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Dist
en banc.

Appeal No. 08-2558

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

UNITED STATES OF AMERICA
Plaintiff-Appellee,

vs.

OVERTIS SYKES
Defendant-Appellant.

==========

APPELLANT OVERTIS SYKES
PETITION FOR REHEARING AND
REHEARING EN BANC

==========

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Certification of Grounds for Rehearing

I express a belief, based on a reasoned and studied judgement, that the panel decision, attached as the Appendix of this Petition, is contrary to the following decisions of the Supreme Court of the United States and the consideration of the full court is necessary to secure and maintain uniformity of the decision of this court and the Supreme Court.

United States v. Taylor, 487 US 326, 101 L. Ed. 2d 297, 108 S. Ct. 2413 (1988)

I express a belief, based on a reasoned and studied judgement, that this appeal involves one or more questions of exceptional importance:

1. This Court should reconsider its ruling in United States v. Fountain, 840 F. 2d 509, 513 (7th Cir. 1988) because it is in conflict with the purpose of the Speedy Trial Act, and in conflict with the expressed will of Congress.

2. Can a Court adequately determine the "facts and circumstances that led to the dismissal" as required by the Speedy Trial Act 18 USC § 3162(a)(2) without isolating when the violation of the Act occured and examining the record to the culpability of each party (the government, the court, or the defendant)

Dated: August 26, 2010

Overtis Sykes

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A R G U E M E N T

The sole purpose of requesting a rehearing is to give the panel the opportunity to look at errors inadvertenly overlooked and to insure that the panel considerd all relevant factual and legal information in making it's decision. Because of this, Petitioner submits the following:

I S S U E O N E

THE PANEL'S DECISION IS IN DIRECT CONFLICT WITH THE OPINION OF THE SUPREME COURT IN UNITED STATES v. TAYLOR, 487 US 326, 101 L. Ed. 2d 297. 108 S. Ct. 2413 (1988), AND THE SPEEDY TRIAL ACT 18 USC 3162(a)(2), IN THAT NEITHER THE PANEL OR THE DISTRICT COURT EVER ISOLATED, ADDRESSED OR ARTICULATED ANY "FACT" OR "CIRCUMSTANCE" THAT DID ACTUALLY LEAD TO THE DISMISSAL, AS REQUIRES BY § 3162(a)(2).

In Taylor, 101 L. Ed. 2d at 298, the Supreme Court reversed the Judgement of the Ninth Circuit, and held that the District Court had abused it's decretion in dismissing Taylor's indictment with prejudice because the District Court "failed to consider all relevant factors or adequately support the factors it did consider." (underline emphasis added).

The Speedy Trial Act requires that a judge, when considering whether to dismiss an indictment with or without prejudice, 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."

In both the District Court's and the Panel's opinions the facts and circumstances that led to the dismissal could not properly be assesed because both are missing the following:

A. Never isolated the periods of delay that actually caused the Speedy Trail Act violation. that "actually led to the dismissal."

and therefore;

B. Never articulated any particular set "facts" or "circumstances" that actually caused the particular periods of delay that caused the Speedy Trial Act violation, that actually led to the dismissal.

and therefore;

C. Never articulated which party (the defendant, Government, or the Court), requested, caused, or was otherwise responsible for the particular set of facts and circumstances that led to the particular periods of delay that created the Speedy Trial Act violation, that actually led to the dismissal.

and therefore;

D. Never explained exactly how petitioner (or either defendant for that matter) contributed to the periods of delay, that caused the violation, that actually led to the dismissal.

and therefore;

E. Could never actually properly asses either the effect of the dismissal on the administration of the Speedy Trial Act and the Administration of Justice, or properly asses the prejudice to the defendant.

It is **impossible** to consider and/or articulate the facts and circumstances that led to the dismissal without first isolating the continuences/period(s) of delay that cause the violation, and then assertaining, from the record, which party caused those delays.

The Panel has, in denying Petitioner's appeal made and/or agreed with the following findings by the District Court, but, the district court, nor the Panel, has laid any factual foundation concerning its rulings that: **(1)** the delay had been "unconscious" on the part of the Government and the court; **(2)** that the delay was based "almost entirely" on the defendants "antics"; **(3)** the defendant was largely responsible for most of the continuences, and; **(4)** that because the defendant was largely responsible for most of the continuences, any claim of prejudice was weak. (see opinion of panel, page 11 in Appx.) These are the type of unsupported characterizations and vague rulings that was criticized in Taylor, 101 L. Ed. 2d at 300.

Periods of delay that Actually Caused the Speedy Trial Act Violation

Petitioner claims, and the Panel agrees in it's opinion on page 5, note 3, that there was 224 nonexcludable days that caused violations of the Speedy Trial Act. This Petitioner, both in his motion to dismiss in the district court and in his appeal has challenged two periods, that combined account for 207 of those nonexcludable days. Those two periods are: January 25, 2007-to-May 8, 2007 (103 days), and August 2, 2007-to-November 14, 2007 (104 days). These two periods represent the time when the Speedy Trial

Act was violated, first on the original indictment (Jan. 25-to-May 8,), and then on the superceding indictment (Aug. 2,-to-Nov. 14,). In order for the District Court's ruling to make any sense, the record of the case (transcripts) must show the following: **(1)** that the delay was "unconscious" on the part of the court; **(2)** that the delay was "unconscious" on the part of the government; and **(3)** that there was some "antict," "action," or "argument" by, or issue concerning this Petitioner, that in some way either caused or contributed to these periods of delay. Since the records and transcripts are quite clear on these points, Petitioner offers the transcripts as **prima facie evidence** of the facts and circumstances that **actually** led to the dismissal.

Tr. 1/25/2007 pg. 10, ln. 2-12, Ex. A

THE COURT: Let's set a trial date. How about sometime in -- do we have any speedy trial problems here? I mean, I have been excluding time, I'm sure --

MR MURRAY: You have been, Judge.

THE COURT: -- to provide for counsel or to work out --

MR. MURRAY: Well, we had a competency issue, we have had counsel issues.

THE COURT: That's right.

MR. MURRAY: More recently we had plea negotiations.

THE COURT: Well, I'm going to continue to exclude time.

This transcript clearly shows that both the court and the government were completely aware of the Speedy Trial clock, and with no legitimate issues left to resolve, made a conscience decision to continue to exclude time. This could only be a conscious decision to circumvent the act and deny Petitioner his right to a speedy trial.

Further, the delay was also caused by scheduling of Mr. Plotkin (standby counsel) and the Court. (see tr. Jan. 25, 2007, pg. 10, ln. 19 and continuing on pg. 11, ln. 1-17 Ex.B) :

THE COURT: Okay. All right. Then a week. What about April 2, Monday, April 2?[1/] Will we have a new jury that day, Jackie?

MR. PLOTKIN: Your Honor, sorry to interrupt, but not only do I have a trial beginning the 16th, but that also the first day, first evening of passover.

THE COURT: Okay. Passover last until what?

MR. PLOTKIN: It would be eight days until either the 9th or 10th then. I also have trial beginning the 16th of April presently before Judge Kendall.

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1. If the Trial had been set for April 2, 2007, it would have still violated the Act since the Speedy Trial clock expired on March 19, 2007.

THE COURT: How long will that take?

MR. PLOTKIN: That will take approximately a week.

THE COURT: Well, let's look at May. How about May 14th?

MR. PLOTKIN: I'm sorry your Honor. There is a very good chance I am out of town the 17th and 18th. I could do May 7th.

THE COURT: That's the Judicial Conference, Seventh Circuit Judicial Conference. May 21?

MR. PLOTKIN: I could do that.

THE COURT: Trial date May 21st. We will have a statuts, how about May 16th at 10:30, a last minute conference there.

Mr. Plotkin was standby counsel for Ms. Barkalow, but he was not the only standby counsel assigned to Ms. Barkalow. Ms. Carol A. Brook was also assigned as standby counsel. Ms. Barkalow had informed the court that she wished to go to trial and that she did not want Mr. Plotkin to do anything. Therefore, his presence was not necessary, and time cannot be excluded under the Speedy Trial Act for standby counsel.

Another reason for the delay was the Government's unsupported oral motion for an exclusion of time. Once again see Tr. 1/25/2007, pg. 12. ln. 3-12, EX.A.

THE COURT: Otherwise, May 21st at 10:00 o'clock for trial. All right. Thank you. Anything else we need to talk about?

MR. MURRAY: I would just ask that time be excluded.

THE COURT: Time continues to be excluded to provide for continuity of standby counsel and plea negotiations as to the defendant Barkalow. Okay.

MR. MURRAY: Thank you, Judge.

THE COURT: And exclusion is until further order of the court.

Under the Speedy Trial Act, the Government's request for exclusion of time is a request for a continuance (see 18 USC § 3161(h)(8)). In fact the government requested every delay in the entire year of 2007 (from Jan 25, 2007 to November 14, 2007) while never once giving the court any reason for needing the exclusion.

Further, and most importantly, Petitioner was not even in court on January 25, 2007. There were no issues concerning the defendant being considered by the court, no "arguments," "anticts," or otherwise. No motions or anything at all being considered by either the court, or the government concerning this Petitioner. Therefore, this Petitioner could not, by any stretch of the imagination, have caused or contributed to this 103 day delay. The delay that **actually caused the violation.** The court's ruling is therefore in error.

The second period of delay that led to the dismissal (104 days) from August 2, 2007, to Novenmer 14, 2007, is equally clear, Ms. Barkalow was arraigned the trial date was set for November 19, 2007, there were no issues concerning the defendants before the court, the court was not trying to decide what to do with the case, Petitioner was not present, and more importantly **The Government Requested the Exclusion of Time** . (see Tr. Aug. 1, 2007, pg. 4. ln. 21-25, & pg. 5, ln. 1, EX. B):

> THE COURT: Anything els we'll need to do before the 19th?
>
> MR. MURRAY: No. Judge. Just ask that time be excluded until that time.
>
> THE COURT: All right. Time is excluded between now and November 19 to permit trial preparation.

Petitioner could not have been responsible for this delay that actually caused the Speedy trial Act violation. The case was simply set for trial, and at the request of the government, $3\frac{1}{2}$ months were excluded. This is why the District Court could not isolate the periods of delay that led to the dismissal, because that would shine a spotlight on the actions of the government.

The Panel and The District Court Failed to Even Address what part the Government played in the delay.

THE GOVERNMENT'S REPEATED UNSUPPORTED ORAL MOTION FOR EXCLUSION OF TIME SHOW A CLEAR PATTERN OF DILATORY CONDUCT ON THE PART OF THE ATTORNEY FOR THE GOVERNMENT AND ARE CLEAR GROUNDS FOR DISMISSAL WITH PREJUDICE.

In Taylor, 101 L. Ed. 2d at 312, the Supreme Court made it clear that each parties "culpable conduct" must be considered, and how that conduct contributed to the delay. Without evaluating the roles each party and the court played in causing the delay that led to the dismissal, no court could adequately consider consider this statutory factor.

All but 18 days of the 224 day delay in this case, were as a result of unsupported oral motions by the government. The government requested exclusions of time on the following dates in 2007: January 25, May 9. May 30, July 25, and Aug 1, 2007. These request, which represented 207 unexcludible days of delay, are treated as Government request for a continuance under 18 USC § 3161(h)(8). They represent the entire year of 2007, from January 25, 2007, to November 14, 2007 when Petitioner filed his motion to dismiss . Of all of the dates above, only the May 9th request for exclusion was supported by any allowable reason.

Dilatory Practice

The government had developed a dilatory practice. They would ask that time be excluded at every court date. Therefore, If they never allowed the Speedy Trial Clock to ever start, there would never be a violation. But, in order for this tatic to be sucessful, they need a cooperative Judge. One that would accept any excuse they gave for needing the time excluded, or in the absence of an excuse from the government, manufacture one for them. The attorney for the Government found such a judge in Judge Grady.

This is a serious claim, but in the event that this case ends up in front of the Supreme Court, Petitioner wants to be able to say that he brought this issue to the Panel's attention to give them an opportunity to address the issue and correct this blatant attempt to both circumvent the requirements of the Speedy Trial Act, and to deny Petitioner and the Public their right to a speedy trial under both the Speedy Trial Act, and the Sixth Amendment.

Petitioner need make no fancy arguments. Instead, he offers the Transcripts of this case as **prima facie evidence** of the claim made above:

Tr. January 25, 2007, page 12, line(s) 3-to-12 (Ex. A)°°

THE COURT: Otherwise, May 21st at 10:00 o'clock for trial. All right. Thank You Any thing else we have to talk about?

MR. MURRAY: I would just ask that time be excluded.

THE COURT: Time continues to be excluded to provide for continunity of standby and plea negotiations as to the defendant Barkalow. Okay.

MR. MURRAY: Thank You, Judge.

THE COURT: And the exclusion is until furhter order of the court[2]

Tr. May 9, 2007, page 11, line(s) 9-14 (Ex. B)

* This day is important in showing that the Judge was so willing to exclude time whenever requested, that he agreed to exclude time, and began to make a ruling, before he even knew what he was excluding time for.

MR. MURRAY: Judge, the government would just ask that time continue to be excluded.

THE COURT: Time will continue to be excluded in the interest of continuity -- well, I don't know -- because of an intended superseding indictment and because of the pendency of a motion for severance. Okay?

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[2] This issue must be addressed in this circuit. 'open ended' ends of justice exclusion are detrimental to the administration of the Speedy trial Act and to the administration of justice, in that, they ignore both the rights of the accused, and the rights of the public in a speedy trial. the Ninth Circuit Court of Appeals has addressed this issue squarely in United States v. Clymer, 25 F. Ed 3d 842 (9th Cir. 1994) "we take this opportunity once

Tr. May 30, 2007, page 11, line 15-19 (Ex. C)

MR. MURRAY: Judge, the government ask that time be excluded.

THE COURT: Time will continue to be excluded to allow time for the superceding indictment and arraingment thereon, and the exclusion of time is till June 20th.

This government requested exclusion was granted by the Judge under § 3161(h)(6) to allow for superseding indictment. But this exclusion was improper for two reasons that need to be addressed by this Panel. **(1)** § 3161(h)(6) is only applicable when the indictment is dismissed by the attorney for the government. In this case the government never dismissed the original indictment, and more importantly, **(2)** the purpose of the Speedy Trial Act is to expedite the processing of pending criminal proceedings, not to "supervise prosecutoral discretion in investigating and charging crimes not actually before the court." United states v. Stierwalt, 16 F. 3d 282 (8th Cir. 1994); United States v. MacDonald, 456 U.S. 1, 102 S. Ct. 1497, 71 L. Ed. 2d 696 (1982); United States v. Gaskin, 364 F. 3d 438 (2nd cir. 2004).

Tr. July 25, 2007, page 10, line(s) 11-17 (Ex. D)

MR. MURRAY: your Honor, one last thing. I ask that time be excluded.

THE COURT: Yes, time is excluded as to both defendants in order to permit time for trial preperation and for the arraignment of the defendant Barkalow on the superceding indictment. Time is excluded between now and November 19th --

Tr. August 1, 2007, page 4, line(s) 21-25 & page 5, line 1 (Ex.E) °°

THE COURT: Anything else we'll need to do before the 19th?

MR. MURRAY: No, Judge. Just ask that time be excluded until that time.

THE COURT: All right. Time is excluded between now and November 19 to permit trial preperation.

From the above it is clear that both the government and the District Court had worked out a system for circumventing the requirements of the Speedy Trial Act. If this court were look into cases that were handeled by this United States Attorney (Tyler C. Murray) and/or

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again to emphasize that the "ends of justice" exclusion in § 3161(h)(8) is not to be routinely applied, and that it may not be invoked in such a way as to circumvent the time limitations set forth in the act. The Speedy Trial Act and it's Amendments are the product of a series of delicate legislative compromises. The Act requires criminal cases to be brought to trial promply, subject to certain, enumerated exceptions. This delicate balance could be seriouslt distorted if a District Court were able to make a single, open ended "ends of justice" determinations early in a case, which would "exempt the entire case from the requirements of the Speedy Trial Act altogether." Jordan, 915 F.2d at 565-566.

°° Started delays that **Actually Caused The Violation Of The Speedy Trial Act.**

by this Judge (John Grady), Petitioner has no doubt that you will discover the same pattern. This type of practiceis the very definition of the term "dilitory practice" on the part of the government, and as such, the responsibility for the delay that led directly to the dismissal rest solely with the government. This is why the District Court in its ruling on the Motion to dismiss had to avoid isolating when the violation actually occured.

Summary

Without a proper evaluation of the roles of each party and the court played in causing the delay(s), the District Court and the Panel on Appeal could not adequately consider this statutory factor. Without isolating when the violation actually occured, the roles of each party in contributing to the delay could not be articulated and the attorney for the government's actions, in filing frivolous motions for continuances and other 'dilatory practices' were ignored. 18 USC § 3162(b)(2) calls for additional sanctions for an attorney that causes such unnecessary delays. There, it states in part:

> "In any case in which counsel for the defendant or the attorney for ther government: 'files a motion solely for the purpose of delay which he knows to be totally frivolous and without merit'.... the court may punish any such counsel or attorney..."

In Saltzman, 984 F. 2d at 1093 it states: "when the delay in bringing the case to trial is the result of intentional dilatory conduct, or a pattern of neglect on the part of the government, dismissal with prejudice is the appropriate remedy." Id. at 1093-94.

If the government's repeated request for continuances are granted by the court, and those request are not connected to any legitimate govermental need, and the court grants such unsupported request for exclusions of time under § 3161(h)(8)(A)(B), without even making the necessary findings of how the "ends of justice" are served by taking such actions 'outweigh the best interest of the Public and the Defendant in a Speedy trial,' and then lay the blame for the court's granting of the government's frivolous motions for continuances at the feet of a defendant who was not present when these continuances were requested and granted, thereby excusing the dilatory practice of the government that led directly to the Speedy Trial Act violation, then the protections of the Act are reduced to being "protections" in name only. If the Speedy Trial Act does not direct the dismissal with prejudice in this case, It is difficult to envision a fact pattern which would require such a dismissal. The Act would become quite meaningless -- a paper tiger with no teeth.

I S S U E T W O

THIS COURT SHOULD RECONSIDER ITS RULING IN UNITED STATES v. FOUNTAIN, 840 F. 2d 509, 513 (7th Cir. 1988) BECAUSE IT IS IN CONFLICT WITH THE PURPOSE OF THE SPEEDY TRIAL ACT, AND IN CONFLICT WITH THE EXPRESSED WILL OF CONGRESS.

In Fountain, this court ruled that "A defendant who waits passively while the time runs has less claim to dismissal with prejudice than does a defendant who demands, but does not receive prompt attention." This quote suggest that the defendant has some duty to either bring himself to trial swiftly, or to spot a violation of the Speedy Trial Act as soon as it occures and promptly bring it to the courts attention. And if that defendant should fail to spot the violation and bring it to the court's attention on day 71, and instead does not spot the violation until day 171, and then files his motion to dismiss, he is in danger of being said to have "waited passively" while the unexcluded days have piled up. And his timely motion will count against his receiving a dismissal with prejudice. This is even though the responsibility for insuring a speedy trial rest squarely with the government.

It is well settled that "Defendants are not required to ensure speediness against themselves." United States v. Maranda, 835 F. 2d 830, and "A defendant has no duty to bring himself to trial. The state has that duty as well as the duty of ensuring that the trial is consistant with due process. Moreover,... [S]ociety has a particular interest in bringing swift prosecution, and society's representatives are the ones who should protect that interest." Barker v. Wingo, 407 U.S. at 527.

In the Panel's opinion on page 12, it states that "the court was also justified in observing that Sykes did not bring the delay to the court's attention as the number of nonexcludible days accumulated." and that he "did not bring the violation to the court's attention until he filed his motion to dismiss." See Panel opinion page 11.

When and how a defendant asserts his right to a speedy trial is part of the Barker balancing test and has to do with the Sixth Amendment right to a Speedy Trial. Congress, enacted the Speed Trial Act to protect the defendant and the Public from excessive delays on the part of the government. Congress chose not to include the requirement that a defendant assert his rights under the Speedy Trial Act. That requirement was never part of any statute. But was instead created by the Supreme Court in order to try and give the lower court some instruction as to enforcement of the Sixth Amendment right to a Speedy Trial.

Further, when Congress was formulating the Speedy trial Act, it criticized the Barker, test saying: "It provides no guidance to either the defendant or the criminal justice system. It is, in effect a neutral test which reinforces the legitimacy of delay." H.R. Rep. No. 93-1508 (1974), reprinted in 1974 U.S.C.C.A.N 7401, 7405.

Fountain, is used in the same way. To reinforce the legitimacy of excessive delay and removes the responsibility for enforcement from the government, and places it on the shoulders of the defendant. It also give the government and the court a ready made excuse to dismiss without prejudice by blaming the defendant. This is extremely troubling because it give no guidance to either the defendant or the criminal justice system as to what time frame constitutes "waiting passively", and it also assumes that a defendant spotted the violation as soon as it occured and somehow ambushed the government with a motion to dismiss.

Congress chose to only require that the motion be filed before either trial or plea. If such a motion is filed then it is timely. And a motion to dismiss for violation of the Sopeedy Trial Act cannot be both meritorious and timely, and at the same time be held against the defendant as being in some way tardy and weighing in some way tword dismissal without prejudice.

It is clear from the congressional record, that the timing of the motion to dismiss is not one of the factors "among others" that a judge should consider when deciding to dismiss with or without prejudice. If this factor is considered at all, it is error.

Petitioner request that this court reconsider its decision in Fountain, 840 F. 2d 509, and give direction to the district court that the timing of a motion to dismiss under the Speedy Trial Act is not to be considered.

R E L I E F S O U G H T

Petitioner prays that this court will grant him a rehearing, and rehearing en banc and either reverse his judgement with instructions to either dismiss his indictment with prejudice, or remand to the district court for proper consideration of the statutory factors under 18 USC § 3162(a)(2) i.e. the "facts and circumstances of the case that led to the dismissal."

Accordingly I, OVERTIS SYKES, respectfully request that this court grant this petition for a rehearing of this matter en banc.

Dated: August 26, 2010

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Certificate of Service

I certify that a true and correct copy of the attached **Petition for Rehearing en Banc** was sent by first class mail, in a properly addressed envelope, with postage pre-paid to the attorneys of record for all the parties in this action at the addresses as listed below. With the original to the Court of Appeals by placing the same in the legal mail at USP McCreary on this 26 day of August 2010.

UNITED STATES COURT OD APPEALS FOR THE SEVENTH CIRCUIT
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Chicago, Illinois 60604

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OVERTIS SYKES

In the
United States Court of Appeals
For the Seventh Circuit

No. 08-2558

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

OVERTIS SYKES,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 07 CR 857—**John F. Grady**, *Judge.*

ARGUED APRIL 6, 2009—DECIDED JULY 19, 2010

Before BAUER, SYKES, and TINDER, *Circuit Judges.*

SYKES, *Circuit Judge.* In a trial he chose not to attend, Overtis Sykes was convicted of four counts of bank robbery in violation of 18 U.S.C. § 2113(a). On appeal he advances three reasons why we should reverse his convictions. First, he claims that the charges against him should have been dismissed with prejudice as a result of a Speedy Trial Act violation. The district court noted the violation but dismissed the charges without preju-

dice, which Sykes contends was an abuse of discretion. Second, Sykes argues he was deprived of his Fifth Amendment right to meaningful access to the courts under *Bounds v. Smith*, 430 U.S. 817 (1977), because for a five-week period before his trial, he was incarcerated in a state prison that had no law library. Third, Sykes challenges the district court's decision to permit jurors to directly question the witnesses.

We affirm. The district court did not abuse its discretion when it dismissed the charges against Sykes without prejudice. The judge thoroughly considered the relevant statutory factors, *see* 18 U.S.C. § 3162(a)(2), and reasonably concluded that on balance, those factors favored dismissal without prejudice. Nor does the record support Sykes's claim that his pretrial detention deprived him of meaningful access to the courts. When he complained to the court, the judge asked whether he wanted a continuance to have more time to prepare a defense, and he said he did not. Finally, although the district court should not have given jurors free rein to directly question the witnesses, Sykes has not established prejudice.

I. Background

A. The Bank Robberies

Over a 12-day period in June 2006, four banks were robbed on Chicago's North Side. In each robbery a heavy-set African-American man walked into the bank, presented a note to the teller, and left with cash. The note from the

first robbery read: "This is a robbery[.] PUT THE 100s AND 50s on the counter[.] NO FUNNY MONEY[.] I HAVE A GUN[.] YOU HAVE 15 SECONDS." The others used similar language. Security cameras captured images of the robber in three of the robberies, and the robber left a drink carton bearing his fingerprints at the scene of the third robbery.

On June 21, 2006, four days after the last robbery, Sykes and his wife, Laura Barkalow,[1] were arrested at a nearby motel. Officers recovered about $500 in cash and a demand note stating: "This is a robbery[.] Put all loose bills on the counter[.] I HAVE A GUN[.] YOU HAVE 15 SECONDS[.]" Sykes's fingerprints were on the notes from the second and third robberies, and the fingerprints on the drink carton left behind at the third robbery matched his. Barkalow's prints were found on the notes from three of the robberies. In addition, Sykes fit the physical description of the robber provided by witnesses, and tellers from the first and fourth robberies identified Sykes in a photo array.

B. Pretrial Proceedings

Unfortunately, neither the pretrial proceedings nor the trial ran smoothly. Sykes was charged by criminal complaint in June 2006, and a month later a grand jury returned an indictment charging him with three of the four

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[1] Barkalow was tried separately. She is mentioned here only insofar as it is relevant to Sykes's appeal.

bank robberies. In early August Sykes was arraigned, entered a plea of not guilty on all counts, and exercised his right of self-representation. *See Faretta v. California*, 422 U.S. 806 (1975). The district court appointed Attorney Robert Korenkiewicz as standby counsel, and because Sykes was making some strange arguments to the court, ordered a psychiatric evaluation to determine if he was competent to stand trial.[2]

In January 2007 the court found Sykes competent to stand trial and scheduled a mid-May trial. In early May 2007, the government requested a continuance pending receipt of fingerprint evidence linking Sykes to the then-uncharged robbery. The government also

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[2] At the August 7 status hearing, Sykes told the court:

> If I may, I am a secured party on behalf of Mr. Sykes. . . . I explained to the Court on other occasions that I consider this a dispute over property. I'm a secured property over this entity. So the reason that I am here today is not a general appearance, I am here by special visit to make an offer, to exchange the bond for a guilty plea and use it as my exemption. My exemption has been registered with the Secretary of the Treasury, and that's the reason why I'm here today.

Sykes made similarly bizarre arguments throughout the case. For example, he contended that Title 18 of the United States Code was not properly enacted, that the court had no jurisdiction over him because he was a sovereign, that the government could not prosecute the case because it was not a flesh-and-blood person, and that the *Uniform Commercial Code* somehow relieved him of criminal liability.

moved to sever the trials of Sykes and Barkalow under *Bruton v. United States*, 391 U.S. 123 (1968). On May 30 the government informed the court that it was seeking a superseding indictment for the remaining robbery; the indictment was later returned on July 24, 2007. The following day, Sykes pleaded not guilty to all counts, and the court scheduled trial for November 19, 2007.

On November 14, 2007, Sykes filed a motion to dismiss the superseding indictment for a violation of the Speedy Trial Act, 18 U.S.C. §§ 3161 *et seq.* Sykes pushed for a dismissal with prejudice in light of the length of the delay, which included 224 nonexcludable days.[3] The prosecutor said he had no objection to a dismissal as long as it was without prejudice. On December 20, 2007, the court dismissed the charges without prejudice and ordered Sykes released, which occurred on December 31.

The same day as the dismissal, a grand jury returned a new indictment charging the same four bank robberies. Sykes remained free from December 31 until his arraignment on January 16, 2008, where he again made some bizarre arguments and otherwise disrupted the proceedings. The judge held him in contempt and entered not-guilty pleas on his behalf. At a January 30 status hearing, Sykes asked to be released to prepare for trial. The judge initially granted his request and set trial for March 10. The following day, however, while Sykes was

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[3] The parties spend considerable time arguing about the proper number of nonexcludable days. We will assume that Sykes's calculation of 224 days is correct.

still in custody, the judge reconsidered this decision and vacated the release order, concluding that Sykes was too risky to be released and that the presence of standby counsel was sufficient to assist Sykes in preparing for trial.

At a status hearing on March 6, four days before the scheduled trial, Sykes moved to dismiss the charges based on alleged violations of his Fifth Amendment right to meaningful access to the courts and his Sixth Amendment right to a speedy trial. Sykes explained that since January 16, 2008, he had been incarcerated at a state prison in Kankakee, Illinois, and that the prison had no law library. Sykes was apparently relying on other inmates to assist him in mailing legal documents and telephoning potential alibi witnesses and his standby counsel. Sykes told the judge that his "numerous" calls to Korenkiewicz "would not go through." Korenkiewicz confirmed that he and Sykes had not spoken during the time Sykes was held in the Kankakee prison. Korenkiewicz explained that he initially thought Sykes was housed at the Metropolitan Correctional Center ("MCC") in Chicago and had delivered trial-preparation material there for Sykes. The MCC did not forward these materials to Sykes at Kankakee or return them to Korenkiewicz.

Sykes told the court he had three alibi witnesses who would help him establish a defense, but that the witnesses had gone missing in light of the long pretrial delay. Korenkiewicz said he had not heard of these potential witnesses until earlier on March 6 and that Sykes

never asked him to try to contact these witnesses. The prosecutor hadn't heard of these witnesses, either, and noted the probable violation of Rule 12.1 of the Federal Rules of Criminal Procedure, which requires the defendant to give notice of alibi witnesses.

The judge asked Sykes if he was requesting a continuance "to permit Mr. Korenkiewicz or a court-appointed investigator to locate and interview these three alibi witnesses you claim to have." Sykes twice answered "no" and said "[t]he damage has already happened." The court responded: "You have answered my question, you are not moving for a continuance, and, therefore, the question of a trial continuance is not before the Court. We will go to trial on Monday morning." The hearing then got out of hand. Sykes alleged that the trial would be "a show trial" and that "[t]here is no defense." He interrupted the judge on several occasions, and the judge again held him in contempt. Sykes vowed he would not attend his trial and that he would not permit Korenkiewicz to attend on his behalf.

C. Trial

Trial finally commenced on March 10, 2008, and lasted two days. True to his word, Sykes did not attend and forbade Korenkiewicz from attending; they watched through a video/audio monitor but otherwise did not participate in the trial. After the prosecution presented its first witness, the judge sua sponte invited the jury's participation:

> Because Mr. Sykes is not present, I'm going to permit the jury to ask any questions you like of the witnesses as they appear. You don't have to, but if there's any question in your mind about what the witness said or you're confused about anything, go ahead and ask the witness.

Jurors seized this opportunity and posed many questions to the witnesses. Notably, while the first witness was still on the stand, a juror spoke up and asked the judge, "Does [the] defendant not have a defense?" The following exchange ensued:

> THE COURT: That would be up to him.
>
> JUROR: He has no defense attorney here, though, present?
>
> THE COURT: I appointed what we call a standby attorney for Mr. Sykes. He demanded the right to represent himself, which he has. Under the Constitution, a person has the right to represent himself. You don't have to have a lawyer.
>
> Mr. Sykes insisted on representing himself; but as is customary in cases of that kind, I appointed standby counsel for him to consult if he wished to do so. So, we have both Mr. Sykes and standby counsel, and Mr. Sykes has instructed his standby counsel not to appear today or during this trial.
>
> Mr. Sykes takes the position, for reasons that I won't go into, that this Court has no jurisdiction over him; and this certainly is one reason he's decided to waive his presence.

> JUROR: Thank you.
>
> THE COURT: But I do want the jury to know that I've given Mr. Sykes every opportunity to defend, and he has declined to appear in this trial.

The jurors asked the first witness a few more questions, and the judge then added this instruction:

> While you're reviewing that, let me remind you—or maybe this is the first time I've said it. Mr. Sykes's absence has nothing to do with whether he's guilty or not. You are to decide whether he's guilty or not based on the evidence that is presented and based on the government's burden to prove beyond a reasonable doubt that Mr. Sykes is guilty, but you should not hold against him the fact that he's not present.

After this unconventional trial, the jury found Sykes guilty on all counts, and the court sentenced him to 240 months' imprisonment.

II. Discussion

Sykes presents three arguments on appeal. First, he contends that the district court should have dismissed the charges against him with prejudice based on the conceded violation of the Speedy Trial Act. Second, Sykes argues that his pretrial detention in the Kankakee prison violated his Fifth Amendment right to meaningful access to the courts under *Bounds v. Smith*, 430 U.S. 817 (1977). Finally, he challenges the district court's decision to allow jurors to directly question the witnesses.

A. Speedy Trial Act Violation

The Speedy Trial Act generally requires a federal criminal trial to begin within 70 days from the date the defendant is charged or makes his initial appearance. 18 U.S.C. § 3161(c)(1). Section 3161(h) provides a number of exclusions to the 70-day rule. After 70 nonexcludable days have passed, the Act requires the district court to dismiss the charges "on motion of the defendant." *Id.* § 3162(a)(2). Here, Sykes made the appropriate motion, and the district court dismissed the charges.

The inquiry in this case focuses on whether the district court selected the appropriate remedy for the violation of the Speedy Trial Act. The Speedy Trial Act gives district courts substantial discretion to determine whether to dismiss the indictment with or without prejudice, requiring the court to 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." *Id.*; *United States v. Taylor*, 487 U.S. 326, 333 (1988). That the court should consider whether the defendant has been prejudiced is implicit in this broadly stated formula. *Taylor*, 487 U.S. at 341 ("[A]lthough the absence of prejudice is not dispositive, in this case it is another consideration in favor of permitting reprosecution."); *id.* at 344 (Scalia, J., concurring in part) ("[T]hat prejudice to the defendant is one of the factors that the phrase 'among others' in § 3162(a)(2) refers to . . . seem[s] to me so utterly clear from the text of the legislation . . . .").

We review the district court's decision to dismiss without prejudice for abuse of discretion, *United States v. Killingsworth*, 507 F.3d 1087, 1090 (7th Cir. 2007), but "undertake more substantive scrutiny to ensure that the judgment is supported in terms of the factors identified in the statute," *Taylor*, 487 U.S. at 337. Here, the judge explained that balancing the statutory factors was "easy to do." The judge noted that the bank-robbery charges against Sykes were "quite serious" and a dismissal with prejudice would result in "a gross miscarriage of justice" given the gravity of the offenses. The judge also said the delay had been "unconscious" on the part of the government and the court, and instead was based almost "entirely [on] the antics of Mr. Sykes, which I now believe to have been totally a product of his imaginative efforts to defend the case based upon notions that he knows are far-fetched and not supported by any rational legal basis." The judge also noted that Sykes did not bring the Speedy Trial Act violation to the court's attention until he filed his motion to dismiss. Finally, regarding prejudice, the judge said that because Sykes was "largely responsible" for most of the continuances, any claim of prejudice was weak; the continuances, the judge remarked, were "granted in some effort to understand what to do with the case that [Sykes] has made into a serious challenge to the Court's ability to do justice."

The court did not abuse its discretion in weighing these factors. The judge accurately characterized bank robbery as "quite serious." *See United States v. Jones*, 213 F.3d 1253, 1257 (10th Cir. 2000) (characterizing armed-bank-robbery and firearm charges as "extremely serious"). The

judge was entitled to consider Sykes's outlandish and disruptive behavior, which posed serious challenges for the court and was in large part responsible for the delay in bringing the case to trial. The court also correctly considered the absence of fault on the part of the government. *See Killingsworth*, 507 F.3d at 1091 ("[T]he absence of bad faith by the government and the lack of prejudice to the defendant nudge this factor in favor of dismissal without prejudice."); *United States v. Arango*, 879 F.2d 1501, 1508 (7th Cir. 1989) (similar). And despite Sykes's argument to the contrary, the court was also justified in observing that Sykes did not bring the delay to the court's attention as the number of nonexcludable days accumulated. *See United States v. Fountain*, 840 F.2d 509, 513 (7th Cir. 1988) ("A defendant who waits passively while the time runs has less claim to dismissal with prejudice than does a defendant who demands, but does not receive, prompt attention.").

There is one aspect of the district court's ruling that requires further discussion, however. The judge commented that our opinion in *Killingsworth* "indicates that unless there is good reason for dismissing with prejudice, the dismissal should be without prejudice." This statement might be read to suggest that the judge thought *Killingsworth* established a presumption in favor of dismissal without prejudice for violations of the Speedy Trial Act. *Killingsworth* did not articulate such a presumption, and indeed, such a holding would be directly contrary to the Supreme Court's opinion in *Taylor*. *See Taylor*, 487 U.S. at 334 ("Congress did not intend any particular type of dismissal to serve as the

presumptive remedy for a Speedy Trial Act violation."); *id.* at 343 n.15 ("[W]e have expressly concluded that there is no presumption in favor of either form of dismissal."). Instead, *Killingsworth* merely concluded that a three-day violation of the Act did not warrant a dismissal with prejudice for charges of possession with intent to distribute over 500 grams of cocaine and possession of a firearm in furtherance of a drug-trafficking crime. Here, the record as a whole makes it clear that the judge ultimately did not apply *Killingsworth* as if it created a presumption in favor of dismissal without prejudice; rather, the judge thoroughly considered and weighed all of the statutory factors, as required by the statute and controlling caselaw.

Sykes claims the court was wrong to hold him responsible for much of the delay. Our review of the record convinces us otherwise. Sykes repeatedly advanced frivolous arguments and made the efficient handling of his case extremely difficult. He also points to the length of the delay, noting that there were 224 nonexcludable days. A lengthy delay is one important factor for the court to consider. But there are no bright-line rules, and a delay of 224 nonexcludable days does not by itself require dismissal with prejudice. *See, e.g., Jones*, 213 F.3d 1253 (affirming district court's dismissal without prejudice in case involving charges of bank robbery and weapons possession where there were 414 nonexcludable days).

Finally, Sykes takes issue with the district court's view that the delay did not imperil his defense. His primary contention on this point is that the delay allowed the

government to bring an additional bank-robbery count in the superseding indictment. This argument makes little sense. The government could have brought that charge at any time within the statute of limitations, even if the district court dismissed the other three counts with prejudice. Sykes's last claim of prejudice is that he remained incarcerated while awaiting trial. But this too is just one factor for the district court to consider. Here, the court was well aware that Sykes remained in pretrial custody and weighed that against the fact that Sykes himself caused a substantial amount of the delay. The district court was well within its discretion to dismiss the charges without prejudice.

B. Fifth Amendment Right to Meaningful Access to the Courts

Sykes next argues that his pretrial detention in the Kankakee prison violated his Fifth Amendment right to meaningful access to the courts under *Bounds v. Smith*, 430 U.S. 817 (1977). *Bounds* held that the "fundamental constitutional right of access to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law." 430 U.S. at 828. The Court made clear, however, that "while adequate law libraries are one constitutionally acceptable method to assure meaningful access to the courts, our decision here . . . does not foreclose alternative means to achieve that goal." *Id.* at 830.

We have long interpreted *Bounds* to give the government the choice to provide either access to a law library or access to counsel or other appropriate legal assistance. *United States ex rel. George v. Lane*, 718 F.2d 226 (7th Cir. 1983); *accord United States v. Byrd*, 208 F.3d 592, 593-94 (7th Cir. 2000); *United States v. Chapman*, 954 F.2d 1352, 1362 (7th Cir. 1992); *Martin v. Davies*, 917 F.2d 336, 340 (7th Cir. 1990); *United States v. Moya-Gomez*, 860 F.2d 706, 742-43 (7th Cir. 1988); *Howland v. Kilquist*, 833 F.2d 639, 643 (7th Cir. 1987). We have further held that a defendant who declines appointed counsel and instead invokes his constitutional right to self-representation under *Faretta v. California*, 422 U.S. 806 (1975), "does not have a right to access to a law library." *Byrd*, 208 F.3d at 593; *accord Moya-Gomez*, 860 F.2d at 743; *Lane*, 718 F.2d at 227. "The rule is that [the defendant] has the right to legal help through appointed counsel, and when he declines that help, other alternative rights, like access to a law library, do not spring up." *Byrd*, 208 F.3d at 593. Insofar as Sykes contends that access to a law library is *mandated* under *Bounds*, our caselaw squarely forecloses his claim.

Sykes maintains, however, that his right to access the courts was violated because he could not reach his appointed standby counsel during the time he was incarcerated in the Kankakee prison. This argument fails as a matter of fact; the record does not support Sykes's claim that he was deprived of access to the courts. While he was incarcerated at the Kankakee prison, Sykes filed three separate motions to dismiss, each of which quotes relevant legal authorities at length. Sykes admitted that he and the other prisoners who were assisting him

called his claimed alibi witnesses but that *the witnesses* would not answer the calls. He claimed that he called his standby counsel "on numerous occasions" but for some unexplained reason, the calls "would not go through." This five-week inability to reach stand-by counsel is mitigated by the fact that he had access to Korenkiewicz during the first 18 months of his incarceration.

Moreover, when Sykes complained to the court about his inability to reach either his standby counsel or his alibi witnesses, the judge asked him whether he wanted a continuance to allow counsel or a court-appointed investigator to track down these witnesses. Sykes twice answered "no," insisting that "[t]he damage has already happened." Sykes left the district court with little choice but to proceed, having expressly rejected the only obvious cure for any possible *Bounds* violation. Under the circumstances here, Sykes was not deprived of his constitutional right to access the courts.

C. Jury Questioning

Finally, Sykes contends that the district court's decision to allow jurors to directly question the witnesses warrants reversal. Because Sykes did not object to this practice at trial—indeed, because he did not even attend his trial—we review his claim for plain error. *See* FED. R. CRIM. P. 52(b); *United States v. Feinberg*, 89 F.3d 333, 336 (7th Cir. 1996). Under the plain-error standard, Sykes must establish that the court plainly erred and that the error affected his substantial rights. *United States v. Olano*, 507

U.S. 725, 732-35 (1993). An error is "plain" when it is "'clear' or, equivalently, 'obvious.'" *Id.* at 734. An error affects substantial rights when it "affected the outcome of the district court proceedings." *Id.*; *accord United States v. Dominguez Benitez*, 542 U.S. 74, 83 (2004); *Feinberg*, 89 F.3d at 336 ("Feinberg must show that but for the jurors' questions, the outcome of the trial probably would have been different."). Even if Sykes makes these showings, the decision to remedy the error is discretionary, and we "should not exercise that discretion unless the error 'seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.'" *Olano*, 507 U.S. at 732 (alteration in original) (quoting *United States v. Atkinson*, 297 U.S. 157, 160 (1936)).

We first addressed the practice of juror questioning of witnesses in *United States v. Feinberg*. We held there that the district court may, in its discretion, allow jurors to propose questions to be put to the witnesses. 89 F.3d at 337. We noted that the practice could be beneficial in some contexts, "such as conspiracy or antitrust cases, in which the facts are so complicated that jurors should be allowed to ask questions in order to perform their duties as fact-finders." 89 F.3d at 337. We cautioned, however, that the practice is "fraught with risks." *Id.* at 336. We therefore instructed district courts to

> take prophylactic measures in an attempt to prevent the practice from harming either party. For example, common sense dictates that the questions should be proffered in writing to the district court judge. By reducing the questions to writing, a court eliminates

> the possibility that a witness will answer a question prematurely. Written questions also guard against juror commentary that suggests or precipitates premature deliberation.

Id. at 337 (internal citation omitted).

We recently revisited the issue of juror questioning in *SEC v. Koenig*, 557 F.3d 736 (7th Cir. 2009), and took a far more approving view of the practice, explaining that the American Bar Association recommended it and recent research on juror questioning had established its benefits. *Id.* at 741. In particular, we noted our own circuit's participation in the ABA's American Jury Project and observed that the "judges, the lawyers for the winning side, and, tellingly, the lawyers for the losing side, all concluded (by substantial margins) that when jurors were allowed to ask questions, their attention improved, with benefits for the overall quality of adjudication." *Id.* Nevertheless, we noted the Jury Project's "proviso that jurors should submit their questions to the judge, who will edit them and pose appropriate, non-argumentative queries." *Id.*

Here, however, the judge did not require jurors to reduce their questions to writing and submit them to the court, which would have allowed the judge to "edit them and pose appropriate, non-argumentative queries," and otherwise filter prejudicial comments. *See also United States v. Rawlings*, 522 F.3d 403, 408 (D.C. Cir. 2008) (listing other sensible prophylactic procedures). Instead, the court allowed—and indeed encouraged—the jurors to interrupt the witnesses and ask questions at will. This

approach significantly increases the risk of prejudice. In light of our statements in *Feinberg* and *Koenig* regarding the need for procedural safeguards, we conclude that the district court erred in allowing the jurors free rein to question the witnesses.

For us to reverse, however, Sykes must establish that jurors asked improper questions or that their questions precipitated some other impropriety in the trial, and that the improper questions affected the jury's verdict. Sykes cannot establish either. Sykes points to the juror's question *to the judge* about his absence from the courtroom and argues that this caused the judge to cast him in a poor light and "disparage[] . . . the merits of the defense case." We disagree. The court's answer to the juror's question was entirely appropriate. The judge correctly explained that Sykes was not present because he invoked his constitutionally protected right of self-representation and then chose not to attend his trial. The judge also explained that Sykes had standby counsel and had instructed his lawyer not to attend the trial. Lest there be any confusion about any inferences from Sykes's absence, the judge quickly added that the jury was not to hold Sykes's absence against him and that it must determine Sykes's guilt beyond a reasonable doubt based only on the evidence before it. To the extent the court's comment cast Sykes in a poor light (and we do not think it did), the court corrected any possible improper impression almost immediately with this remedial instruction to the jury. *See United States v. Curry*, 538 F.3d 718, 728 (7th Cir. 2008) ("This court repeatedly has held that jurors are presumed to follow limiting and curative

instructions unless the matter improperly before them is so powerfully incriminating that they cannot reasonably be expected to put it out of their minds." (internal quotation marks omitted)).

Nor can Sykes show that the jurors' questions likely changed the outcome of this case. *See Dominguez Benitez*, 542 U.S. at 83. He argues that the government might not have sustained its burden of proving identity, but the uncontradicted evidence is overwhelmingly against him. *Cf. United States v. Cotton*, 535 U.S. 625, 632-34 (2002) (exercising discretion not to reverse a plain error because evidence related to error was "overwhelming" and "essentially uncontradicted"); *Johnson v. United States*, 520 U.S. 461 (1997) (same). Not only did the prosecution present substantial fingerprint evidence connecting Sykes to the robberies, but it also elicited testimony that eyewitnesses identified Sykes from a photo array and that Sykes and Barkalow were found in possession of $500 in cash and a substantially similar demand note as the ones used during the robberies. Finally, still images from security-camera footage showed Sykes in the banks, and the absent Sykes offered the jury absolutely no defense that would call his guilt into question. Thus, although the court should not have allowed jurors to directly question the witnesses, there is no reason to question the ultimate outcome of his trial.

AFFIRMED.

E X H I B I T A

Transcript January 25, 2007

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reason I am not going to allow it.

Let's set a trial date. How about sometime in -- do we have any speedy trial problems here? I mean, I have been excluding time, I'm sure --

MR. MURRAY: You have been, Judge.

THE COURT: -- to provide for counsel or to work out --

MR. MURRAY: Well, we had a competency issue, we have had counsel issues.

THE COURT: That's right.

MR. MURRAY: More recently we had plea negotiations.

THE COURT: Well, I am going to continue to exclude time. What about -- what do you estimate the government's case to take, Mr. Murray; five banks?

MR. MURRAY: Actually, we are only talking about three banks.

THE COURT: Three banks.

MR. MURRAY: And I would say three days.

THE COURT: Okay. All right. Then a week. What about April 2, Monday, April 2? Will we have a new jury that day, Jackie?

MR. PLOTKIN: Your Honor, sorry to interrupt, but not only do I have a trial beginning the 16th, but that's also the first day, first evening of Passover.

THE COURT: Okay. Passover lasts until what?

MR. PLOTKIN: It would be eight days until either the 9th or 10th then. I also have a trial beginning the 16th of April presently before Judge Kendall.

THE COURT: How long will that take?

MR. PLOTKIN: That will take approximately a week.

THE COURT: Well, then let's look at May. How about May 14?

MR. PLOTKIN: I am sorry, your Honor. There is a very good chance I am out of town the 17th and 18th. I could do May 7th.

THE COURT: That's the judicial conference, Seventh Circuit judicial conference. May 21st?

MR. PLOTKIN: I could do May 21st.

MR. KORENKIEWICZ: I could do that.

THE COURT: Trial date May 21st. We will have a status, how about May 16th at 10:30, a last minute conference there.

MR. KORENKIEWICZ: Any instructions regarding jury instructions that I could pass on to Mr. Sykes? Would you want proposed instructions beforehand or would you simply wait for trial?

THE COURT: We will wait until trial. I will give the appropriate instructions. Now, if he has any instructions he wishes to tender consistent with his Uniform Commercial Code defense or any other matter, he may tender them, and I'll

certainly consider them.

MR. KORENKIEWICZ: Fine. I will pass it on.

THE COURT: Otherwise, May 21st at 10:00 o'clock for trial. All right. Thank you.

Anything else we need to talk about?

MR. MURRAY: I would just ask that time be excluded.

THE COURT: Time continues to be excluded to provide for continuity of standby counsel and plea negotiations as to the defendant Barkalow. Okay.

MR. MURRAY: Thank you, Judge.

THE COURT: And the exclusion is until further order of court.

(Which were all the proceedings had in the above-entitled cause on the day and date aforesaid.)

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

Carolyn R. Cox
Official Court Reporter
Northern District of Illinois

11-26-07
Date

E X H I B I T B

Transcript May 9, 2007

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no further medical examination is either pending or required.

MR. KORENKIEWICZ: Thank you.

MS. BROOK: I think it should say examination or study.

THE COURT: Or study, okay, or study is either pending or required.

MR. KORENKIEWICZ: Thank you, Judge.

THE COURT: Okay.

MR. MURRAY: Judge, the Government would just ask that time continue to be excluded.

THE COURT: Time will continue to be excluded in the interest of continuity -- well, I don't know -- because of an intended superseding indictment and because of the pendency of a motion for severance. Okay?

MS. BROOK: Thank you, Judge.

MR. KORENKIEWICZ: Thank you, Judge.

THE COURT: And time is excluded until May 30.

MR. MURRAY: Thank you, Judge.

(Proceedings concluded.)

C E R T I F I C A T E

I, Patrick J. Mullen, do hereby certify that the foregoing is a complete, true, and accurate transcript of the proceedings had in the above-entitled case before the Honorable JOHN F. GRADY, one of the judges of said court in Chicago, Illinois, on May 9, 2007.

Official Court Reporter
United States District Court
Northern District of Illinois

E X H I B I T C

Transcript May 30, 2007

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criminal code is that you are alleged to have robbed five banks, and we're going to find out whether that's true or not in due course.

All right. The government has until June 6th to respond and the defendants 6/20 to reply, and status and arraignment on the superseding indictment 6/20 at 9:30 a.m.

DEFENDANT SYKES: All right. I only have one final question and I'm done, one final question for the court. If all parties are already in agreement and I have put my presentments here under notary seal, can a judgment be rendered against me if all parties are already in agreement?

THE COURT: I don't understand the question, so I wouldn't attempt to answer it.

All right. Thank you very much.

MR. MURRAY: Judge, the government asks that time be excluded.

THE COURT: Time will continue to be excluded to allow time for the superseding indictment and arraignment thereon, and the exclusion of time is till June 20.

MR. MURRAY: Thank you, Judge.

MR. KORENKIEWICZ: Thank you.

I hereby certify that the foregoing is a true and correct transcript of the above-entitled matter.

Court Reporter

11/20/07
Date

E X H I B I T D

Transcript July 25, 2007

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MR. MURRAY: Yes.

THE COURT: All right, fine.

Is that all right with you, Ms. Brooks?

MS. BROOKS: Yes, Judge.

THE COURT: Okay, fine. Thank you.

Call the next case, please.

DEFENDANT SYKES: Before --

THE MARSHAL: We're done.

DEFENDANT SYKES: Your Honor, before we leave --

THE MARSHAL: We're done.

MR. MURRAY: Your Honor, one last thing. I ask that time be excluded.

THE COURT: Yes, time is excluded as to both defendants in order to permit time for trial preparation and for the arraignment of the defendant Barkalow on the superseding indictment. Time is excluded between now and November 19th --

MR. MURRAY: Thank you, Judge.

THE COURT: -- for both defendants.

MR. KORENKIEWICZ: Your Honor, just one thing. Should there, in fact, not be a Barkalow trial, should Mr. Sykes be ready to go on the 19th?

THE COURT: Right.

MR. KORENKIEWICZ: Thank you.

(Which were all the proceedings heard.)

E X H I B I T E

Transcript August 1, 2007

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with. I see.

Okay. So -- and we're set for trial when?

MR. MURRAY: November 19th, Judge.

MS. BROOK: Judge, just for the record, if this case does go to trial on that day, I would not be available on that Wednesday because it is the Wednesday before Thanksgiving.

THE COURT: I would probably take off anyway.

MS. BROOK: Okay. I have to cook.

THE COURT: Okay. Then let's make a -- let's do that right now.

Jackie, maybe what we'll do is --

(Discussion off the record.)

THE COURT: I think we'll leave things the way they are. There are other standby counsel besides you, aren't there?

MS. BROOK: Mr. Plotkin is also appointed as standby in this case, yes, Judge.

THE COURT: All right. Well, if we decide to go ahead on Wednesday, we'll have Mr. Plotkin here.

MS. BROOK: Okay.

THE COURT: Anything else we'll need to do before the 19th?

MR. MURRAY: No, Judge. Just ask that time be excluded until that time.

THE COURT: All right. Time is excluded between now

and November 19 to permit trial preparation.

Okay. Ms. Barkalow, do you have anything else you wish to say?

THE DEFENDANT: No.

THE COURT: All right. Thank you.

MS. BROOK: Thank you, Judge.

MR. MURRAY: Thank you.

(Which concluded the proceedings in the above-entitled matter.)

C E R T I F I C A T E

I hereby certify that the foregoing is a transcript of proceedings before the Honorable John F. Grady on August 1, 2007.

DATED: November 26, 2007