APPENDIX

INDEX TO APPENDICES

96 F.4th 1095
United States Court of Appeals, Ninth Circuit.

UNITED STATES of America, Plaintiff-Appellee,
v.
Philip LAYFIELD, aka Philip Samuel Pesin, Defendant-Appellant.

No. 22-50047, No. 22-50133
|
Argued and Submitted February 16, 2024 Pasadena, California
|
Filed March 7, 2024

Synopsis

Background: Defendant was convicted in the United States District Court for the Central District of California, Michael W. Fitzgerald, J., of wire fraud, mail fraud, and various tax offenses, and he appealed.

The Court of Appeals, Owens, Circuit Judge, held that transportation delay did not count towards Speedy Trial Act's 70-day limit.

Affirmed.

***1096** Appeal from the United States District Court for the Central District of California, Michael W. Fitzgerald, District Judge, Presiding, D.C. No. 2:18-cr-00124-MWF-1

Attorneys and Law Firms

Katherine K. Windsor (argued), Law Office of Katherine Kimball Windsor, Pasadena, California, for Defendant-Appellant.

Mark Aveis (argued), Ian V. Yanniello, and Carolyn S. Small, Assistant United States Attorneys; Bram M. Alden, Assistant United States Attorney, Criminal Appeals Section Chief; E. Martin Estrada, United States Attorney; United States Attorney's Office, Central District of California, Los Angeles, California; for Plaintiff-Appellee.

Before: Richard C. Tallman, Sandra S. Ikuta, and John B. Owens, Circuit Judges.

OPINION

OWENS, Circuit Judge:

Philip James Layfield appeals from his convictions for wire fraud, mail fraud, and various tax offenses. He argues that the twenty-one days it took the U.S. Marshals Service to transport him from the District of New Jersey (where agents arrested him) to the Central District of California (where the grand jury indicted him) should have triggered a Speedy Trial Act violation and requires this court to overturn all of his convictions. Consistent with our own precedent and that of the First and Second Circuits, we reject his challenge and affirm.[1]

I. BACKGROUND

A. The Crime and Court Appearances

To make a long story short, Layfield was a crooked plaintiff's lawyer and certified public accountant with operations in Los Angeles and elsewhere. He routinely (and illegally) used client settlements to cover his personal expenses as well as his firm's operating expenses to the tune of millions of dollars commingled and stolen, and eventually moved to Costa Rica —at which point his client trust account was down to $134.

Speedy Trial Act cases often turn on specific dates, so the key events are listed in bullet form below for ease of the reader.

- February 23, 2018: A complaint in the Central District of California (CDCA) charged Layfield with one count of mail fraud for defrauding a client and misusing the client's settlement funds.
- February 24, 2018: Agents arrested Layfield on the Los Angeles arrest warrant at the Newark International Airport while he was boarding a flight to Costa Rica.
- February 26, 2018: Layfield made his first appearance in the District of New Jersey, and the magistrate judge continued his bail hearing.
- March 2, 2018: The magistrate judge denied bail and ordered Layfield removed to the CDCA.

- March 9, 2018: A CDCA grand jury returned an indictment against Layfield.[2]
- March 23, 2018: Layfield made his first appearance before a judge in the CDCA.

***1097 B. The District Court Rejected Layfield's Speedy Trial Act Argument**

Before the district court Layfield contended that the transportation delay between his detention in the District of New Jersey and his initial appearance in the CDCA should have counted towards the seventy-day limit of the Speedy Trial Act. 18 U.S.C. § 3161(c)(1) (providing that a trial "shall commence within seventy days from" certain specified dates). Layfield argued that, properly accounting for that transportation delay, the government did not bring him to trial within the seventy-day limit and, therefore, dismissal of the indictment was required. Ruling from the bench, the district court relied on cases cited by the government—*United States v. Palomba*, 31 F.3d 1456 (9th Cir. 1994), and *United States v. Munoz-Amado*, 182 F.3d 57 (1st Cir. 1999), among others. The district court explained that there are "no cases that say that the remedy for this violation is to shove that time into the 70 days." Layfield's argument, moreover, ignored the "universal understanding ... of when the 70 days began to run," which "is supported by Ninth Circuit law," holding that the triggering date is the date of the defendant's initial appearance in the charging district.

II. DISCUSSION

A. Standard of Review and Jurisdiction

We have jurisdiction under 28 U.S.C. § 1291. We review a district court's interpretation of the Speedy Trial Act de novo. *United States v. Orozco-Barron*, 72 F.4th 945, 954 (9th Cir. 2023).

B. There Was No Speedy Trial Act Violation

The Speedy Trial Act of 1974, 18 U.S.C. § 3161 *et seq.*, provides:

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

§ 3161(c)(1). In calculating that seventy-day period, the Speedy Trial Act excludes certain "periods of delay" listed in § 3161(h). "If a defendant is not brought to trial within the time limit required by section 3161(c) as extended by section 3161(h)," then the indictment must be dismissed. *Id.* § 3162(a)(2).

Under the clear language of § 3161(c)(1), only two events could trigger Layfield's seventy-day speedy trial clock: (1) the March 9, 2018 public filing of the indictment or (2) his March 23, 2018 first appearance before a judge in the CDCA. And because his CDCA appearance was the latter date, it triggered the seventy-day clock. This plain reading of § 3161(c)(1) dictates that the twenty-one-day delay between his detention in New Jersey and his first appearance in the CDCA was immaterial to the Speedy Trial Act analysis.

On multiple occasions, the Ninth Circuit has confirmed that this straightforward interpretation of § 3161(c)(1) is correct. For example, in *Palomba*, the defendant argued that his initial appearance in the CDCA should have triggered the seventy-day period under the Speedy Trial Act, even though he faced charges in the Northern District of California. 31 F.3d at 1462. We rejected that argument, as it "overlooks the fact that the 70-day period commences only on the date when the defendant is brought before a 'judicial officer of the court *in which the matter is pending.*' " *Id.* (quoting § 3161(c)); *see also* ***1098** *United States v. Wilson*, 720 F.2d 608, 609 (9th Cir. 1983) (rejecting identical argument as "difficult to square with the language of Section 3161(c)(1)").

Layfield does not fight the clear holdings of *Palomba* and *Wilson.* Instead, he contends that those cases featured defendants out on bond, and not detained like he was after his initial New Jersey appearance. Because he was detained, the argument goes, a different provision becomes relevant —§ 3161(h)(1)(F), which provides that, in calculating the seventy days, a "delay resulting from transportation of any defendant from another district ... in excess of ten days ... shall be presumed to be unreasonable."[3] And because the delay between his detention in New Jersey and his first appearance in the CDCA was twenty-one days—exceeding the ten days referenced above—presumably eleven of those days should count against the seventy-day period.[4]

This is not a new argument, nor is it a winning one. For example, in *United States v. Barnes*, 159 F.3d 4, 10 (1st Cir. 1998), the First Circuit rejected an identical contention: "The pre-indictment or pre-appearance transfer of a defendant is not explicitly listed as one of the only two triggering events in section 3161(c)(1), and we decline to read into that provision what was not expressly included by Congress. Accordingly, ... [the delay in transfer] does not start the 70-day speedy trial clock." *See also Munoz-Amado*, 182 F.3d at 60 (applying *Barnes* to a defendant held in custody during transport to the charging district); *United States v. Lynch*, 726 F.3d 346, 353 (2nd Cir. 2013) (rejecting the view that "the limitation on the exclusion of travel time of a defendant in § 3161(h)(1)(F) applies to the seventy-day period of § 3161(c)(1)"); *cf. United States v. Wickham*, 30 F.3d 1252, 1254-55 (9th Cir. 1994) (adhering to the statute's "plain meaning" in rejecting the argument that § 3161(i) "replace[s] section 3161(c)(1) when a defendant withdraws a guilty plea").

According to Layfield, this interpretation effectively reads § 3161(h)(1)(F) out of the criminal code. Not so. That subsection readily applies when a prisoner, after § 3161(c)(1) is triggered, is transferred between districts for separate trial proceedings. For example, the defendant may be subject to detainers lodged by other districts where charges are also pending against them. The first ten days of that travel are deemed reasonable. Days exceeding those ten are not. *See Barnes*, 159 F.3d at 10 (describing § 3161(h)(1)(F) [then (H)] as "a tolling provision, not one that sets forth the events that trigger the start of the 70-day period"). Courts apply this provision to prisoners travelling between different jurisdictions for court proceedings once the seventy-day clock has started—not to defendants in Layfield's procedural posture. *See, e.g., United States v. Nash*, 946 F.2d 679, 680 (9th Cir. 1991) (applying section (h)(1)(F) [then (H)] to transportation between state institution and federal custody); *United States v. Collins*, 90 F.3d 1420, 1427 (9th Cir. 1996) (applying section (h)(1)(F) [then (H)] to travel to and from state court proceedings); *United States v. Robertson*, 810 F.2d 254, 259-60 (D.C. Cir. 1987) (applying section (h)(1)(F) [then (H)] to travel from Wisconsin to the District of Columbia for trial and back). That section (h)(1)(F) does ***1099** not apply to Layfield does not render it meaningless to others.

Layfield cites one out-of-circuit district court case—*United States v. Thompson*, No. 6:06-CR-228-ORL-18KRS, 2007 WL 1222573, at *1-2 (M.D. Fla. Apr. 24, 2007)—to buttress his argument. The judge in that case, apparently frustrated that the government made no effort to explain a three-month delay in transporting the defendant, ruled that the speedy trial clock began with the order of removal. *Id.* The court neither cited nor distinguished any authority but reasoned that "[t]o hold otherwise would render the relevant tolling provision, § 3161(h)(1)([F]), largely useless in situations such as this one, where the Order of Removal ... was either ignored or forgotten about." *Id.* at *2. *Thompson* holds limited, if any, value: no court has ever relied on it, and, by contrast, Layfield's order of removal was not ignored.

Layfield also argues that the prevailing reading of § 3161(c)(1) means that a defendant could spend months or even years awaiting transport to the charging district without any avenue of relief. Again, not so. The Supreme Court outlined the procedure for challenging pretrial delay more than fifty years ago in *Barker v. Wingo*, 407 U.S. 514, 530, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972) (explaining that speedy trial cases require a balancing test applied "on an ad hoc basis"). And while the facts of this case do not merit such relief, the more egregious hypothetical scenarios that Layfield outlines might.

III. CONCLUSION

Based on the clear language of § 3161(c)(1) and consistent with our own precedent and that of the First and Second Circuits, we reject Layfield's Speedy Trial Act challenge.

AFFIRMED.

All Citations

96 F.4th 1095, 133 A.F.T.R.2d 2024-925, 2024 Daily Journal D.A.R. 2051

Footnotes

1 Layfield also individually challenges some of his wire fraud and tax convictions. We address those claims in a concurrently filed memorandum disposition, in which we also affirm.

2 In November 2018, a grand jury returned a twenty-eight-count superseding indictment.

3 Prior to 2008, § 3161(h)(1)(F) was numbered as (h)(1)(H). *See* Judicial Administration and Technical Amendments Act of 2008, Pub. L. No. 110-406, § 13, 122 Stat. 4291, 4294.

4 In *United States v. Greene*, 783 F.2d 1364, 1368 (9th Cir. 1986), we appear to have faced this very issue—the interaction between § 3161(c)(1) and (h)(1)(F) [then (H)]—but we ultimately did not need to resolve it.

United States District Court
Central District of California

(AMENDED June 9, 2022)

UNITED STATES OF AMERICA vs. **Docket No.** CR 18-124(A)-MWF

Defendant Philip James Layfield **Social Security No.** 8 1 4 0

akas: Pedin, Philip Samuel; Pesin, Philip Samuel; Pedkin, Philip Samuel; Layfield, Philip

(Last 4 digits)

JUDGMENT AND PROBATION/COMMITMENT ORDER

MONTH	DAY	YEAR
FEB.	17	2022

In the presence of the attorney for the government, the defendant appeared in person on this date.

COUNSEL Anthony M. Solis and Steven A. Brody, CJA

(Name of Counsel)

PLEA ☐ **GUILTY,** and the court being satisfied that there is a factual basis for the plea. ☐ **NOLO CONTENDERE** ☐ **NOT GUILTY**

FINDING There being a finding/verdict of **GUILTY,** defendant has been convicted as charged of the offense(s) of:
Counts 1-19: Wire Fraud in violation of 18 U.S.C. § 1343;
Count 23: Mail Fraud in violation of 18 U.S.C. § 1341;
Count 26: Attempt to Evade and Defeat Tax in violation of 26 U.S.C. § 7201;
Count 27: Willful Failure to Collect or Pay Over Tax in violation of 26 U.S.C. § 7202;
Count 28: Willful Failure to File Tax Return in violation of 26 U.S.C. § 7203.

JUDGMENT AND PROB/ COMM ORDER The Court asked whether there was any reason why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the Court, the Court adjudged the defendant guilty as charged and convicted and ordered that: Pursuant to the Sentencing Reform Act of 1984, it is the judgment of the Court that the defendant is hereby committed to the custody of the Bureau of Prisons to be imprisoned for a term of:

It is ordered that the defendant shall pay to the United States a special assessment of $2,225, which is due immediately. Counts 1-19, 23, 26-28 in the amount of $2,200, Count 28, misdemeanor in the amount of $25.00, for a total of special assessment $2,225.00. Any unpaid balance shall be due during the period of imprisonment, at the rate of not less than $25 per quarter, and pursuant to the Bureau of Prisons' Inmate Financial Responsibility Program.

The defendant shall comply with Second Amended General Order No. 20-04.

Pursuant to Guideline § 5E1.2(a), all fines are waived as the Court finds that the defendant has established that he is unable to pay and is not likely to become able to pay any fine.

RESTITUTION

IT IS HEREBY ORDERED that defendant, Philip James Layfield, shall pay a total of $7,650,127.32 in restitution to the following individuals or entities, pursuant to 18 U.S.C. § 3663A., in the following amounts, and on the following terms and conditions:

I.	INDIVIDUALS (clients and referral counsel)	
	T.B.	$42,874.25
	J.L.	$83,300.00
	J.N.	$2,135,893.41
	R.P.	$460,105.44
	Da. S.	$243,000.00
	T.D.F.	$150,000.00
	M.M.	$242,502.16
	W.M.	$24,382.37
	P.M.	$24,382.37
II.	ENTITIES	
	U.S. Claims/Opco	$700,000.00
	State Bar of California, Client Security Fund	$2,796,057.58
	Internal Revenue Service	$747,629.74

Total restitution: $7,650,127.32

III. TERMS AND CONDITIONS OF RESTITUTION

In addition to all other applicable terms and conditions provided in the judgment and commitment order in this case (Dkt. 368), restitution shall be payable on the following terms and conditions:

1. Restitution, except for restitution owed the Internal Revenue Service, shall be due during the period of imprisonment, at the rate of not less than $25 per quarter, and pursuant to the Bureau of Prisons' Inmate Financial responsibility Program. If any amount of restitution remains unpaid after defendant's release from custody, nominal monthly payments of at least 10% of defendant's gross monthly income but not less than $150, whichever is greater, shall be made during the period of supervised release and shall begin 90 days after the commencement of supervision. The parties agree that nominal restitution payments should be ordered because, and the Court finds that, defendant's economic circumstances do not allow for either immediate or future payment of the amount ordered.

2. Restitution payments shall be distributed in the following order: first, prorata and until full repayment, among the individuals identified Section I of this order; second, to US Claims/Opco until full repayment; third, to the California State Bar Client Security Fund until full repayment; and fourth, to the Internal Revenue Service. If the defendant makes a partial payment, each payee shall receive approximately proportional payment pursuant to such priority.

3. Pursuant to 18 U.S.C. § 3612(f)(3)(A), interest on the restitution ordered is waived because the defendant does not have the ability to pay interest.

4. Payments may be subject to penalties for default and delinquency pursuant to 18 U.S.C. § 3612(g).

5. Nothing in this order shall foreclose or limit the ability of the Internal Revenue Service to examine and make adjustments to defendant's return(s) for calendar year 2016 with respect to returns already filed or to be filed. Furthermore, nothing in this order shall foreclose the right of the Internal Revenue Service to assess civil penalties against defendant for any tax year.

Pursuant to the Sentencing Reform Act of 1984, it is the judgment of the Court that the defendant, Philip J. Layfield, is hereby committed on Counts 1-19, 23, and 26, 27, and 28 of the First Superseding Indictment to the custody of the Bureau of Prisons for a term of 144 months. This term consists of 144 months on each of Counts 1 through 19, and 23 of the First Indictment, and 60 months on each of Counts 26, 27, and 12 months on Count 28 (Misdemeanor) of the First Superseding Indictment, to be served concurrently.

Upon release from imprisonment, the defendant shall be placed on supervised release for a term of 3 years. This term consists of 3 years on each of Counts 1-19, 23, 26, 27, and 1 year on Count 28 of the Indictment, all such terms to run concurrently under the following terms and conditions:

1. The defendant shall comply with the rules and regulations of the United States Probation & Pretrial Services Office and Second Amended General Order 20-04, including the conditions of probation and supervised release set forth in Section III of Second Amended General Order 20-04.

2. The defendant shall cooperate in the collection of a DNA sample from the defendant.

3. During the period of community supervision, the defendant shall pay the special assessment and restitution in accordance with this judgment's orders pertaining to such payment.

4. When not employed or excused by the Probation Officer for schooling, training, or other acceptable reasons, the defendant shall perform 20 hours of community service per week as directed by the Probation & Pretrial Services Office.

5. The defendant shall truthfully and timely file and pay taxes owed for the years of conviction, and shall truthfully and timely file and pay taxes during the period of community supervision. Further, the defendant shall show proof to the Probation Officer of compliance with this order.

6. The defendant shall not be employed by, affiliated with, own or control, or otherwise participate, directly or indirectly, in the conduct of the affairs of any financial institution insured by the Federal Deposit Insurance Corporation.

7. The defendant shall not be employed in any capacity wherein the defendant has custody, control, or management of the defendant's employer's funds.

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8. The defendant shall not be employed in any position that requires licensing or certification by any local, state, or federal agency without the prior written approval of the Probation Officer.

9. The defendant shall apply all monies received from income tax refunds, lottery winnings, inheritance, judgments and any other

financial gains to the Court-ordered financial obligation.

10. The defendant shall submit the defendant's person, property, house, residence, vehicle, papers, computers, cell phones, other electronic communications or data storage devices or media, email accounts, social media accounts, cloud storage accounts, or other areas under the defendant's control, to a search conducted by a United States Probation Officer or law enforcement officer. Failure to submit to a search may be grounds for revocation. The defendant shall warn any other occupants that the premises may be subject to searches pursuant to this condition. Any search pursuant to this condition will be conducted at a reasonable time and in a reasonable manner upon reasonable suspicion that the defendant has violated a condition of his supervision and that the areas to be searched contain evidence of this violation.

The drug testing condition mandated by statute is suspended based on the Court's determination that the defendant poses a low risk of future substance abuse.

The defendant is advised of his appeal rights.

The Court grants the government's motion to dismiss Counts 20, 21, and 22 of the First Superseding Indictment, and the underlying Indicment.

The Court recommends the defendant be designated to either Pensacola, Florida or Cumberland, Maryland.

The Court further recommends that the defendant be considered for participation in the Bureau of Prison's Residential Drug Abuse Program (RDAP).

In addition to the special conditions of supervision imposed above, it is hereby ordered that the Standard Conditions of Probation and Supervised Release within this judgment be imposed. The Court may change the conditions of supervision, reduce or extend the period of supervision, and at any time during the supervision period or within the maximum period permitted by law, may issue a warrant and revoke supervision for a violation occurring during the supervision period.

March 7, 2022
Date

Honorable Michael W. Fitzgerald
U. S. District Judge

It is ordered that the Clerk deliver a copy of this Judgment and Probation/Commitment Order to the U.S. Marshal or other qualified officer.

Clerk, U.S. District Court

March 8, 2022
Filed Date

By Rita Sanchez /s/
Deputy Clerk

The defendant must comply with the standard conditions that have been adopted by this court (set forth below).

STANDARD CONDITIONS OF PROBATION AND SUPERVISED RELEASE

While the defendant is on probation or supervised release pursuant to this judgment:

1. The defendant must not commit another federal, state, or local crime;
2. The defendant must report to the probation office in the federal judicial district of residence within 72 hours of imposition of a sentence of probation or release from imprisonment, unless otherwise directed by the probation officer;
3. The defendant must report to the probation office as instructed by the court or probation officer;
4. The defendant must not knowingly leave the judicial district without first receiving the permission of the court or probation officer;
5. The defendant must answer truthfully the inquiries of the probation officer, unless legitimately asserting his or her Fifth Amendment right against self-incrimination as to new criminal conduct;
6. The defendant must reside at a location approved by the probation officer and must notify the probation officer at least 10 days before any anticipated change or within 72 hours of an unanticipated change in residence or persons living in defendant's residence;
7. The defendant must permit the probation officer to contact him or her at any time at home or elsewhere and must permit confiscation of any contraband prohibited by law or the terms of supervision and observed in plain view by the probation officer;
8. The defendant must work at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons and must notify the probation officer at least ten days before any change in employment or within 72 hours of an unanticipated change;
9. The defendant must not knowingly associate with any persons engaged in criminal activity and must not knowingly associate with any person convicted of a felony unless granted permission to do so by the probation officer. This condition will not apply to intimate family members, unless the court has completed an individualized review and has determined that the restriction is necessary for protection of the community or rehabilitation;
10. The defendant must refrain from excessive use of alcohol and must not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;
11. The defendant must notify the probation officer within 72 hours of being arrested or questioned by a law enforcement officer;
12. For felony cases, the defendant must not possess a firearm, ammunition, destructive device, or any other dangerous weapon;
13. The defendant must not act or enter into any agreement with a law enforcement agency to act as an informant or source without the permission of the court;
14. The defendant must follow the instructions of the probation officer to implement the orders of the court, afford adequate deterrence from criminal conduct, protect the public from further crimes of the defendant; and provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.

☐ The defendant must also comply with the following special conditions (set forth below).

STATUTORY PROVISIONS PERTAINING TO PAYMENT AND COLLECTION OF FINANCIAL SANCTIONS

The defendant must pay interest on a fine or restitution of more than $2,500, unless the court waives interest or unless the fine or restitution is paid in full before the fifteenth (15th) day after the date of the judgment under 18 U.S.C. § 3612(f)(1). Payments may be subject to penalties for default and delinquency under 18 U.S.C. § 3612(g). Interest and penalties pertaining to restitution, however, are not applicable for offenses completed before April 24, 1996. Assessments, restitution, fines, penalties, and costs must be paid by certified check or money order made payable to "Clerk, U.S. District Court." Each certified check or money order must include the case name and number. Payments must be delivered to:

United States District Court, Central District of California
Attn: Fiscal Department
255 East Temple Street, Room 1178
Los Angeles, CA 90012

or such other address as the Court may in future direct.

If all or any portion of a fine or restitution ordered remains unpaid after the termination of supervision, the defendant must pay the balance as directed by the United States Attorney's Office. 18 U.S.C. § 3613.

The defendant must notify the United States Attorney within thirty (30) days of any change in the defendant's mailing address or residence address until all fines, restitution, costs, and special assessments are paid in full. 18 U.S.C. § 3612(b)(l)(F).

The defendant must notify the Court (through the Probation Office) and the United States Attorney of any material change in the defendant's economic circumstances that might affect the defendant's ability to pay a fine or restitution, as required by 18 U.S.C. § 3664(k). The Court may also accept such notification from the government or the victim, and may, on its own motion or that of a party or the victim, adjust the manner of payment of a fine or restitution under 18 U.S.C. § 3664(k). See also 18 U.S.C. § 3572(d)(3) and for probation 18 U.S.C. § 3563(a)(7).

Payments will be applied in the following order:

1. Special assessments under 18 U.S.C. § 3013;
2. Restitution, in this sequence (under 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid):
   Non-federal victims (individual and corporate),
   Providers of compensation to non-federal victims,
   The United States as victim;
3. Fine;
4. Community restitution, under 18 U.S.C. § 3663(c); and
5. Other penalties and costs.

CONDITIONS OF PROBATION AND SUPERVISED RELEASE PERTAINING TO FINANCIAL SANCTIONS

As directed by the Probation Officer, the defendant must provide to theProbation Officer: (1) a signed release authorizing credit report inquiries; (2) federal and state income tax returns or a signed release authorizing their disclosure and (3) an accurate financial statement, with supporting documentation as to all assets, income and expenses of the defendant. In addition, the defendant must not apply for any loan or open any line of credit without prior approval of the Probation Officer.

When supervision begins, and at any time thereafter upon request of the Probation Officer, the defendant must produce to the Probation and Pretrial Services Office records of all bank or investments accounts to which the defendant has access, including any business or trust accounts. Thereafter, for the term of supervision, the defendant must notify and receive approval of the Probation Office in advance of opening a new account or modifying or closing an existing one, including adding or deleting signatories; changing the account number or name, address, or other identifying information affiliated with the account; or any other modification. If the Probation Office approves the new account, modification or closing, the defendant must give the Probation Officer all related account records within 10 days of opening, modifying or closing the account. The defendant must not direct or ask anyone else to open or maintain any account on the defendant's behalf.

The defendant must not transfer, sell, give away, or otherwise convey any asset with a fair market value in excess of $500 without approval of the Probation Officer until all financial obligations imposed by the Court have been satisfied in full.

These conditions are in addition to any other conditions imposed by this judgment.

USA vs. Philip James Layfield Docket No.: CR 18-124(A)-MWF

RETURN

I have executed the within Judgment and Commitment as follows:

Defendant delivered on _____ to _____

Defendant noted on appeal on _____

Defendant released on _____

Mandate issued on _____

Defendant's appeal determined on _____

Defendant delivered on _____ to _____

at _____

the institution designated by the Bureau of Prisons, with a certified copy of the within Judgment and Commitment.

United States Marshal

_____ By _____

Date Deputy Marshal

CERTIFICATE

I hereby attest and certify this date that the foregoing document is a full, true and correct copy of the original on file in my office, and in my legal custody.

Clerk, U.S. District Court

_____ By _____

Filed Date Deputy Clerk

FOR U.S. PROBATION OFFICE USE ONLY

Upon a finding of violation of probation or supervised release, I understand that the court may (1) revoke supervision, (2) extend the term of supervision, and/or (3) modify the conditions of supervision.

These conditions have been read to me. I fully understand the conditions and have been provided a copy of them.

(Signed) _____ _____

Defendant Date

_____ _____

U. S. Probation Officer/Designated Witness Date

FILED

APR 15 2024

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

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. PHILIP LAYFIELD, AKA Philip Samuel Pesin, Defendant-Appellant.	No. 22-50047 22-50133 D.C. No. 2:18-cr-00124-MWF-1 Central District of California, Los Angeles ORDER

Before: TALLMAN, IKUTA, and OWENS, Circuit Judges.

Judges Ikuta and Owens have voted to deny the petition for rehearing en banc, and Judge Tallman has so recommended.

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

The petition for rehearing en banc is DENIED.

NOT FOR PUBLICATION

FILED

MAR 7 2024

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

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. PHILIP LAYFIELD, AKA Philip Samuel Pesin Defendant-Appellant.	Nos. 22-50047 22-50133 D.C. No. 2:18-cr-00124-MWF-1 MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
Michael W. Fitzgerald, District Judge, Presiding

Argued and Submitted February 16, 2024
Pasadena, California

Before: TALLMAN, IKUTA, and OWENS, Circuit Judges.

Philip James Layfield appeals from his convictions after a jury trial on nineteen counts of wire fraud (counts 1-19), one count of mail fraud (count 23), one count of attempt to evade and defeat tax (count 26), one count of willful failure to collect or pay over tax (count 27), and one count of misdemeanor failure to file a tax return (count 28). He brings various challenges to counts 1-4, 6, 8-10, 12-13,

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

16-17, and 26. As the parties are familiar with the facts, we do not recount them here. We affirm.[1]

1. Layfield brings three sufficiency-of-the evidence challenges to certain wire fraud convictions. We review claims of insufficient evidence under *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). Under this deferential standard, a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt for all the wire fraud convictions Layfield challenges. *See id.*

A. Layfield argues that *Parr v. United States*, 363 U.S. 370 (1960), requires us to reverse his convictions on counts 1-4, 6, 8-9, and 12-13.[2] Specifically, Layfield contends that, because the wires at issue deposited client settlement money into the firm's trust account in accordance with California law, such legally compelled wirings cannot support a conviction for wire fraud. Because *Parr* is distinguishable, we reject Layfield's argument.

We have previously "held that *Parr* does not insulate from federal prosecution mailings whose necessity under law was triggered by the fraudulent

[1] We address Layfield's global speedy trial challenge to his convictions in a concurrently filed published opinion, in which we also affirm.

[2] While *Parr* is a mail fraud case, "[i]t is well settled that cases construing the mail fraud and wire fraud statutes are applicable to either." *United States v. Shipsey*, 363 F.3d 962, 971 n.10 (9th Cir. 2004), *overruled on other grounds by United States v. Miller*, 953 F.3d 1095, 1102-03 (9th Cir. 2020). Accordingly, we refer to mail fraud and wire fraud cases interchangeably throughout our discussion.

scheme." *United States v. Bernhardt*, 840 F.2d 1441, 1447 (9th Cir. 1988) (citing *United States v. Mitchell*, 744 F.2d 701 (9th Cir. 1984)). In *Mitchell*, the defendant had been convicted of various counts of mail fraud for using his position as a city council member to secure approval of a project for which he received a kickback. 744 F.2d at 703. To secure the city's approval for such a project, city ordinances required that certain notices be mailed to various interested parties. *Id.* at 704. Mitchell argued that his convictions could not stand under *Parr* because the notices on which they were predicated were "required by law to be sent." *Id.* We concluded, however, that "*Parr* is inapposite":

> The tax statements, checks, and receipts mailed in *Parr* were sent out regularly and routinely [pursuant to the state constitution] and would have been mailed even if the scheme to defraud the district had not existed. In Mitchell's case, the fraudulent scheme triggered the mailings, which would not have occurred except as a step in the scheme.

Id. Our decision in *Bernhardt* later applied *Mitchell* to conclude that *Parr* also does not insulate "mailings required by a private agreement, wherein one of the parties to the agreement is seeking to defraud the other." *Bernhardt*, 840 F.2d at 1447 (emphasis omitted).

Our decisions in *Mitchell* and *Bernhardt* control this case, not *Parr*; Layfield's duty under state law to deposit client money into a trust account "stemmed from" his fraudulent representation of, and contractual arrangements with, each of his firm's clients. *Bernhardt*, 840 F.2d at 1447. Accordingly, in

describing Layfield's fraudulent scheme, the indictment had alleged that "[i]n connection with causing clients to execute Retainer Agreements, . . . [Layfield] represented, promised, and maintained the pretense that he and [his firm] would . . . zealously and diligently represent clients' interests and hold, in trust for the benefit of each client, case disposition proceeds and use those proceeds only as permitted by applicable laws, rules, and regulations governing the ethical practice of law." Those retainer agreements generally "provided that [the firm] could deposit [settlement] money . . . into a trust account without notice to, or further authorization from, the client." The wires into the trust account were the result of the services that Layfield had falsely represented he would perform in accordance with his fiduciary duty to protect and hold their funds in trust. In other words, Layfield's fraudulent representations led to the firm's services to clients which in turn led to the receipt of settlement funds that were then deposited into the trust account. Therefore, because Layfield's "fraudulent scheme . . . triggered the applicability of the local law that required the [wires]," *Parr* cannot immunize Layfield. *Id.*

Nor does the fact that the deposits were not false on their face compel a different conclusion. The Supreme Court has been clear that a wire that is "routine and innocent in and of itself" may satisfy the wire element of the offense, as long as the wire is "a step in [the] plot" of the fraudulent scheme. *Schmuck v. United*

States, 489 U.S. 705, 711 (1989) (alteration in original) (quoting *Badders v. United States*, 240 U.S. 391, 394 (1916)). Indeed, *Schmuck* cited *Parr* for *Parr*'s "specific[] acknowledge[ment] that 'innocent' mailings—ones that contain no false information—may supply the mailing element." *Id.* at 715 (quoting *Parr*, 363 U.S. at 390).

We affirm Layfield's convictions on counts 1-4, 6, 8-9, and 12-13.

B. We also reject Layfield's challenge to his wire fraud conviction on count 10; sufficient evidence supported the conclusion that Layfield caused the firm's litigation director to charge a client $25,623.94 as a fraudulent "Miscellaneous Expense."

A rational juror could have found that Layfield caused the email containing that charge to be sent to the client. *See Pereira v. United States*, 347 U.S. 1, 8-9 (1954) (causality satisfied where a person "does an act with knowledge that the use of [a wire] will follow in the ordinary course of business, or where such use can reasonably be foreseen"). Six weeks before the client received that charge, Layfield had instructed the firm's Chief Financial Officer to allocate $371,869.53 in past costs that had not been "properly or individually accounted for . . . as miscellaneous expenses among all of our outstanding cases pro rata based on the total balance." Layfield's email had insisted that the firm "can't take a $371,869.53 loss on this."

Though it is not clear exactly what costs the firm allocated to which clients, a rational juror could have found Layfield guilty of this count for making "it seem as though the client was paying miscellaneous expenses for that client's own case, when in fact, unbeknownst to the client, that person was paying expenses for somebody else's case"—as the government argued in closing. Contrary to Layfield's contention, whether another person at the firm—who may or may not have been aware of Layfield's billing instructions—thought the charge was appropriate does not make evidence of fraud insufficient under *Jackson*. Thus, we uphold Layfield's conviction on count 10.

C. Sufficient evidence also supported counts 16 and 17. Layfield asserts that his failure to disclose the existence of a past fee-sharing agreement to a loan underwriter—who had inquired about such fee-sharing agreements and the existence of co-counsel—was not a material misrepresentation.

Layfield contends that *Olsen v. Harbison*, 119 Cal. Rptr. 3d 460 (Ct. App. 2010), extinguished any prior fee-splits with co-counsel as a matter of law. But *Olsen* involved a situation where the client—not an attorney—had fired co-counsel. *Id.* at 466. Regardless of whether *Olsen* applied, a rational juror could have found that Layfield created a misleading impression in the loan application—which also contained other material omissions—by omitting all mention of the extinguished fee-sharing agreements. In calculating the degree of risk involved in

the loan, even supposedly extinguished fee-sharing agreements would have been material. Layfield's own acknowledgement that "at the end of the day" his firm would "honor any agreements it had" further suggests the continuing relevance of such fee-sharing agreements.

Accordingly, sufficient evidence supported the jury's verdict that the loan was fraudulently obtained.

2. Finally, Layfield brings four challenges to his conviction for felony tax evasion, 26 U.S.C. § 7201, on count 26. None of these challenges have merit.

The elements of a § 7201 offense are: "(1) willfulness; (2) the existence of a tax deficiency; and (3) an affirmative act constituting an evasion or attempted evasion of the tax." *United States v. Kayser*, 488 F.3d 1070, 1073 (9th Cir. 2007). The crime is complete as soon as the attempt is made, and any affirmative act that indicates a willful attempt to evade the tax satisfies the attempt element. *See Spies v. United States*, 317 U.S. 492, 498-99 (1943). The government charged Layfield with a so-called *Spies* evasion—the failure to file a timely tax return coupled with an affirmative act of evasion—and specified four possible affirmative acts.

First, contrary to Layfield's contention, the district court did not err in formulating the jury instructions. The court's instructions "adequately presented the defendant's theory of the case and . . . presented the jury with every element of the crime." *Unites States v. Jinian*, 725 F.3d 954, 960 (9th Cir. 2013). Nor did the

district court abuse its discretion by modifying the Ninth Circuit's Model Jury Instructions. *See id.*; *Bearchild v. Cobban*, 947 F.3d 1130, 1148 (9th Cir. 2020). And in so modifying, the court's instruction did not convey to the jury that it could convict based only on the fact that Layfield had filed a late return. *See United States v. Pang*, 362 F.3d 1187, 1194 (9th Cir. 2004) (holding that "evidence of belated tax payments, made while awaiting prosecution, is irrelevant").

Second, sufficient evidence supported this conviction. Layfield asserts that the government failed to prove any of the four affirmative acts in the indictment. But, contrary to Layfield's argument, even a lawful act can constitute an affirmative act. *See Spies*, 317 U.S. at 499 (defining an affirmative act as "any conduct, the likely effect of which would be to mislead or to conceal"). A rational juror could have found that at least one of the four alleged acts identified by the government constituted evasion or attempted evasion of a tax.

Third, no constructive amendment was effected. By arguing that embezzled income is taxable to the embezzler, the government did not convict Layfield on the basis of uncharged conduct. *See United States v. Ward*, 747 F.3d 1184, 1190 (9th Cir. 2014). The indictment alleged the existence of a tax deficiency but did not limit the theory of the case as to the source or the exact amount of the income in question. *See United States v. Pisello*, 877 F.2d 762, 765-66 (9th Cir. 1989). Moreover, in a § 7201 prosecution, the government need not prove the precise

amount of tax that was evaded, as long as it can establish some deficiency. *Id.* at 765 (upholding § 7201 conviction because "Pisello committed the same offense whether he evaded the tax on $197,000 in income or $227,000 in income").

Fourth, the district court did not abuse its discretion by refusing to conduct a *Daubert* hearing regarding the government's tax expert. *See United States v. Alatorre*, 222 F.3d 1098, 1105 (9th Cir. 2000) (noting that a district court is not required to hold a *Daubert* hearing). There is no indication that the district court failed to assure that the expert's testimony rested on a reliable foundation. Nor did the district court fail to clarify that it—and not the expert—would instruct the jury on the law regarding a § 7201 offense.

Because his four challenges fail, we affirm Layfield's tax evasion conviction on count 26.

AFFIRMED.

18 U.S. Code § 3161 - Time limits and exclusions

(a) In any case involving a defendant charged with an offense, the appropriate judicial officer, at the earliest practicable time, shall, after consultation with the counsel for the defendant and the attorney for the Government, set the case for trial on a day certain, or list it for trial on a weekly or other short-term trial calendar at a place within the judicial district, so as to assure a speedy trial.

(b) Any information or indictment charging an individual with the commission of an offense shall be filed within thirty days from the date on which such individual was arrested or served with a summons in connection with such charges. If an individual has been charged with a felony in a district in which no grand jury has been in session during such thirty-day period, the period of time for filing of the indictment shall be extended an additional thirty days.

(c)

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

(2) Unless the defendant consents in writing to the contrary, the trial shall not commence less than thirty days from the date on which the defendant first appears through counsel or expressly waives counsel and elects to proceed pro se.

(d)

(1) If any indictment or information is dismissed upon motion of the defendant, or any charge contained in a complaint filed against an individual is dismissed or otherwise dropped, and thereafter a complaint is filed against such defendant or individual charging him with the same offense or an offense based on the same conduct or arising from the same criminal episode, or an information or indictment is filed charging such defendant with the same offense or an offense based on the same conduct or arising from the same criminal episode, the provisions of subsections (b) and (c) of this section shall be applicable with respect to such subsequent complaint, indictment, or information, as the case may be.

(2) If the defendant is to be tried upon an indictment or information dismissed by a trial court and reinstated following an appeal, the trial shall commence

within seventy days from the date the action occasioning the trial becomes final, except that the court retrying the case may extend the period for trial not to exceed one hundred and eighty days from the date the action occasioning the trial becomes final if the unavailability of witnesses or other factors resulting from the passage of time shall make trial within seventy days impractical. The periods of delay enumerated in section 3161(h) are excluded in computing the time limitations specified in this section. The sanctions of section 3162 apply to this subsection.

(e) If the defendant is to be tried again following a declaration by the trial judge of a mistrial or following an order of such judge for a new trial, the trial shall commence within seventy days from the date the action occasioning the retrial becomes final. If the defendant is to be tried again following an appeal or a collateral attack, the trial shall commence within seventy days from the date the action occasioning the retrial becomes final, except that the court retrying the case may extend the period for retrial not to exceed one hundred and eighty days from the date the action occasioning the retrial becomes final if unavailability of witnesses or other factors resulting from passage of time shall make trial within seventy days impractical. The periods of delay enumerated in section 3161(h) are excluded in computing the time limitations specified in this section. The sanctions of section 3162 apply to this subsection.

(f) Notwithstanding the provisions of subsection (b) of this section, for the first twelve-calendar-month period following the effective date of this section as set forth in section 3163(a) of this chapter the time limit imposed with respect to the period between arrest and indictment by subsection (b) of this section shall be sixty days, for the second such twelve-month period such time limit shall be forty-five days and for the third such period such time limit shall be thirty-five days.

(g) Notwithstanding the provisions of subsection (c) of this section, for the first twelve-calendar-month period following the effective date of this section as set forth in section 3163(b) of this chapter, the time limit with respect to the period between arraignment and trial imposed by subsection (c) of this section shall be one hundred and eighty days, for the second such twelve-month period such time limit shall be one hundred and twenty days, and for the third such period such time limit with respect to the period between arraignment and trial shall be eighty days.

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

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

(A) delay resulting from any proceeding, including any examinations, to determine the mental competency or physical capacity of the defendant;

(B) delay resulting from trial with respect to other charges against the defendant;

(C) delay resulting from any interlocutory appeal;

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

(E) delay resulting from any proceeding relating to the transfer of a case or the removal of any defendant from another district under the Federal Rules of Criminal Procedure;

(F) delay resulting from transportation of any defendant from another district, or to and from places of examination or hospitalization, except that any time consumed in excess of ten days from the date an order of removal or an order directing such transportation, and the defendant's arrival at the destination shall be presumed to be unreasonable;

(G) delay resulting from consideration by the court of a proposed plea agreement to be entered into by the defendant and the attorney for the Government; and

(H) delay reasonably attributable to any period, not to exceed thirty days, during which any proceeding concerning the defendant is actually under advisement by the court.

(2) Any period of delay during which prosecution is deferred by the attorney for the Government pursuant to written agreement with the defendant, with the approval of the court, for the purpose of allowing the defendant to demonstrate his good conduct.

(3)

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

(B) For purposes of subparagraph (A) of this paragraph, a defendant or an essential witness shall be considered absent when his whereabouts are unknown and, in addition, he is attempting to avoid apprehension or prosecution or his whereabouts cannot be determined by due diligence. For purposes of such subparagraph, a defendant or an essential witness shall be

considered unavailable whenever his whereabouts are known but his presence for trial cannot be obtained by due diligence or he resists appearing at or being returned for trial.

(4) Any period of delay resulting from the fact that the defendant is mentally incompetent or physically unable to stand trial.

(5) If the information or indictment is dismissed upon motion of the attorney for the Government and thereafter a charge is filed against the defendant for the same offense, or any offense required to be joined with that offense, any period of delay from the date the charge was dismissed to the date the time limitation would commence to run as to the subsequent charge had there been no previous charge.

(6) A reasonable period of delay when the defendant is joined for trial with a codefendant as to whom the time for trial has not run and no motion for severance has been granted.

(7)

(A) Any period of delay resulting from a continuance granted by any judge on his own motion or at the request of the defendant or his counsel or at the request of the attorney for the Government, if the judge granted such continuance on the basis of his findings that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial. No such period of delay resulting from a continuance granted by the court in accordance with this paragraph shall be excludable under this subsection unless the court sets forth, in the record of the case, either orally or in writing, its reasons for finding that the ends of justice served by the granting of such continuance outweigh the best interests of the public and the defendant in a speedy trial.

(B) The factors, among others, which a judge shall consider in determining whether to grant a continuance under subparagraph (A) of this paragraph in any case are as follows:

(i) 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.

(ii) Whether the case is so unusual or so complex, due to the number of defendants, the nature of the prosecution, or the existence of novel questions of fact or law, that it is unreasonable to expect adequate preparation for pretrial proceedings or for the trial itself within the time limits established by this section.

(iii) Whether, in a case in which arrest precedes indictment, delay in the filing of the indictment is caused because the arrest occurs at a time such that it is unreasonable to expect return and filing of the indictment within the period specified in section 3161(b), or because the facts upon which the grand jury must base its determination are unusual or complex.

(iv) Whether the failure to grant such a continuance in a case which, taken as a whole, is not so unusual or so complex as to fall within clause (ii), would deny the defendant reasonable time to obtain counsel, would unreasonably deny the defendant or the Government continuity of counsel, or would deny counsel for the defendant or the attorney for the Government the reasonable time necessary for effective preparation, taking into account the exercise of due diligence.

(C) No continuance under subparagraph (A) of this paragraph shall be granted because of general congestion of the court's calendar, or lack of diligent preparation or failure to obtain available witnesses on the part of the attorney for the Government.

(8) Any period of delay, not to exceed one year, ordered by a district court upon an application of a party and a finding by a preponderance of the evidence that an official request, as defined in section 3292 of this title, has been made for evidence of any such offense and that it reasonably appears, or reasonably appeared at the time the request was made, that such evidence is, or was, in such foreign country.

(i) If trial did not commence within the time limitation specified in section 3161 because the defendant had entered a plea of guilty or nolo contendere subsequently withdrawn to any or all charges in an indictment or information, the defendant shall be deemed indicted with respect to all charges therein contained within the meaning of section 3161, on the day the order permitting withdrawal of the plea becomes final.

(j)

(1) If the attorney for the Government knows that a person charged with an offense is serving a term of imprisonment in any penal institution, he shall promptly—

(A) undertake to obtain the presence of the prisoner for trial; or

(B) cause a detainer to be filed with the person having custody of the prisoner and request him to so advise the prisoner and to advise the prisoner of his right to demand trial.

(2) If the person having custody of such prisoner receives a detainer, he shall promptly advise the prisoner of the charge and of the prisoner's right to demand trial. If at any time thereafter the prisoner informs the person having custody that he does demand trial, such person shall cause notice to that effect to be sent promptly to the attorney for the Government who caused the detainer to be filed.

(3) Upon receipt of such notice, the attorney for the Government shall promptly seek to obtain the presence of the prisoner for trial.

(4) When the person having custody of the prisoner receives from the attorney for the Government a properly supported request for temporary custody of such prisoner for trial, the prisoner shall be made available to that attorney for the Government (subject, in cases of interjurisdictional transfer, to any right of the prisoner to contest the legality of his delivery).

(k)

(1) If the defendant is absent (as defined by subsection (h)(3)) on the day set for trial, and the defendant's subsequent appearance before the court on a bench warrant or other process or surrender to the court occurs more than 21 days after the day set for trial, the defendant shall be deemed to have first appeared before a judicial officer of the court in which the information or indictment is pending within the meaning of subsection (c) on the date of the defendant's subsequent appearance before the court.

(2) If the defendant is absent (as defined by subsection (h)(3)) on the day set for trial, and the defendant's subsequent appearance before the court on a bench warrant or other process or surrender to the court occurs not more than 21 days after the day set for trial, the time limit required by subsection (c), as extended by subsection (h), shall be further extended by 21 days.