow v. United States, 644 F.2d 764, 768-69 \(9th Cir. 1981\)](#) (describing the Speedy Trial Act as the [Sixth Amendment's](#) "implementation"). The Speedy Trial Act requires that a criminal trial begin within seventy days from either the date on which an indictment was filed, or the date on which a defendant makes an initial appearance, whichever is later. [18 U.S.C. § 3161\(c\)\(1\)](#). But the Act contains "a long and detailed list of [**18](#) periods of delay that are excluded in computing the time within which trial must start." [Zedner v. United States, 547 U.S. 489, 497, 126 S. Ct. 1976, 164 L. Ed. 2d 749 \(2006\)](#); see [§ 3161\(h\)](#). Relevant here is the ends of justice provision, allowing for the exclusion of time if a district court finds "that the ends of justice served by taking such action [in continuing a trial and excluding time] outweigh the best interest of the public and the defendant in a speedy trial." [§ 3161\(h\)\(7\)\(A\)](#); see also [Olsen, 21 F.4th at 1041](#) (explaining the ends of justice provision).

As we described in *Olsen*, [HN4](#)^[↑] "[i]n determining whether the ends of justice outweigh the best interest of the public and the defendant in a speedy trial, the district court must evaluate, 'among others,' several enumerated factors," each of which can be sufficient to warrant an exclusion of time if present. 21 F.4th at 1041 (quoting [§ 3161\(h\)\(7\)\(B\)](#)). The first enumerated factor is "[w]hether the failure to grant such a continuance in the proceeding would be likely to make a continuation of such proceeding impossible, or result in a miscarriage of justice." [§ 3161\(h\)\(7\)\(B\)\(i\)](#).

Our court has already addressed the application of "the ends of justice" exclusion provision to criminal trials delayed by the pandemic. [HN5](#)^[↑] In *Olsen*, we held that "[n]othing in the Speedy Trial Act limits district courts to granting ends of justice continuances **[**19]** only when holding jury trials is *impossible*." 21 F.4th at 1045 (emphasis added).

The Speedy Trial Act and our case law are silent as to what non-statutory factors district courts should generally consider. Nevertheless, in the context of the COVID-19 pandemic, we find relevant the following non-exhaustive factors: (1) whether a defendant is detained pending trial; (2) how long a defendant has been detained; (3) whether a defendant has invoked speedy trial rights since the case's inception; (4) whether a defendant, if detained, belongs to a population that is particularly susceptible to complications if infected with the virus; (5) the seriousness of the charges a defendant

faces, and in particular whether the defendant is accused of violent crimes; (6) whether there is a reason to suspect recidivism if the charges against the defendant are dismissed; and (7) whether the district court has the ability to safely conduct a trial.

[*1236] *Id.* at 1046. But the *Olsen* factors are not exhaustive when applied to pandemic-related continuances, and the ultimate touchstone is still the statute—[18 U.S.C. § 3161\(h\)\(7\)](#). See *id.* at 1046-47.

Applying the relevant factors, 557 days elapsed between Walker's indictment and the first day of trial. In total, the district court excluded 553 of **[**20]** those days. However, Walker claims there were "at least 228 days" of non-excludable time.⁵ The parties agree that much of the relevant time is excludable for reasons unrelated to the ends of justice.⁶ And while Walker contends there were improper exclusions beyond the "ends of justice" exclusions, such exclusions are immaterial if the district court did not err in its pandemic-related ends of justice exclusions. Several *Olsen* factors arguably favor Walker here. First, he was detained for a substantial period pending trial—approximately eighteen months. And second, Walker invoked his

⁵ In his Reply, Walker claims he opposed exclusion of "at least 265 days." But this number fails to take into account the parties' stipulation to exclude time between June 17, 2021 and August 24, 2021.

⁶ The government argues that Walker may not challenge some of the exclusions he now appears to challenge because, according to the government, Walker consented to certain continuances. But Walker's briefs make clear that his challenge depends on the district court's COVID-related ends of justice exclusions. Because we uphold all those ends of justice exclusions, it is unnecessary for us to determine whether Walker consented to certain continuances.

speedy trial rights relatively early.⁷

The fifth factor perhaps favors Walker, though our decision here to affirm would be the same even if this factor indisputably favored Walker. Though the [§ 922\(g\)](#) offense of being a felon in possession of a firearm is a serious felony, it is not considered a "violent" offense.⁸ *See, e.g., United States v. Sahakian, 965 F.2d 740, 742 (9th Cir. 1992)* (holding that a felon-in-possession conviction is not a crime of violence under the Career Offender guideline).

But the *Olsen* factors supporting that the exclusions were in the interests of justice are far more substantial. Walker's prior record includes two felon-in-possession convictions, as **[**21]** well as convictions for second-degree robbery, hit and run, and theft of a vehicle.⁹ And while it is unclear whether Walker "belongs to a population that is particularly susceptible to complications if infected with the virus," *Olsen, 21 F.4th at 1046*, the extent of Walker's argument on this factor is that it "may favor" him "if viewed categorically." Accordingly, as the district court found, "Walker does not claim to be part of a

population that is particularly at risk for complications related to COVID-19."¹⁰ Most critically, the district **[*1237]** court did not clearly err in finding that it could not have safely conducted a trial during the challenged period.

The period most relevant to this appeal occurred between June 15, 2020, Walker's first post-arraignment hearing, and March 26, 2021, when Walker filed pretrial motions that paused the speedy trial clock.¹¹ Putting aside the unchallenged exclusions, the district court excluded this time under the ends of justice provision of [§ 3161\(h\)\(7\)](#) because of the pandemic. The court found it "did not have the ability to safely conduct a trial at the time it granted continuances and excluded time." The court did not clearly err in making this finding. The court also found, citing *Olsen [**22]*, that "the ends of justice served by granting [the] continuance[s] outweigh the best interest of the public and the defendant in convening a speedy trial." It did not err in making this determination.

During the challenged period, all courthouses in the Eastern District of

⁷The district court found this factor did not weigh in Walker's favor: "Mr. Walker did not invoke his speedy trial rights since the inception of his case; rather he stipulated to exclude time up until June 15, 2020."

⁸The district court found that as to this factor, Walker "faces serious even if non-violent charges."

⁹The district court found: "There is reason to suspect Mr. Walker might reoffend if the charges are dropped given his criminal history and recidivism with respect to felon in possession charges. *See* Compl. ¶ 11, ECF No. 1 (describing convictions for second degree robbery, hit and run, theft of vehicle, and two prior felon in possession of firearm violations)."

¹⁰In his Reply, Walker argues that "[t]his fourth factor may be considered neutral, as Mr. Walker was not more susceptible to COVID-19 [than] others, save for his prolonged exposure and lack of mitigation ability by being confined in the Sacramento County jail. (Which ultimately resulted in him catching the virus.)" We view this as a concession that the fourth factor does not favor Walker, and there is no evidence in the record that Walker belongs to a population that is particularly susceptible to complications if infected with the virus.

¹¹Not all the time between June 15, 2020 and March 26, 2021 is contested. Walker does not challenge the Speedy Trial Act exclusions from August 21, 2020 to September 28, 2020 (pretrial motions) and from January 11, 2021 to January 25, 2021 (unavailability of defendant).

California were closed to the public. In-person jury trials did not resume until June 2021. And the district court made regular, case-specific factual findings about its own ability to hold a jury trial safely. Indeed, the court ordered counsel to meet and confer in September 2020, before there were any vaccines, to try to come up with a trial date and a COVID-19-safe plan. The district court's willingness to hold jury trials changed when the courthouse was reopened to the public (after the availability of vaccines), and courts around the county began to "open up" once again. As courts around the country have noted, and as we noted in *Olsen*, the pandemic "presented courts with unprecedented challenges." 21 F.4th at 1040. Such challenges required balancing the right to a speedy and public trial with the "public health and safety issues posed by COVID-19" to everyone from prospective jurors to defendants, attorneys, and court personnel. [**23] *Id.* at 1049.

The district court did not clearly err in its determinations based on COVID-19. The court tried, admirably in our view, to tie its exclusions to public health data and recommendations. It responded to an evolving and unpredictable situation by considering updated data every two weeks. It ordered the parties to submit a joint proposal with safety protocols and a timeline for trial. The district court did not act lightly and did not dismiss out of hand Walker's speedy trial concerns. The trial judge was, as she said, trying to follow the "principle of first do no harm."

Walker was entitled to a speedy trial. But in

2020, COVID-19 was the third leading cause of death in the United States.¹² And it is estimated that over one million people in the United States and 6.8 million people worldwide have died from COVID-19.¹³ After vaccines were released to the public in 2021, deaths in the United States decreased significantly.¹⁴ The district court [*1238] acted commendably in doing its best to balance speedy trial rights and public safety in the face of what is hopefully a once-in-a-lifetime pandemic.¹⁵ The district court did not err—much less clearly err—in its ends of justice determination, and thus we affirm [**24] the denial of the Speedy Trial Act motion to dismiss.

2. Walker's *Sixth Amendment* claim

Walker also raises constitutional claims based on his pretrial detention. [HN6](#)[↑] The *Sixth Amendment's* speedy trial provision is "an important safeguard to prevent undue and oppressive incarceration prior to trial." [United States v. Ewell, 383 U.S. 116, 120, 86 S. Ct. 773, 15 L. Ed. 2d 627 \(1966\)](#). And as this court has stated in the context of

¹² See Sherry L. Murphy et al., *Mortality in the United States, 2020*, NCHS Data Brief No. 427, Nat'l Ctr. for Health Stats. 1 (Dec. 2021), <https://www.cdc.gov/nchs/data/databriefs/db427.pdf>.

¹³ WHO Coronavirus (COVID-19) Dashboard, <https://covid19.who.int> (last visited Feb. 20, 2023).

¹⁴ See WHO Coronavirus (COVID-19) Dashboard: United States of America, <https://covid19.who.int/region/amro/country/us> (last visited Feb. 20, 2023).

¹⁵ Walker's argument that the emergence of vaccines against COVID-19 should not matter because the district court did not require jurors to be vaccinated is unpersuasive. The determination that safety required a significant pause in trials is not undercut by the district court's decision not to categorically exclude from jury service unvaccinated individuals.

COVID-19 delays, "at some point, pretrial detention can become excessively prolonged, and therefore punitive, resulting in a due process violation." [*Torres*, 995 F.3d at 708](#) (internal quotation marks omitted) (quoting [*United States v. Salerno*, 481 U.S. 739, 747 n.4, 107 S. Ct. 2095, 95 L. Ed. 2d 697 \(1987\)](#)). "The point at which detention constitutes a due process violation requires a case-by-case analysis." *Id.* (citation omitted). And when "evaluating whether a due process violation has occurred," courts must "weigh the following factors: (1) the length of the defendant's pretrial detention; (2) the prosecution's contribution to the delay; and (3) the evidence supporting detention under the Bail Reform Act." *Id.* The Bail Reform Act requires courts to consider: (1) "the nature and circumstances of the offense charged"; (2) "the weight of the evidence against the person"; (3) "the history and characteristics of the person"; and (4) "the nature and seriousness of the danger to any person or the **[**25]** community that would be posed by the person's release." [18 U.S.C. § 3142\(g\)](#). Under the [*Sixth Amendment*](#), courts also conduct "ad hoc" balancing of factors including the "[l]ength of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant." [*Barker v. Wingo*, 407 U.S. 514, 530, 92 S. Ct. 2182, 33 L. Ed. 2d 101 \(1972\)](#); *see also* [*United States v. Lonich*, 23 F.4th 881, 893 \(9th Cir. 2022\)](#) (postdating the Speedy Trial Act).

Walker was detained for about eighteen months before being tried, a significant period. *See* [*United States v. Myers*, 930 F.3d](#)

[1113, 1119 \(9th Cir. 2019\)](#) (noting that, [HN7](#)^[↑] in general, delays of one year are presumptively prejudicial). But we have found that longer periods do not necessarily weigh heavily in a defendant's favor. *See* [*United States v. King*, 483 F.3d 969, 976 \(9th Cir. 2007\)](#). All other relevant factors weigh against Walker. The pandemic, not the prosecution, caused the delay.¹⁶ And the Bail Reform Act weighing mirrors the *Olsen* factors. Walker had five prior felony convictions—including prior convictions for being a felon in possession of a firearm—and while an offense under [§ 922\(g\)\(1\)](#) is considered nonviolent, *see* [*Sahakian*, 965 F.2d at 742](#), it is a serious felony. Moreover, the weight of evidence against Walker on the gun charge was overwhelming: His neighbor called the police because she saw him waving a gun in public and threatening to kill someone. When officers searched his home, they found the gun next to paperwork bearing Walker's name. **[*1239]** These **[**26]** and other facts found by the district court also support the conclusion that the community faced danger or other risks if Walker had been released.¹⁷

¹⁶The district court found that "the prosecution did nothing to delay this case."

¹⁷The original detention order found that the reasons for the court detaining Walker included: the strong weight of the evidence against Walker; Walker's prior criminal history; Walker's participation in criminal activity while on probation, parole, or supervision; Walker's history of violence or use of weapons; Walker's prior attempt(s) to evade law enforcement; and Walker's prior violations of probation, parole, or supervised release. Walker did not appeal the Magistrate Judge's detention order to the district court. In rejecting Walker's constitutional claims, the district court found that Walker "presents no evidence from which the court can conclude he does not pose a danger to any other person or the community. The evidence supports Mr. Walker's detention under the Bail Reform Act to prevent danger to the community and assure he will appear in court."

Walker's claim also fails under the *Barker v. Wingo* balancing factors. In *Barker*, the Court held that a delay between arrest and trial of "well over five years" caused in "good part" by "the Commonwealth's failure" was outweighed by the fact that prejudice was minimal and the fact that Barker "did not want a speedy trial." [407 U.S. at 533-34](#). Here, although Walker was insistent about his right to a speedy trial and the time between his arrest and conviction was substantial, these factors are outweighed by the reason for the delay and lack of legal prejudice to Walker. As in *Barker*, "there is no claim that any of [Walker's] witnesses died or otherwise became unavailable owing to the delay." *Id.* Similarly, Walker raises no "lapses of memory" which might have been "significant to the outcome" of his case. [Id. at 534](#).

Reviewing de novo, we affirm the district court's decision not to dismiss the indictment, as we find that the delay did not violate Walker's constitutional rights.

B. The District Court Correctly Refused the Requested Mens Rea Jury Instruction

Walker contends [\[**27\]](#) the district court erred by refusing to give his requested mens rea jury instruction—that to convict, the jury had to find that he *knew* the handgun he possessed had traveled in or affected interstate commerce.

[HN8](#)[\[↑\]](#) The federal felon-in-possession statute makes it unlawful for any person "who has been convicted in any court of[] a

crime punishable by imprisonment for a term exceeding one year" to "possess in or affecting commerce, any firearm or ammunition." [18 U.S.C. § 922\(g\)\(1\)](#). [18 U.S.C. § 924](#) provides that any person who "knowingly violates" [§ 922\(g\)](#) "shall be fined under this title, imprisoned for not more than 15 years, or both." [§ 924\(a\)\(8\)](#). Walker claims that the statutory requirement of a knowing violation requires proof that he knew his gun had traveled in or affected interstate commerce.

[HN9](#)[\[↑\]](#) In *United States v. Stone*, [706 F.3d 1145, 1146 \(9th Cir. 2013\)](#), we rejected this precise argument and held that there is no mens rea for the *affecting commerce* element of the felon-in-possession statute. After noting that "the context in which [§§ 922\(g\)\(1\)](#) and [924\(a\)\(2\)](#) were enacted does not suggest Congress intended to extend the mens rea requirement to the interstate commerce element,"¹⁸ we concluded that "the interstate commerce element [of those statutes] is purely jurisdictional" and intended to ensure the constitutionality [\[**28\]](#) of these federal criminal laws. [Id. at 1147](#).

[\[*1240\]](#) Walker first argues that *Stone* is distinguishable because of the "specific and unusual facts" of this case: the gun Walker was convicted of possessing was both manufactured in and possessed by him in California. This argument fails because *Stone* admits of no such limitation—its

¹⁸Though *Stone* was convicted for being a felon in possession of *ammunition* in violation of [§ 922\(g\)\(1\)](#), [706 F.3d at 1145](#), Walker's conviction for possession of a firearm occurred pursuant to the same subsection.

holding is clear and categorical: the "knowingly" requirement applicable to § 922(g) does not apply to the jurisdictional interstate commerce element.¹⁹

But Walker's primary argument is that "the textual analysis that forms the holding in *Rehaif v. United States*, 139 S. Ct. 2191, 204 L. Ed. 2d 594 (2019),] effectively overrules [the] conclusion in *Stone*." **HN10** [↑] In *Rehaif*, the Supreme Court held that in a prosecution under §§ 922(g) and 924(a)(2), the government must prove both that the defendant knew he possessed a firearm and that he knew he belonged to a category of persons barred from possessing a firearm. See 139 S. Ct. at 2195. But *Rehaif* explicitly disclaims imposing any mens rea requirement on the federal jurisdictional requirement. "No one here claims that the word 'knowingly' modifies the statute's jurisdictional element. Jurisdictional elements do not describe the 'evil Congress seeks to prevent,' but instead simply ensure that the Federal Government has ****29** the constitutional authority to regulate the defendant's conduct (normally, as here, through its *Commerce Clause* power)." *Id.* at 2196 (quoting *Luna Torres v. Lynch*, 578 U.S. 452, 136 S. Ct. 1619, 1630-31, 194 L. Ed. 2d 737 (2016)).²⁰ *Rehaif*, thus, did not

¹⁹ Walker also relies on *Flores-Figueroa v. United States*, 556 U.S. 646, 129 S. Ct. 1886, 173 L. Ed. 2d 853 (2009). But as the government points out, the defendant in *Stone* also relied on *Flores-Figueroa*, which had been decided four years before *Stone*, and the court in *Stone* rejected the same argument Walker makes here. See *Stone*, 706 F.3d at 1146-47.

²⁰ In his dissent, Justice Alito, joined by Justice Thomas, wrote that while one interpretation of the statute could impose the requirement that a defendant "knew that what he did was 'in or affecting commerce[.]" both "the parties (and the majority) disclaim this reading." 139 S. Ct. at 2205 (Alito, J., dissenting).

overrule *Stone*.

Nor is *Stone*'s holding "clearly irreconcilable" with *Rehaif*. *Miller*, 335 F.3d at 893 (holding that prior circuit authority binds unless its reasoning or theory "is clearly irreconcilable with the reasoning or theory of intervening higher authority"). The concern animating *Rehaif*—whether Congress intended to impose felony criminal penalties upon those who do not know that they belong to a category of persons barred from possessing a firearm—simply does not apply here. The jury was instructed that to convict Walker, it had to be convinced beyond a reasonable doubt that when Walker possessed the semiautomatic handgun, he "knew that he had been convicted of a crime punishable by imprisonment for a term exceeding one year."

We also note that while other defendants have advanced the argument Walker advances, no court of appeals has ever agreed with that argument. Cases predating *Rehaif* have clearly articulated that there is no "knowledge" aspect to § 922(g)'s jurisdictional element. See, e.g., *United States v. Garcia-Hernandez*, 803 F.3d 994, 997 (8th Cir. 2015) ("The mens rea requirement in § 924(a)(2) does not apply to the interstate-commerce ****30** element of § 922(g)(1)."); *United States v. Kirsh*, 54 F.3d 1062, 1071 (2d Cir. 1995) ("A defendant's knowledge or ignorance of the interstate nexus is irrelevant."). And cases following *Rehaif* have not changed course. See, e.g., *United States v. Trevino*, 989 F.3d 402, 406 (5th Cir. 2021) (listing the elements of a § 922(g) conviction, noting

their compliance with *Rehaif*, and not including knowledge that the firearm traveled [*1241] in interstate commerce); [*United States v. Raymore*, 965 F.3d 475, 484 \(6th Cir. 2020\)](#), cert. denied, 141 S. Ct. 2814, 210 L. Ed. 2d 938 (2021) ("[P]roof that the firearm traveled through interstate commerce can satisfy the statute's nexus requirement.").

* * *

For these reasons, we affirm Walker's conviction and the revocation of his supervised release.

End of Document

Garrett - Direct (Resumed) by Thomas

1 Q It's not two-dimensional. It's three-dimensional, right?

2 A Yes.

3 Q And what company manufactured that firearm?

4 A It's a Jimenez Arms firearm.

5 Q And do you know where they are located?

6 A They have had operations in California as well as Nevada.

7 Q Do you know if the company is still in business?

8 A I believe they are, but they're in bankruptcy at the
9 moment.

10 Q And what -- where was this particular firearm manufactured?

11 A Based on my research, it was manufactured in California.

12 Q In Costa Mesa?

13 A Yes.

14 Q And what model is that firearm?

15 A It is a model JA380.

16 Q JA380?

17 A JA380.

18 Q And what is a .380?

19 A .380 is a caliber designation.

20 Q And that's for the ammunition?

21 A Yes.

22 Q And what's the serial number on that particular firearm?

23 A Serial number is 019771.

24 Q You described earlier the form 4473; is that right?

25 A Yes. That's a firearms transaction record.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
BEFORE CHIEF JUDGE KIMBERLY J. MUELLER

UNITED STATES OF AMERICA,

Plaintiff,

No. 2:20-CR-00039-KJM

v.

MINUTES

TOMMY WALKER,

Defendant.

Date: August 30, 2021
Deputy Clerk: C. Schultz
Court Reporter: Jennifer Coulthard

Counsel for Plaintiff: Jill Thomas and Aaron Pennekamp,
Assistant U.S. Attorneys

Counsel for Defendant: Douglas Beevers, Appointed

JURY TRIAL (Day 1):

- 9:20 a.m. Attorneys present as noted above. Plaintiff's case agent, F.B.I. Special Agent, Keith Lipp, present. Defendant present, in custody. The court and counsel discussed housekeeping matters. The Government moved to have defense investigator, Melvin Buford, sequestered. After hearing from the parties and careful consideration of the parties' comments, the court ordered that Mr. Buford could remain in the courtroom during trial proceedings.
- 9:30 a.m. Prospective jurors present. Prospective jurors sworn, and voir dire began.
- 11:05 a.m. Prospective jurors admonished and excused for a morning break. All parties excused for a morning break.
- 11:35 a.m. Court back in session. All parties present. Prospective jurors present. Voir dire continued.

- 1:05 p.m. Prospective jurors admonished and excused for an afternoon break. Outside the presence of the prospective jurors, the court and counsel discussed housekeeping matters.
- 1:10 p.m. All parties excused for an afternoon break.
- 1:25 p.m. Court back in session. All parties present. Outside the presence of the prospective jurors, the court and counsel discussed a concern related to prospective juror number 9.
- 1:28 p.m. Prospective juror number 9 present. The court asked questions of prospective juror number 9.
- 1:30 p.m. All prospective jurors present. Voir dire continued.
- 2:00 p.m. Prospective jurors passed for cause. Prospective jurors excused for a lunch break. Outside the presence of the prospective jurors, the court and counsel discussed housekeeping matters.
- 2:05 p.m. Court in recess to allow parties to exercise peremptory challenges.
- 3:05 p.m. Court back in session. All parties present. Outside the presence of the prospective jurors, the court confirmed the parties had completed their peremptory challenges and there were no motions.
- 3:08 p.m. Prospective jurors present. Prospective jurors thanked and excused in accordance with the strike sheet. Upon stipulation of the parties and with the approval of the court, the jury will be sworn and the court will give preliminary instructions when the jury reports on August 31, 2021.
- 3:10 p.m. The court admonished and excused the jury until 8:45 a.m. on August 31, 2021. Outside the presence of the jury, the court and counsel discussed housekeeping matters.
- 3:15 p.m. All parties excused for an afternoon break.
- 4:30 p.m. Court back in session. All parties present. Outside the presence of the jury, the court and counsel discussed housekeeping matters and the parties' motions *in limine*.

5:20 p.m. All parties excused for evening recess. Jury Trial
(Day 2) set for August 31, 2021 at 8:45 a.m.

ADMITTED EXHIBITS:

N/A

TIME IN COURT: 5 Hours

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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

The United States of America,

Plaintiff,

v.

Tommy Walker,

Defendant.

No. 2:20-cr-00039-KJM-1

ORDER

Custodial defendant Tommy Walker moves to dismiss the indictment against him for violation of the Speedy Trial Act, 18 U.S.C. § 3161, and his Sixth Amendment due process rights. The government opposes. For the reasons below, the court **denies** the motion.

I. BACKGROUND

In November 2019, Mr. Walker was arrested for possession of a firearm by a felon; he was charged in state court and held in state custody for 70 days. Mot. at 1, ECF No. 41. On February 20, 2020, he was indicted on a federal charge of being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1) with a criminal forfeiture allegation based on § 924(d)(1) and 28 U.S.C. § 2461(c). Indictment, ECF No. 7. Mr. Walker was arraigned in federal court four days later. Mins. for Arraignment, ECF 10. At that time the government moved to exclude time until April 20, 2020 and the defense did not object. *Id.* By that time, out of concerns relating to the emerging COVID-19 pandemic, the Eastern District of California suspended all jury

1 proceedings as of March 17, 2020. *See* E.D. Cal. General Order 611 (Mar. 17, 2020). The
2 restriction remained in place “until further notice,” E.D. Cal. General Order 618 (May 13, 2020),
3 until the courthouse reopened to the public on June 14, 2021, E.D. General Order 631 (May 26,
4 2021).

5 The court reset the jury trial in this case several more times after the April 2020
6 arraignment, excluding time under the Speedy Trial Act, as the pandemic persisted. First, the
7 parties stipulated to exclude time until June 15, 2020, ECF No. 12, and the court at that point set
8 trial for August 10, 2020, ECF No. 14. Then, the government moved for a further exclusion of
9 time. ECF No. 15. Although Mr. Walker objected, ECF No. 17, the court granted the motion and
10 reset the trial date. ECF No. 19. From August 24, 2020, to January 25, 2021, the court reset the
11 trial date and excluded time over Mr. Walker’s objection five more times. ECF
12 Nos. 22, 25, 27, 31, 38. Mr. Walker remains in custody at Sacramento County jail pending trial.
13 Mot. at 2.

14 Mr. Walker now moves to dismiss the indictment for violation of his rights under the
15 Speedy Trial Act. ECF No. 41. The government opposes, ECF No. 60, and Mr. Walker has
16 replied, ECF No. 62. The court held a hearing on the motion on May 10, 2021. Hr’g Mins., ECF
17 No. 64. Assistant United States Attorney Aaron Pennekamp appeared on behalf of the
18 government, and Assistant Federal Defender Douglas Beevers appeared for defendant.

19 **II. LEGAL STANDARD**

20 The Speedy Trial Act mandates a criminal matter proceed to trial within seventy days of
21 the defendant’s being charged or making his initial appearance, whichever occurs later.
22 18 U.S.C. § 3161(c)(1). “[T]he Act recognizes that criminal cases vary widely and that there are
23 valid reasons for greater delay in particular cases”; thus, there are several mechanisms for
24 excluding time from the seventy-day period. *Zedner v. United States*, 547 U.S. 489, 497 (2006);
25 *see generally* 18 U.S.C. § 3161(h). The Act allows for discretionary exclusions under section
26 3161(h)(7), when the court articulates its reasons for finding a continuance is justified on the
27 record. *See* 18 U.S.C. § 3161(h)(7). Section 3161(h)(7) “permits a district court to grant a
28 continuance and to exclude the resulting delay if the court, after considering certain factors,

1 makes on-the-record findings that the ends of justice served by granting the continuance outweigh
2 the public’s and defendant’s interests in a speedy trial.” *Zedner*, 547 U.S. at 498–499. The Act
3 provides factors for the court to consider in determining whether the ends of justice are served by
4 a continuance, including “[w]hether the failure to grant such a continuance . . . would be likely to
5 make a continuation of such proceeding impossible, or result in a miscarriage of justice” as well
6 as the complexity of the case, the time needed for preparation of counsel and the presence of
7 novel questions of fact or law. *See* 18 U.S.C. § 3161(h)(7)(B) (i)–(iv).

8 The defendant carries the burden of proving a speedy trial violation. *See* 18 U.S.C.
9 § 3162(a)(2); *see also United States v. Medina*, 524 F.3d 974, 980 (9th Cir.2008) (paraphrasing
10 18 U.S.C. § 3162(a)(2)). “If the defendant carries this burden, the indictment ‘shall be
11 dismissed,’ and the district court must then consider whether to dismiss the case with or without
12 prejudice.” *Medina*, 524 F.3d at 980–81.

13 **III. ANALYSIS**

14 **A. Speedy Trial**

15 The Ninth Circuit has addressed the issue of the speedy trial act in the context of the
16 COVID-19 pandemic on three occasions. *See United States v. Olsen*, 995 F.3d 683 (9th Cir.
17 2021); *In re Smith*, No. 20-73723, 2021 WL 1595443, at *1 (9th Cir. Apr. 23, 2021); *United*
18 *States v. Torres*, 995 F.3d 695 (9th Cir. 2021). In particular, the Circuit has found the COVID-19
19 pandemic “falls within such unique circumstances to permit a court to temporarily suspend jury
20 trials in the interest of public health” under the broad “ends of justice” exclusion of the Speedy
21 Trial Act. *Olsen*, 995 F.3d at 693 (remanding with directions for the district court to grant an
22 “ends of Justice continuance under § 3161(h)(7)”). Courts must still balance the relevant section
23 3161(h)(7)(A) factors. *In re Smith*, 2021 WL 1595443, at *2. And the Ninth Circuit has
24 identified seven non-statutory factors for courts to consider including:

- 25 (1) whether a defendant is detained pending trial; (2) how long a defendant has
- 26 been detained; (3) whether a defendant has invoked speedy trial rights since the
- 27 case’s inception; (4) whether a defendant, if detained, belongs to a population
- 28 that is particularly susceptible to complications if infected with the virus; (5) the
- 29 seriousness of the charges a defendant faces, and in particular whether the
- 30 defendant is accused of violent crimes; (6) whether there is a reason to suspect

1 recidivism if the charges against the defendant are dismissed; and (7) whether
2 the district court has the ability to safely conduct a trial.

3 *Olsen*, 995 F.3d at 692.

4 The non-statutory factors weigh against finding a Speedy Trial Act violation here. *See*
5 18 U.S.C. § 3161(h)(7)(A). The first two factors weigh in Mr. Walker’s favor as he is in
6 ongoing detention pending trial, and has been for over a year now. The remaining factors do not
7 weigh in his favor. Mr. Walker did not invoke his speedy trial rights since the inception of his
8 case; rather he stipulated to exclude time up until June 15, 2020. Mot. at 1. Mr. Walker does not
9 claim to be part of a population that is particularly at risk for complications related to
10 COVID-19. Furthermore, he faces serious even if non-violent charges. There is reason to
11 suspect Mr. Walker might reoffend if the charges are dropped given his criminal history and
12 recidivism with respect to felon in possession charges. *See* Compl. ¶ 11, ECF No. 1 (describing
13 convictions for second degree robbery, hit and run, theft of vehicle, and two prior felon in
14 possession of firearm violations). Lastly, the court found it did not have the ability to safely
15 conduct a trial at the time it granted continuances and excluded time. In this case “the ends of
16 continuance outweigh the best interest of the public and the defendant in convening a speedy
17 trial.” *See Olsen*, 995 F.3d at 693.

18 The court finds there was no Speedy Trial Act violation and denies Mr. Walker’s motion
19 on this ground.

20 **B. Sixth Amendment**

21 In *United States v. Torres* the Ninth Circuit noted that “at some point, pretrial detention
22 can become excessively prolonged, and therefore punitive, resulting in a due process violation.”
23 995 F.3d at 708 (quoting *United States v. Salerno*, 481 U.S. 739, 747 n.4 (1987)) (internal marks
24 omitted). “The point at which detention constitutes a due process violation requires a case-by-
25 case analysis.” *Id.* (citing *United States v. Gelfuso*, 838 F.2d 358, 359–60 (9th Cir. 1988)). “[I]n
26 evaluating whether a due process violation has occurred, [the court must] weigh the following
27 factors: (1) the length of the defendant’s pretrial detention; (2) the prosecution’s contribution to
28 the delay; and (3) the evidence supporting detention under the Bail Reform Act.” *Id.* The Bail

1 Reform Act requires the court consider (1) “the nature and circumstances of the offense charged”;
2 (2) “the weight of the evidence against the person”; (3) “the history and characteristics of the
3 person”; and (4) “the nature and seriousness of the danger to any person or the community that
4 would be posed by the person’s release” 18 U.S.C. § 3142(g).

5 On balance, the relevant factors weigh against finding Mr. Walker’s due process rights
6 were violated. Mr. Walker’s length of detention in this federal case, presently approximating
7 sixteen months, is concerning and presumptively prejudicial. *See id.* (citing *United States v.*
8 *Myers*, 930 F.3d 1113, 1119 (9th Cir. 2019) (explaining that “delays approaching one year are
9 presumptively prejudicial” for Sixth Amendment purposes) (citation omitted)). But, the
10 prosecution did nothing to delay this case, as all of the trial date continuances were based on the
11 ongoing pandemic. Additionally, Mr. Walker is charged with serious even if non-violent crimes,
12 he has a criminal history, *see* Indictment at 1–2, and he presents no evidence from which the court
13 can conclude he does not pose a danger to any other person or the community. The evidence
14 supports Mr. Walker’s detention under the Bail Reform Act to prevent danger to the community
15 and assure he will appear in court.

16 Accordingly, the court denies Mr. Walker’s motion to the extent it is based on Sixth
17 Amendment grounds.

18 **IV. CONCLUSION**

19 The court **denies** the defendant’s motion to dismiss.

20 This order resolves ECF No. 41.

21 IT IS SO ORDERED.

22 DATED: July 6, 2021.



CHIEF UNITED STATES DISTRICT JUDGE

1 in an earlier matter today. I'll explain that here today. But
2 is there more that I should consider in determining whether or
3 not on what basis to exclude time, Mr. Pennekamp?

4 MR. PENNEKAMP: No, your Honor. Having listened to
5 the earlier matters, so long as the Court makes a similar
6 record, I think we don't have anything to add to that.

7 THE COURT: Mr. Beevers? Again, you are muted.

8 MR. BEEVERS: Sorry, your Honor. I haven't heard the
9 earlier findings, but I believe I've heard similar ones before.
10 Is there something additional from what you've said in the past
11 weeks?

12 THE COURT: Well, just answer my question first, and
13 then I'll tell you what I'm basing the exclusion of time on.
14 Is there anything other than COVID-19 that I would consider in
15 excluding time? There's no T4 exclusion because you're ready
16 to go trial, right, except for issuing subpoenas and things
17 like that?

18 MR. BEEVERS: Right, your Honor.

19 THE COURT: All right. And you understand that while
20 I'm putting a trial date on the calendar, the trial
21 confirmation date is when I'll give you an update as to whether
22 or not I believe we can proceed on that date. You understand
23 that?

24 MR. BEEVERS: Yes, your Honor. We have no problem
25 with that in this case.

1 THE COURT: All right. So I'm excluding time through
2 the new trial date of November 16th, and I am basing that on
3 the persistence of the coronavirus pandemic in the Sacramento
4 division of our court. And I am going to -- I'll place on the
5 docket in this case as well the public health data that our
6 court considers and closely reviews every two weeks. The last
7 data reviewed by the Court's facility security committee on
8 Friday shows no downward trend in coronavirus cases. The data
9 is -- it comes from Johns Hopkins, a reputable public health
10 institution. It's compiled for this Court by the
11 Administrative Office of the U.S. Courts, and I'm taking notice
12 of that information. I've referenced it in the past, but in
13 the interest of full transparency, I am not putting it on the
14 docket. This is the kind of data I have looked at each time
15 when I have had to reach a decision in an individual case.

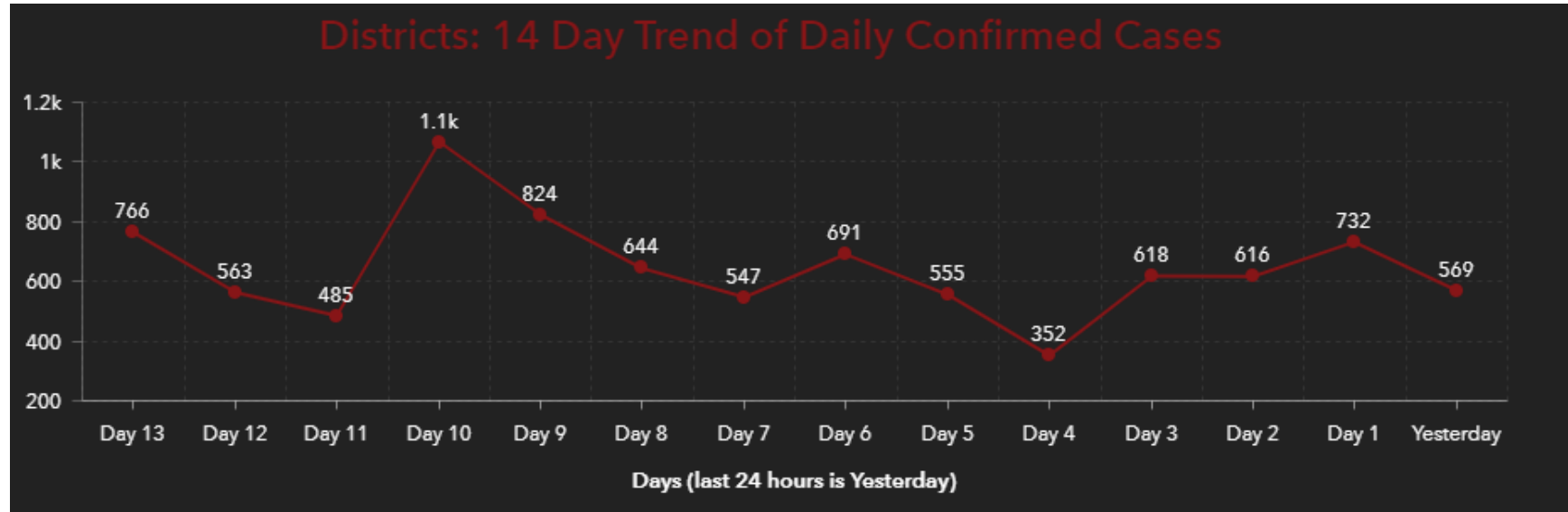
16 At this point the Court is not aware of any case of a
17 person testing positive who works or frequents the Matsui
18 Courthouse or of anyone being exposed. There have been ongoing
19 reports of persons infected in the Sacramento County Jail.

20 For the time being that COVID-19 persists, there are
21 some positive signs that if every member of society does his
22 and her part that we may be able to suppress the virus as a
23 community as a whole, but we are not there yet. And so the
24 Court is applying a principle of first do no harm, and that is
25 applied to Mr. Walker as the defendant, all the people needed

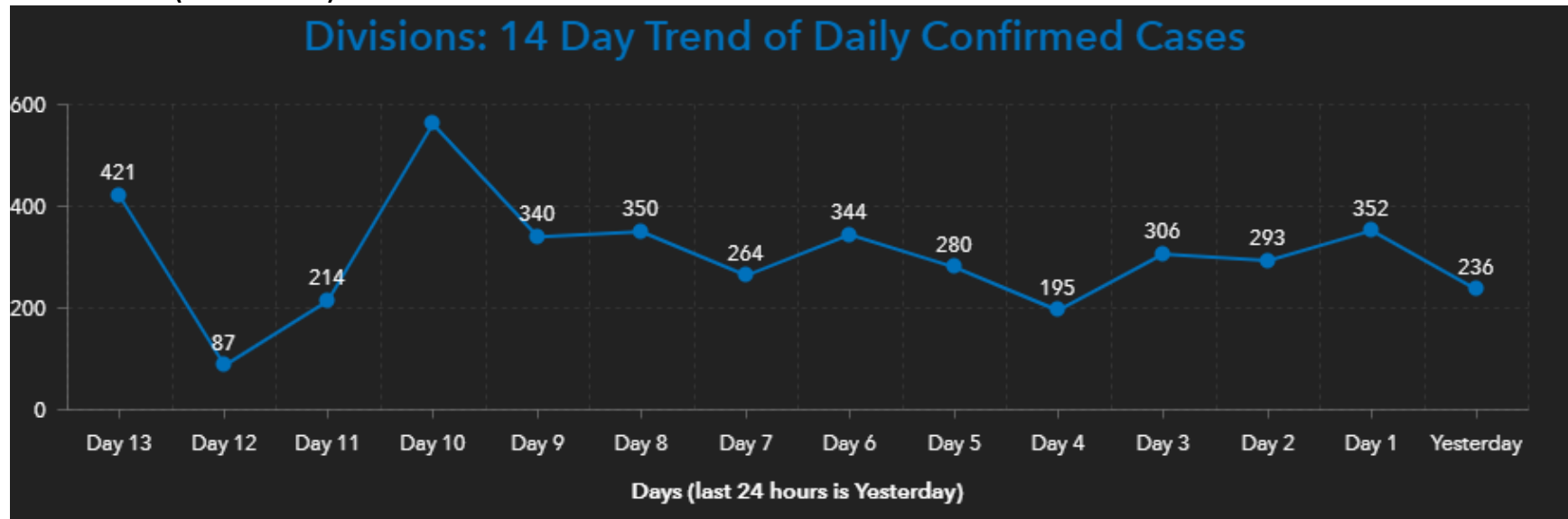
14-DAY TREND ANALYSIS

“Looked over the data you attached, can tell you there is no area in the data that is experiencing a “sustained downward trend”. As to how that is defined, there should be a consistent downward slope in the trend line for a period of 14-days, with no upward peaks.” – Kyle Yoder, AO

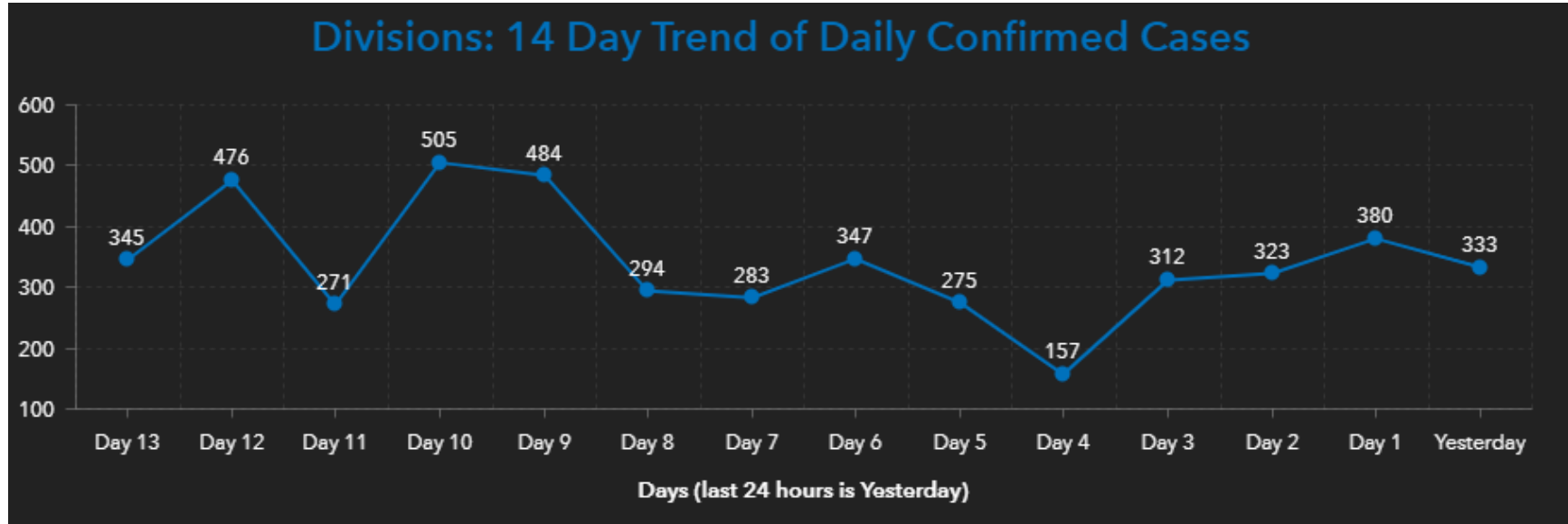
DISTRICT



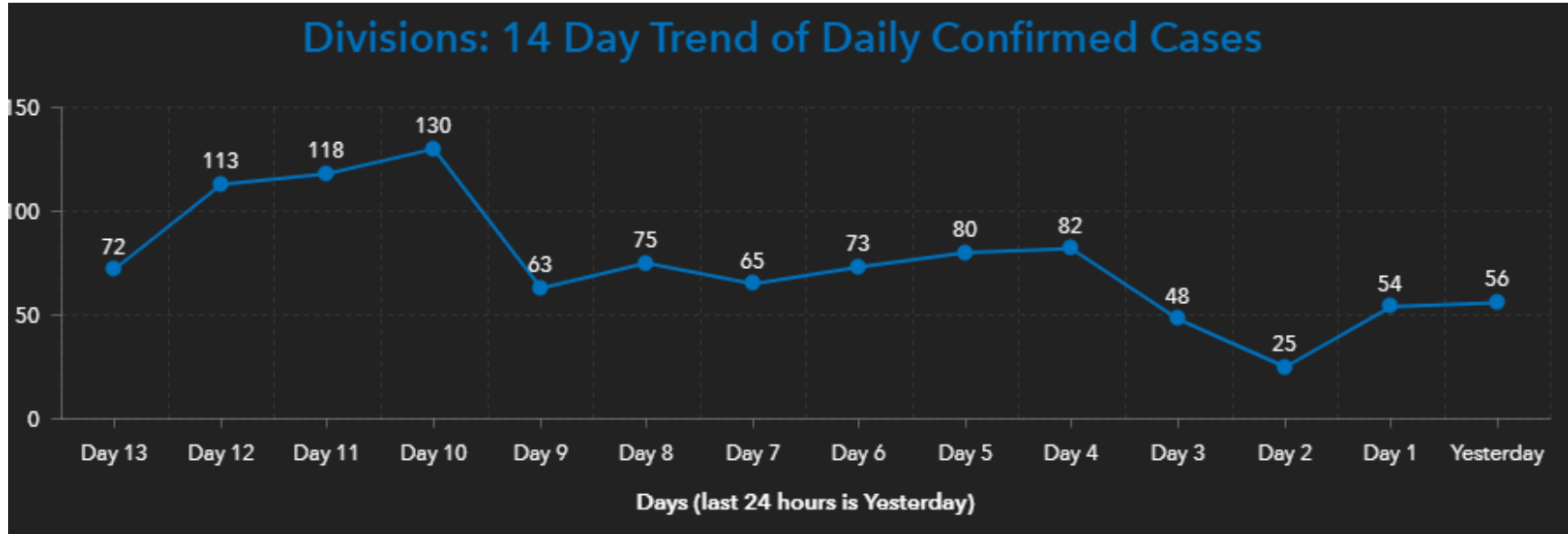
SACRAMENTO (DAY 10 – 562)



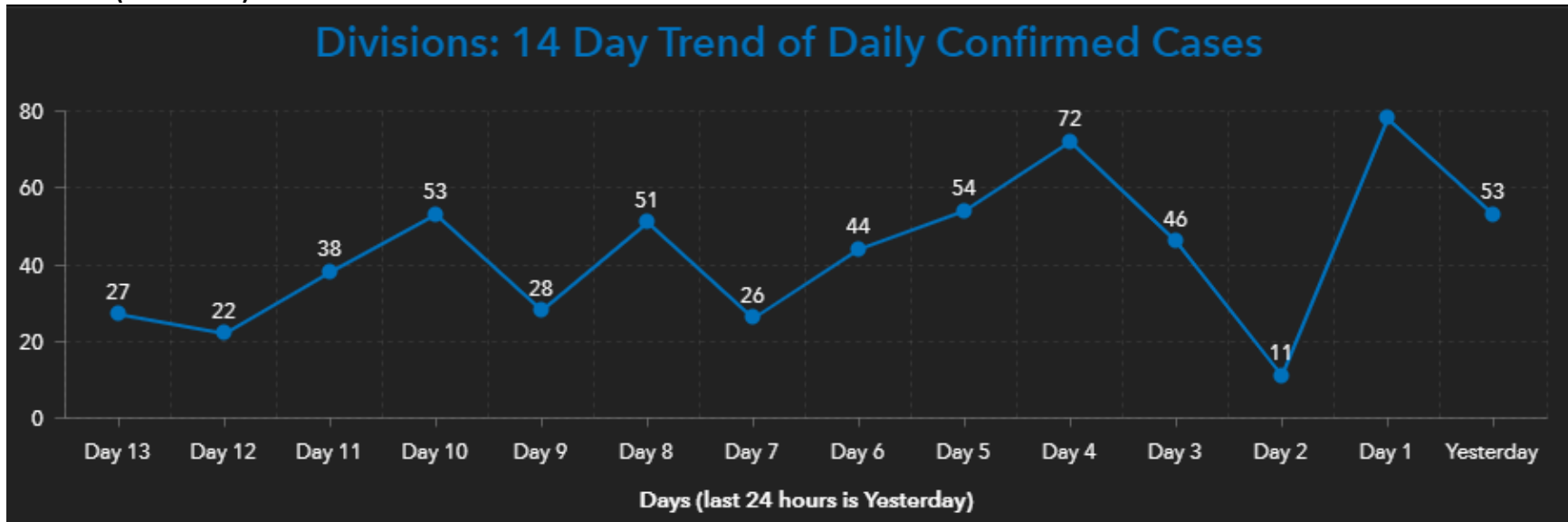
FRESNO



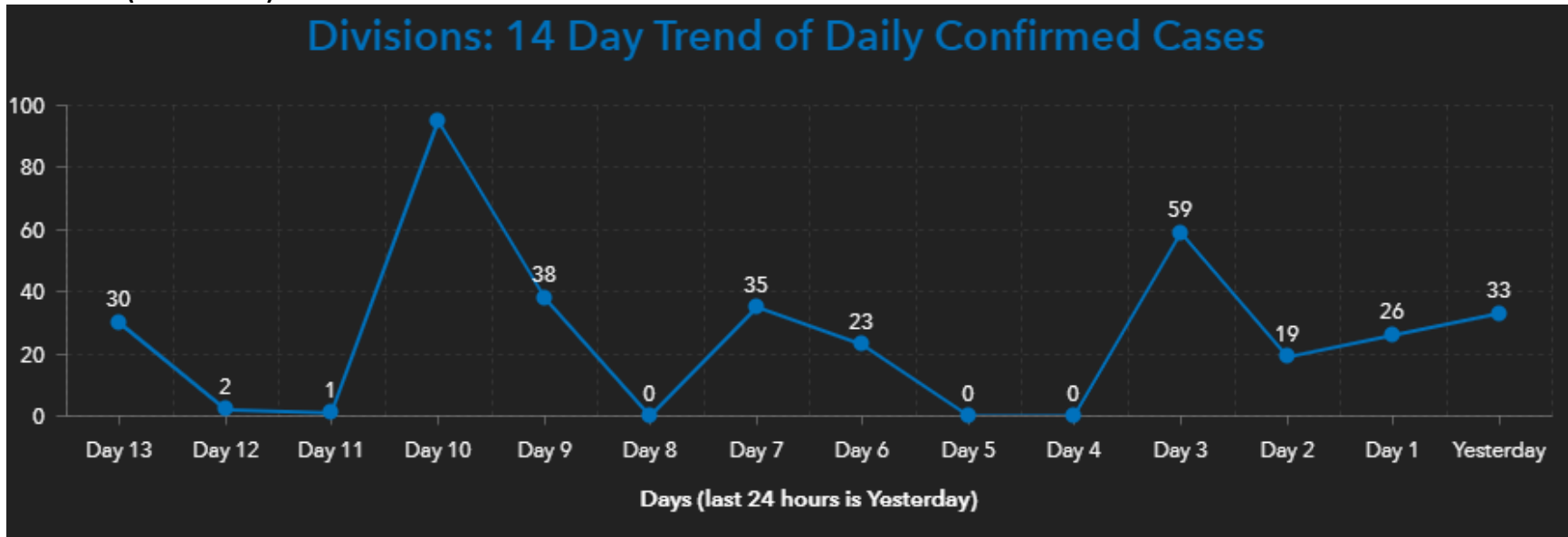
BAKERSFIELD



REDDING (DAY 1 – 78)



YOSEMITE (DAY 10 – 95)



County risk level	Adjusted cases	Positivity rate
<p data-bbox="359 201 619 261">WIDESPREAD</p> <p data-bbox="226 302 747 362">Many non-essential indoor business operations are closed</p>	<p data-bbox="932 201 1167 237">More than 7</p> <p data-bbox="900 277 1197 305">Daily new cases (per 100k)</p>	<p data-bbox="1480 201 1745 237">More than 8%</p> <p data-bbox="1537 277 1688 305">Positive tests</p>
<p data-bbox="352 496 625 557">SUBSTANTIAL</p> <p data-bbox="226 597 747 657">Some non-essential indoor business operations are closed</p>	<p data-bbox="1014 496 1085 532">4-7</p> <p data-bbox="900 573 1197 600">Daily new cases (per 100k)</p>	<p data-bbox="1549 496 1675 532">5 – 8%</p> <p data-bbox="1537 573 1688 600">Positive tests</p>
<p data-bbox="369 792 609 852">MODERATE</p> <p data-bbox="226 893 747 953">Some indoor business operations are open with modifications</p>	<p data-bbox="989 792 1110 828">1 – 3.9</p> <p data-bbox="900 868 1197 896">Daily new cases (per 100k)</p>	<p data-bbox="1535 792 1692 828">2 – 4.9%</p> <p data-bbox="1537 868 1688 896">Positive tests</p>
<p data-bbox="384 1088 594 1148">MINIMAL</p> <p data-bbox="226 1188 747 1248">Most indoor business operations are open with modifications</p>	<p data-bbox="942 1088 1157 1123">Less than 1</p> <p data-bbox="900 1164 1197 1192">Daily new cases (per 100k)</p>	<p data-bbox="1486 1088 1738 1123">Less than 2%</p> <p data-bbox="1537 1164 1688 1192">Positive tests</p>

Current tier assignments as of September 29, 2020

All data and tier assignments are updated weekly every Tuesday.

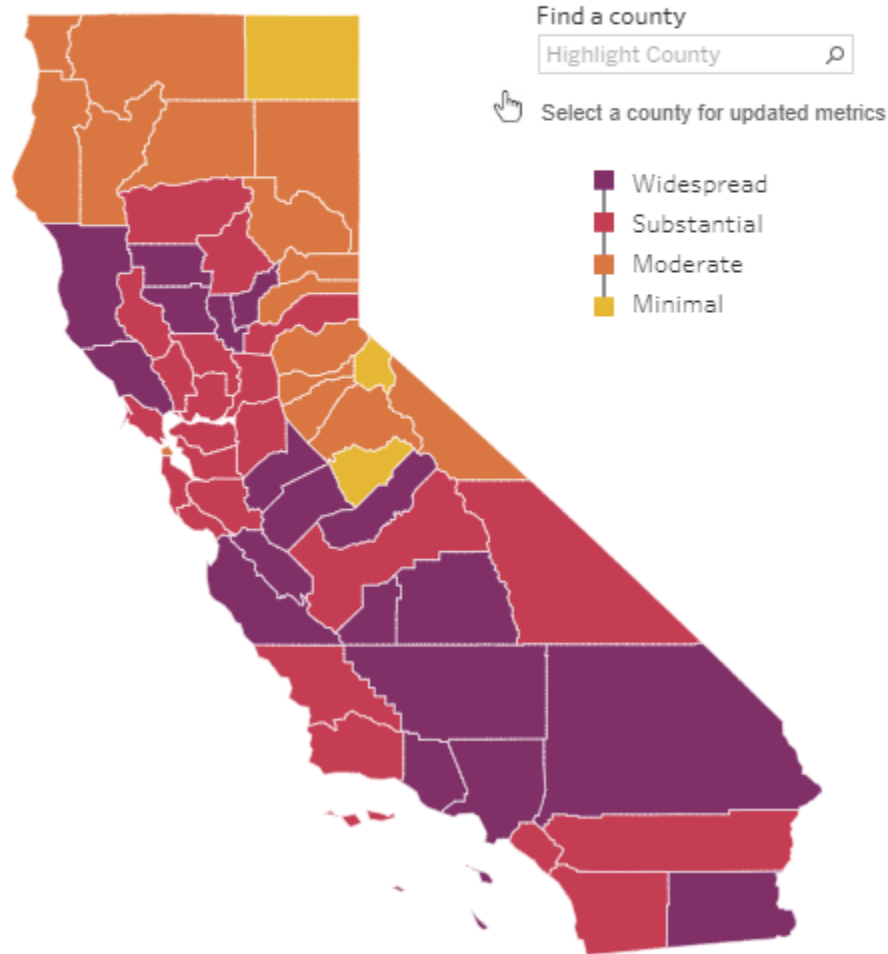
Statewide metrics

7.0

New COVID-19 positive cases per day per 100K

3.4%

Positivity rate



06/15/2020 14

MINUTES for VIDEO STATUS CONFERENCE held before Chief District Judge Kimberly J. Mueller on 6/15/2020. Government Counsel, Aaron Pennekamp, present. Defense Counsel, Douglas Beevers, present. Defendant present, in custody. The Defendant requested a speedy trial. The United States requested an exclusion of time, defense objected and arguments were heard. After careful consideration of the parties' comments and for the reasons as stated on the record, the court DENIED the United States' request, but noted the denial was without prejudice to a formal written motion and related briefing. After discussion with the parties regarding excludable time, public health concerns, and logistics related to trial, the following trial dates were set: Trial Confirmation Hearing SET for 7/6/2020 at 9:00 AM, and Jury Trial SET for 8/10/2020 at 1:30 PM, with the understanding this date may need to be rescheduled due to public health concerns. The court advised the parties that it would consider mailing, in advance of trial, a prospective juror questionnaire, with questions related to the coronavirus (COVID-19) pandemic *only*. The court added that a copy of the proposed questionnaire would be provided to counsel, and if they did not have objections, the court would consider mailing the questionnaire. Defense counsel requested additional questions regarding bias be added to the questionnaire. The court denied defense request without prejudice to the filing of a formal written motion and related briefing. Court Reporter: Kacy Barajas. (Text Only Entry) (Schultz, C) (Entered: 06/15/2020)

1 MCGREGOR W. SCOTT
United States Attorney
2 AARON D. PENNEKAMP
Assistant United States Attorney
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Sacramento, CA 95814
4 Telephone: (916) 554-2700
Facsimile: (916) 554-2900
5

6 Attorneys for Plaintiff
United States of America
7

FILED

FEB 20 2020

CLERK, U.S. DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

BY _____
DEPUTY CLERK

8 IN THE UNITED STATES DISTRICT COURT
9 EASTERN DISTRICT OF CALIFORNIA

10
11 UNITED STATES OF AMERICA,

12 Plaintiff,

13 v.

14 TOMMY WALKER,

15 Defendant.
16

CASE NO. **2:20-CR-0039 KJM**

18 U.S.C. § 922(g)(1) – Felon in Possession of
Firearm; 18 U.S.C. § 924(d)(1) and 28 U.S.C. §
2461(c) – Criminal Forfeiture

17 INDICTMENT

18 The Grand Jury charges: T H A T

19 TOMMY WALKER,

20 defendant herein, on or about November 22, 2019, in the County of Sacramento, State and Eastern
21 District of California, knowing that he had been convicted of a crime punishable by a term of
22 imprisonment exceeding one year, specifically:

- 23 1. Second Degree Robbery, in violation of California Penal Code § 212.5(c), on or about
24 January 30, 2003, in Contra Costa County, California;
25 2. Hit and Run – Vehicle Injury, in violation of Oregon Revised Statutes § 811.705, on or about
26 March 2, 2005, in Marion County, Oregon;
27 3. Taking a Vehicle without the Owner’s Consent/Vehicle Theft, in violation of California
28 Vehicle Code § 10851(a), on or about August 14, 2006, in Contra Costa County, California;
4. Felon in Possession of a Firearm, in violation of California Penal Code § 12021(a)(1), on or
about November 22, 2010, in Contra Costa County, California;

- 1 5. Felon in Possession of a Firearm, in violation of 18 U.S.C. § 922(g)(1), on or about
2 November 15, 2016, in the Northern District of California; and
- 3 6. Felon in Possession of a Firearm, in violation of 18 U.S.C. § 922(g)(1), on or about
4 September 12, 2018, in the Northern District of California;

5 did knowingly possess a firearm, specifically, a Jimenez Arms .380 semiautomatic handgun with serial
6 number 019771, in and affecting commerce, in that said firearm had previously been transported in
7 interstate and foreign commerce, in violation of Title 18, United States Code, Section 922(g)(1).

8
9 FORFEITURE ALLEGATION: [18 U.S.C. § 924(d)(1) and 28 U.S.C. § 2461(c) – Criminal Forfeiture]

10 1. Upon conviction of the offense alleged in this Indictment, defendant TOMMY WALKER
11 shall forfeit to the United States pursuant to Title 18, United States Code, Section 924(d)(1) and Title 28,
12 United States Code, Section 2461(c), any firearms and ammunition involved in or used in the knowing
13 commission of the offense.

14 2. If any property subject to forfeiture, as a result of the offense alleged in this Indictment,
15 for which defendant is convicted:

- 16 a. cannot be located upon the exercise of due diligence;
 - 17 b. has been transferred or sold to, or deposited with, a third party;
 - 18 c. has been placed beyond the jurisdiction of the Court;
 - 19 d. has been substantially diminished in value; or
 - 20 e. has been commingled with other property which cannot be divided without difficulty;
- 21 it is the intent of the United States, pursuant to Title 28, United States Code, Section 2461(c), as
22 incorporated by Title 21, United States Code, Section 853(p), to seek forfeiture of any other property of
23 defendant, up to the value of the property subject to forfeiture.

24 A TRUE BILL.

25 **/s/ Signature on file w/AUSA**

26 
27 _____
FOREPERSON

27 MCGREGOR W. SCOTT
28 United States Attorney

No. **2:20 - CR - 0039 KJM**

UNITED STATES DISTRICT COURT

Eastern District of California

Criminal Division

THE UNITED STATES OF AMERICA

vs.

TOMMY WALKER

NO PROCESS NECESSARY

INDICTMENT

VIOLATION(S): 18 U.S.C. § 922(g) – Felon in Possession of a Firearm; 18 U.S.C. § 924(d)(1) and 28 U.S.C. § 2461(c) – Criminal Forfeiture

A true bill,

/s/ Signature on file w/AUSA

Foreman.

Filed in open court this 20 day

of FEBRUARY, A.D. 20 20

Clerk

NO PROCESS NECESSARY

Carolyn K. Delaney

**Carolyn K. Delaney
U.S. Magistrate Judge**

GPO 863 525

2:20 - CR - 0039 KJM

United States v. Tommy Walker
Penalties for Indictment

Defendant

TOMMY WALKER

COUNT 1:

VIOLATION: 18 U.S.C. § 922(g) - Felon in possession of firearm

PENALTIES: Not more than 120 months,
Not more than \$250,000 fine or both
A three-year term of Supervised Release

SPECIAL ASSESSMENT: \$100 (mandatory on each count)

FORFEITURE ALLEGATION:

VIOLATION: 18 U.S.C. § 924(d)(1) and 28 U.S.C. § 2461(c) - Criminal Forfeiture

PENALTIES: As stated in the charging document

FILED

UNITED STATES DISTRICT COURT

for the

Eastern District of California



JAN 31 2020

CLERK, U.S. DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
BY  DEPUTY CLERK

United States of America

v.

Tommy WALKER

Case No. 2:20 - MJ 0024 -  KJN 

Defendant(s)

CRIMINAL COMPLAINT

I, the complainant in this case, state that the following is true to the best of my knowledge and belief.

On or about the date(s) of November 22, 2019, in the county of Sacramento in the Eastern District of California, the defendant(s) violated:

Code Section
18 U.S.C. § 922(g)(1)

Offense Description
Felon in Possession of a Firearm

This criminal complaint is based on these facts:

See attached affidavit of FBI Safe Streets Task Force Detective Adam Tedford.

Continued on the attached sheet.

Complainant's signature

Adam Tedford, FBI Safe Streets/Detective

Printed name and title

Sworn to before me and signed in my presence.

Date: JAN 31, 2020

City and state: Sacramento, California

Judge's signature

Hon. Kendall J. Newman, U.S. Magistrate Judge

Printed name and title

**AFFIDAVIT OF FBI SAFE STREETS TASK FORCE DETECTIVE ADAM TEDFORD
IN SUPPORT OF CRIMINAL COMPLAINT AND ARREST WARRANT**

I, Adam Tedford, being duly sworn, hereby depose and state the following:

1. This Affidavit is made in support of a criminal complaint and an arrest warrant for Tommy WALKER. As described below, I believe there is probable cause to believe that on or about November 22, 2019, in the State and Eastern District of California, WALKER committed a violation of 18 U.S.C. § 922(g)(1), felon in possession of a firearm or ammunition.

Agent's Background and Experience

2. I have been a duly sworn Peace Officer with the Sacramento County Sheriff's Department since October 21, 2001. I graduated from the basic Sheriff's Academy in April 2001. The Sheriff's Academy consisted of approximately 980 hours of training. I obtained my intermediate POST certificate. I am currently assigned to Impact Division Gang Suppression team. I have been a gang Detective since 2017. Since March 2018, I have been working with the Federal Bureau of Investigation's Safe Street Task Force (SSTF). Some of my duties include providing expert testimony in court and working closely with the United States Attorney's Office and various county District Attorney Offices to aid in the prosecution of gang members. I work as a part of a regional task force and work closely with other detectives and special agents from allied law enforcement agencies and routinely collect and share intelligence with them regarding criminal street gangs.

3. During the course of my employment as a Deputy Sheriff, I have participated in numerous criminal investigations. I have also participated in numerous investigations involving the use of federal and state search warrants to collect evidence, including controlled substances, the seizure of narcotics-related records, and other types of evidence that document the activities of criminal organizations in both the manufacturing and distribution of controlled substances and weapons. To successfully conduct these investigations, I have utilized a variety of investigative techniques and resources including physical and electronic surveillance, various types of infiltration (including undercover agents, informants, and cooperating sources), pen register and trap and trace devices, GPS and telephone tracking devices, trash covers, mail covers, pole cameras, stationary video recording vehicles, and audio and audio/video recording devices.

Statement of Probable Cause

4. Title 18 U.S.C. § 922(g)(1) prohibits any person who has previously been convicted of an offense punishable by imprisonment for more than one year to possess a firearm or ammunition that has traveled in interstate or foreign commerce.

5. Because this affidavit is submitted for the limited purpose of establishing probable cause for the requested criminal complaint and arrest warrant, I have not included each and every fact known to me about this case. Rather, I have set forth only the facts that I believe are necessary to support probable cause.

6. This affidavit is based upon my own personal knowledge but also the knowledge of other law enforcement officers involved in this investigation. Where I describe statements made by other people (including other law enforcement officers), the statements are described in sum, substance, and relevant part. Similarly, where I describe information contained in reports and other documents or records in this affidavit, this information is also described in sum, substance, and relevant part.

7. According to Sacramento Police Department reports, on November 22, 2019, a complainant contacted police dispatch to report that a male and female were arguing at 2496 Fairfield Street, and that the complainant saw the male put a handgun in his back pocket. Based on prior experiences responding to calls to this address, the responding police officers knew that WALKER lived at this address, and that he was on federal probation for firearms-related charges until August 13, 2022.

8. Sacramento Police Department Officers Phelan and Cunningham arrived at 2496 Fairfield Street and knocked on the door. WALKER answered and advised the officers that he still lived at this residence. The officers then conducted a probation search of the residence and located a loaded, unregistered Jimenez Arms .380 semiautomatic handgun (serial number 019771) in the dresser of the master bedroom. Next to the handgun in the dresser, the officers found pieces of mail and documents bearing WALKER's name. WALKER made a Mirandized statement that he slept in the master bedroom. An adult female who also lived at the residence stated that the handgun was not hers, and that WALKER had pointed a firearm at her three weeks prior.

9. Officer Cunningham secured the handgun found in the master-bedroom dresser and manually cycled the gun to remove the rounds from the chamber and magazine. Officer Cunningham ultimately removed five live PMC-brand .380 rounds from the handgun.

10. I communicated with Special Agent Matthew Garrett of the Bureau of Alcohol, Tobacco, Firearms and Explosives, who has specialized training in the manufacture and origin of firearms and ammunition. Special Agent Garrett informed me that the ammunition in this case (*i.e.*, the five live .380 rounds made by PMC) was manufactured outside California. The ammunition therefore has been transported in interstate commerce.

Conclusion

13. Based upon the facts described above, I believe that WALKER is in violation of 18 U.S.C. § 922(g)(1), felon in possession of a firearm or ammunition. I request that an arrest warrant be issued for WALKER for this violation.

I swear, under the penalty of perjury, that the foregoing information is true and correct to the best of my knowledge, information, and belief.



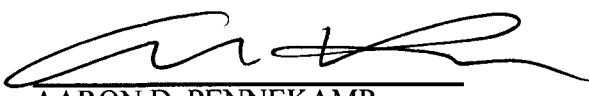
ADAM WEDFORD
FBI Safe Streets/Detective

Sworn and subscribed to me on January 31, 2020,



HON. KENDALL J. NEWMAN
United States Magistrate Judge

Reviewed and approved as to form and content:



AARON D. PENNEKAMP
Assistant United States Attorney