**UNPUBLISHED**

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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**No. 22-4002**

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UNITED STATES OF AMERICA,

Plaintiff – Appellee,

v.

JEAN BUTEAU REMARQUE,

Defendant – Appellant.

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Appeal from the United States District Court for the District of Maryland, at Greenbelt. Stephanie A. Gallagher, District Judge. (8:19–cr–00039–SAG–1)

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Submitted: January 19, 2023 Decided: April 6, 2023

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Before NIEMEYER, KING, and DIAZ, Circuit Judges.

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Affirmed by unpublished per curiam opinion.

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**ON BRIEF:** Bernard V. Kleinman, LAW OFFICE OF BERNARD V. KLEINMAN PLLC, Somers, New York, for Appellant. Erek L. Barron, United States Attorney, Baltimore, Maryland, Timothy F. Hagan, Jr., Assistant United States Attorney, John M. Blumenschein, Special Assistant United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Greenbelt, Maryland, for Appellee.

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Unpublished opinions are not binding precedent in this circuit.



"APPENDIX A."

PER CURIAM:

Jean Buteau Remarque appeals his conviction and sentence for two counts of receipt of child pornography and one count of possession of child pornography. Although he confessed his crimes to an investigating officer, Remarque went to trial, where a jury found him guilty on all counts. The district court's sentence varied downward from the Guidelines range. On appeal, Remarque argues that (1) his indictment was deficient, (2) he was denied a speedy trial, (3) there was insufficient evidence to convict him of receipt of child pornography, (4) the affidavit that led to the government's search warrants was deficient, and (5) the district court's sentence was substantively unreasonable. Finding no error, we affirm.

Rather than reciting the full factual and procedural history here, we discuss the relevant aspects below as they relate to each of Remarque's arguments on appeal.

I.

First, Remarque argues that his possession charge is multiplicitous of his receipt charges because of a lack of factual allegations in the indictment. But the operative Third Superseding Indictment lists the date and time for Remarque's two receipt charges, which are distinct from the date of the possession charge (the date the agents searched Remarque's apartment and found child pornography). *United States v. Fall*, 955 F.3d 363, 373 (4th Cir. 2020) (possession and receipt charges "are not multiplicitous" when they "involve different conduct on different dates"). And as in *Fall*, there were many more files at issue in Remarque's possession charge than in the two receipt charges, such that "any overlap

. . . is much too small to warrant a finding that the offense conduct charged in [the possession count] was in fact the same as that charged in the receipt counts." *Id.* at 374. So the district court correctly held there was no multiplicity issue.

We also reject Remarque's argument that his indictment doesn't allege mens rea, as the Third Superseding Indictment states he "did *knowingly*" receive and possess child pornography. J.A. 213, 214, 215 (emphasis added). Remarque is correct that the knowledge requirement applies both to "the sexually explicit nature of the materials as well as . . . the involvement of minors in the materials' production." *United States v. Miltier*, 882 F.3d 81, 86 (4th Cir. 2018) (cleaned up). But his indictment doesn't have to spell that out in detail. Rather, indictments need only "allege each element of the offense, so that fair notice is provided." *United States v. Bolden*, 325 F.3d 471, 490 (4th Cir. 2003). Remarque doesn't challenge the district court's finding that he was sufficiently on notice of his charges. So this argument fails, too.

II.

Next, Remarque argues that his trial was illegally delayed. He raises only a constitutional challenge, appearing to concede that his trial accorded with the Speedy Trial Act.[1]

[1] That's for good reason, because on all but 43 days between his initial appearance and his trial, there was either at least one pending motion or an "ends of justice" exclusion because of COVID-19. On some days, both exceptions applied. Those 43 countable days are well within the Speedy Trial Act's 70-day limit. *See* 18 U.S.C. § 3161(c)(1), (h).

Remarque doesn't challenge the trial delays attributable to the COVID-19 pandemic. Rather, he faults the government for taking too long (ten months) to respond to the motions to suppress he filed thirteen days after his initial appearance. This, he argues, pushed the trial into the pandemic, leading to unconstitutional delays that could have been avoided if the government had timely responded.

But we agree with the district court that the government's response was timely under the court's routine scheduling practices. And guided by the factors laid out in *Barker v. Wingo*, 407 U.S. 514, 530–32 (1972)—the length of delay, the reason for the delay, the defendant's responsibility to assert his right, and prejudice—we agree with the district court that Remarque did not suffer a constitutional speedy-trial violation. At bottom, most of the delay is not the fault of the government, but rather is attributable to Remarque's own decision to change counsel repeatedly—and, we would add, to file dozens of pretrial motions—along with the COVID-19 pandemic, which neither party could foresee.

III.

Despite his confession, Remarque challenges the sufficiency of the evidence underlying his two receipt convictions. He asserts there was insufficient evidence that he (1) actually received images, (2) received them in interstate commerce, (3) knew they were sexually explicit or involved minors, (4) received depictions of real children, or (5) received the images in Maryland. But the trial record forecloses his arguments. There was "substantial evidence, taking the view most favorable to the Government, to support" his convictions. *Fall*, 955 F.3d at 375.

First, substantial evidence supported the jury's finding that Remarque received the two images at issue. The jury heard a recorded confession in which Remarque admitted to Department of Homeland Security Special Agent Christine Carlson that he'd used his phone to view and save images of child pornography. The jury also heard from a forensic expert who testified that the two images at issue were screenshots taken on an Android phone from the internet and transferred to a USB drive that Remarque admitted was his.

Second, substantial evidence likewise supported the federal nexus, interstate commerce. Using the internet satisfies this element. *See Fall*, 955 F.3d at 375. And the government "introduced evidence that, taken together, would allow a reasonable juror to conclude that the two files" came "from the internet." *Miltier*, 882 F.3d at 88. Remarque confessed that he used his phone to access 4-Share, which he called both a "platform" and a "website." *See, e.g.*, J.A. 330–31; S.J.A. 25–28, 32–34. Forensic evidence backed this up, as several images showed partial web addresses. And Agent Carlson testified specifically about the two images underlying the receipt charges, explaining that they were screenshots from a phone connected to Wi-Fi. One screenshot showed a partial URL. With this record, a reasonable juror could find that Remarque used the internet on his phone to access the two images and screenshot them.

Third, substantial evidence supported a finding that Remarque acted knowingly with respect to both the images' sexually explicit nature and the fact that they involved minors. The jury had Remarque's confession to Agent Carlson, in which he even expressly acknowledged that he knew the images were illegal. S.J.A. 29 ("I know. I know."); S.J.A.

37 ("Yeah, the act is illegal, yeah."). He also described being "addicted" to child pornography. S.J.A. 35.

Fourth, Remarque's argument that there was insufficient proof the images "depicted a real child," Appellant's Br. at 28, is similarly meritless. Agent Carlson provided unrebutted trial testimony that all images shown at the trial—including the two Remarque was charged with receiving—were database-verified images of identified children.

Finally, Remarque's argument that the government never proved venue in Maryland likewise fails. The search that produced the contraband, including the images in the receipt charges, took place in Remarque's apartment in Greenbelt, Maryland. Remarque told Agent Carlson he lived there, and his laptop and USB drive were recovered there. At the very least, this is substantial circumstantial evidence that Remarque committed the "essential conduct" of receipt in Maryland. *United States v. Sterling*, 860 F.3d 233, 241 (4th Cir. 2017) (holding that circumstantial evidence of venue, supported by the record as a whole, is sufficient).

## IV.

Next, Remarque challenges the search warrants that uncovered his offenses. We hold that Agent Carlson's affidavit, attached to the warrant applications, established probable cause under a "totality-of-the-circumstances analysis," consistent "with the practical, common-sense decision demanded of the magistrate." *Massachusetts v. Upton*, 466 U.S. 727, 732 (1984) (per curiam) (cleaned up).

The warrants were based on the personal knowledge of a named informant, Remarque's then-wife, Wanna Remarque. Remarque challenges Wanna's credibility, but she was a named informant—not an anonymous one—who described her personal knowledge of the facts. *Cf. United States v. Perez*, 393 F.3d 457, 462 (4th Cir. 2004) ("Unlike an anonymous tipster, an informant who meets face-to-face with an officer provides the officer with an opportunity to assess his credibility and demeanor and also exposes himself to accountability for making a false statement." (cleaned up)). And Agent Carlson independently corroborated several facts she learned from Wanna, including Remarque's address, the kind of car he drove, his current job and employment history, and even what his cell phone looked like. Wanna also described images she personally saw in Remarque's possession, and her description left no room to doubt that those images were child pornography.

At bottom, the affidavit supported probable cause. But even if the affidavit had fallen short of probable cause, the district court correctly denied suppression because good-faith reliance on the warrants was objectively reasonable. *See Fall*, 955 F.3d at 371.

V.

Finally, Remarque challenges the factual basis for his sentence enhancements and argues that his below-Guidelines sentence was substantively unreasonable. We find both arguments to lack merit.

The district court conducted its own review of the images at issue and rejected Remarque's challenges to: (1) the number-of-images enhancement because the district

court counted them, (2) the use-of-computer enhancement because there was evidence linking Remarque's phone, laptop, and USB drive, (3) the sadistic/masochistic enhancement because the court found depictions of children being bound, and (4) the prepubescent enhancement because the court found a pornographic image of a baby. Given these findings by the district court, which Remarque doesn't and can't meaningfully challenge, applying these enhancements wasn't an abuse of discretion. *Cf. Gall v. United States*, 552 U.S. 38, 51–52 (2007) ("The sentencing judge is in a superior position to find facts and judge their import under § 3553(a) in the individual case."). Nor were the district court's findings clearly erroneous. *United States v. Barnett*, 48 F.4th 216, 219 (4th Cir. 2022).

Remarque's argument that his below-Guidelines sentence is substantively unreasonable under 18 U.S.C. § 3553(a) is also unfounded. While he argues his case involved a shorter time span and fewer images than more egregious child-pornography cases, the district court's downward variance accounts for this. The record shows proper consideration of the parties' positions and the factors relevant to the case, so we see no abuse of discretion with respect to the sentence's substantive reasonableness. *United States v. Pauley*, 511 F.3d 468, 473 (4th Cir. 2007).[2]

[2] Remarque raises other challenges to his conviction and sentence, but we find none to have merit.

VI.

We affirm the district court's judgment. And we dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this Court and argument would not aid in our decision.

*AFFIRMED*

FILED: April 6, 2023

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 22-4002, US v. Jean Remarque
8:19-cr-00039-SAG-1

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NOTICE OF JUDGMENT

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Judgment was entered on this date in accordance with Fed. R. App. P. 36. Please be advised of the following time periods:

**PETITION FOR WRIT OF CERTIORARI:** The time to file a petition for writ of certiorari runs from the date of entry of the judgment sought to be reviewed, and not from the date of issuance of the mandate. If a petition for rehearing is timely filed in the court of appeals, the time to file the petition for writ of certiorari for all parties runs from the date of the denial of the petition for rehearing or, if the petition for rehearing is granted, the subsequent entry of judgment. See Rule 13 of the Rules of the Supreme Court of the United States; www.supremecourt.gov.

**VOUCHERS FOR PAYMENT OF APPOINTED OR ASSIGNED COUNSEL:** Vouchers must be submitted within 60 days of entry of judgment or denial of rehearing, whichever is later. If counsel files a petition for certiorari, the 60-day period runs from filing the certiorari petition. (Loc. R. 46(d)). If payment is being made from CJA funds, counsel should submit the CJA 20 or CJA 30 Voucher through the CJA eVoucher system. In cases not covered by the Criminal Justice Act, counsel should submit the Assigned Counsel Voucher to the clerk's office for payment from the Attorney Admission Fund. An Assigned Counsel Voucher will be sent to counsel shortly after entry of judgment. Forms and instructions are also available on the court's web site, www.ca4.uscourts.gov, or from the clerk's office.

**BILL OF COSTS:** A party to whom costs are allowable, who desires taxation of costs, shall file a Bill of Costs within 14 calendar days of entry of judgment. (FRAP 39, Loc. R. 39(b)).

**PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC:** A petition for rehearing must be filed within 14 calendar days after entry of judgment, except that in civil cases in which the United States or its officer or agency is a party, the petition must be filed within 45 days after entry of judgment. A petition for rehearing en banc must be filed within the same time limits and in the same document as the petition for rehearing and must be clearly identified in the title. The only grounds for an extension of time to file a petition for rehearing are the death or serious illness of counsel or a family member (or of a party or family member in pro se cases) or an extraordinary circumstance wholly beyond the control of counsel or a party proceeding without counsel.

Each case number to which the petition applies must be listed on the petition and included in the docket entry to identify the cases to which the petition applies. A timely filed petition for rehearing or petition for rehearing en banc stays the mandate and tolls the running of time for filing a petition for writ of certiorari. In consolidated criminal appeals, the filing of a petition for rehearing does not stay the mandate as to co-defendants not joining in the petition for rehearing. In consolidated civil appeals arising from the same civil action, the court's mandate will issue at the same time in all appeals.

A petition for rehearing must contain an introduction stating that, in counsel's judgment, one or more of the following situations exist: (1) a material factual or legal matter was overlooked; (2) a change in the law occurred after submission of the case and was overlooked; (3) the opinion conflicts with a decision of the U.S. Supreme Court, this court, or another court of appeals, and the conflict was not addressed; or (4) the case involves one or more questions of exceptional importance. A petition for rehearing, with or without a petition for rehearing en banc, may not exceed 3900 words if prepared by computer and may not exceed 15 pages if handwritten or prepared on a typewriter. Copies are not required unless requested by the court. (FRAP 35 & 40, Loc. R. 40(c)).

**MANDATE**: In original proceedings before this court, there is no mandate. Unless the court shortens or extends the time, in all other cases, the mandate issues 7 days after the expiration of the time for filing a petition for rehearing. A timely petition for rehearing, petition for rehearing en banc, or motion to stay the mandate will stay issuance of the mandate. If the petition or motion is denied, the mandate will issue 7 days later. A motion to stay the mandate will ordinarily be denied, unless the motion presents a substantial question or otherwise sets forth good or probable cause for a stay. (FRAP 41, Loc. R. 41).

**UNITED STATES OF AMERICA, Plaintiff - Appellee v. JEAN BUTEAU REMARQUE, Defendant - Appellant**
**UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT**
**2023 U.S. App. LEXIS 11181**
**No. 22-4002**
**May 5, 2023, Filed**

**Editorial Information: Prior History**

{2023 U.S. App. LEXIS 1}(8:19-cr-00039-SAG-1).United States v. Remarque, 2023 U.S. App. LEXIS 8231, 2023 WL 2810288 (4th Cir. Md., Apr. 6, 2023)

**Counsel** For UNITED STATES OF AMERICA, Plaintiff - Appellee: Erek L. Barron, U. S. Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Baltimore, MD; Timothy Francis Hagan Jr., Assistant U. S. Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Greenbelt, MD.

For JEAN BUTEAU REMARQUE, Defendant - Appellant: Bernard Victor Kleinman, LAW OFFICE OF BERNARD V. KLEINMAN PLLC, Somers, NY.

**Opinion**

ORDER

The petition for rehearing en banc was circulated to the full court. No judge requested a poll under Fed. R. App. P. 35. The court denies the petition for rehearing en banc.





"APPENDIX B."

**UNITED STATES, Plaintiff, v. JEAN BUTEAU REMARQUE, Defendant.**
**UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND**
**2021 U.S. Dist. LEXIS 28016**
**Criminal No. SAG-19-0039**
**February 12, 2021, Decided**
**February 12, 2021, Filed**

**Counsel** {2021 U.S. Dist. LEXIS 1}For Jean Buteau Remarque, Defendant: Michael D Montemarano, LEAD ATTORNEY, Michael D Montemarano PA, Ellicott City, MD.

For USA, Plaintiff: Kristi Noel O'Malley, LEAD ATTORNEY, Office of the United States Attorney, Greenbelt, MD USA; Jared Hernandez, U.S. Attorney's Office for the District of Maryland, Greenbelt, MD.

**Judges:** Stephanie A. Gallagher, United States District Judge.

**CASE SUMMARY**Two of three indictment counts in a child pornography case, while not overly descriptive, satisfied standards because the counts tracked the statutory language and also included "essential facts" distinctive enough to allow preparation of the defense and to bar a second prosecution for the same offense.

**OVERVIEW:** HOLDINGS: [1]-Two of three indictment counts in a child pornography case, while not overly descriptive, satisfied standards because the counts tracked the statutory language and also included "essential facts" distinctive enough to allow preparation of the defense and to bar a second prosecution for the same offense; [2]-Count Three was deficient because it supplemented its recitation of the statutory language with only a date, providing no "essential facts" regarding what pornography was allegedly possessed, such that it was merely a generic reformulation of the elements rather than a sufficiently distinctive charge; [3]-Indictment was not multiplicitous because receipt and possession of separate child pornography images and files constituted distinct conduct; [4]-Government's failure to give defendant the opportunity to turn himself in did not constitute misconduct.

**OUTCOME:** Motion to quash indictment granted in part, although Government permitted to supersede the indictment. Motions to dismiss denied. Government's motion to stay denied.

**LexisNexis Headnotes**

A valid indictment must: (1) allege the essential facts constituting the offense; (2) allege each element of the offense, so that fair notice is provided; and (3) be sufficiently distinctive that a verdict will bar a second prosecution for the same offense. Tracking of statutory language is sufficient if the words fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offence intended to be punished. However, when the words of a statute are used to describe the offense generally, they must be accompanied with such a statement of the facts and circumstances as will inform the accused of the specific offence, coming under the general description,





"APPENDIX C."

with which he is charged.

***Constitutional Law > Bill of Rights > Fundamental Rights > Procedural Due Process > Double Jeopardy***

An indictment must merely identify those essential facts necessary to inform a defendant of the charge, prepare a defense, and avoid double jeopardy, not layout the whole of the Government's case.

***Computer & Internet Law > Criminal Offenses > Child Pornography***
***Criminal Law & Procedure > Criminal Offenses > Sex Crimes > Child Pornography > Elements***
***Criminal Law & Procedure > Criminal Offenses > Sex Crimes > Child Pornography > Penalties***

Receipt and possession of separate child pornography images and files constitute distinct conduct, and those charges therefore are not multiplicitous.

***Criminal Law & Procedure > Grand Juries > Evidence Before the Grand Jury > Admissible Evidence***
***Criminal Law & Procedure > Grand Juries > Investigative Authority > Independence***
***Criminal Law & Procedure > Grand Juries > Evidence Before the Grand Jury > Illegally Obtained Evidence***

In Bank of Nova Scotia v. United States, the Supreme Court held that as a general matter, a district court may not dismiss an indictment for errors in grand jury proceedings unless such errors prejudiced the defendants. Against this backdrop, challenges to the reliability of evidence presented to the grand jury are particularly disfavored. Indeed, the Fourth Circuit has held in no uncertain terms that it will not hear a challenge to the reliability or competence of the evidence presented to the grand jury, and the mere fact that evidence is unreliable is not sufficient to require a dismissal of the indictment.

***Criminal Law & Procedure > Appeals > Standards of Review > Plain Error > Definitions***

Disagreement with the Government's legal theory is not equivalent to prejudicial error.

**Opinion**

**Opinion by:** Stephanie A. Gallagher

**Opinion**

**MEMORANDUM OPINION**

Defendant Jean Buteau Remarque, who faces charges of receipt and possession of child pornography, has now filed a number of pending motions: a Motion to Quash the Indictment for Lack of Sufficiency, ECF 174, a Motion to Dismiss for Arbitrary Multiplication of Offenses, ECF 175, and a Motion to Dismiss for Bad Faith Prosecution and Abuse of the Grand Jury Process, ECF 176 (collectively "the Motions").1 The Government has opposed the Motions, ECF 177, and Mr. Remarque has replied, ECF 179, 180, 181. Following a telephone conference in which the Court provided the parties with its initial views on the merits of the Motions, ECF 183, Mr. Remarque filed an Opposition to the Government's forthcoming third superseding indictment. ECF 184. The Government also filed a Motion to Stay Ruling{2021 U.S. Dist. LEXIS 2} as to Count Three on

Defendant's Motion to Quash. ECF 187. Upon review of those filings, for the reasons stated below, the Motion to Quash will be granted in part, although implementation of the ruling will be deferred to permit the Government to supersede the indictment, and the Motions to Dismiss will be denied. The Government's Motion to Stay will also be denied.

## I. Factual and Procedural Background

A review of this case's procedural history is central to several facets of the Court's analysis. Mr. Remarque's initial appearance in federal court, on a one-count indictment charging possession of child pornography, occurred on January 30, 2019. ECF 6. The Federal Public Defender's office entered its appearance on Mr. Remarque's behalf, ECF 14, and filed two suppression motions thirteen days later, on February 12, 2019. ECF 16, 17. The early months of the case were marked by several changes in attorney for Mr. Remarque, as well as his withdrawal from a plea agreement. ECF 19, 22, 27, 33, 36, 42. During that time, Mr. Remarque filed a motion for discovery. ECF 30. Judge Paula Xinis, the then-presiding judge in this case, held a telephone conference on September 25, 2019, and subsequently{**2021 U.S. Dist. LEXIS 3**} entered the case's initial pretrial scheduling order. ECF 46. The scheduling order set, inter alia, a December 2, 2019 deadline for Mr. Remarque to file or supplement pretrial motions, a motions hearing date of January 3, 2020, and a trial date of March 25, 2020. ECF 46.

During this entire period, while Mr. Remarque was repeatedly replacing his counsel, the motions filed on Mr. Remarque's behalf by the assistant Federal Public Defender remained pending. On or before the December 2, 2019 deadline, Mr. Remarque's then-counsel, Michael Montemarano, Esq., filed six additional pre-trial motions. ECF 56, 57, 59, 60, 61, 64. A motions hearing occurred on February 4, 2020, at which Judge Xinis denied Mr. Remarque's various pretrial motions. ECF 74, 75.

On March 11, 2020, Chief Judge James K. Bredar issued the first of a long series of orders restricting access to Court facilities in light of the COVID-19 pandemic. *See* Standing Order No. 2020-02. During this time, Mr. Remarque once again sought to change his counsel. ECF 83. His previous counsel continued to work on his behalf, filing a motion seeking Mr. Remarque's release from custody for health and safety reasons, citing the pandemic. ECF{**2021 U.S. Dist. LEXIS 4**} 86. On June 11, 2020, Mr. Remarque's current counsel, Donald LaRoche, Esq., entered his appearance. ECF 102.

On July 18, 2020, Mr. LaRoche filed a motion to withdraw the motion in limine that had been filed by Mr. Montemarano. ECF 104. Judge Xinis entered a new scheduling order, which set a pre-trial conference for September 15, 2020 and a trial date for September 21, 2020. ECF 109. While the deadline for pretrial motions had long-since passed, Judge Xinis authorized Mr. LaRoche to file a renewed motion to suppress. ECF 112. On August 17, 2020, the case was reassigned from Judge Xinis to my docket. Extensive scheduling efforts ensued in hopes of safely proceeding ahead with Mr. Remarque's trial despite the pandemic, during which time Mr. Remarque filed numerous additional motions covering a wide range of topics. He sought reconsideration of the Court's previous denial of his request for pretrial release on bail, ECF 114, and filed a renewed motion to suppress, ECF 116. He then moved to dismiss Counts One and Two of the indictment on multiplicity grounds, ECF 121, sought review of his detention order, ECF 127, moved to dismiss on the grounds of prosecutorial vindictiveness, ECF 135,{**2021 U.S. Dist. LEXIS 5**} and moved to dismiss due to unnecessary delay, ECF 139. In the lead up to the then-target November 16, 2020 trial date, he moved to suppress several statements, ECF 151, and also filed several additional motions in limine, ECF 155, 159, 160. The trial was, unfortunately, again delayed multiple times until its currently scheduled date of March 1, 2021. ECF 173. Without seeking further leave of court, Mr. Remarque has continued to file motions. He filed a speedy trial motion in early December, ECF 169, before

ultimately filing the instant motions in early January, ECF 174, 175, 176.

In light of the approaching trial date, upon review of Mr. Remarque's most recent motions, the Court scheduled a February 5, 2021 conference call to provide both parties with ample notice of its forthcoming rulings. On the call, the Court stated that it would be issuing this written opinion in due course, but that it intended to deny the Motions, with the exception of the Motion to Quash, ECF 174, as it pertained to Count Three of the second superseding indictment. It stated that it would give the Government the opportunity, if desired, to file a third superseding indictment in an attempt to remedy the defects{2021 U.S. Dist. LEXIS 6} the Court had identified in Count Three, *see* Section II(A) *infra*. Mr. Remarque, meanwhile, was given the option of continuing the trial should he wish to do so in light of the Government's impending third superseding indictment. This written opinion provides more detail regarding the basis for those oral rulings.

**II. Analysis**

**A. Motion to Quash for Lack of Sufficiency and Specificity**

"A valid indictment must: (1) allege the essential facts constituting the offense; (2) allege each element of the offense, so that fair notice is provided; and (3) be sufficiently distinctive that a verdict will bar a second prosecution for the same offense." *United States v. Bolden*, 325 F.3d 471, 490 (4th Cir. 2003). Here, all three counts of the second superseding indictment track the language of the statutes charged. Such tracking of statutory language is sufficient if the words "fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offence intended to be punished." *Hamling v. United States*, 418 U.S. 87, 117, 94 S. Ct. 2887, 41 L. Ed. 2d 590 (1974) (internal citation omitted); *United States v. Wicks*, 187 F.3d 426, 427 (4th Cir. 1999); *United States v. Brandon*, 298 F.3d 307, 310 (4th Cir. 2002). However, "[w]hen the words of a statute are used to describe the offense generally, they must be accompanied with such a statement of the facts and circumstances as will inform the accused of the{2021 U.S. Dist. LEXIS 7} specific offence, coming under the general description, with which he is charged." *Brandon*, 298 F.3d at 310 (internal citations omitted).

Counts One and Two of the indictment, while not overly descriptive, satisfy these standards. Not only do the counts track the statutory language and thus expressly set out all the elements necessary to constitute the offense of receipt of child pornography, but they also include "essential facts" distinctive enough to allow preparation of the defense and to bar a second prosecution for the same offense-namely the inclusion of a precise date and time when the child pornography was allegedly received. For a charge centering on the receipt of images, such date and time details are sufficient to allow the defendant to identify what conduct and images the government are alleging violated the statute, particularly given that the dates and times align with the filenames of screenshots of the alleged child pornography found here.2 While Mr. Remarque challenges the validity of the Government's "filenames-as-timestamps" theory, that question will be determined by the jury. For notice and double jeopardy purposes, the specific date and time sufficiently protect Mr. Remarque as to Counts{2021 U.S. Dist. LEXIS 8} One and Two.

Count Three, by contrast, supplements its recitation of the statutory language with only a date, providing no "essential facts" regarding what pornography was allegedly possessed, such that it is merely a generic reformulation of the elements rather than a sufficiently distinctive charge. Nothing in the indictment protects Mr. Remarque from being charged for the same possession crime at some point in the future, because there is no information specifying the alleged child pornography being charged. As such, the indictment is deficient, per *Bolden*, 325 F.3d at 490. The Government need not detail the evidence it intends to use to prove Mr. Remarque's guilt, nor is it cabined to any particular type of facts that must be included in order to satisfy the indictment's notice requirements,

whether it be the inclusion of image file names, reference to particular devices on which the pornography was stored, or some other avenue entirely. Whatever route the prosecution chooses, however, must involve sufficient inclusion of "essential facts" to allow Mr. Remarque to prepare a defense and to ensure that he cannot again be charged for possession of the same alleged pornography at a later{**2021 U.S. Dist. LEXIS 9**} date. That concern is particularly acute where, as here, the date alleged in the indictment represents a search of a defendant's home, where multiple items are often seized and could potentially undergird the charge.

The question, then, is the appropriate remedy in this unique situation. The Court has no concerns about actual notice to Mr. Remarque regarding the nature of the government's charges. Mr. Remarque's own filings demonstrate that he is aware of the items being alleged to contain child pornography. *See, e.g.*, ECF 160 at 2 (referencing the flash drive with child pornography found in his living room). Any double jeopardy concerns that might result from Count Three's language have not come to fruition, since there is no evidence that he has been charged with any other offenses. Thus, as discussed during the February 5, 2021 conference call, this Court will afford the Government the opportunity to supersede the indictment to remedy Count Three's technical deficiencies, prior to dismissing that count as stated in the second superseding indictment.3 While Mr. Remarque objects to allowing the Government to seek a superseding indictment and suggests dismissal with prejudice is the{**2021 U.S. Dist. LEXIS 10**} appropriate remedy instead, ECF 184, the very case law he cited in his Motion to Quash demonstrates that, in these circumstances, the Government is permitted to supersede. *See, e.g., United States v. Bryant-Royal*, No.WDQ-12-0040, 2013 U.S. Dist. LEXIS 93780, 2013 WL 3364476, at *1 (D. Md. July 3, 2013) (noting that "the second superseding indictment repled and reinstituted the charge" that had been dismissed earlier for lack of sufficient specificity); *United States v. Hooker*, 841 F.2d 1225, 1232 (4th Cir. 1988) (stating that "[i]t is obvious that the government could easily have obtained a superseding indictment" to cure defects in the original indictment identified prior to trial). *See also, e.g., United States v. Schmidt*, No. 4:09CR00265 ERW, 2009 U.S. Dist. LEXIS 76516, 2009 WL 2836460, at *8 (E.D. Mo. Aug. 27, 2009) (finding an indictment sufficient because it described the hard drive containing the child pornography and identified images of child pornography contained on the drive); *United States v. Brooks*, 648 F. App'x 791, 796 (11th Cir. 2016) (deeming a child pornography indictment sufficient because it alleged not just a date but also a name of the child pornography file in question). The third superseding indictment will incorporate specific references to the alleged child pornography being charged, which has long been identified to Mr. Remarque in discovery.

This case is, admittedly, mere weeks away from trial. Mr. Remarque has, however, been{**2021 U.S. Dist. LEXIS 11**} given the opportunity to seek a continuance, which he declined, ECF 188. What is more, the offending Count Three language has been present in this indictment since the inception of this case in early 2019. Mr. Remarque, despite roughly two-dozen rounds of motions challenging many different aspects of the indictment, his detention, and the prosecution's conduct, did not raise this issue until less than two months before trial, and more than a year after the December 2, 2019 deadline for filing pretrial motions, ECF 46. The Court is sensitive to the fact that Mr. Remarque has experienced extensive pre-trial detention as a result of the pandemic and the resulting public health restrictions on jury trials. Thus, this Court is not inclined to bar his belated motions on timeliness grounds. That said, he should not benefit from his two-year delay in raising the issue of Count Three's sufficiency, to the prejudice of the government. *See* Section I, *supra* (outlining the long history of this case). The Government will be afforded the opportunity to supersede to correct the deficiency, just as it would have if the issue had been raised in a timely fashion. *See United States v. Hillie*, 227 F. Supp. 3d 57, 82 (D.D.C. 2017) ("[T]his Court will hold in abeyance the order dismissing{**2021 U.S. Dist. LEXIS 12**} the federal counts for 14 days, which should give the government adequate time to determine whether a superseding federal indictment that contains

constitutionally sufficient child pornography charges will be sought."). The Government is permitted until February 18, 2021 to supersede Count Three.

**B. Motion to Dismiss for Arbitrary Multiplication of Offenses**

Mr. Remarque has made variations of this same argument regarding the multiplicitous nature of the indictment counts several times already, ECF 64, 121, and it has been rejected each time by the then-presiding judges, ECF 110, 148. The Government has stated that the evidence it will present in support of the possession offense is distinct from the two images charged in the receipt counts, ECF 177 at 7, and the forthcoming third superseding indictment will presumably clarify the details surrounding that position. Receipt and possession of separate child pornography images and files constitute distinct conduct, and those charges therefore are not multiplicitous. *See United States v. Fall*, 955 F.3d 363, 373 (4th Cir. 2020), *United States v. Schnittker*, 807 F.3d 77, 83 (4th Cir. 2015). There is no debate that Mr. Remarque cannot be punished twice for the same offense, and he will not be sentenced for receipt and possession of the same child pornography**{2021 U.S. Dist. LEXIS 13}** images. Thus, even if the Government did ultimately rely on the same child pornography images and files to prove possession and receipt, the Court would remedy the situation at trial or before sentencing to ensure that Mr. Remarque's rights are protected. As an example, should Mr. Remarque ultimately be found guilty of both receipt and possession, the Court could sentence him only on the counts for which distinct evidence was provided without inputting any multiplicitous counts into the guidelines calculations. While the Court understands that Mr. Remarque will argue that the screenshot filenames provided by the Government do not adequately evidence two distinct acts of receipt of child pornography, that is a factual issue to be presented to the jury, not a question to be adjudicated by the Court prior to trial. Thus, while Court will continue to monitor the case for multiplicity and will take appropriate action if any is discovered, Mr. Remarque's motion to dismiss the indictment on that ground will be denied.

**C. Motion to Dismiss for Bad Faith Prosecution and Abuse of the Grand Jury Process**

As evidence of bad faith prosecution, Mr. Remarque cites 1) the Government's decision to arrest**{2021 U.S. Dist. LEXIS 14}** him at his home instead of arranging for self-surrender, 2) the insufficient specificity of the indictment, 3) the "unsubstantiated and frivolous accusations that Mr. Remarque engaged in questionable conduct with a minor female in Haiti" which he claims is a lie fed to prosecutors by his estranged ex-wife Ms. Wanna Crevecoeur, and 4) his claim that he "continues to lack any information with which to investigate or defend himself against these accusations." ECF 176.

Regarding the Government's arresting Mr. Remarque at his home, he cites no authority for the proposition that such arrests (which are routine practice) constitute misconduct or bad faith. Instead, that decision is permissible and within the Government's discretion. *See, e.g., United States v. Khimani*, No. 1:14-CR-00455-PGG, 2015 WL 13876771, at *6 (S.D.N.Y. Apr. 27, 2015) (rejecting defendant's argument that the government's failure to give him the opportunity to turn himself in constituted misconduct). His concerns about the sufficiency of the indictment, meanwhile, have been addressed in Section II(A). His assertion that the prosecution is relying on evidence manufactured by Ms. Crevecoeur is another point of factual dispute that he may present as part of his defense to the**{2021 U.S. Dist. LEXIS 15}** jury, but does not amount to evidence of prosecutorial misconduct. Lastly, Mr. Remarque's apparent confusion as to what information to investigate or how to defend himself does not demonstrate prosecutorial misconduct, either. The Government has produced to Mr. Remarque and his counsel, among other evidence, images of child pornography found on a device found in his living room, a recording of his custodial interrogation, and statements made by Ms. Crevecoeur. *See* ECF 160 at 2 (referencing Mr. Remarque's receipt of the thumb drive found in

Dated: February 12, 2021

/s/ Stephanie A. Gallagher

United States District Judge

**ORDER**

For the reasons stated in the accompanying memorandum{2021 U.S. Dist. LEXIS 19} opinion, it is this 12th day of February, 2021, ORDERED that Defendant's Motion to Dismiss for Arbitrary Multiplication of Offenses, ECF 175, and Motion to Dismiss for Bad Faith Prosecution and Abuse of the Grand Jury Process, ECF 176, are DENIED. The Government's Motion to Stay Ruling as to Count Three on Defendant's Motion to Quash, ECF 187, is also DENIED.

/s/ Stephanie A. Gallagher

United States District Judge

**Footnotes**

1

Several motions in limine, ECF 155, 159, 160, remain pending because this Court has deferred their adjudication. One additional motion, seeking to obtain additional grand jury records, is not yet ripe, ECF 178.

2

Mr. Remarque alleges several other issues with the indictment, including its use of the word "any" and its alleged failure to outline how he allegedly affected interstate commerce with his receipt and possession of child pornography. ECF 174. To the extent Mr. Remarque objects to the language used in the indictment, it closely tracks the statutory language, such that there can be little doubt that it sufficiently and clearly alleges each element of the charged offenses. Mr. Remarque's arguments regarding the indictment's lack of highly specific details regarding interstate commerce and other matters, meanwhile, find no purchase in *Bolden* or other relevant precedent. The Government need not flesh out the entirety of its case at the indictment stage. *See, e.g., United States v. Elbaz*, 332 F. Supp. 3d 960, 970 (D. Md. 2018) ("[A]n indictment must merely identify those essential facts necessary to inform her of the charge, prepare a defense, and avoid double jeopardy, not layout the whole of the Government's case.").

3

The Government filed a motion requesting that the Court defer consideration of Mr. Remarque's Motion to Quash regarding Count Three because it intends to seek the third superseding indictment. ECF 187. Thus, it argues that the issue raised by Mr. Remarque will be moot. *Id.* The Government is only seeking to supersede, however, because the Court indicated on the February 5, 2021 conference call that it intended to issue a written opinion finding Count Three deficient. The conference call's purpose was to give the parties the maximum possible notice of the indictment's insufficiency (and the opportunity to supersede in particular), given the looming trial date in just a few weeks. There are thus no mootness concerns, since the Court functionally already made its ruling regarding Count Three on the teleconference, and is using this opinion to formalize its reasoning.

4

At several points in his filings, Mr. Remarque accurately highlights the fact that "time" is not a

material element of the crimes charged. *E.g.*, ECF 180 at 4. He thus asserts the Government's heavy reliance on the screenshot filenames as timestamps in the indictment and grand jury proceedings "border[s] on ridiculous." *Id.* That contention overlooks the fact that the Government's theory is that the date and time stamps prove that Mr. Remarque received and/or possessed these images at separate times. While the Government does not have to prove the date or the time, it does need to prove separate instances of receipt/possession and can argue to the jury that the date and time stamps suffice.

5

Mr. Remarque has filed a separate motion seeking the Government's instructions to the Grand Jury. ECF 178. That motion is not yet ripe and is not addressed herein, although the Court notes that the same rationale articulated here is likely to govern its assessment of that motion.

**RE: USA v. Jean Buteau Remarque**
**UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND**
**2020 U.S. Dist. LEXIS 204666**
**Criminal Case No. SAG-19-0039**
**November 3, 2020, Decided**
**November 3, 2020, Filed**

**Editorial Information: Prior History**

United States v. Remarque, 2020 U.S. Dist. LEXIS 73000 (D. Md., Apr. 27, 2020)

**Counsel** {2020 U.S. Dist. LEXIS 1}For Jean Buteau Remarque, Defendant: Michael D Montemarano, LEAD ATTORNEY, Michael D Montemarano PA, Ellicott City, MD.
For USA, Plaintiff: Kristi Noel O'Malley, LEAD ATTORNEY, Office of the United States Attorney, Greenbelt, MD; Jared Hernandez, U.S. Attorney's Office for the District of Maryland, Greenbelt, MD.

**Judges:** Stephanie A. Gallagher, United States District Judge.

**Opinion**

**Opinion by:** Stephanie A. Gallagher

**Opinion**

Dear Counsel:

I have reviewed Mr. Remarque's Motion to Dismiss the Indictment for Unnecessary Delay in Bringing the Defendant to Trial, ECF 139, the Government's Opposition, ECF 149, and Mr. Remarque's reply, ECF 161. No hearing is necessary. For the reasons stated below, the motion will be DENIED.

**Procedural Background**

A detailed review of this case's procedural history is crucial to the Court's analysis. Mr. Remarque's initial appearance in federal court, on a one-count indictment charging possession of child pornography, occurred on January 30, 2019. ECF 6. The federal public defender's office entered its appearance on Mr. Remarque's behalf, ECF 14, and filed two suppression motions thirteen days later, on February 12, 2019. ECF 16, 17. According to Mr. Remarque's own timeline, "Before the Court held a{2020 U.S. Dist. LEXIS 2} hearing to dispose of the motions to suppress and pretrial conference scheduled for March 5, 2019, the Assistant Public Defender brought a plea agreement to Defendant."1 ECF 135 at 3. The docket reflects that the former presiding judge, United States District Judge Paula Xinis, held a hearing that had been noticed as a rearraignment on March 20, 2019. ECF 19. Mr. Remarque withdrew from the plea agreement, *id.*, and Judge Xinis referred the case to a magistrate judge for an attorney inquiry hearing. ECF 20. Following that hearing, an attorney from this Court's Criminal Justice Act ("CJA") panel, Michael D. Montemarano, Esq., entered his appearance on March 25, 2019. ECF 22. However, just a few weeks later on April 8, 2019, private retained counsel, Seth Russell Okin, Esq., replaced Mr. Montemarano as counsel for Mr. Remarque. ECF 27. Mr. Okin quickly filed a motion for discovery, ECF 28, which Judge Xinis





"APPENDIX D."

denied, ECF 30.

The docket reflects that Judge Xinis held status conference calls with counsel on April 15, 2019, and May 30, 2019. However, on June 14, 2019, Mr. Remarque docketed a letter in which he represented that he had "not heard from Attorney Seth Okin Esq. since April 8, 2019,"**{2020 U.S. Dist. LEXIS 3}** the date he had entered his appearance. ECF 33. Mr. Okin subsequently filed a motion to withdraw as counsel. ECF 36. Judge Xinis re-referred the case to a magistrate judge for another attorney inquiry hearing, which occurred on July 19, 2019, and resulted in the termination of Mr. Okin's appearance. ECF 41. Mr. Montemarano again became counsel of record, and requested sixty days to provide a status report to the Court. ECF 42. Judge Xinis held a telephone conference on September 25, 2019, and subsequently entered the case's initial pretrial scheduling order. ECF 46. The scheduling order set, *inter alia*, a December 2, 2019 deadline for Mr. Remarque to file or supplement pretrial motions, a motions hearing date of January 3, 2020, and a trial date of March 25, 2020. ECF 46.

During this entire period, while Mr. Remarque was repeatedly replacing his counsel, the motions filed on Mr. Remarque's behalf by the assistant federal public defender remained pending. On or before the December 2, 2019 deadline, Mr. Montemarano filed six additional pre-trial motions. ECF 56, 57, 59, 60, 61, 64. A motions hearing occurred on February 4, 2020, at which Judge Xinis denied Mr. Remarque's pre-trial motions.**{2020 U.S. Dist. LEXIS 4}** ECF 74, 75.

On March 5, 2020, Mr. Montemarano sought a brief extension of time to file motions in limine for the expected trial on March 25, 2020. ECF 80. He timely filed a motion in limine on March 6, 2020. ECF 82. However, on March 9, 2020, the Clerk docketed a letter from Mr. Remarque, which was dated March 4, 2020, asking that Mr. Montemarano be removed as his counsel. ECF 83. On March 10, 2020, Judge Xinis again referred the case to a magistrate judge for a third attorney inquiry hearing. ECF 84. Before that hearing, however, on March 11, 2020, Chief Judge James K. Bredar issued the first of a long series of orders restricting access to Court facilities in light of the COVID-19 pandemic. *See* Standing Order No. 2020-02. Two days later, Mr. Montemarano filed a joint request to vacate the schedule in this case "since the Court will be closed over most of these dates as now set and all jury trials have been cancelled." ECF 85.

On March 30, 2020, Mr. Montemarano filed a motion seeking Mr. Remarque's release from custody for health and safety reasons, citing the pandemic. ECF 86. After briefing, United States Magistrate Judge Timothy J. Sullivan denied the motion. ECF 90. Mr. Montemarano**{2020 U.S. Dist. LEXIS 5}** sought review by the presiding judge, Judge Xinis, who denied the motion for release on April 27, 2020, following additional briefing. ECF 92, 100.

On May 17, 2020, the Government filed its first motion to exclude time pursuant to the Speedy Trial Act. ECF 101. Judge Xinis held a teleconference on June 11, 2020, but just two days later, another privately retained attorney, Donald LaRoche, Esq., entered his appearance for Mr. Remarque. ECF 102. Judge Xinis granted the Government's motion to exclude time on June 19, 2020, in a lengthy order detailing the procedural history of this case and the Court's operational status in light of the public health concerns engendered by the pandemic. ECF 103.

On July 18, 2020, Mr. LaRoche filed a motion to withdraw the motion in limine that had been filed by Mr. Montemarano. ECF 104. On July 26, 2020, the Government filed a second motion to exclude time pursuant to the Speedy Trial Act, which Judge Xinis granted in another detailed order on July 27, 2020. ECF 105, 106. In August, 2020, the Court began scheduling a very limited number of jury trials in priority cases, because it had then implemented sufficient public safety measures including, but not**{2020 U.S. Dist. LEXIS 6}** limited to, physical rearranging of courtroom facilities, installation of plexiglass barriers, and consultation with epidemiologists and engineers regarding air circulation.

As a result, Judge Xinis entered a new scheduling order, which set a pre-trial conference for September 15, 2020 and a trial date for September 21, 2020. ECF 109. The order noted that the expected length of trial would be one week. *Id.* On August 17, 2020, the case was reassigned from Judge Xinis to my docket.

Upon review of the record, and consultation with the judges who had presided over the first jury trials held during the pandemic, this Court ordered counsel to provide an estimated number of the witnesses to be called at trial, and the approximate length of their testimony. ECF 120. Those estimates reflected that the Government's case would last approximately 1.5 days, but that the defense anticipated calling up to ten witnesses, and thought that with a Haitian Creole speaking interpreter, the testimony of those witnesses would be estimated to last 3 days. ECF 122, 123. By this time, the Court had learned that jury selection for a criminal case, using the new procedures designed to protect public health and**{2020 U.S. Dist. LEXIS 7}** safety, consumed one full trial day. Accordingly, the Court became concerned that the trial would not be able to be completed during a single trial week, which would not allow for a full day of jury selection plus four-and-one-half days of testimony (not including opening statements, closing argument, or jury instructions).

The trial calendar in the Greenbelt courthouse, where Mr. Remarque's trial had been scheduled, would not permit this trial to extend past its one-week allotted window. However, on September 4, 2020, this Court notified counsel that if the trial were held in the Baltimore Courthouse (located roughly twenty-five miles from the Greenbelt Courthouse), the trial could start as scheduled and could extend into the following week to accommodate all of the anticipated witnesses. ECF 124.

On September 8, 2020, Mr. LaRoche indicated that Mr. Remarque objected to reducing the number of trial days, and also objected to relocating the trial to Baltimore. ECF 125. Accordingly, on September 8, 2020, this Court removed the September trial date from the Court's trial calendar, and directed counsel to meet and confer to provide the Court with additional trial dates. ECF 126.

After several**{2020 U.S. Dist. LEXIS 8}** attempts to obtain a list of dates agreed by both counsel, on October 2, 2020, this Court calendared the trial for its present trial date, November 16, 2020. ECF 138. Absent an uptick in viral activity causing the Court to reduce its operations to protect public health, the case will proceed to trial as scheduled.

**Legal Analysis**

Mr. Remarque argues that the Government failed to comply with constitutional and statutory requirements that he be afforded a speedy trial. ECF 139. This Court looks first to the Speedy Trial Act, 18 U.S.C. § 3161(c)(1), which generally requires that "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." The Speedy Trial Act provides that its seventy-day "clock" is tolled in certain circumstances, including when the defendant files a pre-trial motion, 18 U.S.C. § 3161(h)(1)(D), or when the ends of justice so require, 18 U.S.C. § 3161(h)(7)(A).

Mr. Remarque's initial appearance in court occurred on January 30, 2019. His attorney filed pre-trial motions thirteen days later, and those motions remained pending between February 12, 2019 and February 4, 2020. Mr. Remarque's counsel filed**{2020 U.S. Dist. LEXIS 9}** additional motions on March 5, 2020, and March 6, 2020, and the later of those motions remained pending until October 13, 2020. By that time additional defense motions had been filed, one of which remained pending until October 30, 2020. Thus, as of this writing, in this Court's view the only time credited against the seventy-day speedy trial clock is (1) the initial thirteen days before the initial motions were filed, plus (2) the thirty days between February 4, 2020 and March 5, 2020, for a maximum total of forty-three

days.2 No Speedy Trial Act violation has occurred.

Though his statutory speedy trial claim is unavailing, Mr. Remarque also contends that the Government violated his constitutional right to a speedy trial. ECF 139. Such claims are governed by the four-factor test the Supreme Court elucidated in *Barker v. Wingo*, 407 U.S. 514, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972). Specifically, the Court is to weigh: (1) the length of the delay; (2) the reason for the delay; (3) whether defendant timely asserted his right; and (4) whether the delay prejudiced the defendant's case. *Id.* at 530. The inquiry requires a "difficult and sensitive balancing process." *Id.* at 533.

The court will assume that the first factor, the 20-month length of this delay, weighs in favor of Mr.**{2020 U.S. Dist. LEXIS 10}** Remarque, and thus that the Court should inquire "into to the other factors that go into the balance." *Id.* at 530. However, the second factor, the reason for the delay, weighs overwhelmingly in favor of the Government. Despite Mr. Remarque's attempt to portray the delay as resulting from the Government's delinquent response to his motions to suppress, ECF 139 at 8, the docket conclusively tells a much different story. The delay from the filing of the motions to suppress in February, 2019, through the setting of the case schedule in September, 2019, was directly attributable to the initial but ultimately unsuccessful plea negotiations, Mr. Remarque's repeated replacement of his counsel, and the attendant delays with each replacement. *See, e.g.*, ECF 42 (July 22, 2019 letter from Mr. Montemarano requesting a sixty-day continuance upon his re-entry of appearance). In September, 2019, Judge Xinis set a reasonable trial schedule that the parties adhered to, until the pandemic necessitated an indefinite postponement. ECF 109. Even Mr. Remarque concedes that "a pandemic such as COVID-19 is a neutral reason for trial delay," ECF 139 at 11, but suggests that the Government should still be held at fault,**{2020 U.S. Dist. LEXIS 11}** because his trial would have occurred pre-pandemic absent the initial periods of delay. As described above, that logic is belied by the record, which unequivocally rests blame for the initial delays on Mr. Remarque's recurring dissatisfaction with, and replacement of, his attorneys.3 No one contests Mr. Remarque's right to counsel of choice, but he is not entitled to attribute the delays resulting from his decisions to the Government.

The third factor is the defendant's assertion of his speedy trial rights. Certainly, the record indicates that Mr. Remarque has asserted his speedy trial rights throughout the pendency of this litigation. While those assertions would typically weigh in Mr. Remarque's favor, they are undermined, as noted above, by his repeated replacement of his attorneys, including his attempt to remove his attorney just two weeks before his scheduled March, 2020 trial (at which point he had already been detained for over one year). *See, e.g.*, ECF 83. The record clearly reflects that Mr. Remarque prioritized his satisfaction with counsel over his proffered desire to proceed expeditiously to trial. His priorities other than a speedy trial also became clear when he declined**{2020 U.S. Dist. LEXIS 12}** to proceed to trial on September 21, 2020 in the Baltimore Courthouse, in favor of an indefinitely delayed trial in the Greenbelt Courthouse. Thus, this factor is neutral.

The final factor is the prejudice caused by the delay. The primary prejudice cited by Mr. Remarque arises from the pandemic: witnesses that are unavailable because of pandemic-related travel restrictions and/or the expiration of their visas, and public health restrictions preventing his attorney from visiting him in jail.4 ECF 139 at 11-13. Again, the delay that eventually resulted in his trial being impacted by the pandemic was caused by Mr. Remarque's own choices. He replaced his federal public defender with a privately retained attorney who, Mr. Remarque alleges, failed to provide adequate representation, resulting in the need to again replace that second attorney with counsel from the Criminal Justice Act panel. Without those actions, months of delay could have been avoided, and Mr. Remarque's trial may have concluded in 2019. Similarly, most of the oppressive conditions of pretrial incarceration cited by Mr. Remarque stem from the pandemic and the related

public health measures that had to be instituted within{2020 U.S. Dist. LEXIS 13} correctional institutions.

Ultimately, a balancing of the relevant factors reveals that the blame for the early delay rests with the defense, not with the Government. The latter portion of the delay results from the global pandemic that could not have been foreseen by any party, and the severe public health concerns preventing jury trials from proceeding safely for many months. Under these highly unusual circumstances, despite the delay in this case, the Government has not infringed Mr. Remarque's constitutional right to a speedy trial.

For the foregoing reasons, Mr. Remarque's motion to dismiss for unnecessary delay in bringing the defendant to trial, ECF 139, is DENIED. Despite the informal nature of this letter, it is an Order of the Court and will be docketed as such.

Sincerely yours,

/s/ Stephanie A. Gallagher

United States District Judge

**Footnotes**

1

Mr. Remarque's understanding of the case's posture appears flawed, as Judge Xinis had scheduled an initial conference call for March 5, 2019, not a motions hearing or a pretrial conference. ECF 18.
2

In addition to the time being excludable under § 3161(h)(1)(D) because of the pending defense motions, Judge Xinis also made two separate findings that the ends of justice required exclusion of the time between March 16, 2020 and September 28, 2020. ECF 103, 106.
3

Mr. Remarque correctly notes that the Government also changed counsel on several occasions. ECF 161 at 7. The docket does not reflect any delays resulting from the replacement of AUSAs.
4

Mr. Remarque also suggests that witnesses now have "dimmed memories," but has proffered or established no evidence of such failures of recollection. ECF 161 at 1.

**RE: USA v. Jean Buteau Remarque**
**UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND**
**2020 U.S. Dist. LEXIS 204666**
**Criminal Case No. SAG-19-0039**
**November 3, 2020, Decided**
**November 3, 2020, Filed**

**Editorial Information: Prior History**

United States v. Remarque, 2020 U.S. Dist. LEXIS 73000 (D. Md., Apr. 27, 2020)

**Counsel** {2020 U.S. Dist. LEXIS 1}For Jean Buteau Remarque, Defendant: Michael D Montemarano, LEAD ATTORNEY, Michael D Montemarano PA, Ellicott City, MD.
For USA, Plaintiff: Kristi Noel O'Malley, LEAD ATTORNEY, Office of the United States Attorney, Greenbelt, MD; Jared Hernandez, U.S. Attorney's Office for the District of Maryland, Greenbelt, MD.

**Judges:** Stephanie A. Gallagher, United States District Judge.

**Opinion**

**Opinion by:** Stephanie A. Gallagher

**Opinion**

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"APPENDIX E."

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The docket reflects that Judge Xinis held status conference calls with counsel on April 15, 2019, and May 30, 2019. However, on June 14, 2019, Mr. Remarque docketed a letter in which he represented that he had "not heard from Attorney Seth Okin Esq. since April 8, 2019,"**{2020 U.S. Dist. LEXIS 3}** the date he had entered his appearance. ECF 33. Mr. Okin subsequently filed a motion to withdraw as counsel. ECF 36. Judge Xinis re-referred the case to a magistrate judge for another attorney inquiry hearing, which occurred on July 19, 2019, and resulted in the termination of Mr. Okin's appearance. ECF 41. Mr. Montemarano again became counsel of record, and requested sixty days to provide a status report to the Court. ECF 42. Judge Xinis held a telephone conference on September 25, 2019, and subsequently entered the case's initial pretrial scheduling order. ECF 46. The scheduling order set, *inter alia*, a December 2, 2019 deadline for Mr. Remarque to file or supplement pretrial motions, a motions hearing date of January 3, 2020, and a trial date of March 25, 2020. ECF 46.

During this entire period, while Mr. Remarque was repeatedly replacing his counsel, the motions filed on Mr. Remarque's behalf by the assistant federal public defender remained pending. On or before the December 2, 2019 deadline, Mr. Montemarano filed six additional pre-trial motions. ECF 56, 57, 59, 60, 61, 64. A motions hearing occurred on February 4, 2020, at which Judge Xinis denied Mr. Remarque's pre-trial motions.**{2020 U.S. Dist. LEXIS 4}** ECF 74, 75.

On March 5, 2020, Mr. Montemarano sought a brief extension of time to file motions in limine for the expected trial on March 25, 2020. ECF 80. He timely filed a motion in limine on March 6, 2020. ECF 82. However, on March 9, 2020, the Clerk docketed a letter from Mr. Remarque, which was dated March 4, 2020, asking that Mr. Montemarano be removed as his counsel. ECF 83. On March 10, 2020, Judge Xinis again referred the case to a magistrate judge for a third attorney inquiry hearing. ECF 84. Before that hearing, however, on March 11, 2020, Chief Judge James K. Bredar issued the first of a long series of orders restricting access to Court facilities in light of the COVID-19 pandemic. *See* Standing Order No. 2020-02. Two days later, Mr. Montemarano filed a joint request to vacate the schedule in this case "since the Court will be closed over most of these dates as now set and all jury trials have been cancelled." ECF 85.

On March 30, 2020, Mr. Montemarano filed a motion seeking Mr. Remarque's release from custody for health and safety reasons, citing the pandemic. ECF 86. After briefing, United States Magistrate Judge Timothy J. Sullivan denied the motion. ECF 90. Mr. Montemarano**{2020 U.S. Dist. LEXIS 5}** sought review by the presiding judge, Judge Xinis, who denied the motion for release on April 27, 2020, following additional briefing. ECF 92, 100.

On May 17, 2020, the Government filed its first motion to exclude time pursuant to the Speedy Trial Act. ECF 101. Judge Xinis held a teleconference on June 11, 2020, but just two days later, another privately retained attorney, Donald LaRoche, Esq., entered his appearance for Mr. Remarque. ECF 102. Judge Xinis granted the Government's motion to exclude time on June 19, 2020, in a lengthy order detailing the procedural history of this case and the Court's operational status in light of the public health concerns engendered by the pandemic. ECF 103.

On July 18, 2020, Mr. LaRoche filed a motion to withdraw the motion in limine that had been filed by Mr. Montemarano. ECF 104. On July 26, 2020, the Government filed a second motion to exclude time pursuant to the Speedy Trial Act, which Judge Xinis granted in another detailed order on July 27, 2020. ECF 105, 106. In August, 2020, the Court began scheduling a very limited number of jury trials in priority cases, because it had then implemented sufficient public safety measures including, but not**{2020 U.S. Dist. LEXIS 6}** limited to, physical rearranging of courtroom facilities, installation of plexiglass barriers, and consultation with epidemiologists and engineers regarding air circulation.

As a result, Judge Xinis entered a new scheduling order, which set a pre-trial conference for September 15, 2020 and a trial date for September 21, 2020. ECF 109. The order noted that the expected length of trial would be one week. *Id.* On August 17, 2020, the case was reassigned from Judge Xinis to my docket.

Upon review of the record, and consultation with the judges who had presided over the first jury trials held during the pandemic, this Court ordered counsel to provide an estimated number of the witnesses to be called at trial, and the approximate length of their testimony. ECF 120. Those estimates reflected that the Government's case would last approximately 1.5 days, but that the defense anticipated calling up to ten witnesses, and thought that with a Haitian Creole speaking interpreter, the testimony of those witnesses would be estimated to last 3 days. ECF 122, 123. By this time, the Court had learned that jury selection for a criminal case, using the new procedures designed to protect public health and**{2020 U.S. Dist. LEXIS 7}** safety, consumed one full trial day. Accordingly, the Court became concerned that the trial would not be able to be completed during a single trial week, which would not allow for a full day of jury selection plus four-and-one-half days of testimony (not including opening statements, closing argument, or jury instructions).

The trial calendar in the Greenbelt courthouse, where Mr. Remarque's trial had been scheduled, would not permit this trial to extend past its one-week allotted window. However, on September 4, 2020, this Court notified counsel that if the trial were held in the Baltimore Courthouse (located roughly twenty-five miles from the Greenbelt Courthouse), the trial could start as scheduled and could extend into the following week to accommodate all of the anticipated witnesses. ECF 124.

On September 8, 2020, Mr. LaRoche indicated that Mr. Remarque objected to reducing the number of trial days, and also objected to relocating the trial to Baltimore. ECF 125. Accordingly, on September 8, 2020, this Court removed the September trial date from the Court's trial calendar, and directed counsel to meet and confer to provide the Court with additional trial dates. ECF 126.

After several**{2020 U.S. Dist. LEXIS 8}** attempts to obtain a list of dates agreed by both counsel, on October 2, 2020, this Court calendared the trial for its present trial date, November 16, 2020. ECF 138. Absent an uptick in viral activity causing the Court to reduce its operations to protect public health, the case will proceed to trial as scheduled.

**Legal Analysis**

Mr. Remarque argues that the Government failed to comply with constitutional and statutory requirements that he be afforded a speedy trial. ECF 139. This Court looks first to the Speedy Trial Act, 18 U.S.C. § 3161(c)(1), which generally requires that "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." The Speedy Trial Act provides that its seventy-day "clock" is tolled in certain circumstances, including when the defendant files a pre-trial motion, 18 U.S.C. § 3161(h)(1)(D), or when the ends of justice so require, 18 U.S.C. § 3161(h)(7)(A).

Mr. Remarque's initial appearance in court occurred on January 30, 2019. His attorney filed pre-trial motions thirteen days later, and those motions remained pending between February 12, 2019 and February 4, 2020. Mr. Remarque's counsel filed**{2020 U.S. Dist. LEXIS 9}** additional motions on March 5, 2020, and March 6, 2020, and the later of those motions remained pending until October 13, 2020. By that time additional defense motions had been filed, one of which remained pending until October 30, 2020. Thus, as of this writing, in this Court's view the only time credited against the seventy-day speedy trial clock is (1) the initial thirteen days before the initial motions were filed, plus (2) the thirty days between February 4, 2020 and March 5, 2020, for a maximum total of forty-three

days.2 No Speedy Trial Act violation has occurred.

Though his statutory speedy trial claim is unavailing, Mr. Remarque also contends that the Government violated his constitutional right to a speedy trial. ECF 139. Such claims are governed by the four-factor test the Supreme Court elucidated in *Barker v. Wingo*, 407 U.S. 514, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972). Specifically, the Court is to weigh: (1) the length of the delay; (2) the reason for the delay; (3) whether defendant timely asserted his right; and (4) whether the delay prejudiced the defendant's case. *Id.* at 530. The inquiry requires a "difficult and sensitive balancing process." *Id.* at 533.

The court will assume that the first factor, the 20-month length of this delay, weighs in favor of Mr.**{2020 U.S. Dist. LEXIS 10}** Remarque, and thus that the Court should inquire "into to the other factors that go into the balance." *Id.* at 530. However, the second factor, the reason for the delay, weighs overwhelmingly in favor of the Government. Despite Mr. Remarque's attempt to portray the delay as resulting from the Government's delinquent response to his motions to suppress, ECF 139 at 8, the docket conclusively tells a much different story. The delay from the filing of the motions to suppress in February, 2019, through the setting of the case schedule in September, 2019, was directly attributable to the initial but ultimately unsuccessful plea negotiations, Mr. Remarque's repeated replacement of his counsel, and the attendant delays with each replacement. *See, e.g.*, ECF 42 (July 22, 2019 letter from Mr. Montemarano requesting a sixty-day continuance upon his re-entry of appearance). In September, 2019, Judge Xinis set a reasonable trial schedule that the parties adhered to, until the pandemic necessitated an indefinite postponement. ECF 109. Even Mr. Remarque concedes that "a pandemic such as COVID-19 is a neutral reason for trial delay," ECF 139 at 11, but suggests that the Government should still be held at fault,**{2020 U.S. Dist. LEXIS 11}** because his trial would have occurred pre-pandemic absent the initial periods of delay. As described above, that logic is belied by the record, which unequivocally rests blame for the initial delays on Mr. Remarque's recurring dissatisfaction with, and replacement of, his attorneys.3 No one contests Mr. Remarque's right to counsel of choice, but he is not entitled to attribute the delays resulting from his decisions to the Government.

The third factor is the defendant's assertion of his speedy trial rights. Certainly, the record indicates that Mr. Remarque has asserted his speedy trial rights throughout the pendency of this litigation. While those assertions would typically weigh in Mr. Remarque's favor, they are undermined, as noted above, by his repeated replacement of his attorneys, including his attempt to remove his attorney just two weeks before his scheduled March, 2020 trial (at which point he had already been detained for over one year). *See, e.g.*, ECF 83. The record clearly reflects that Mr. Remarque prioritized his satisfaction with counsel over his proffered desire to proceed expeditiously to trial. His priorities other than a speedy trial also became clear when he declined**{2020 U.S. Dist. LEXIS 12}** to proceed to trial on September 21, 2020 in the Baltimore Courthouse, in favor of an indefinitely delayed trial in the Greenbelt Courthouse. Thus, this factor is neutral.

The final factor is the prejudice caused by the delay. The primary prejudice cited by Mr. Remarque arises from the pandemic: witnesses that are unavailable because of pandemic-related travel restrictions and/or the expiration of their visas, and public health restrictions preventing his attorney from visiting him in jail.4 ECF 139 at 11-13. Again, the delay that eventually resulted in his trial being impacted by the pandemic was caused by Mr. Remarque's own choices. He replaced his federal public defender with a privately retained attorney who, Mr. Remarque alleges, failed to provide adequate representation, resulting in the need to again replace that second attorney with counsel from the Criminal Justice Act panel. Without those actions, months of delay could have been avoided, and Mr. Remarque's trial may have concluded in 2019. Similarly, most of the oppressive conditions of pretrial incarceration cited by Mr. Remarque stem from the pandemic and the related

public health measures that had to be instituted within{2020 U.S. Dist. LEXIS 13} correctional institutions.

Ultimately, a balancing of the relevant factors reveals that the blame for the early delay rests with the defense, not with the Government. The latter portion of the delay results from the global pandemic that could not have been foreseen by any party, and the severe public health concerns preventing jury trials from proceeding safely for many months. Under these highly unusual circumstances, despite the delay in this case, the Government has not infringed Mr. Remarque's constitutional right to a speedy trial.

For the foregoing reasons, Mr. Remarque's motion to dismiss for unnecessary delay in bringing the defendant to trial, ECF 139, is DENIED. Despite the informal nature of this letter, it is an Order of the Court and will be docketed as such.

Sincerely yours,

/s/ Stephanie A. Gallagher

United States District Judge

**Footnotes**

1

Mr. Remarque's understanding of the case's posture appears flawed, as Judge Xinis had scheduled an initial conference call for March 5, 2019, not a motions hearing or a pretrial conference. ECF 18.
2

In addition to the time being excludable under § 3161(h)(1)(D) because of the pending defense motions, Judge Xinis also made two separate findings that the ends of justice required exclusion of the time between March 16, 2020 and September 28, 2020. ECF 103, 106.
3

Mr. Remarque correctly notes that the Government also changed counsel on several occasions. ECF 161 at 7. The docket does not reflect any delays resulting from the replacement of AUSAs.
4

Mr. Remarque also suggests that witnesses now have "dimmed memories," but has proffered or established no evidence of such failures of recollection. ECF 161 at 1.