

No. \_\_\_\_\_

In The Supreme Court Of The United States

---

Markhel D'John Harris-Franklin,

Petitioner,

vs.

United States of America,

Respondent.

---

On Petition for Writ of Certiorari  
To The United States Court of Appeals  
For The Eighth Circuit

---

**APPENDIX TO  
PETITION FOR WRIT OF CERTIORARI**

---

Daniel L. Gerdts  
*Counsel of Record for Petitioner*  
331 Second Avenue South, Suite 705  
Minneapolis, Minnesota 55401  
(612) 800-5086  
daniel@danielgerdtslaw.com

APPENDIX TABLE OF CONTENTS

Opinion of the Court of Appeals..... 1

District Court Order Adopting the Report and Recommendation ..... 29

Report and Recommendation of the Magistrate Judge..... 33

Transcript of the District Court Status Conference on 17 May 2023 ..... 54

Court of Appeals Order Denying the Petition for Rehearing En Banc..... 64

Grant of Application for Extension of Time to  
File the Petition for Certiorari ..... 65

United States Court of Appeals

For the Eighth Circuit

No. 24-2451

---

United States of America,

*Plaintiff - Appellee*

v.

Markhel D'John Harris-Franklin,

*Defendant - Appellant*

---

Appeal from United States District Court

for the District of Minnesota

---

Submitted: February 12, 2025

Filed: July 24, 2025

---

Before SMITH, KELLY, and KOBES, Circuit Judges.

---

SMITH, Circuit Judge.

Markhel D'John Harris-Franklin was charged with being an armed career criminal in possession of ammunition, in violation of 18 U.S.C. §§ 922(g)(1) and 924(e). Prior to trial, Harris-Franklin moved to dismiss the indictment, alleging a violation of the Speedy Trial Act and that 18 U.S.C. § 922(g)(1) is unconstitutional under the Second Amendment. The district court<sup>1</sup> denied Harris-Franklin's dismissal motions. Harris-Franklin proceeded to trial, and the jury found him guilty. Harris-Franklin now appeals the district court's denial of his dismissal motions. We affirm.

### I. *Background*

In September 2022, Harris-Franklin was indicted by a federal grand jury on two counts of possessing ammunition as a felon and an armed career criminal, in violation of 18 U.S.C. §§ 922(g)(1) and 924(e). Count 1 concerned Harris-Franklin's June 2022 shooting of a woman who was holding her infant son while sitting on the front steps of a St. Paul, Minnesota apartment building. Count 2 concerned law enforcement's recovery of ammunition found in a 9mm Polymer80 handgun and elsewhere in Harris-Franklin's vehicle at the time of his arrest. He was also charged in state court with attempted second-degree murder and second-degree assault stemming from the

---

<sup>1</sup> The Honorable Ann D. Montgomery, United States District Judge for the District of Minnesota, denied Harris-Franklin's dismissal motions. R. Doc. 59. Judge Montgomery subsequently recused from the case. R. Doc. 60. The case was reassigned to the Honorable Katherine M. Menendez, United States District Judge for the District of Minnesota. *Id.*

June 2022 shooting. He made his initial appearance in federal court on September 26, 2022. R. Doc. 5.

On October 18, 2022, Harris-Franklin moved the district court for a continuance of the due date for filing pretrial motions. R. Doc. 14. On October 31, the district court granted the motion to extend the time for filing pretrial motions and found “that the ends of justice served by the granting of the requested continuance outweigh[ed] the best interests of the public and [Harris-Franklin] in a speedy trial.” R. Doc. 15, at 1. The district court ordered all motions to be filed by November 8, 2022.

On November 8, 2022, Harris-Franklin filed his second motion to extend the time for filing pretrial motions. R. Doc. 16. On November 14, the district court granted the second motion to extend the time for filing pretrial motions. R. Doc. 17. It again found that the ends of justice were served by granting the continuance. The district court ordered all motions to be filed by November 22, 2022. On that date, Harris-Franklin filed a letter indicating that he would not be filing any pretrial motions. R. Doc. 18. The government filed a discovery motion and request for notice of certain defenses. R. Doc. 19. The district court took the government’s motion under advisement. *See* 18 U.S.C. § 3161(h)(1)(D). The district court had 30 days of excludable time to adjudicate the motion. *See id.* § 3161(h)(1)(H) (permitting exclusion of 30 days from the time a motion is “actually under advisement by the court”). The passage of 30 days occurred on December 23, 2022.

After the parties indicated to the district court that they were attempting to

negotiate a global resolution to both the state and federal charges pending against Harris-Franklin, the court scheduled a status conference for January 18, 2023, to discuss either a resolution or a trial date. R. Doc. 21. The morning of that hearing, the court was informed that Harris-Franklin refused to be transported to the courthouse. The district court rescheduled the hearing for two weeks later, on February 1, 2023. R. Doc. 22.

On February 1, 2023, the district court held the status conference. R. Doc. 23. Later that same day, the government moved for a competency determination. R. Doc. 24. The district court granted the motion on February 6, ordering the Bureau of Prisons (BOP) to evaluate Harris-Franklin's mental competency to proceed. R. Doc. 25. Harris-Franklin was transported to the Federal Detention Center in Englewood, Colorado, where he was examined on multiple occasions in February and March 2023.

On April 27, 2023, a BOP psychologist submitted the mental competency report to the court, opining that Harris-Franklin did suffer from mental illnesses but that these diagnoses did not establish incompetency at that time. *See* R. Doc. 26. On that same date, the district court scheduled a status conference for May 17, 2023. R. Doc. 27.

At the status conference on May 17, 2023, the district court first addressed Harris-Franklin's mental competency evaluation. The district court stated:

Since we were last in court some time ago, I ordered a forensic evaluation to be done of you, Mr. Harris-Franklin, to evaluate whether you were competent to proceed to trial. That report has now been returned to the [c]ourt, and I believe both counsel have

had an opportunity to review it.

R. Doc. 40, at 2. When Harris-Franklin indicated that he had not reviewed the report but would like to, the court provided him with a copy and afforded him time to review it. After Harris-Franklin reviewed the report, he commented that the court had “sen[t] [him] on a frivolous mental health evaluation.” *Id.* at 7. The court replied:

That was a decision that I made, and you can make a motion about that or something, but I’m trying to figure out how to go forward. *And my understanding is, whether that was frivolous or not, you’ve been found to be competent at trial.* So I’m trying to figure out how to get you a trial and how we can next proceed with your case.

*Id.* (emphasis added).

Also during the hearing, Harris-Franklin indicated his dissatisfaction with his current counsel and orally moved to remove his counsel from the case. In support, he told the district court that his attorney “refused to make arguments on [his] behalf, file motions like [he] asked him to.” *Id.* at 5–6. The district court asked Harris-Franklin how he would like to proceed, and Harris-Franklin responded that his preference was for the federal public defender to appoint another attorney. The court granted Harris-Franklin’s motion to remove counsel but took under advisement Harris-Franklin’s motion to have the federal public defender appoint another attorney. The court explained that it would need time to consult with the federal public defender about appointment of new counsel. The district court also explained to Harris-Franklin why appointment of new counsel would require additional time to file pretrial motions, stating:

And you want a trial, after [counsel] gets appointed, as soon as possible, but you have, as I understand, some motions you want

that attorney to bring as well.

I'll need to hear those motions, and at the conclusion of those motions, I'll set a trial date at that time. So effectively, we're going to have a little time built in here for you to get acquainted with a new attorney and for them to bring the new motions, if any. Understood?

*Id.* at 10–11. Harris-Franklin indicated that he understood and that he agreed to this course of action. The court then stated, “And so you’re giving up your speedy trial acts [sic] until we can get a new attorney involved in your case. Is that true?”

*Id.* at 11. Harris-Franklin responded, “No It should happen in a timely manner.” *Id.* The court responded that it would appoint new counsel “in the next day or two.” *Id.* The court again asked Harris-Franklin if that is what he “want[ed] to have happen,” and Harris-Franklin responded, “Right.” *Id.* The district court then stated, “Okay. And then they’ll bring the motions and then I’ll need some time to review the motions and rule on the motions.” *Id.* Harris-Franklin again responded, “Right.” *Id.* At the hearing, the district court did not set a firm date by which the defense must file its motions.

On May 31, 2023, the district court appointed new counsel. R. Doc. 33. The government provided defense counsel with a copy of discovery the following day, as well as a letter stating the government’s positions on various discovery matters. Defense counsel did not thereafter file any pretrial motions; instead, counsel filed a motion for leave to file pretrial motions on July 11. R. Doc. 34. The next day, the district court granted the motion and found that the ends of justice were served by granting the continuance. R. Doc. 35. The district court directed Harris-Franklin to file all motions on or before August 1.

On August 1, 2023, Harris-Franklin moved to dismiss the indictment for violation of the Speedy Trial Act. R. Doc. 37. In a separate motion to dismiss, he also challenged the constitutionality of 18 U.S.C. § 922(g)(1) based on the Second Amendment. R. Doc. 36. The magistrate judge held a hearing on the motions on August 23. R. Doc. 46.

On October 2, 2023, the magistrate judge issued a report and recommendation (R&R), recommending that the district court deny the dismissal motions. R. Doc. 54. The court first noted that this court's precedent foreclosed Harris-Franklin's Second Amendment arguments. R. Doc. 54, at 3–4 (citing *United States v. Jackson (Jackson I)*, 69 F.4th 495 (8th Cir. 2023); *United States v. Cunningham (Cunningham I)*, 70 F.4th 502, 506 (8th Cir. 2023)). With respect to the Speedy Trial Act, the magistrate judge examined “each block of time,” *id.* at 7, that Harris-Franklin alleged was non-excludable and found “that only 19 days ha[d] accrued on the speedy trial clock,” *id.* at 18. The next day, Harris-Franklin filed objections to the R&R but did not advance any new arguments. R. Doc. 55.

On November 15, 2023, the district court issued an order adopting the R&R in full. R. Doc. 59. The court also noted in a footnote that it “had granted an ends-of-justice continuance under § 3161(h)(7)(A)”; it reasoned that “failure to grant a continuance would deny Harris-Franklin's counsel the reasonable time necessary for effective preparation.” *Id.* at 3 n.1.

Shortly after issuing this order, the district court reached out to counsel to set a trial date in February or March 2024. *See* R. Doc. 63, at 3. In an email dated

December 8, 2023, the district court indicated its inclination to set Harris-Franklin's trial for January 2, 2024. But before a date could be set, the district court recused and the case was reassigned. R. Doc. 60.

On December 8, 2023, the government moved to continue the trial set for January 2, 2024, and to exclude the time under the Speedy Trial Act. R. Doc. 63, at 1. On December 13, the newly assigned district court held a hearing on the motion for continuance. R. Doc. 67. The district court orally granted the continuance, as well as the requests for exclusion of time.

On January 11, 2024, the district court set Harris-Franklin's jury trial for February 26, 2024. On January 16, Harris-Franklin proceeded to trial in state court on his state charges of attempted second-degree murder and second-degree assault. After he was convicted of both counts for the June 2022 shooting of the victim holding her infant son, the government moved to dismiss Count 1 of its indictment, which was based on the same conduct. R. Doc. 73. The district court granted the dismissal. R. Doc. 74.

On February 26, 2024, the pretrial conference was held. R. Doc. 95. The next day, Harris-Franklin proceeded to trial on Count 2 of the federal indictment concerning the ammunition found in his vehicle in July 2022. R. Doc. 92. Harris-Franklin did not renew his motion to dismiss the indictment on Speedy Trial Act (or any other) grounds before the trial began. He was convicted after a three-day jury trial. R. Doc. 94. The jury also found that Harris-Franklin was an armed career criminal under 18 U.S.C. § 924(e). R. Doc. 96; *see Erlinger v. United States*, 602 U.S.

821 (2024) (requiring a jury to find whether a defendant’s past offenses were committed on separate occasions under the ACCA).

## II. Discussion

On appeal, Harris-Franklin argues that the district court erred in denying his dismissal motions because his rights under the Speedy Trial Act were violated and 18 U.S.C. § 922(g)(1) is unconstitutional as applied to him under the Second Amendment. Because circuit precedent<sup>2</sup> forecloses Harris-Franklin’s Second Amendment argument, we focus solely on whether Harris-Franklin’s rights under the Speedy Trial Act were violated.

“The [Speedy Trial] Act generally requires a federal criminal trial to begin within 70 days after a defendant is charged or makes an initial appearance.” *Zedner v. United States*, 547 U.S. 489, 492 (2006) (citing 18 U.S.C. § 3161(c)(1)). However, “the Act recognizes that criminal cases vary widely and that there are valid reasons for greater delay in particular cases. To provide the necessary flexibility, the Act includes a long and detailed list of periods of delay that are excluded in computing the time within which trial must start.” *Id.* at 497 (citing 18 U.S.C. § 3161(h)). The Act, for example, excludes “[a]ny period of delay resulting from other

---

<sup>2</sup> See, e.g., *United States v. Jackson (Jackson II)*, 110 F.4th 1120, 1125–27 (8th Cir. 2024) (rejecting an as-applied challenge to § 922(g)(1) in which the defendant had prior nonviolent drug offenses, noting that “history supports the authority of Congress to prohibit possession of firearms by persons who have demonstrated disrespect for legal norms of society,” and concluding that “there is no need for felony-by-felony litigation regarding the constitutionality of § 922(g)(1)”), *cert. denied sub nom.*, *Jackson v. United States*, No. 24-6517, 2025 WL 1426707 (U.S. May 19, 2025).

proceedings concerning the defendant, including but not limited to” the following:

(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.

18 U.S.C. § 3161(h)(1). Another excludable period is “[a]ny period of delay resulting from the absence or unavailability of the defendant.” *Id.* § 3161(h)(3)(A); *see also id.* § 3161(h)(3)(B) (defining “absent” and “unavailable”).

“Much of the Act’s flexibility is furnished by § 3161(h)[(7)], which governs

ends-of-justice continuances . . . .” *Zedner*, 547 U.S. at 498.<sup>3</sup> Under this provision, a district court may “grant a continuance and . . . exclude the resulting delay if the court, after considering certain factors, makes on-the-record findings that the ends of justice served by granting the continuance outweigh the public’s and defendant’s interests in a speedy trial.” *Id.* at 498–99; *see also* 18 U.S.C. § 3161(h)(7)(A)–(B) (stating that “[a]ny period of delay resulting from a continuance” is excludable when the court finds “that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial” and setting forth the factors that the court “shall consider in determining whether to grant a continuance”). This provision affords “the district court discretion—within limits and subject to specific procedures—to accommodate limited delays for case-specific needs.” *Zedner*, 547 U.S. at 499.

If a defendant is not brought to trial within the time limit required under the Act, after taking into consideration any of the statutory exceptions that permit a delay, the “indictment shall be dismissed on motion of the defendant.” 18 U.S.C. § 3162(a)(2). “When a district court denies a motion to dismiss on Speedy Trial Act grounds, we review its legal conclusions *de novo* and its ultimate Speedy Trial Act ruling for an abuse of discretion.” *United States v. Wilson*, 122 F.4th 317, 323 (8th Cir. 2024).

Here, Harris-Franklin challenges the district court’s exclusion of certain periods of time from the statutory 70-day period. The district court found that 19 days

---

<sup>3</sup> “The Act was amended in 2008, and the ends-of-justice subsection was renumbered from § 3161(h)(8) to § 3161(h)(7).” *United States v. O’Connor*, 656 F.3d 630, 636 n.2 (7th Cir. 2011).

were not excludable under the Act. And the government concedes “that the parties’ plea negotiations from December 23, 2022–January 17, 2023 [(26 days)], should not have been excluded as ‘other proceedings’” under the Act. Appellee’s Br. at 35 (emphasis omitted). Combining the district court’s 19-day period with the government’s conceded 26-day period yields 45 days of non-excludable time from the 70-day clock. To prevail on appeal, Harris-Franklin must show that the district court erred in excluding 25 additional days.

*A. April 27 to May 17, 2023 (19 days)*

On February 1, 2023, the government moved for a competency evaluation. The district court granted the motion on February 6. The competency report was filed on April 27. The district court held a status conference on May 17. The court subsequently found that the period from April 27 (filing of the competency report) to May 17 (status conference) was excludable.

On appeal, Harris-Franklin argues that the district court erred in excluding these 19 days from its speedy trial calculation based “on the theory that the district court actually had granted the [g]overnment’s motion for a competency hearing and had the issue under advisement the entire time between the filing of the evaluation and the next scheduled status conference.” Appellant’s Br. at 18. According to Harris-Franklin the district court never “granted” a competency hearing and “no hearing took place,” *id.*; instead, only a status conference took place that did not concern Harris-Franklin’s competence to stand trial.

As explained *supra*, the Speedy Trial Act excludes from the 70-day calculation

the “delay resulting from any *proceeding*, including any examinations, to determine the mental competency or physical capacity of the defendant.” 18 U.S.C. § 3161(h)(1)(A) (emphasis added). “By making clear that the time spent examining the defendant is included in the delay attributed more generally to a competency proceeding, that provision indicates that such a proceeding involves more than just the competency examination itself.” *United States v. Graves*, 722 F.3d 544, 547 (3d Cir. 2013). “[P]roceeding” is defined as “[t]he business conducted by a court or other official body; a hearing”; thus, the term “suggests judicial involvement.” *Id.* (second alteration in original) (quoting *Proceeding*, Black’s Law Dictionary (8th ed. 2004)). The Act’s plain language “therefore indicates that the excludable delay under § 3161(h)(1)(A) continues beyond the completion of the Bureau of Prisons competency report, which, important though it is, is only one step in determining a defendant’s competence to stand trial.” *Id.*

This reading of § 3161(h)(1)(A) “is consistent with 18 U.S.C. § 4241, the statute regarding competency determinations.” *Id.* It “provides a mandatory process that is intended to culminate in a record-based judicial determination of competence.” *Id.* (internal quotation marks omitted). Under § 4241, a district court must “order a competency hearing whenever there is reasonable cause to believe that the defendant is mentally incompetent.” *Id.* (internal quotation marks omitted). “Prior to the date of the hearing, the court may order that a psychiatric or psychological examination of the defendant be conducted . . . .” *Id.* (ellipsis in original) (quoting 18 U.S.C. § 4241(b)). The purpose of the psychiatric examination is “to provide evidence for the

hearing.” *Id.* (internal quotation marks omitted). Following the competency hearing, the district court must decide “whether, by a preponderance of the evidence, ‘the defendant is presently suffering from a mental disease or defect rendering him mentally incompetent’ to proceed to trial.” *Id.* (quoting 18 U.S.C. § 4241(d)). Thus, the process set forth in § 4241 “suggests that a hearing is a vital part of a ‘proceeding . . . to determine the mental competency’ of the defendant.” *Id.* (ellipsis in original) (quoting 18 U.S.C. § 3161(h)(1)(A)).

The Speedy Trial Act places no limits on “the amount of time that may be spent on a competency proceeding.” *Id.* The Act requires that “[a]ny period of delay’ for a competency proceeding . . . ‘be excluded’ from the 70-day calculation.” *Id.* (alteration in original) (quoting 18 U.S.C. § 3161(h)(1)). The “broad language” of § 3161(h)(1) can be contrasted with “§ 3161(h)(6), which provides for the exclusion of 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. . . .’” *Id.* (ellipsis in original). There is no “reasonableness requirement” in § 3161(h)(1) as there is in (h)(6). *Id.* The absence of a reasonableness requirement in § 3161(h)(1) “indicat[es] that Congress intended the exclusion of the periods defined in those other provisions to be ‘automatic.’” *Id.* at 547–48 (quoting *Henderson v. United States*, 476 U.S. 321, 327 (1986)). “Thus, when it turns out that a hearing is necessary to resolve a pretrial motion, the entire period before the hearing is excluded from the Speedy Trial Act calculation, regardless of whether the delay was reasonable.” *Id.* at 548. As a result, “all delays attributable to a competency proceeding, reasonable or not, are excluded

from the 70-day calculation.” *Id.*

In summary, “the period of excludable delay under § 3161(h)(1)(A) begins when a party moves for, or the court *sua sponte* orders, a competency determination. The excluded time continues *at least until a competency hearing is held . . . .*” *Id.* (second emphasis added).<sup>4</sup>

In other words, the period between a request for a competency examination and a hearing addressing that issue is clearly part of the “delay resulting from any proceeding . . . to determine the mental competency or physical capacity of the defendant,” and therefore is “excluded . . . in computing the time within which the trial . . . must commence.”

*Id.* (ellipses in original) (quoting 18 U.S.C. § 3161(h)(1)(A)).

We have recognized that a district court has “discretion to hold or to forgo an additional hearing on [a defendant’s] competency” when “[t]he psychiatric report submitted to the court indicated that [the defendant] was competent to stand trial.” *United States v. Jones*, 23 F.3d 1307, 1309 (8th Cir. 1994). But even in the absence of a hearing, the district court must make “a subsequent judicial declaration of competency.” *Id.* at 1310 (explaining “that such a declaration is necessary”).

Here, the mental competency report docketed on April 27, 2023, concluded that Harris-Franklin was competent. At that point, the court could have forgone a competency hearing and made a judicial declaration of competency on the record. *See*

---

<sup>4</sup> 4“Because the [d]istrict [c]ourt [in *Graves*]made its competency determination at the hearing, [the Third Circuit did] not resolve the question of when a post-hearing delay may also be excluded.” *Id.* at 548 n.6.

*id.* at 1309. But the district court opted to hold a hearing. The same day that the report was filed, the district court scheduled a “[s]tatus [c]onference” for May 17. R. Doc. 28. Labeling the hearing a “status conference” is of no consequence—the record makes clear that the hearing’s purpose was to discuss, in part, Harris-Franklin’s competency. *See Graves*, 722 F.3d at 545 (noting that the competency report was reviewed at a “status hearing”). At the outset of the status conference, the district court explained that it had previously “ordered a forensic evaluation to be done . . . to evaluate” Harris-Franklin’s competency. R. Doc. 40, at 2. The court indicated that it had received the competency report and that counsel had also received and reviewed it. When Harris-Franklin indicated that he had not reviewed the report but would like to, the court provided him with a copy and afforded him time to review it. After Harris-Franklin reviewed the report, he commented that the court had “chose[n] to send [him] on a frivolous mental health evaluation.” *Id.* at 7. The court replied that “whether that was frivolous or not, [Harris-Franklin had] been found to be *competent at trial*.” *Id.* (emphasis added). As a result, the court’s next step was to determine how to “proceed with [Harris-Franklin’s] case.” *Id.* The district court’s acknowledgment that Harris-Franklin had been found competent constitutes its “judicial declaration of competency.” *See Jones*, 23 F.3d at 1310.

“[W]e conclude that the period of excludable delay under § 3161(h)(1)(A)” began to run in this case when the government moved for a competency determination on February 1, 2023. *See Graves*, 722 F.3d at 548. “The excluded time

continue[d]” until the district court held the May 17 status conference, *id.*, during which it made the necessary competency finding, *see Jones*, 23 F.3d at 1309. As a result, the district court did not err in excluding the challenged 19-day period.

B. *June 1 to July 11, 2023 (40 days)*

During the May 17, 2023 status conference, the district “[c]ourt explained the need for [a] continuance on the record . . . in response to Harris-Franklin’s oral motion for new counsel.” R. Doc. 59, at 3 n.1 (citing R. Doc. 40, at 10–11). “Harris-Franklin acknowledged that his new counsel would require time to prepare motions.” *Id.* (citing R. Doc. 40, at 10–11). On May 31, the district court appointed Harris-Franklin new counsel. On July 11, Harris-Franklin’s new counsel moved for leave to file pretrial motions. The magistrate judge found that the time period from June 1 to July 11 was “excludable because the [district court] had granted an ends-of-justice continuance under § 3161(h)(7)(A) to allow Harris-Franklin’s new counsel a reasonable time to prepare pretrial motions” at the May 17 status conference. *Id.* (citing R. Doc. 54, at 16–18). The district court agreed with this finding and clarified, “To the extent that the [c]ourt may not have fully articulated the basis for the continuance, the [c]ourt finds that failure to grant a continuance would deny Harris-Franklin’s counsel the reasonable time necessary for effective preparation.” *Id.* (citing 18 U.S.C. § 3161(h)(7)(B)(iv)). As a result, the court found “that the ends of justice served by granting the continuance outweigh[ed] the best interest of the public and Harris-Franklin in a speedy trial.” *Id.* (citing 18 U.S.C. § 3161(h)(7)(A)).

On appeal, Harris-Franklin argues that “the forty (40) days between the

appointment of counsel and the request for a continuance to prepare motions . . . is *not* excludable for any reason.” Appellant’s Br. at 20 (bold omitted). Harris-Franklin emphasizes that it was not until the district court entered its order adopting the R&R that it “put on the record the required ends-of-justice finding.” *Id.* Although Harris-Franklin concedes that “such retroactive record-making is not entirely forbidden,” he asserts that the district court’s retroactive finding was limited to new counsel needing “time to *prepare motions.*” *Id.* According to Harris-Franklin, “While the district court had anticipated that [his] new counsel *might* seek a continuance to prepare motions, new counsel did not seek that continuance until *after* the forty days at issue already had passed . . . .” *Id.* at 21 (footnote omitted).<sup>5</sup>

Section 3161(h)(7)(A) permits a district court to exclude from the 70-day period “[a]ny period of delay resulting from a continuance granted by any judge . . . 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.” The Act provides a non-exhaustive list of factors for a district court to consider in making its ends-of-justice determination, including “[w]hether the failure to grant such a continuance in a case which . . . would deny counsel for the defendant . . . the reasonable time necessary for effective preparation, taking into account the exercise of due diligence.” *Id.* § 3161(h)(7)(B)(iv).

A district court “must set forth, in the record of the case, either orally or in writing, its reasons for finding that the ends of justice are served and they outweigh

---

<sup>5</sup> Harris-Franklin has not argued that the district court failed to order a continuance on May 17; instead, he argues only that the district court did not make the ends-of-justice findings “before granting the continuance.” Appellant’s Br. at 20.

other interests. The court must make the findings, *if only in the judge's mind*, before granting the continuance.” *United States v. Johnson*, 990 F.3d 661, 667 (8th Cir. 2021) (emphasis added) (cleaned up). We require the district court to put its “findings on the record by the time [it] rules on a defendant’s motion to dismiss under § 3162(a)(2).” *Id.* (internal quotation marks omitted).

Here, in ruling on Harris-Franklin’s motion to dismiss, the district court concluded that the ends of justice would be served by continuing the trial to allow Harris-Franklin’s new counsel time to prepare for trial. Specifically, the district court found “that failure to grant a continuance would deny Harris-Franklin’s counsel the reasonable time necessary for *effective preparation*.” R. Doc. 59, at 3 n.1 (emphasis added).

Consistent with § 3161(h)(7)(B)(iv), we have upheld district courts’ findings that the ends of justice would be served by continuing the trial to allow new counsel time to prepare for trial; however, in all of those cases the district courts excluded from the speedy trial calculations the time between the appointment of new counsel *and the new trial date*.<sup>6</sup> In this case, however, the district court left the continuance

---

<sup>6</sup> *See, e.g., United States v. Harlan*, 960 F.3d 1089, 1092–93 (8th Cir. 2020) (holding that the district court committed no error in “exclud[ing] from the speedy trial calculations the time between May 31st (the date the court granted the [defendant’s motion for] continuance) and August 20th (the date the trial was continued to)” to afford new counsel additional time to prepare for trial); *United States v. Rector*, 598 F.3d 468, 473 (8th Cir. 2010) (holding that the district court committed no error in excluding from the speedy trial calculation the “time between July 23 [the date of the change-of-plea hearing at which the defendant informed the court that he wanted to terminate counsel and hire new counsel] and August 25, 2008, [the new trial date]” because the “ends of justice” would be served “by allowing (1) the defendant to retain new counsel and (2) counsel to seek admission to the district and prepare for trial”).

*open ended* to afford new counsel time to prepare motions and did not set a new trial date. Defense counsel ultimately *did not* file any motions after the May 31 appointment but instead filed the *motion for leave to file pretrial motions* on July 11, 2023.

We have “never addressed whether ends-of-justice continuances granted under § 3161(h)(7) may be open ended.” *United States v. Grady*, 88 F.4th 1246, 1256 (8th Cir. 2023).<sup>7</sup> And we declined to address the issue in *Grady* because the district court’s “continuances, while accompanied by no express end date, were effectively limited in time, *as they were regularly reevaluated.*” 88 F.4th at 1256 (emphasis added). Here, the district court did not reevaluate the continuance during the 40-day period; no progress in the case ensued until defense counsel moved for leave to file pretrial motions.

Our sister “circuits have split over whether a district court may grant an open-ended continuance under § 3161(h)(7)(A).” *United States v. Westbrook*, 119 F.3d 1176, 1187 (5th Cir. 1997). “The First and Third Circuits have stated that open-ended continuances to serve the ends of justice are not prohibited, provided ‘they are reasonable in length.’” *United States v. Spring*, 80 F.3d 1450, 1458 (10th Cir. 1996) (first quoting *United States v. Lattany*, 982 F.2d 866, 868 (3rd Cir. 1992); and then citing *United States v. Rush*, 738 F.2d 497, 508 (1st Cir. 1984)). Similarly, the Fifth

---

<sup>7</sup> We note that in an unpublished per curiam opinion, this court concluded that a defendant’s rights under the Speedy Trial Act were not violated when “the district court ordered an open-ended continuance to address [the defendant’s] numerous motions, and [the defendant] was primarily responsible for the delay of trial.” *United States v. Flying Horse*, No. 22-2202, 2022 WL 6861539, at \*1 (8th Cir. Oct. 12, 2022) (unpublished per curiam).

Circuit has “held that open-ended continuances are not prohibited, but noted that ‘such a continuance for any substantial length of time is extraordinary and must be adequately justified by the circumstances of the particular case.’” *Id.* (quoting *United States v. Jones*, 56 F.3d 581, 586 (5th Cir. 1995)). The Tenth Circuit has “agree[d] with the First, Third, and Fifth Circuits that, while it is preferable to set a specific ending date for a continuance, there will be rare cases where that is not possible, and an open-ended continuance for a reasonable time period is permissible.” *Id.* The Eleventh Circuit has likewise recognized that “[a]n open-ended continuance may be granted to serve the ends of justice,” holding that “[i]f the trial court determines that the ‘ends of justice’ require the grant of a continuance, and makes the required findings, any delay is excludable under § 3161(h)([7])(A) of the Speedy Trial Act.” *United States v. Twitty*, 107 F.3d 1482, 1489 (11th Cir. 1997).

By contrast, the Second and Ninth Circuits have concluded that ends-of-justice continuances must be limited in time. *See United States v. Gambino*, 59 F.3d 353, 358 (2d Cir. 1995) (stating that “[t]he length of an exclusion for complexity must be . . . limited in time”)<sup>8</sup>; *United States v. Jordan*, 915 F.2d 563, 565 (9th Cir. 1990) (stating that “ends of justice” continuance must “be specifically limited in time” and supported by findings justified by the record); *United States v. Pollock*, 726 F.2d 1456, 1461 (9th Cir. 1984) (rejecting open-ended continuances and holding that “an ‘ends of justice’ extension . . . is proper only if ordered for a specific period of time

---

<sup>8</sup> We note that the Second Circuit “slightly equivocated in the very next sentence, observing that ‘[g]enerally a trial court should set at least a tentative trial date in granting a complex case exclusion.’” *Spring*, 80 F.3d at 1458 (alteration in original) (quoting *Gambino*, 59 F.3d at 358).

and justified on the record with reference to the factors enumerated in section 3161(h)(7)(B)” (emphasis omitted).

“Doubtless it is generally preferable to limit a continuance to a definite period for the sake of clarity and certainty . . . .” *Rush*, 738 F.2d at 508. But we agree with the majority of our sister circuits that “open-ended continuances may be necessary in some cases.” *Lattany*, 982 F.2d at 880 (citing *Rush*, 738 F.2d at 508 (stating that there may be circumstances in which “a court is forced to order an (h)(7) continuance without knowing exactly how long the reasons supporting the continuance will remain valid”)); see also *Jones*, 56 F.3d at 586 (“There will be some situations in which it is impossible, or at least quite difficult, for the parties or the court to gauge the length of an otherwise justified continuance.”).

Open-ended “continuances can be reconciled with the Speedy Trial Act provided they are not permitted to continue for an unreasonably long period of time.” *Lattany*, 982 F.2d at 881. First, § 3161(h)(7)(A) does not contain a “fixed limit to the amount of time that may be excluded under the ends of justice provision. The provision excludes ‘any period of delay resulting from a continuance.’” *Twitty*, 107 F.3d at 1489 (quoting *United States v. Vasser*, 916 F.2d 624, 627 (11th Cir. 1990)). Second, “[s]ubsection (h)(7) of the Act is designed to make the Speedy Trial Act ‘flexible enough to accommodate the practicalities of our adversary system.’” *Lattany*, 982 F.2d at 881 (quoting *Rush*, 738 F.2d at 508). Barring open-ended continuances would be contrary to the Act’s purpose. *Id.*

Third, as relevant here, one of the non-exhaustive factors a district court

considers in making its ends-of-justice determination is the impact not granting the continuance would have on affording defendant's counsel "reasonable time" to effectively prepare. 18 U.S.C. § 3161(h)(7)(B)(iv). Thus, applying a "reasonableness limitation is appropriate to prevent continuances from delaying trials unfairly and circumventing the dismissal sanctions in the Speedy Trial Act." *Lattany*, 982 F.2d at 880–81 (quoting *Rush*, 738 F.2d at 508). Thus, "open-ended continuances to serve the ends of justice are not prohibited if they are reasonable in length." *Id.* at 868.

Because "open-ended continuances cannot . . . be unreasonably long, we must decide whether the delays that resulted from the district court's open-ended continuance . . . are reasonable under the particular circumstances of this case." *Id.* at 882. On this record, we conclude that 40 days was "a reasonable time period." *See Spring*, 80 F.3d at 1458. Harris-Franklin's request for new counsel at the May 17 status conference necessitated the delay. Harris-Franklin was dissatisfied with his counsel at the time for not filing certain pretrial motions. The district court explained that if it appointed new counsel for Harris-Franklin, that his new counsel would require additional time to file such motions. During the 40-day period, new counsel did not request a definitive trial date, nor did counsel object to the open-ended continuance. In denying the motion to dismiss, the district court clarified that the continuance was to afford new counsel a reasonable time to prepare for trial, not just to prepare pretrial motions. *See Lattany*, 982 F.2d at 881 (citing the District of Maine's Speedy Trial Plan, which recognized the concern for open-ended continuances and specifically provided "that an (h)(8) continuance may be granted

‘for either a specific period of time or a period to be determined by reference to an event . . . not within the control of the government’’).

Accordingly, we hold that the district court did not err in granting the open-ended ends-of-justice continuance under § 3161(h)(7)(A) to afford new counsel time to prepare for trial. As a result, the district court did not err in excluding the challenged 40-day period from the speedy trial calculation.

*C. Alleged Periods of Additional Non-Excludable Time*

Harris-Franklin argues that two more periods of non-excludable time accrued *after* the district court denied Harris-Franklin’s motion to dismiss based on violation of the Speedy Trial Act. First, he argues that the speedy trial clock began to run on November 16, 2023, the day after the district court denied dismissal, and ran until the government filed its motion for continuance on December 8, 2023 (22 days). Second, he argues that the speedy trial clock resumed on December 14, 2023—the day after the district court held a hearing on the government’s motion for continuance of trial, granted that continuance, and excluded the time from the old trial date to the new trial date from the speedy trial clock—and ran until the trial began on January 2, 2024 (19 days).

The government responds that Harris-Franklin “cannot raise for the first time on appeal new arguments alleging new periods of delay that supposedly occurred after the filing of the motion to dismiss.” Appellee’s Br. at 23. According to the government, “the failure to renew a motion to dismiss under the Speedy Trial Act waives any period of delay that occurs after the motion was filed.” *Id.* at 22.

“Section 3162(a)(2) [of the Speedy Trial Act] states that the ‘[f]ailure of the defendant to move for dismissal prior to trial . . . shall constitute a *waiver* of the right to dismissal under this section.’” *United States v. Taplet*, 776 F.3d 875, 879 (D.C. Cir. 2015) (second alteration in original) (emphasis added) (quoting 18 U.S.C. § 3162(a)(2)). We have not yet addressed whether “defendants waive a period of non-excludable time if they fail to raise it in their motion to dismiss or fail to renew their [Speedy Trial Act] claims prior to trial.” *Id.* at 881. But the majority of our sister circuits to have addressed the issue have held that waiver applies to specific non-excludable periods of time not raised in a dismissal motion or renewed dismissal motion.<sup>9</sup>

These courts have used four rationales for their holdings. First, “[t]hese circuits reasoned that since ‘spotting’ [Speedy Trial Act] violations is a role assigned to

---

<sup>9</sup> See, e.g., *United States v. Holley*, 813 F.3d 117, 121 (2d Cir. 2016) (per curiam) (“We have not squarely addressed whether the [Speedy Trial Act]’s waiver provision applies where, as here, the defendant made a timely motion to dismiss on [Speedy Trial Act] grounds but failed to challenge a particular period of delay. However, several other circuit courts have held that, under these circumstances, the defendant has waived any claims not specifically raised below. We are persuaded by the reasoning of our sister circuits.” (citations omitted)); *Taplet*, 776 F.3d at 881 (“[D]efendants waive a period of non-excludable time if they fail to raise it in their motion to dismiss or fail to renew their [Speedy Trial Act] claims prior to trial.”); *United States v. Loughrin*, 710 F.3d 1111, 1121 (10th Cir. 2013) (“We therefore conclude that a defendant seeking to challenge on appeal a district court’s order of continuance must do the same in his motion to dismiss to the district court. Because Loughrin did not object to the November 18 order, he cannot do so now.”); *United States v. Gates*, 709 F.3d 58, 68 (1st Cir. 2013) (“To avoid a finding of waiver, therefore, a defendant must raise any potential [Speedy Trial Act] violations before the district court in a motion to dismiss.”); cf. *United States v. O’Connor*, 656 F.3d 630, 638 (7th Cir. 2011) (finding forfeiture at a minimum, but noting that “the text of § 3162(a)(2)—read as a whole and in light of the [Supreme] Court’s language in *Zedner*—strongly suggests that violations not specifically identified in the defendant’s motion to dismiss are waived, not forfeited”).

defendants, ‘it follows that any specific violation not raised in a motion to dismiss is waived.’” *Taplet*, 776 F.3d at 880 (quoting *O’Connor*, 656 F.3d at 638). “This ensures that the district court has the opportunity to develop all arguments below and fully explain its reasoning for excluding a particular period of delay.” *Holley*, 813 F.3d at 121.

Second, and relatedly, applying plain error review instead of waiver “would force the court on a motion to dismiss for [Speedy Trial Act] violation[s] to consider every conceivable basis for challenging its orders of continuance and exclusions of time, for fear that the defendant would raise new arguments on appeal.” *Taplet*, 776 F.3d at 880 (quoting *Loughrin*, 710 F.3d at 1121). This would “shift to the district court” the “burden to identify [Speedy Trial Act] violations” and “contravene Congress’s intent to place that burden squarely on the defendant.” *Holley*, 813 F.3d at 121.

Third, “[i]mplicit in the requirement that a defendant ‘move for dismissal’ is the requirement that the defendant specify the reason for the motion.” *Taplet*, 776 F.3d at 880 (first quoting 18 U.S.C. § 3162(a)(2), and then citing Fed. R. Crim. P. 47(b) (“A motion must state the grounds on which it is based . . . .”). A defendant’s failure “to specify the particular exclusions of time within his or her motion to dismiss” means that he has not “move[d] for dismissal on that ground. And when a defendant fails to renew an objection after a period of non-excludable time has passed, the defendant has, in effect, not moved for dismissal at all.” *Id.*

Finally, “[b]y requiring defendants to notify district courts of any potential

exclusions of time within their motions to dismiss and requiring them to renew their motions, waiver also prevents ‘undue defense gamesmanship.’” *Id.* (quoting *Zedner*, 547 U.S. at 502–03). “Due to its mechanical nature, a meritorious [Speedy Trial Act] claim will always be plain [error] to a reviewing court and will always affect substantial rights.” *Id.* at 881. As a result, defendants are “incentiv[ized] to withhold meritorious non-excludable time in their motions to dismiss on the chance that if their trials go badly, plain error review of a[] [Speedy Trial Act] claim will act as a one-time reset button.” *Id.* Given this “potential for gamesmanship,” applying § “3162(a)(2)’s waiver provision . . . provides a strong incentive, forcing defendants to raise all non-excludable time periods in their motions to dismiss.” *Id.*

Accordingly, we join the majority of our sister circuits in holding that waiver applies to specific non-excludable periods of time not raised in a dismissal motion or renewed dismissal motion. Here, Harris-Franklin failed to file a renewed dismissal motion to raise these additional periods of time as non-excludable. As a result, those periods of delay are waived.

#### D. Summary

To prevail on appeal, Harris-Franklin needed to show that the district court erred in excluding 25 additional days<sup>10</sup> from the speedy trial calculation. Because he has failed to do so, we affirm the district court’s denial of Harris-Franklin’s motion to dismiss on the ground that his rights under the Speedy Trial Act were violated.

---

<sup>10</sup> Harris-Franklin also argues that the 14-day period of time from January 18 to February 1, 2023, is non-excludable. We need not address his argument. Assuming he is correct, he still falls short of satisfying his burden to show that the amount of non-excludable time was exceeded.

### III. *Conclusion*

Accordingly, we affirm the district court's denial of Harris-Franklin's motions to dismiss. First, Harris-Franklin's rights under the Speedy Trial Act were not violated. Second, circuit precedent forecloses Harris-Franklin's argument that 18U.S.C. § 922(g)(1) is unconstitutional as applied to him under the Second Amendment.

**UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA**

United States of America,

Plaintiff,

v.

Markhel D’John Harris-Franklin,

Defendant.

**ORDER ON REPORT  
AND RECOMMENDATION**  
Criminal No. 22-246 ADM/ECW

---

Emily A. Polachek and Andrew S. Dunne, Assistant United States Attorneys,  
United States Attorney’s Office, Minneapolis, MN, on behalf of Plaintiff.

Daniel L Gerdts, Esq., Minneapolis, MN, on behalf of Defendant.

---

**I. INTRODUCTION**

This matter is before the undersigned United States District Judge for a ruling on Defendant Markhel D’John Harris-Franklin’s (“Harris-Franklin”) Objection [Docket No. 55] to Magistrate Judge Elizabeth Cowan Wright’s October 2, 2023 Report and Recommendation [Docket No. 54] (“R&R”). In the R&R, Judge Wright recommends denying Harris-Franklin’s Motion to Dismiss the Indictment as Unconstitutional in Violation of the Second Amendment [Docket No. 36], and denying his Motion for Dismissal Based on the Violation of His Right to a Speedy Trial [Docket No. 37].

**II. STANDARD OF REVIEW**

In reviewing a magistrate judge’s report and recommendation, the district court “shall make a de novo determination of those portions of the report or specified

proposed findings or recommendations to which objection is made.” 28 U.S.C. § 636(b)(1)(C); see also D. Minn. L.R. 72.2(b). A district judge “may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge.” 28 U.S.C. § 636(b)(1)(C).

### III. ANALYSIS

Harris-Franklin raises two objections to the R&R. First, he objects to the recommended denial of his Motion to Dismiss the Indictment as Unconstitutional in Violation of the Second Amendment. Harris-Franklin raises this objection for purposes of preserving the issue of whether the federal felon-in-possession statute, 18 U.S.C. § 922(g)(1), is unconstitutional on its face and as applied to him. He acknowledges that binding Eighth Circuit precedent requires the Court to deny the Motion to Dismiss the Indictment. Obj. at 1-2. The Eighth Circuit has held that § 922(g)(1) is constitutional and does not require “felony-by-felony litigation.” United States v. Jackson, 69 F.4th 495, 502 (8th Cir.), reh’g and reh’g en banc denied, 2023 WL 5605618 (8th Cir. Aug. 30, 2023); see also United States v. Cunningham, 70 F.4th 502, 506 (8th Cir. 2023) (“[T]here is no need for felony-by-felony determinations regarding the constitutionality of § 922(g)(1) as applied to a particular defendant.”). Based on this precedent, the Court agrees with the R&R’s conclusion that the Motion to Dismiss the Indictment must be denied.

Harris-Franklin next objects to the recommended denial of his Motion for Dismissal Based on the Violation of His Right to a Speedy Trial. He states that he “objects to all of the magistrate’s calculations regarding the number of excludable days that do not conform to Defendant’s own analysis of excludable days set forth in

his original motion and his arguments at the motions hearing.” Obj. at 2.

The Speedy Trial Act requires Harris-Franklin’s trial to begin within 70 days after Harris-Franklin’s September 26, 2022 arraignment and initial appearance. See 18 U.S.C. § 3161(c)(1). However, “the Act includes a long and detailed list of periods of delay that are excluded in computing the time within which trial must start.” Zedner v. United States, 547 U.S. 489, 497 (2006) (citing 18 U.S.C. § 3161(h)). The R&R provides a thorough analysis of the days that have elapsed on the speedy trial clock and the days that were excluded under § 3161(h), and concludes that only 19 non-excludable days have accrued on the speedy trial clock. See R&R at 4-18. The Court has conducted a *de novo* review of the speedy trial calculations and agrees with the reasoning and conclusion in the R&R that 19 non-excludable days have elapsed.<sup>1</sup>

---

<sup>1</sup> As noted in the R&R, one of the time periods during which the speedy trial clock was tolled was from June 1, 2023 (the day after new counsel was appointed for Harris-Franklin) to July 11, 2023 (the day Harris-Franklin’s new counsel moved for leave to file pretrial motions). These days were excludable because the undersigned judge had granted an ends-of-justice continuance under § 3161(h)(7)(A) to allow Harris-Franklin’s new counsel a reasonable time to prepare pretrial motions. Id. at 16-18. The Court explained the need for the continuance on the record during a status conference in response to Harris-Franklin’s oral motion for new counsel. See Status Conf. Tr. [Docket No. 40] at 10-11. Harris-Franklin acknowledged that his new counsel would require time to prepare motions. Id. To the extent that the Court may not have fully articulated the basis for the continuance, the Court finds that failure to grant a continuance would deny Harris-Franklin’s counsel the reasonable time necessary for effective preparation. See 18 U.S.C. § 3161(h)(7)(B)(iv). Accordingly, the Court finds that the ends of justice served by granting the continuance outweigh the best interest of the public and Harris-Franklin in a speedy trial. See 18 U.S.C. § 3161(h)(7)(A).

#### IV. CONCLUSION

Based upon the foregoing, and all the files, records, and proceedings herein,

**IT IS HEREBY ORDERED** that:

1. Defendant Markhel D'John Harris-Franklin's Objection [Docket No. 55] to Magistrate Judge Elizabeth Cowan Wright's October 2, 2023 Report and Recommendation is **OVERRULED**;
2. The Report and Recommendation [Docket No. 54] is **ADOPTED**;
3. Harris-Franklin's Motion to Dismiss the Indictment as Unconstitutional in Violation of the Second Amendment [Docket No. 36] is **DENIED**;
4. Speedy Trial [Docket No. 37] is **DENIED**; and
5. The delay from June 1, 2023 to July 11, 2023 is excluded from the calculation of time required by the Speedy Trial Act pursuant to 18 U.S.C. § 3161(h)(7)(A), in that the ends of justice served by such action outweigh the best interest of the public and Defendant in a speedy trial.

BY THE COURT:

Dated: November 15, 2023

s/Ann D. Montgomery  
ANN D. MONTGOMERY  
U.S. DISTRICT JUDGE

**UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA**

---

United States of America,

Case No. 22-cr-246 (ADM/ECW)

Plaintiff,

**REPORT AND RECOMMENDATION**

v.

Markhel D’John Harris-Franklin,

Defendant.

---

This matter is before the Court on Defendant Markhel D’John Harris-Franklin’s Motion to Dismiss the Indictment as Unconstitutional in Violation of the Second Amendment (Dkt. 36) and Motion for Dismissal Based on the Violation of His Right to a Speedy Trial (Dkt. 37). This case has been referred to the undersigned United States Magistrate Judge for a report and recommendation pursuant to 28 U.S.C. § 636 and Local Rule 72.1.

The Court held a hearing on the Motions on August 23, 2023. (Dkt. 46.) Emily Polachek, Assistant U.S. Attorney, appeared on behalf of the United States of America (“the Government”). Daniel Gerdts appeared on behalf of Harris-Franklin, who was present at the hearing. For the reasons stated below, the Court recommends denial of both Motions.

**I. BACKGROUND**

Harris-Franklin is charged by Indictment with two counts of Felon in Possession of Ammunition—Armed Career Criminal in violation of 18 U.S.C. §§ 922(g)(1) and 924(e). (Dkt. 1.) The Indictment alleges that Harris-Franklin

knowingly possessed ammunition on or about June 27, 2022 and July 12, 2022 and has at least three violent felony convictions. (Dkt 1.)

Harris-Franklin seeks dismissal of the Indictment on the basis that the charging statute, 18 U.S.C. § 922(g)(1) (felon in possession of ammunition), is facially unconstitutional and unconstitutional as applied to him in violation of the Second Amendment. Harris-Franklin also seeks dismissal of the Indictment due to alleged violation of his speedy trial rights under the Speedy Trial Act, 18 U.S.C. § 3161.

## II. SECOND AMENDMENT

Harris-Franklin argues that 18 U.S.C. § 922(g)(1) is facially unconstitutional and unconstitutional as applied to him in violation of the Second Amendment in light of the United States Supreme Court's decision in *N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111 (2022). (Dkt. 36 at 1.) The Second Amendment provides: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed." U.S. Const. amend. II. The *Bruen* Court adopted the following test for determining whether a government regulation of firearms is permissible:

[W]e hold that when the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. To justify its regulation, the government may not simply posit that the regulation promotes an important interest. Rather, the government must demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation. Only if a firearm regulation is consistent with this Nation's historical tradition may a court conclude that the individual's conduct falls outside the Second Amendment's "unqualified command."

142 S. Ct. at 2126 (quoting *Konigsberg v. State Bar of Cal.*, 366 U.S. 36, 50 n.10 (1961)) (footnote omitted).

Harris-Franklin argues that merely having a felony record, however, was never among the reasonable, well-defined bases permitting the disarming of persons in this country's historical tradition of regulating firearms.<sup>1</sup> (Dkt. 36 at 3-4.) The Eighth Circuit in *United States v. Jackson*, 69 F.4th 495 (8th Cir. 2023), addressed similar arguments post-*Bruen*, finding that “legislatures traditionally employed status-based restrictions to disqualify categories of persons from possessing firearms,” and concluding that “Congress acted within the historical tradition when it enacted § 922(g)(1) and the prohibition on possession of firearms by felons.” *Id.* at 505. For this reason, the Eighth Circuit affirmed the denial of a motion to dismiss an indictment based on the argument that § 922(g)(1) was unconstitutional as applied to the defendant “because his drug offenses were ‘non-violent’ and do not show that he is more dangerous than the typical law-abiding citizen.” *Id.* at 501-05. Shortly thereafter, the Eighth Circuit rejected a defendant's as-applied challenge asserting entitlement to possess a firearm under the Second Amendment notwithstanding his past felony convictions because neither of his felonies qualified as “violent” finding it “foreclosed” by *Jackson*. *United States v. Cunningham*, 70 F.4th 502, 506 (8th Cir. 2023).

---

<sup>1</sup> Harris-Franklin argues that ammunition falls within the ambit of the Second Amendment. (See Dkt. 36 at 2-3.) The Court assumes, solely for the purposes of this analysis, that Harris-Franklin is correct.

“The District Court . . . is bound to apply the precedent of this Circuit.” *Hood v. United States*, 342 F.3d 861, 864 (8th Cir. 2003) (citation omitted). Both *Jackson* and *Cunningham* were decided post-*Bruen* and are dispositive of Harris-Franklin’s challenge to the constitutionality of § 922(g)(1). Indeed, at the hearing on this Motion, counsel for Defendant conceded that *Jackson* requires this Court to recommend against granting this Motion. Since the hearing, the Eighth Circuit has denied a petition for *en banc* rehearing and for panel rehearing of *Jackson*. See *United States v. Jackson*, No. 22-2870, 2023 WL 5605618, at \*1 (8th Cir. Aug. 30, 2023). For these reasons, based on current Eighth Circuit precedent, the Court recommends denial of Harris-Franklin’s Second Amendment-based Motion to Dismiss.

### III. SPEEDY TRIAL

Harris-Franklin seeks dismissal of the Indictment due to alleged violation of his speedy trial rights under the Speedy Trial Act.<sup>2</sup> The Court addresses the parties’ arguments below.

#### A. Legal Standard

The Act mandates that in non-guilty plea cases, as here, trial must commence within 70 days from either the indictment filing date or the defendant’s first

---

<sup>2</sup> Portions of the Act were renumbered in 2008. See Judicial Administration and Technical Amendments Act of 2008, Pub. L. No. 110–406, § 13, 122 Stat. 4294 (describing amendment of § 3161(h)(1) as “striking subparagraphs (B) and (C)” and “redesignating subparagraphs (D) through (J) as subparagraphs (B) through (H), respectively,” amendments to § 3161(h)(2) as “striking paragraph (5),” and amendments of § 3162(h) (3) as “redesignating paragraphs (6) through (9) as paragraphs (5) through (8), respectively”). This renumbering does not affect the substantive analysis of the Act’s language.

appearance, whichever occurs later. 18 U.S.C. § 3161(c)(1). The Eighth Circuit has interpreted this language as “requir[ing] that a federal criminal defendant be brought to trial within seventy days of the filing of his indictment or his arraignment, whichever is later.” *United States v. Flores-Lagonas*, 993 F.3d 550, 565 (8th Cir. 2021). The clock begins to run the day after the date of the triggering event. *See* Fed. R. Crim. P. 45(a) (“In computing any period of time the day of the act or event from which the designated period of time begins to run shall not be included.”); *see also United States v. Stoudenmire*, 74 F.3d 60, 63 (4th Cir. 1996) (“In determining this 70-day period, the day of the event that triggers the [Act’s] clock, *i.e.*, the filing or opening of the indictment or the initial appearance, is not included in the calculation; the clock begins to run the following day.”).

The Act also identifies periods of delay that are excluded when calculating the 70-day period. 18 U.S.C. § 3161(h). These include “[a]ny period of delay resulting from other proceedings concerning the defendant,” such as “delay resulting from any proceeding, including any examinations, to determine the mental competency or physical capacity of the defendant.” *Id.* § 3161(h)(1)(A). Another example of such delay is “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.” *Id.* § 3161(h)(1)(D). This means “the day a motion is filed through the day the district court holds a hearing on the motion is excluded.” *Stoudenmire*, 74 F.3d at 63 (citing *Henderson v. United States*, 476 U.S. 321, 332 (1986)); *United States v. Parker*, 30 F.3d 542, 546 (4th Cir.), *cert. denied*, 513 U.S. 1029 (1994)); *see also*

*United States v. Moses*, 15 F.3d 774, 777 (8th Cir. 1994) (excluding date a detention motion was filed from speedy trial calculation). Also excluded is “time after a hearing has been held where a district court awaits additional filings from the parties that are needed for proper disposition of the motion.” *Henderson*, 476 U.S. at 331; *see also United States v. Blankenship*, 67 F.3d 673, 676 (8th Cir. 1995) (“Similarly, [the Eighth Circuit] has stated that ‘when a pretrial motion requires a hearing, the excludable period runs . . . until the date when the parties have submitted any additional materials requested by the court.’”) (quoting *United States v. Long*, 900 F.2d 1270, 1274 (8th Cir. 1990)).

The Act further provides that if a court does not “dispose of the motion” at the hearing, “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” is excluded from the statutory speedy trial calculation. 18 U.S.C. § 3161(h)(1)(H). Another period to be excluded is “[a]ny period of delay resulting from the absence or unavailability of the defendant.” *Id.* § 3161(h)(3)(A). And a judge may grant a continuance when she finds “that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial.” *Id.* § 3161(h)(7)(A).

## **B. Speedy Trial Count**

Harris-Franklin argues that 134 non-excludable days (based on the Court’s count from his brief) have accrued since his September 26, 2022 arraignment and initial appearance, requiring dismissal because that number exceeds the 70

permitted by the Act. (Dkt. 37 at 2; *see generally* Dkt. 37 (identifying accrued days).) The Government counters that only 19 days have accrued.<sup>3</sup> (Dkt. 45 at 2-3.) The Court addresses each block of time below.

***September 26, 2022 to October 10, 2022.*** The Indictment issued on September 21, 2022 (Dkt. 1) and Harris-Franklin made his initial appearance and was arraigned on September 26, 2022 (Dkts. 5, 6). Unless September 27, 2022 is excludable for other reasons, the speedy trial clock started on that date, because it is the day after Harris-Franklin’s arraignment. *See Flores-Lagonas*, 993 F.3d at 565. On October 11, 2022, the Government filed a motion for protective order. (Dkt. 12.) Harris-Franklin argues that 15 days accrued between September 26 and October 12, 2022, while the Government argues that only 14 days accrued because September 27, 2022 is excluded. (Dkt. 37 at 2; Dkt. 45 at 3.)

The Government argues that September 27, 2022 is excluded because the Court issued written orders that day on the Government’s motion for detention and appointing counsel for Harris-Franklin, those orders constitute “proceedings involving the defendant,” and, pursuant to *Stoudenmire*, the clock did not resume until the day after those orders issued. (Dkt. 45 at 3 (citing Dkts. 7, 9).) But at the August 23 hearing, Harris-Franklin countered that the *Stoudenmire* rule only applies if a motion is not disposed of during the hearing, and the Court disposed of both motions during the September 26, 2022 proceeding. In response, the Government argued at the hearing that there were still proceedings involving

---

<sup>3</sup> According to the Government, Harris-Franklin argues that 155 days have accrued. (Dkt. 45 at 2.)

Harris-Franklin until the September 27 orders issued because the law requires a written detention order to issue, making the written order necessary, and the order appointing counsel and the arraignment order issued on the same date as the written detention order.

Neither party provided any relevant authority as to counting time when a court orally grants a motion at a hearing but later docketes a written order. The Court agrees with Harris-Franklin's analysis (but not his 15-day count) for two reasons. First, the minutes state that Harris-Franklin was appointed counsel (who represented him at the initial appearance and arraignment that day), arraigned, and ordered detained at the September 26, 2022 proceeding. (Dkts. 5, 6.) Even though written orders issued the next day, the motions were disposed of on September 26, 2022 because Harris-Franklin was ordered detained (and in fact was detained) and appointed counsel on that date. The second reason is that the Act excludes a "**period of delay** resulting from other proceedings concerning the defendant." 18 U.S.C. § 3161(h)(1) (emphasis added). Here, no delay resulted from the issuance of the appointment, detention, and arraignment orders a day after the arraignment/initial appearance because the deadlines in criminal cases are triggered off the September 26, 2022 arraignment date. *See* D. Minn. LR 12.1 (a), (c). For these reasons, the Court concludes that September 27, 2022 is not excludable and 14 days accrued between September 26, 2022 and October 10, 2022.<sup>4</sup>

---

<sup>4</sup> The Court counts 14 days as follows: September 27 (day 1), September 28 (day 2), September 29 (day 3), September 30 (day 4), October 1 (day 5), October 2 (day 6), October 3 (day 7), October 4 (day 8), October 5 (day 9), October 6 (day 10), October 7 (day 11), October 8 (day 12), October 9 (day 13), and October 10 (day 14).

**October 11, 2022 to October 12, 2022.** The Government filed a motion for protective order on October 11, 2022, which the Court granted in a written order on October 12, 2022. (Dkt. 37 at 2; Dkt. 45 at 3-4.) The parties agree, and the Court finds, that the clock was tolled on those dates. *See* 18 U.S.C. § 3161(h)(1)(D), (H).

**October 13, 2022 to November 22, 2022.** The parties agree that the clock began again on October 13 and ran until October 17, 2022 (5 days). This brings the total time on the clock at this point to 19 days.

The parties agree that the clock once again stopped on October 18, 2022, when Harris-Franklin filed a motion to extend the deadline to file motions from October 18 to November 8, 2022. (Dkt. 14; *see* Dkt. 15 ¶ 9 (October 31, 2022 order granting motion and excluding time until November 8, 2022).) On November 2, 2022, Harris-Franklin moved for a second extension of time to file motions, until November 22, 2022 (Dkt. 16), and the Court subsequently granted that motion and excluded time until November 22, 2022 (Dkt. 17 ¶ 9). Then, on November 22, 2022, Harris-Franklin filed a letter stating he would not be filing pre-trial motions and requesting the case be set for trial. (Dkt. 18.) On the same day, the Government filed a discovery motion. (Dkt. 19.) The parties agree that October 18, 2022 to November 22, 2022 (the date of the Government’s discovery motion) is excludable.

---

It appears that Harris-Franklin may have counted the arraignment/initial appearance date of September 26, 2022 in his 15-day count, but that date should not be counted. *See* Fed. R. Crim. P. 45(a) (“In computing any period of time the day of the act or event from which the designated period of time begins to run shall not be included.”); *see also Stoudenmire*, 74 F.3d at 63 (“In determining this 70-day period, the day of the event that triggers the [Act’s] clock, *i.e.*, the filing or opening of the indictment or the initial appearance, is not included in the calculation; the clock begins to run the following day.”).

(See Dkt. 37 at 2-3; Dkt. 45 at 4.)

**December 22, 2022.** The parties also agree that the 30 days following the Government’s discovery motion is excludable time. (Dkt. 37 at 3; Dkt. 45 at 4.) However, quoting *Henderson*, 476 U.S. at 329, Harris-Franklin argues that the motion was taken under advisement as of November 22, 2022 because it was unopposed and no hearing was requested, and asserts that the clock began to run again on December 22, 2022. (Dkt. 37 at 3.) The Court understands this to mean Harris-Franklin thinks November 22, 2022 is included in the 30 days to decide a motion under § 3161(h)(1)(H). The Government states that the clock was stopped until and including December 22, 2022, apparently not counting November 22, 2022 in those 30 days. (Dkt. 45 at 4; *see also* Dkt. 45-1 at 3-4 (demonstrative calendar).) Having reviewed *Henderson*, including the quoted portion, that case does not stand for the proposition that November 22, 2022 is included in the 30 days of excludable time under § 3161(h)(1)(H). Rather, as the Eighth Circuit has explained: “When the motions require no hearing, the excludable period runs from the date of filing until the court receives all the parties’ submissions regarding the motions.” *Long*, 900 F.2d at 1274 (citing *Henderson*, 476 U.S. at 328-31). “Following this period excluded under section 3161(h)(1)(F), the Act will allow exclusion of **up to 30 more days** for the court to consider the motions.” *Id.* (emphasis added). Here, where all submissions were received on the filing date of November 22, 2022, the excludable period under § 3161(h)(1)(D) (formerly § 3161(h)(1)(F)) is the November 22, 2022 date, and the Act allows “up to 30 more days”—that is, until and including

December 22, 2022, for the Court to consider the discovery motion, pursuant to § 3161(h)(1)(H). The Government is correct that December 22, 2022 is excluded for speedy trial purposes, as it is the last of the “up to 30 more days” after the November 22, 2022 motion filing date.

***December 23, 2022 to January 17, 2023.*** The parties dispute whether the period from December 23, 2022 to January 17, 2023 (26 days) is excludable. The Government argues that it is excludable because the parties were engaged in active plea negotiations. (Dkt. 45 at 4-5.) The Government cites *United States v. Van Someren*, 118 F.3d 1214, 1218-19 (8th Cir. 1997), in support of this argument. In *Van Someren*, the Eighth Circuit found that counsel-only plea negotiations were not excludable under § 3161(h)(1)(I), but “the time spent on plea negotiations is excludable . . . as a ‘proceeding involving defendant’ under § 3161(h)(1).” *Id.*; see also *United States v. Goodman*, Crim. No. 05-369 (DWF/RLE), 2006 WL 1134761, at \*1 (D. Minn. Apr. 27, 2006) (adopting magistrate judge decision applying *Van Someren* and concluding “the absence of the district court’s involvement in a plea negotiation does not result in the inclusion of the plea negotiation in the speedy trial calculation, because any time expended on plea negotiations is considered a ‘proceeding involving defendant’ under § 3161(h)(1)”).

At the hearing on the Motion, Harris-Franklin countered that a more recent Eighth Circuit case, *United States v. Elmardoudi*, 501 F.3d 935, 942 (8th Cir. 2007), holds that only time resulting from the Court’s consideration of a plea agreement is automatically excludable. In *Elmardoudi*, the Eighth Circuit examined two time

periods that the Government argued were excludable from the speedy trial clock. *Id.* at 941-42. The first time period of 80 days was deemed excludable because “even though Elmardoudi had decided sometime within this period that he did not want to continue negotiations, neither Elmardoudi nor his counsel informed the government that the deal was off until January 3, 2006” and his counsel’s affidavit “indicates that during this time frame, the defense team, in accord with Elmardoudi’s directions, held out hope to the government that a global resolution still might be worked out.” *Id.* The excludability of the second time period—a 267-day window where the plea negotiations were dormant except for one discussion between the defense and prosecutors—presented “a more vexing problem.” *Id.* at 942. However, the Eighth Circuit (and the district court) did not decide whether the 267 days were excludable because both courts found that more than 70 days had accrued regardless of whether that 267-day period was excludable and took the 267 days into account when determining if dismissal should be with or without prejudice. *Id.* at 939, 942. While *Elmardoudi* did state that *Van Someren* should not be read “to lay down a per se rule that all time periods in which there were any open plea negotiations was excludable,” it did not overrule *Van Someren* or find that plea negotiations could not be excluded from the speedy trial calculation.<sup>5</sup>

---

<sup>5</sup> Harris-Franklin correctly notes that the Eleventh Circuit has observed:

In dicta, the Seventh and Eighth Circuits have embraced the idea that plea negotiations qualify as “other proceedings concerning the defendant.” See *United States v. Van Someren*, 118 F.3d 1214, 1218 (8th Cir. 1997); *United States v. Montoya*, 827 F.2d 143, 150 (7th Cir. 1987). Yet, the Eighth Circuit has more recently expressed doubt about “a per se rule that all time periods in which there are any open plea

Based on the record before the Court, between December 23, 2022 and January 17, 2023, the parties and the Assistant Ramsey County Attorney prosecuting Harris-Franklin’s state court case exchanged “approximately 36 emails and many phone calls” about a “global resolution” to Harris-Franklin’s state and federal charges through a plea agreement. (Dkt. 45 at 5; *see also* Dkts. 45-2 to 45-7, Exs. 2-7.) The Court finds that the parties were engaged in active negotiations and working towards a plea agreement in good faith. Because the parties were actively involved in plea negotiations over a relatively short 26-day period, the Court finds the plea discussions in this case analogous to the 80 days of continuing plea negotiations found excludable in *Elmardoudi*. Consequently, the Court finds that the 26 days between December 23, 2022 and January 17, 2023, the date when Harris-Franklin withdrew from the plea negotiations, are excludable under § 3161(h)(1).

***January 18, 2023 to February 1, 2023.*** Harris-Franklin argues that this period is non-excludable, but the Government responds that it is excludable because Harris-Franklin was supposed to attend court on January 18, 2023, but refused to get on the transport. (Dkt. 45 at 6; Dkt. 45-8, Ex. 8.) The Government argues that the period from and including January 18, 2023 until the next available date for a status conference (February 1, 2023) is excludable under § 3161(h)(3)(A). (Dkt. 45

---

negotiations is excludable.” *United States v. Elmardoudi*, 501 F.3d 935, 942 (8th Cir. 2007).

*United States v. Mathurin*, 690 F.3d 1236, 1241 (11th Cir. 2012) (cleaned up). However, the Court has found the 26-day plea negotiations period excludable based on the circumstances surrounding the negotiations, not a “per se rule.”

at 6-7.) The Court agrees with the Government that the period of delay resulting from the absence or unavailability of Harris-Franklin can be excluded under § 3161(h)(3)(A). Harris-Franklin does not dispute that he refused to get on the transport on January 18, 2023 or that the next available date for a status conference was February 1, 2023. The Court finds that January 18, 2023 to February 1, 2023 is excludable under § 3161(h)(3)(B). *See United States v. Bowers*, 834 F.2d 607, 609 (6th Cir. 1987) (finding time between defendant's failure to appear for an arraignment and the rescheduled arraignment constituted excludable delay resulting from absence or unavailability of the defendant).

**February 1, 2023 to May 17, 2023.** On February 1, 2023, the District Judge held a status conference and the Government moved for a psychiatric exam under 18 U.S.C. § 4241. (Dkts. 23, 24.) Harris-Franklin suggests that only 30 days should be tolled for the competency proceedings “based on the [Court’s competency] order.” (Dkt. 37 at 4 & n.1.) The Government counters, citing to *United States v. McGhee*, 532 F.3d 733, 737 (8th Cir. 2008), and *United States v. DeGarmo*, 450 F.3d 360, 363 (8th Cir. 2006), for the proposition that “the Eighth Circuit has refused to transpose the 30-day limit for competency examinations under 18 U.S.C. §§ 4241-4247, into the Act.” (Dkt. 45 at 8 n.2.) The February 6, 2023 order for psychiatric exam refers to the 30-day period the Attorney General is given to conduct the examination, but does not limit any speedy trial exclusion to 30 days. (*See* Dkt. 25 at 2.) The Eighth Circuit has rejected Harris-Franklin’s argument that any speedy trial exclusion for competency proceedings is limited by the 30-day period for a

competency exam. *DeGarmo*, 450 F.3d at 363 (“We further note that several other circuits have similarly concluded that importing into the [Act] the 30-day time limit from § 4247(b) would be improper. Accordingly, we hold that the delay attributable to DeGarmo’s competency examination was properly excluded from his [Speedy Trial Act] calculation.”). Accordingly, the Court declines to import the 30-day limit for a competency proceeding into § 3161(h)(1)(A).

The parties also disagree as to whether the period after the competency report’s filing on April 27, 2023 (Dkt. 26) to the May 17, 2023 status conference (Dkt. 32) is excludable. Harris-Franklin does not explain why he believes this time is non-excludable, but the Government argues that because a “judicial declaration of competency is necessary” after a psychiatric report of competency is filed, *United States v. Jones*, 23 F.3d 1307, 1310 (8th Cir. 1994), the 19 days between the April 27, 2023 report and the May 17 status conference should be excluded for competency proceedings under § 3161(h)(1)(A). In *Jones*, the Eighth Circuit found that while the district court had the discretion whether to hold an additional hearing on competency after receiving the report, a subsequent judicial declaration of competency is necessary. 23 F.3d at 1309-10. Citing § 3161(h)(1)(J), the Eighth Circuit found that 30 days were excludable “while the question of competency could be considered to have been under advisement.” *Id.* at 1310. Here, the District Judge addressed Harris-Franklin’s competency at the May 17, 2023 status conference, less than 30 days after receiving the April 27, 2023 report. (*See generally* Dkt. 40.) Consequently, no days accrued between the report and status conference.

**May 17, 2023 to May 31, 2023.** Both parties agree that the clock tolled on May 17, 2023 for the status conference, but Harris-Franklin argues that the Court orally disposed of the motions raised at the hearing. (Dkt. 37 at 4.) However, the transcript and minutes show that while the District Judge granted counsel’s motion to withdraw, she took Harris-Franklin’s motion to appoint new counsel under advisement. (Dkt. 32; Dkt. 40 at 10:10-11, 10:16-19.)<sup>6</sup> And thus, under § 3161(h)(1)(D), the speedy trial clock was tolled until May 31, 2023, when the District Judge appointed Harris-Franklin’s current counsel. (Dkt. 33.)

**June 1, 2023 to July 11, 2023.** Harris-Franklin argues that the speedy trial clock ran from June 1, 2023 until he filed a motion for leave to file pretrial motions on July 11, 2023. (Dkt. 37 at 4.) The Government argues that this time was tolled because the District Judge “implicitly granted an ends-of-justice continuance under § 3161(h)(7)(A)” from June 1 to July 11, 2023. (Dkt. 45 at 9.) The Government also argued that “the district court need only put those findings on the record by the time a district court rules on a defendant’s motion to dismiss under § 3162(a)(2).” (*Id.* (quoting *United States v. Johnson*, 990 F.3d 661, 667 (8th Cir. 2021).)

Here, the District Judge explained to Harris-Franklin at the May 17 status conference why appointment of new counsel would require additional time to file pretrial motions. (Dkt. 40 at 10:21-11:24.) And while Harris-Franklin initially rejected any waiver of his speedy trial rights (Dkt. 40 at 11:9-14), after the District Judge explained that she would rule on his motion to appoint new counsel in the next day or so, he appeared to agree that his attorney and the district court would

---

<sup>6</sup> Citations to transcripts are in page:line format.

need time to prepare and decide his motions (*id.* at 40:13-24). But even if Harris-Franklin did not agree to the waiver, that would not matter for purposes of an exclusion under § 3161(h)(7)(A), as a defendant’s consent is not required for exclusion under that provision. *See* 18 U.S.C. § 3161(h)(7)(A) (allowing exclusion of “[a]ny period of delay resulting from a continuance granted by any judge on [her] own motion”).

The District Judge did not expressly include the language “that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial” from § 3161(h)(7)(A) when discussing the delay at the May 17 conference. *See Johnson*, 990 F.3d at 667 (“When a district court grants an ends-of-justice continuance, it must set forth, in the record of the case, either orally or in writing, its reasons for finding that the ends of justice are served, and they outweigh other interests.” (cleaned up)). The District Judge did articulate why more time was needed—so new counsel could prepare motions for Harris-Franklin. (Dkt. 40 at 10:21-11:24.) In any event, “the district court need only put those [“ends-of-justice”] findings on the record by the time a district court rules on a defendant’s motion to dismiss.” *Id.* (quoting *Zedner v. United States*, 547 U.S. 489, 497 (2006)); *United States v. Stackhouse*, 183 F.3d 900, 901 (8th Cir. 1999) (concluding that contemporaneity between the granting of the continuance and the setting forth of findings “is not required” and “a subsequent articulation suffices”). Given that the District Judge explained to Harris-Franklin that this additional time was necessary to give any new counsel time to prepare and file motions, and that the Eighth

Circuit has found appointment of new counsel and time to prepare sufficient reason for an “ends-of-justice” continuance, *e.g.*, *United States v. Rector*, 598 F.3d 468, 473 (8th Cir. 2010) (new counsel); *United States v. Driver*, 945 F.2d 1410, 1414 (8th Cir. 1991) (prepare for trial); the Court recommends that the District Judge make any necessary findings in the Order on this Report and Recommendation, resulting in exclusion of the time from June 1 to July 11, 2023.<sup>7</sup>

***July 11, 2023 to Present.*** The parties agree that since July 11, 2023, the speedy trial clock has been tolled because Harris-Franklin filed a motion for leave to file pretrial motions on that date (Dkt. 34) and in granting that motion, the Court excluded the time until the August 1, 2023 deadline for filing those motions (Dkt. 35). As Harris-Franklin’s counsel noted at the hearing, the clock is stopped while his August 1, 2023 motions remain pending.<sup>8</sup>

---

<sup>7</sup> In any event, even if the 40 days between June 1 and July 11, 2023 accrued, it would bring the total number of accrued days to 59, below the 70 permitted by the Act.

<sup>8</sup> At the August 23, 2023 hearing, counsel for Harris-Franklin requested until September 6, 2023 to file a supplemental brief. On August 31, 2023, he filed a letter stating that he would not be “submitting any further argument or evidence in support of his pretrial motions” and “[t]he Court can take the matters under advisement forthwith on the present record.” (Dkt. 48.) The undersigned took the matter under advisement as of the next day and, pursuant to § 3161(h)(1)(H), had 30 days to issue a Report and Recommendation on the Motions. *See Long*, 900 F.2d at 1275 (stating the magistrate judge had 30 excludable days to issue a Report and Recommendation “after receiving all materials needed to decide it”). Once the Report and Recommendation is filed, the clock will toll for an additional 30 days until the District Judge holds a hearing or has all the filings needed to issue an order on the motions. *Id.* (“The filing of the report and recommendation, therefore, in essence serves to re-file the motions, together with the magistrate [judge]’s study of them, with the district court. Under section 3161(h)(1)([H]), this filing tolls the 70-day count until the district court holds a hearing or has all the submissions it needs to rule on the motions.”).

In sum, the Court finds that only 19 days have accrued on the speedy trial clock. The Court therefore recommends denial of Harris-Franklin's Motion for Dismissal Based on the Violation of his Right to a Speedy Trial.

### **C. Dismissal**

The Government makes an alternative argument that even if Harris-Franklin's speedy trial count is correct, any dismissal of this case should be without prejudice. Under the Speedy Trial Act:

In determining whether to dismiss the case with or without prejudice, the court shall consider, among others, each of the following factors: the seriousness of the offense; the facts and circumstances of the case which led to the dismissal; and the impact of a reprosecution on the administration of this chapter and on the administration of justice.

18 U.S.C. § 3162(a)(2).

Here, Harris-Franklin is charged with two counts of unlawfully possessing ammunition as an armed career criminal. (Dkt. 1.) This is a serious offense. *See United States v. Ward*, 135 F. Appx. 885, 887 (8th Cir. 2005) (stating in the Interstate Agreement on Detainers Act context: “[B]eing a felon in possession of ammunition carries a statutory maximum penalty of ten years imprisonment and a \$250,000 fine. This type of penalty reflects the seriousness of the charged offense.”). Moreover, there is no evidence that the Government delayed bringing this case to gain a tactical advantage or acted in bad faith, rather, much of the disputed delay resulted from Harris-Franklin's refusal to come to court and his decision to seek new counsel. This weighs against dismissal with prejudice. *See United States v. Richardson*, 537 F.3d 951, 958 (8th Cir. 2008).

As to prejudice, the Government argues that Harris-Franklin “is still awaiting trial on attempted murder charges in Ramsey County and would have likely been detained during this period regardless of the Government’s charges and [Harris-Franklin]’s perceived delay in his federal trial.” (Dkt. 45 at 13.) As Harris-Franklin has not asserted that he would have been released by the Ramsey County court, and having denied his Motion for a Change in Custody to Ramsey County (Dkt. 38) due to lack of evidence “indicating that Ramsey County Jail would provide him with the law library access or medical treatment he seeks” (Dkt. 51 at 3), the Court finds that this factor also weighs against dismissal with prejudice. Finally, given the causes of the disputed delays, the Court does not see how dismissal with prejudice, thereby precluding re-prosecution, would advance the administration of the Act or justice. For these reasons, if the District Judge finds a violation of the Act, the Court recommends that any dismissal be without prejudice.

#### **IV. RECOMMENDATION**

Based on the files, records, and proceedings herein, **IT IS RECOMMENDED THAT:**

1. Defendant Markhel D’John Harris-Franklin’s Motion to Dismiss the Indictment as Unconstitutional in Violation of the Second Amendment (Dkt. 36) be **DENIED**;
2. Any findings required under 18 U.S.C. § 3161(h)(7)(A) with respect to the excludability of time from June 1, 2023 to July 11, 2023 due to Defendant Markhel D’John Harris-Franklin’s oral motion for

appointment of new counsel and the time needed for new counsel to prepare motions be made in the Order on this Report and Recommendation; and

3. Defendant Markhel D'John Harris-Franklin's Motion for Dismissal Based on the Violation of his Right to a Speedy Trial (Dkt. 37) be **DENIED**, or in the alternative, that any dismissal of the Indictment be without prejudice.

DATED: October 2, 2023

*s/Elizabeth Cowan Wright*  
ELIZABETH COWAN WRIGHT  
United States Magistrate Judge

UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA

United States of America,

Plaintiff,

vs.

Markhel D'John Harris-Franklin,

Defendant.

File No. 22-cr-246  
(ADM/ECW)

Courtroom 12W  
Minneapolis, Minnesota  
May 17, 2023  
2:31 p.m.

BEFORE THE HONORABLE ANN D. MONTGOMERY  
UNITED STATES DISTRICT COURT JUDGE  
**STATUS CONFERENCE**

**APPEARANCES:**

For the Plaintiff:

UNITED STATES ATTORNEY'S OFFICE  
By: Andrew S. Dunne, Esq.  
300 South Fourth Street, #600  
Minneapolis, Minnesota 55415

For the Defendant:

CAPITOL CITY LAW GROUP, LLC  
By: A.L. Brown, Esq.  
287 East Sixth Street  
St. Paul, Minnesota 55101

Court Reporter:

BRITTANY K. BLESENER, RPR  
United States Courthouse  
300 South Fourth Street  
Minneapolis, Minnesota 55415

Proceedings reported by certified stenographer; transcript produced with computer.

**P R O C E E D I N G S**

*(In open court.)*

COURTROOM DEPUTY: The matter before the Court is the United States vs. Markhel D'John Harris-Franklin.

Counsel, please note your appearances for the record.

THE COURT: Mr. Dunne?

MR. DUNNE: Andrew Dunne, D-U-N-N-E, on behalf of the United States. Good afternoon, Your Honor.

THE COURT: Mr. Brown?

MR. BROWN: Good afternoon, Your Honor. A.L. Brown on behalf of Mr. Harris-Franklin.

THE COURT: And good afternoon as well, Mr. Harris-Franklin.

Since we were last in court some time ago, I ordered a forensic evaluation to be done of you, Mr. Harris-Franklin, to evaluate whether you were competent to proceed to trial. That report has now been returned to the Court, and I believe both counsel have had an opportunity to review it.

Is that correct from your standpoint, Mr. Dunne?

MR. DUNNE: Yes, Your Honor.

THE COURT: And from your standpoint as well, Mr. Brown?

MR. BROWN: Yes, Your Honor.

THE COURT: Mr. Harris-Franklin, have you had an

opportunity to review that report?

THE DEFENDANT: No.

THE COURT: Would you like to do so?

THE DEFENDANT: Yeah.

THE COURT: Okay. I will provide a copy of it for you now, and we're going to give you some time to read and go over that. And it will take you a few minutes to review, so I think we will have you taken back downstairs. And we will take a 15-minute recess. And when you've had time to review it, you'll let the marshals know, and if you'll give us a call that we're ready to proceed, then we'll go forward.

But we'll give Mr. Harris-Franklin what time he needs with the report. Thank you. All rise.

*(Defendant exits courtroom.)*

THE COURT: All right. Mr. Brown, have you had an opportunity to consult with Katherian Roe in light of -- since your client's return?

MR. BROWN: I have. I've talked to her twice. And she's had an opportunity to talk to Mr. Harris-Franklin as well.

THE COURT: Okay. I think we should reconvene down in my chambers on 10 for a few minutes to see where we are, and then we'll go forward from there.

*(A brief recess was taken.)*

THE COURT: Please be seated. The record should reflect we are back in session on the case here.

And I take it, Mr. Harris-Franklin, you've had some time to look at the report?

THE DEFENDANT: Oh, yeah.

THE COURT: Okay. Did you get as much time as you needed?

THE DEFENDANT: Oh, yeah.

THE COURT: Okay. I'm going to record that as a "yes."

So we need to figure out where we go from here. It's my understanding when we last met that you wished to have this case proceed to trial. Is that correct?

THE DEFENDANT: Oh, yeah.

THE COURT: And I remember Mr. Dunne at the last hearing laid out the circumstances of a plea negotiation that was on the table for you.

I'm not sure, Mr. Dunne, does that plea negotiation, is it still on the table or not or where do we stand on that?

MR. DUNNE: Well, there have been no discussions since the last court appearances, but --

THE COURT: Okay. In any event, that wasn't of interest to you, and I take it it isn't today either, true?

THE DEFENDANT: True.

THE COURT: Okay. So we need to figure out where we go from here, which I take it, is to trial. What is your thought about proceeding to trial? Mr. Brown is your current counsel. You've indicated some frustration with him previously. Is that something that remains an issue?

THE DEFENDANT: Yeah.

THE COURT: Okay. And I don't know if you had formally put it -- I'm going to actually have you come to the lectern up here.

And Mr. Brown, if you want to move over there to the other seat, that's fine. We'll keep Mr. Harris-Franklin here so I can speak directly to you.

You indicated to me in -- maybe not exactly legal words, but that you wished to have a new lawyer. And I'm trying to figure out if what you are telling me is that you're making a motion for Mr. Brown to be terminated as your legal representative and as your attorney. Is that a fair understanding?

THE DEFENDANT: Right.

THE COURT: You don't want him to be your lawyer?

THE DEFENDANT: No.

THE COURT: And you're moving that I relieve him of any further responsibility in your case?

THE DEFENDANT: Right.

THE COURT: And can you just state in a couple sentences why that would be? Just so that I make sure I fully understand what you're saying.

THE DEFENDANT: He refused to make arguments on my behalf, file motions like I asked him to. He does what he wants. I don't have no copy of a letter he wrote you. It says he wrote you a letter, to the judge. I don't have no copy of that, so I don't know what you all talked about. I should be informed of that. So all is behind the scenes that's going on. I should be inquired about what's going on, and I'm not. So you can come talk to me directly or whoever else -- somebody else to represent me.

THE COURT: Okay. I'm not sure I know what letter you're talking about.

THE DEFENDANT: It's in the transcripts.

THE COURT: Okay. Anything that's in the court file, anything Mr. Brown has filed in your case will be made available to you, and I'll make sure that we do so.

So as we proceed forward, I'm going to take your motion to excuse Mr. Brown under advisement. I'm going to think about what I want to do about that, but I think I'm likely going to grant that motion.

So then the question becomes where do we go from there. And the options that are available are -- number one would be to hire your own attorney, since he was a court-appointed attorney on the CJA panel. Is that something you've given thought to?

THE DEFENDANT: I could try.

THE COURT: Okay. Do you want time to try or -- originally you were screened and found not to have the resources with which to hire a lawyer.

THE DEFENDANT: Right. That's why I was appointed one.

THE COURT: Okay. Has that changed any? Is there anything that might -- you know, somebody would lend you money or some reason that you would like some time to try and hire an attorney?

THE DEFENDANT: Mm, maybe; maybe not.

THE COURT: Okay. That would be one option. And I'd be happy to give you some time to make some calls and we could see how that proceeds.

THE DEFENDANT: I could have had the time, but you all chose to send me on a frivolous mental health evaluation.

THE COURT: Okay. That was a decision that I made, and you can make a motion about that or something, but I'm trying to figure out how to go forward. And my understanding is, whether that was frivolous or not, you've been found to be

competent at trial. So I'm trying to figure out how to get you a trial and how we can next proceed with your case.

THE DEFENDANT: Well, yeah, if you ain't going to appoint me nobody else, then we can just proceed.

THE COURT: Okay. So the options are for you to hire your own attorney, for you to represent yourself at trial, pro se. -- to do that, I would have to conduct a hearing and find that you were competent to proceed. Or a third option might be, under the circumstances, for me to confer with Ms. Roe about whether she might be willing to appoint another attorney from the panel.

Now, usually it's just one attorney apiece, and I usually would not. And I'm not making any findings that Mr. Brown has done anything wrong here at all, because from what I can tell, he's provided you good representation. But you are differing with that.

So I could ask Ms. Roe if she would consider appointing another attorney, and if she thought that that made sense, I would be willing to do that.

So is that what you want me to do? Do you want to represent yourself? Have time to hire a new attorney?

THE DEFENDANT: The other two, hire an attorney if she don't appoint me nobody else.

THE COURT: Okay. Do you want me first to attempt to see if she would hire -- or appoint a new attorney from the panel that would be another public defender panel attorney?

THE DEFENDANT: Yeah.

THE COURT: That would be your first choice?

THE DEFENDANT: Right.

THE COURT: Okay. So are you making a motion for me to do that?

THE DEFENDANT: Right.

THE COURT: Okay. So I'm going to take forward from today, and I'll rule on in the next 24 hours or so, your motion to relieve Mr. Brown of his responsibilities. And I will take it as a motion that I seek the public defender to appoint new counsel for you.

I do want to make clear to you, if I appointed a new counsel, if Ms. Roe has someone from her panel that she is willing to appoint -- have me appoint in this case, that would be the last one. We're not going to go through multiple counsels. If you can't get along with Mr. Brown, can't deal with him, you're going to get another attorney and that would be it. There's not going to be ever a third attorney. Understand?

THE DEFENDANT: Just make sure they not rigged like he is.

THE COURT: Make sure they're not what?

THE DEFENDANT: Rigged.

THE COURT: Rigged?

THE DEFENDANT: Yeah.

THE COURT: Oh, rigged. Okay.

THE DEFENDANT: Trying to work -- to take my case and not do shit.

THE COURT: Well, that's your opinion. I --

THE DEFENDANT: That's facts.

THE COURT: Well, I'm not going to accept that as fact, but --

THE DEFENDANT: You ain't got to. I ain't asked you to.

THE COURT: I don't have to -- I don't have to today because I'm --

THE DEFENDANT: I ain't asked you to.

THE COURT: -- not making a decision on that. I have made a decision that -- at this point, that you may be relieved of Mr. Brown.

And at this point, I will grant that motion. Mr. Brown is no longer your attorney on this case.

So thank you, Mr. Brown, for your service. I do want you to give all of your materials to any attorney that might be appointed in the future from the criminal justice panel.

MR. BROWN: Of course, Your Honor.

THE COURT: And in the meantime, I will consult and take under advisement your motion to have somebody new appointed to your case, and I will advise you of that as soon as I get a result on that. Understood?

THE DEFENDANT: Yeah.

THE COURT: And you want a trial, after that gets appointed, as soon as possible, but you have, as I understand, some motions you want that attorney to bring as well. So --

THE DEFENDANT: Right.

THE COURT: -- I'll need to hear those motions, and at the conclusion of those motions, I'll set a trial date at that time. So effectively, we're going to have a little time built in here for you to get acquainted with a new attorney and for them to bring the new motions, if any. Understood?

THE DEFENDANT: Yeah.

THE COURT: Is that what you want to have happen here?

THE DEFENDANT: Right.

THE COURT: Okay. And so you're giving up your speedy trial acts until we can get a new attorney involved in your case. Is that true?

THE DEFENDANT: No.

THE COURT: What's not true?

THE DEFENDANT: It should happen in a timely manner.

THE COURT: Yeah, it's going to happen -- I mean, I'm going to rule on it in the next day or two.

THE DEFENDANT: Right.

THE COURT: Okay. And that's what you want to have happen?

THE DEFENDANT: Right.

THE COURT: Okay. And then they'll bring the motions and then I'll need some time to review the motions and rule on the motions.

THE DEFENDANT: Right.

THE COURT: Okay. Mr. Dunne, anything further from the Government?

MR. DUNNE: No, Your Honor.

THE COURT: Okay. Court will be in recess.

*(WHEREUPON, the proceedings were adjourned at 3:04 p.m.)*

**UNITED STATES COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT**

No: 24-2451

United States of America

Appellee

v.

Markhel D'John Harris-Franklin

Appellant

---

Appeal from U.S. District Court for the District of Minnesota  
(0:22-cr-00246-KMM-1)

---

**ORDER**

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

September 22, 2025

Order Entered at the Direction of the Court:  
Clerk, U.S. Court of Appeals, Eighth Circuit.

---

/s/ Susan E. Bindler

Supreme Court of the United States  
Office of the Clerk  
Washington, DC 20543-0001

Scott S. Harris  
Clerk of the Court  
(202) 479-3011

December 3, 2025

Mr. Daniel L. Gerdtts  
*Gerdtts Law PLLC*  
331 Second Avenue South  
Suite 705  
Minneapolis, MN 55401

Re: Markhel D'John Harris-Franklin  
v. United States  
Application No. 25A644

Dear Mr. Gerdtts:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Kavanaugh, who on December 3, 2025, extended the time to and including February 19, 2026.

This letter has been sent to those designated on the attached notification list.

Sincerely,

Scott S. Harris, Clerk

by 

Sara Simmons  
Case Analyst