No. 08-2558

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

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

Case No. 07 CR 857 - 1

Hon. John F. Grady, Presiding Judge

BRIEF AND REQUIRED SHORT APPENDIX OF DEFENDANT-APPELLANT OVERTIS SYKES

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DISCLOSURE STATEMENT

I, the undersigned counsel for the Defendant-Appellant, Overtis Sykes, furnish the following list in compliance with Fed. R. App. P. 26.1 and Cir. R. 26.1:

1. The full name of every party or amicus the attorney represents in the case: Overtis Sykes.

2. Said party is not a corporation.

3. The names of all law firms whose partners or associates are expected to appear for the party before this Court: Sarah O. Schrup (attorney of record), Jessica A. Frogge (senior law student), Matthew T. Kemp (senior law student), and Brooke Krekow (senior law student), of the Bluhm Legal Clinic at the Northwestern University School of Law. The names of all law firms whose partners or associates have appeared for the party in the district court and are not expected to appear:

Robert A. Korenkiewicz
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Attorney's Signature: _____ Date: Nov. 24, 2008

Attorney's Printed Name: Sarah O. Schrup

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** **X** **No**

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STATEMENT OF JURISDICTION

The United States District Court for the Northern District of Illinois, Eastern Division, had jurisdiction over appellant Overtis Sykes's federal criminal prosecution pursuant to 18 U.S.C. § 3231, which states that the "district courts of the United States shall have original jurisdiction . . . of all offenses against the laws of the United States." 18 U.S.C. § 3231 (2006). This jurisdiction was based on a four-count indictment charging Sykes with violations of 18 U.S.C. § 2113(a) (2006). (R. 07-CR-857 at 1.)[1]

Sykes was originally indicted in Case Number 06-CR-453 on July 20, 2006. (R. 06-CR-453 at 14.) After this case was dismissed without prejudice for violation of the Speedy Trial Act, the government brought new charges in a new case, 07-CR-857, on December 20, 2007. (R. 07-CR-857 at 1.) Sykes was eventually tried before a jury and, on March 11, 2008, the jury returned a guilty verdict. (R. 07-CR-857 at 47.) The district court issued final judgment on the verdict on June 17, 2008, which was entered on June 23, 2008. (R. 07-CR-857 at 62.)

Sykes filed his timely notice of appeal with this Court on June 17, 2008, which was entered on June 18, 2008. (R. 07-CR-857 at 56.) This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291, which grants jurisdiction of "all final decisions of the district courts of the United States" to its courts of appeal. 28

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[1] Citations to the two records on appeal are designated by the case number and the docket number. For example, (R. [case number] at __). Citations to the consecutively numbered trial transcript are cited as (Trial Tr. __). All other hearings are cited by the date of the hearing.

U.S.C. § 1291 (2006). Further, this Court retains jurisdiction over all issues arising from both his initial case that was dismissed and the later case under which he was convicted. *See United States v. Kuper*, 522 F.3d 302, 303-04 (11th Cir. 2008) (finding that circuits that have addressed the issue are unanimous in holding that dismissals without prejudice for violation of the Speedy Trial Act are not final orders for purposes of 28 U.S.C. § 1291, and so may not be reviewed on appeal absent a subsequent conviction).

STATEMENT OF THE ISSUES

I. Whether the district court abused its discretion in dismissing the bank robbery charge against Sykes without prejudice for violation of the Speedy Trial Act, thereby allowing reprosecution, when the Speedy Trial clock ran for 233 days and the illegal delay allowed the government to bring an additional charge against Sykes.

II. Whether Sykes's Fifth Amendment due process right to meaningful access to the courts was violated when he was detained during the month-and-a-half before his trial without access to a law library or his standby counsel.

III. Whether the district court denied Sykes a fair trial when it permitted jurors to question witnesses during the trial.

STATEMENT OF THE CASE

This is a direct appeal from a criminal case. The government filed a complaint for Overtis Sykes on June 21, 2006. (R. 06-CR-453 at 1.) The federal authorities arrested defendant-appellant Overtis Sykes and his wife, Laura Barkalow, the same day. (R. 06-CR-453 at 3.) The government filed an indictment against Sykes on July 20, 2006, charging him with three counts of bank robbery in violation of 18 U.S.C. § 2113(a). (R. 06-CR-453 at 14.) The government alleged that Sykes, along with his wife Laura Barkalow, robbed three banks in the Chicago area. (R. 06-CR-453 at 14.) The Grand Jury returned the indictment on the same day. (R. 06-CR-453 at 16.) Sykes was arraigned on August 3, 2006, and promptly entered a plea of not guilty. (R. 06-CR-453 at 19.) On July 24, 2007, the government filed a superseding indictment alleging Sykes's involvement in an additional bank robbery. (R. 06-CR-453 at 63.) Sykes pleaded not guilty to the additional count the next day, July 25, 2007, and the court set a trial date of November 19, 2007. (R. 06-CR-453 at 66.)

On November 14, 2007, Sykes filed a motion to dismiss for violation of the Speedy Trial Act, 18 U.S.C. § 3161 *et seq*. (R. 06-CR-453 at 77.) The district court dismissed both the indictment and the superseding indictment without prejudice. (R. 06-CR-453 at 83.) On the same day that the district court dismissed the indictments without prejudice, the government filed a new indictment containing the same four counts of bank robbery. (R. 07-CR-857 at 1.) Sykes was arraigned on January 16, 2008, and promptly entered a plea of not guilty to all counts. (R. 07-

CR-857 at 13.) On January 30, 2008, Sykes asked for release on the grounds that he had not been given an opportunity to adequately prepare for trial. (Status Hr'g Tr. 6-8, Jan. 30, 2008.) For various reasons, the district court ordered that Sykes be released. (R. 07-CR-857 at 23.) The following day, however, the district court vacated the release order and revoked the bond. (R. 07-CR-857 at 26.)

After a lengthy pretrial period that lasted about twenty-one months, Sykes's jury trial commenced on March 10, 2008. (R. 07-CR-857 at 42.) Neither Sykes nor his standby counsel, Robert Korenkiewicz, attended trial. The government presented its case in less than two days, and on March 11, 2008, the jury returned a guilty verdict. (R. 07-CR-857 at 47.) On June 17, 2008, the district court sentenced Sykes to 240 months in prison and ordered him to pay restitution. (R. 07-CR-857 at 62.) That same day, Sykes filed his timely notice of appeal. (R. 07-CR-857 at 56.)

STATEMENT OF THE FACTS

On June 21, 2006, federal authorities arrested defendant-appellant Overtis Sykes and his wife, Laura Barkalow (R. 06-CR-453 at 3), charging both with three counts of bank robbery (R. 06-CR-453 at 14). Sykes pleaded not guilty to all three counts (R. 06-CR-453 at 19) and immediately invoked his right of self-representation (R. 06-CR-453 at 21). The district court appointed Robert Korenkiewicz as standby counsel. (R. 06-CR-453 at 21.)

Over the next fifteen months, the case proceeded slowly. Although the district court permitted Sykes to represent himself, the court later ordered a psychiatric evaluation of Sykes to determine his competency to stand trial. (R. 06-CR-453 at 23.) Five months later, the district court found him competent (Status Hr'g Tr. 3:2-3, Jan. 10, 2007) and shortly thereafter set a trial date for mid-May (R. 06-CR-453 at 41). In early May, the district court struck the trial date (R. 06-CR-453 at 44) in part because of the government's repeated representations that it planned to file a superseding indictment.[2] The government finally filed the superseding indictment on July 24, 2007. (R. 06-CR-453 at 63.) The following day, Sykes pleaded not guilty to the additional count, and the district court set a new trial date of November 19, 2007. (R. 06-CR-453 at 66.) Throughout this long

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[2] On May 2, 2007, the government expressed its intention to file a superseding indictment adding an additional bank robbery count "within the next couple weeks." (Status Hr'g Tr. 2:21-23, May 2, 2007.) On May 9, the government was less precise, stating that it would "be presenting a superseding indictment certainly this month." (Status Hr'g Tr. 5:5-6, May 9, 2007.) On May 30, the government averred that the superseding indictment would be filed on June 7. (Status Hr'g Tr. 3:23-24, May 30, 2007.) No indictment was filed on June 7.

pretrial period, Sykes had a strained relationship with the court, repeatedly interrupting hearings with legal arguments that the court considered meritless. (*E.g.*, Status Hr'g Tr. 2-21, Jan. 10, 2007.) At one hearing, the court expelled Sykes from the courtroom, stating, "The next time I want to see Mr. Sykes is at trial." (Status Hr'g Tr. 10:3-4, 19:21-22, Jan. 10, 2007.)

After arraignment on the superseding indictment on July 25, Sykes did not appear in court until November, 14, 2007, five days before his scheduled trial, when he filed a motion to dismiss for violation of the Speedy Trial Act, 18 U.S.C. § 3161 *et seq*.[3] (R. 06-CR-453 at 77.) Sykes had drafted the motion to dismiss and intended to argue the motion himself. Nevertheless, on two different occasions, the district court heard argument on the merits of Sykes's motion when Sykes was not present. (Status Hr'g Tr. 2-18, Nov. 15, 2007; Status Hr'g Tr. 2-20, Dec. 12, 2007.) It is unclear from the record why Sykes was absent from the first hearing, but he was deliberately excluded from the second hearing. (Status Hr'g Tr. 4:22-24, Dec. 12, 2007.) The district court explained that "[t]he reason [it] didn't ask [Sykes] to come is that it's impossible to conduct a rational conversation if he participates in it." (Status Hr'g Tr. 4:22-24, Dec. 12, 2007.) At the second hearing, the district court also noted that it was inclined to grant the motion to dismiss, but that "it would take a very strong argument by the defendants to persuade [the court] that the dismissal should be with prejudice." (Status Hr'g Tr. 16:2-4, Dec. 12, 2007.)

[3] Relevant dates in the case and the basis for exclusions of time under the Speedy Trial Act are summarized in a table at Appendix 1.

The district court finally gave Sykes an opportunity to present his argument for dismissal with prejudice at the third and final hearing on the issue. (Status Hr'g Tr. 4-10, Dec. 20, 2008.) The district court concluded that the indictment should be dismissed *without* prejudice because "unless there is good reason for dismissing with prejudice, the dismissal should be without prejudice . . . ." (Status Hr'g Tr. 19:15-18, Dec. 20, 2007.) The district court also suggested that the "defendant['s] lassitude in regard to the Speedy Trial Act" should favor dismissal without prejudice. (Status Hr'g Tr. 19:6-9, Dec. 20, 2007.)

On the same day that the district court dismissed the indictment—eighteen months after Sykes's arrest—the government filed a new indictment containing the same four counts of bank robbery. (R. 07-CR-857 at 1.) On January 16, 2008, Sykes again entered a plea of not guilty, and the district court set the trial for February 11, 2008. (R. 07-CR-857 at 13.) The district court denied his oral request for bond and ordered him to be detained. (R. 07-CR-857 at 13.)

On January 30, with less than two weeks left before his scheduled trial, Sykes asked for release because he had not been given an opportunity to adequately prepare for the trial. (Status Hr'g Tr. 6-8, Jan. 30, 2008.) Since January 16, Sykes had been incarcerated in a state facility in Kankakee, Illinois, where he was unable to access a law library, mail legal documents, or contact potential witnesses. (Status Hr'g Tr. 7:17-25, 23:1-4, Jan. 30, 2008.) The district court accepted Sykes's arguments, noting that Sykes's need to prepare for trial was "sufficient to outweigh any risk of flight and any risk of future offenses during the period of liberty."

(Status Hr'g Tr. 9:21-23, Jan. 30, 2008.) The district court ordered that he be released and reset the trial date for March 10. (R. 07-CR-857 at 23.)

The following day, upon the government's request for reconsideration, the district court vacated the release order. (R. 07-CR-857 at 26.) The district court explained that as a pretrial detainee, Sykes was not entitled to a law library. (Status Hr'g Tr. 4:1-16, Jan. 31, 2008.) The court also reasoned that Sykes could ask standby counsel for assistance with all aspects of trial preparation, even locating witnesses. (Status Hr'g Tr. 5:1-2, Jan. 31, 2008.) Thus, the court denied release and returned Sykes to Kankakee, where he remained until he was brought back to Chicago just days before his trial. (R. 07-CR-857 at 26.)

At the next pretrial hearing on March 6, four days before trial, Sykes again requested release under the Fifth and Sixth Amendments to prepare for trial based on the significant impediments to his trial preparation, including his inability to conduct legal research, locate alibi witnesses, or contact his standby counsel. (Status Hr'g. Tr. 9:24-25, Mar. 6, 2008.) Standby counsel confirmed that he and Sykes could not contact each other while Sykes was in Kankakee. (Status Hr'g Tr. 15:17-21, Mar. 6, 2008.) Sykes's phone calls to Korenkiewicz would not go through, and he was unable to send letters to Korenkiewicz. (Status Hr'g Tr. 7:7-13, Mar. 6, 2008.) Similarly, trial preparation materials that Korenkiewicz had hand-delivered to the Metropolitan Correctional Center ("MCC") for Sykes were neither forwarded

to Sykes in Kankakee nor returned to Korenkiewicz.[4] (Status Hr'g Tr. 13:19-22, Mar. 6, 2008.) For this reason, Sykes never received the documents and Korenkiewicz had no notification of the failed delivery. (Status Hr'g Tr. 13:17-25, Mar. 6, 2008.) In short, while Sykes was detained in Kankakee, Korenkiewicz had "no contact with him whatsoever." (Status Hr'g Tr. 15:4-5, Mar. 6, 2008.)

In addition to being unable to contact standby counsel, Sykes had no access to a law library while in Kankakee. (Status Hr'g Tr. 7:23, Jan. 30, 2008.) Furthermore, due to strict prison regulations, Korenkiewicz could not send or hand-deliver legal books to Sykes, and Sykes could not obtain books from publishers in the short period before the trial. (Status Hr'g Tr. 7:14-21, Mar. 6, 2008.) Sykes also asserted that he did not receive any discovery until the end of January 2008.[5] (Status Hr'g Tr. 7:23-25, Mar. 6, 2008.) During this hearing, Sykes passionately argued that these impediments prevented him from preparing a defense, which was essential to him receiving a fair trial. (Status Hr'g Tr. 8:1-3, Mar. 6, 2008.) Therefore, according to Sykes, if the scheduled trial went forward, it would be nothing more than a "show trial." (Status Hr'g Tr. 8:9-10, Mar. 6, 2008.)

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[4] Korenkiewicz was not told that Sykes had been moved to Kankakee, so he hand-delivered trial preparation materials that he had compiled for Sykes to the MCC, where he thought Sykes was being detained. (Status Hr'g Tr. 13:9-17, Mar. 6, 2008.)

[5] Korenkiewicz told the district court that although he received the original discovery during the summer of 2006, he did not remember giving Sykes a copy of the discovery. (Status Hr'g Tr. 12-13, Mar. 6, 2008.) However, he did have a large copying expense that he thought was for making Sykes a copy. (Status Hr'g Tr. 12:6-16, Mar. 6, 2008.) And although Korenkiewicz explained why it was possible, if not likely, that the MCC never delivered the discovery to Sykes (Status Hr'g Tr. 13:6-25, Mar. 6, 2008), the district court found that Sykes did indeed receive discovery during the summer of 2006 (Status Hr'g Tr. 30:17-20, Mar. 6, 2008).

Despite Sykes's complete inability to communicate with standby counsel or access a law library, the court denied his request for release in order to prepare for trial. (R. 07-CR-857 at 43.) The district court focused on the fact that Sykes had not directly asked Korenkiewicz to research a specific legal issue or locate witnesses. (Status Hr'g Tr. 16:5-10, Mar. 6, 2008.) After hearing that the trial would proceed as scheduled, Sykes became upset and reiterated that his inability to prepare a defense meant that there would only be a "show trial." (Status Hr'g Tr. 27:22-23, Mar. 6, 2008.) For this reason, he chose not to be present at his trial, and he instructed Korenkiewicz not to be present on his behalf. (Status Hr'g Tr. 30:7-9, 35:6-13, Mar. 6, 2008.)

The trial finally began on March 10, 2008. (R. 07-CR-857 at 42.) Despite the fact that Sykes was not present at trial, the district court allowed jurors to ask questions directly to the witnesses. (Trial Tr. 38:13-17.) The district court stated: "Because Mr. Sykes is not present, I am going to permit the jury to ask any questions you like of the witnesses as they appear. . . . [G]o ahead and ask the witness." (Trial Tr. 38:13-17.) The district court repeated its invitation to ask questions during or after the testimony of each witness.[6] The jurors amply took the district court up on its offer by thoroughly questioning several witnesses as well as the district court itself. (*E.g.*, Trial Tr. 125-57.)

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[6] For example, during the second day of trial, the court interjected during the government's direct examination of a fingerprint expert: "Let me interrupt for just a moment. If any of the jurors have any questions as we go along, feel free to ask them during the testimony of the witness." (Trial Tr. 137:11-13.)

During the first day of trial, one juror asked the district court whether the defendant had a defense (Trial Tr. 40:17) or a lawyer to represent him (Trial Tr. 40:19). The district court responded by telling the jury that Sykes had been given every opportunity to defend himself, but that he had declined to attend the trial in part because he felt the court had no jurisdiction over him. (Trial Tr. 40:21-25, 41:1-13.) The district court later reminded the jury that Sykes's absence should not be seen as evidence of his guilt. (Trial Tr. 43:16-23.)

The bulk of the jurors' questions focused on the uniqueness of fingerprints, the reliability of fingerprint forensic analysis, and how any potential mishandling might have compromised the integrity of the fingerprints. (Trial Tr. 139-41, 152-57.) For example, a juror asked one expert witness, "How often would you find a similar pattern between two individuals but the length of the ridges might be different?" (Trial Tr. 139:5-7.) A juror also commented, "[I]t seems like I've read in the literature that there's been some questions about fingerprints and their uniqueness. Is that – is there really a basis for that?" (Trial Tr. 153:5-8.) Jurors further probed the integrity of the fingerprint evidence by asking pointed questions about the handling of the bank robbery demand notes,[7] the location of the forensic

[7] For example, a juror asked, "How often do you think that too much of handling of the material which you've examined obliterate what you're really looking for? For instance, with this note, if you're looking to compare with the known print of the defendant, but it went through several hands, and their prints might be on the note, too. How often do you think that the other fingerprint actually sort of – how should I put it, smudged the original ones? Can you still see the original ones through all of this messing other . . ." (Trial Tr. 140:9-17.)

analysis (Trial Tr. 152:4-7), and the number of days between the collection and analysis (Trial Tr. 152:11-14).

In response to these questions, the fingerprint experts testified that the literature lacked any evidence that two separate persons had ever been found to have the same fingerprints (Trial Tr. 153:21-24) and that there were "no two individuals with the same friction skin design" (Trial Tr. 153:11-13). The experts confirmed that there was no "smudging that would deteriorate this latent print" (Trial Tr. 140:18-21) and also provided details about the location and timing of the fingerprint analysis (Trial Tr. 153:1-2, 152:4-25). The questions about the fingerprint evidence ended only after the district court weighed in, suggesting that it had "read something about that" and that it was "an obvious proposition" that no one had ever examined and compared all the fingerprints in the world but that "there is such skepticism out there." (Trial Tr. 156:3-25.) No other jurors asked questions of the fingerprint experts after this final comment by the district court.

In addition to fingerprint evidence, the government offered the eyewitness testimony of bank employees (*see, e.g.*, Trial Tr. 64-71), as well as surveillance video and photos from the banks (*see, e.g.*, Trial Tr. 67:1-12). But because Sykes did not attend the trial, the jurors could not compare the man in the surveillance photos to the actual person—the defendant Overtis Sykes—that was charged with the crime. Similarly, the witnesses on the stand could not point out and identify Sykes as the man that robbed the bank. Instead, the jurors had to rely on testimony from witnesses who said they had identified Sykes in a sequential photo lineup as the

man who robbed the bank. (*See, e.g.*, Trial Tr. 77:1-25.) The government also called one FBI agent who testified that $498 in loose cash and a demand note similar to the ones used in the robberies were found in the hotel room where Sykes and Laura Barkalow were arrested. (Trial Tr. 37:16-20, 38:10-11.)

After deliberation, the jury found Sykes guilty on all four counts. (R. 07-CR-857 at 44.) The court sentenced Sykes to 240 months in prison and ordered him to pay restitution. (Sentencing Hr'g Tr. 13:8-20, June 18, 2008.)

SUMMARY OF ARGUMENT

This case presents three issues on appeal. First, the district court abused its discretion when, pursuant to the Speedy Trial Act, it dismissed without prejudice Sykes's indictment. As an initial matter, the district court incorrectly employed a presumption favoring dismissal without prejudice. Neither the Speedy Trial Act nor prior cases evince such a presumption, which unfairly weighted the court's decision-making against Sykes. Moreover, the district court inappropriately counted the egregious length of the violation against Sykes, which is contrary to both Supreme Court precedent and basic notions of fairness. Finally, the district court failed to consider the prejudice to Sykes resulting from the delay. In addition to unduly restricting Sykes's liberty, the delay allowed the government to bring an additional bank robbery count against Sykes. Therefore, Sykes's conviction should be vacated and the indictment against him should be dismissed with prejudice.

Second, Sykes's conviction should be reversed and his case should be remanded for a new trial because he was denied his Fifth Amendment right to meaningful access to the courts. Due process requires that pretrial detainees be given adequate access to legal counsel or a law library. In this case, Sykes was unable to communicate with his standby counsel or prepare for trial using a law library during the crucial month-and-a-half before his trial. This fundamental error should be deemed structural requiring automatic reversal.

Finally, the conviction should be reversed and the case remanded for a new trial because the district court committed plain error by allowing jurors to question trial witnesses, an inherently dangerous practice that is fraught with risk. At

Sykes's trial, the district court erred by permitting such questioning without first weighing the benefit to the jurors against the potential risk of prejudice to the defendant or implementing any safeguards to reduce the risk of prejudice. These juror questions affected Sykes's right to a fair trial by, among other things, eliciting additional expert testimony and prejudicial judicial commentary. Because the unnecessary use of juror questions undermined Sykes's right to a fair trial and also compromised the fundamental fairness, integrity, and reputation of the trial, this Court should remand the matter to the district court for a new trial.

ARGUMENT

I. The district court abused its discretion in dismissing without prejudice Sykes's indictment pursuant to the Speedy Trial Act.

Violation of the Speedy Trial Act ("the Act") requires a district court to dismiss an indictment upon the motion of the defendant. 18 U.S.C. § 3162(a)(2) (2006). The Act allows dismissal with or without prejudice, and the Supreme Court has emphasized that "Congress did not intend any particular type of dismissal to serve as the presumptive remedy for a Speedy Trial Act violation." *United States v. Taylor*, 487 U.S. 326, 334 (1988). When deciding whether to bar reprosecution, the district court must "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). Among the "other" factors to be considered by the court are the length of the delay and prejudice to the defendant. *Taylor*, 487 U.S. at 340-41. Moreover, the court must take care to explain its decision "in terms of the guidelines specified by Congress." *Id.* at 343.

In *Taylor*, the district court had scheduled a trial to begin the day before expiration of the seventy-day window granted by the Speedy Trial Act. *Id.* at 339. The defendant, who was charged with felony drug possession but was out on bail, contributed to the delay when he failed to appear for his trial and was re-arrested more than two months later. *Id.* The district court granted the defendant's motion to dismiss, with prejudice, for a fourteen-day violation of the Speedy Trial Act's time requirements. *Id.* at 329. The district court cited the need to send a strong message

to the government for its "lackadaisical" pursuit of its case. *Id.* at 330. The Supreme Court reversed, holding that the district court abused its discretion in barring reprosecution. *Id.* at 344. The Supreme Court recognized that "dismissal with prejudice always sends a stronger message than dismissal without prejudice, and is more likely to induce salutary changes in procedures, reducing pretrial delays." *Id.* at 342. The Supreme Court ultimately held, however, that the facts of the case did not warrant a bar on reprosecution. *Id.* at 344. It faulted the district court for failing to consider "the brevity of the delay and the consequential lack of prejudice to [the defendant], as well as [the defendant's] own illicit contribution to the delay." *Id.* at 343.

This Seventh Circuit has reached similar conclusions in cases with relatively short delays and demonstrable lack of prejudice to the defendant. *See, e.g.*, *United States v. Fountain*, 840 F.2d 509, 512-13 (7th Cir. 1988) (upholding a dismissal without prejudice for a twenty-day Speedy Trial violation because the delay did not prejudice the defendant but criticizing the government as "careless"); *see also United States v. Arango*, 879 F.2d 1501, 1508 (7th Cir. 1989) (holding that a ninety-three-day violation of the Speedy Trial Act did not require dismissing a narcotics charge with prejudice because the defendant had failed to show that the delay impaired his ability to defend himself). More recently, this Court has concluded that a three-day violation of the Speedy Trial Act in a drug and firearm possession case did not warrant dismissal with prejudice. *United States v. Killingsworth*, 507 F.3d 1087, 1091 (7th Cir. 2007). In reaching its holding, the *Killingsworth* court

emphasized the minor nature of the delay and the defendant's concession that he had suffered no prejudice. *Id.* at 1090-91.

Unlike these cases, where the delays ranged from only three to ninety-three days and the defendants suffered no prejudice, Sykes endured a 163-day delay[8] and suffered significant prejudice. Thus, Sykes's situation is clearly distinguishable from all cases in which the Supreme Court or this Court has found dismissal without prejudice appropriate. In the present case, the district court's analysis was flawed for three reasons. First, the district court wrongly presumed that the dismissal should be without prejudice—weighting the outcome against Sykes before

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[8] There were at least 233 days of non-excludable time (163 more than allowed by the Act) between Sykes's first indictment on July 20, 2006, and the dismissal of the superseding indictment on December 20, 2007. The district court did not precisely identify when the violation of the Act occurred, but the record indicates that three separate periods of time were *not* excludable under the Act:

- the period from July 20, 2006 to August 7, 2006, a period of eighteen days, because there were no motions pending or other circumstances that would toll the clock;
- the period from January 25, 2007 to May 8, 2007, a period of 103 days. The district court's first rationale, "continuity of standby counsel," was not a legitimate basis for exclusion because the Act does not provide for it and it is particularly inappropriate where, as here, the defendant insisted on representing himself but was not present to object to the continuances. The second rationale provided was the purported plea negotiations of Sykes's co-defendant, Laura Barkalow. Although active plea negotiations may be a legitimate basis for exclusion, *see United States v. Montoya*, 827 F.2d 143, 150 (7th Cir. 1987), this justification was not applicable here because there is no indication in the record that Barkalow or Sykes engaged in active negotiations. At most, the government expressed hope that such negotiations would take place. (*See* Status Hr'g. Tr. 11:8-17, Dec. 12, 2007.);
- the period from July 25, 2007 to November 14, 2007, a period of 112 days, because this Court has soundly rejected exclusions for "trial preparations," see *United States v. Thomas*, 788 F.2d 1250, 1256 (7th Cir. 1986), and allowing extra time for the arraignment of Sykes's co-defendant was inappropriate since the 70-day window had already expired.

even considering the statutory factors. Second, to the extent that it considered the excessive length of the delay, the district court counted it *against* Sykes, which is contrary to the Supreme Court's holding in *Taylor*. Third, the district court did not consider the prejudice to Sykes resulting from the superseding indictment—the "fruit of forbidden delay"—nor from the self-evident burden of his long incarceration. In sum, dismissal without prejudice is not the appropriate remedy for a 163-day delay of an incarcerated *pro se* defendant's trial, particularly where the defendant did not contribute to the delay and the delay worked to the defendant's detriment. For these reasons, Sykes's conviction should be vacated.[9]

A. The district court improperly presumed the default remedy was dismissal without prejudice.

First, the district court improperly began its analysis of whether to bar reprosecution with the presumption that dismissal should be *without* prejudice; it stated on the record before hearing argument from either side that "it would take a very strong argument by the defendant[] to persuade [the court] that the dismissal should be with prejudice." (Status Hr'g Tr. 16:2-4, Dec. 12, 2007.) At the next status hearing, the district court claimed that "[t]he recent case of *United States*

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[9] For similar reasons, the district court erred in denying Sykes's motion to dismiss for violation of his Sixth Amendment speedy trial rights. *See Barker v. Wingo*, 407 U.S. 514, 530 (1972) (identifying "[l]ength of delay, reason for the delay, the defendant's assertion of his right, and the prejudice to the defendant" as relevant factors in considering whether a Sixth Amendment speedy trial violation has occurred). In this case all of the *Barker* factors were satisfied because: (1) there was a twenty-one-month delay between Sykes's arrest and his trial; (2) the delay resulted partly from a neglectful prosecution; (3) Sykes directly asserted his speedy trial rights; and (4) he was prejudiced by the superseding indictment and his long incarceration, *see infra*, at 24-25.

against Killingsworth . . . indicates that unless there is good reason for dismissing with prejudice, the dismissal should be without prejudice. . . . I think that the *Killingsworth* case applies four square to the situation that now confronts me." (Status Hr'g Tr. 19:15-22, Dec. 20, 2007.)

The district court failed to recognize, however, that *Killingsworth* is clearly distinguishable from Sykes's case in two critical respects. First, *Killingsworth* involved only a three-day violation of the Act, rather than the 163-day violation that occurred here. Second, the defendant in *Killingsworth* conceded that he had suffered no prejudice as the result of the violation; Sykes, in contrast, argued forcefully that he was prejudiced. (Status Hr'g. Tr. 13-16, Dec. 20, 2007.)

More importantly, *Killingsworth* sets forth no presumption in favor of dismissal without prejudice, contrary to the district court's understanding. Rather, this Court, in reversing a dismissal with prejudice, simply concluded that the trial court had improperly balanced the relevant factors. *Killingsworth*, 507 F.3d at 1091. Moreover, the Supreme Court in *Taylor* explicitly rejected the idea that the Act evinces a presumption favoring any particular remedy. 487 U.S. at 334. Thus, the district court erred in treating dismissal without prejudice as the favored remedy, and its analysis was unfairly biased against Sykes from the beginning.

B. The length of the delay was egregious, yet the district court counted the delay against Sykes.

Second, the district court further erred in failing to account for the egregious length of the Speedy Trial Act violation. The Supreme Court in *Taylor* considered

the length of the delay to be an important factor: "The longer the delay, the greater the presumptive or actual prejudice to the defendant, in terms of his ability to prepare for trial or the restrictions on his liberty[.]" 487 U.S. at 340. In addition, the longer the delay, the more carelessness can be attributed to the government, thus warranting harsher sanctions. *Cf. id.* at 342. In the present case, the Speedy Trial clock ran for 233 days—163 days over the statutory limit. The longest violation for which this Court has allowed dismissal without prejudice is 93 days, and that case involved no prejudice to the defendant. *Arango*, 879 F.2d at 1508.

Yet nowhere in its analysis of Sykes's case did the district court mention the extreme length of the delay as a factor weighing in favor of dismissal with prejudice. In fact, the district court reached the opposite conclusion, suggesting that the "defendant['s] lassitude in regard to the Speedy Trial Act" should favor dismissal without prejudice. (Status Hr'g Tr. 19:6-9, Dec. 20, 2007.) The district court evidently relied on an argument made by the government 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." (Status Hr'g Tr. 12:15-20, Dec. 20, 2007 (quoting *Fountain*, 840 F.2d at 513).)

The district court's ruling, however, misapplies *Fountain* for two reasons. First, *Fountain* was decided before the Supreme Court's decision in *Taylor*, which clearly affirmed the importance of the length of the violation and thus called into question the reasoning of the dictum in *Fountain*. *See Taylor*, 487 U.S. at 340. Second, to the extent the statement in *Fountain* is still legally accurate, it merely

offers a comparison between two groups of defendants: those who repeatedly assert their speedy trial rights deserve *more* consideration than those who make a claim well after the violation has occurred. But *Fountain* does not stand for the proposition that belated claims militate in favor of dismissing without prejudice. The latter interpretation would produce the perverse result that the government could excuse an egregious Speedy Trial Act violation merely by pointing out that the defendant was tardy in raising a claim and, thus, must not care about a speedy trial. This result runs counter to the Act's instruction that the court consider "the impact of a reprosecution on the administration of this chapter," 18 U.S.C § 3162(a)(2), and the fact that harsher sanctions should apply when the government neglects the Act. Moreover, it is particularly unfair in the context of *pro se* defendants, who may not even be aware of their rights under the Act and might not immediately recognize that a violation has occurred. Penalizing defendants for belated Speedy Trial Act claims would thus produce a "catch-22" dilemma for defendants because raising a claim as soon as the violation occurs would likely lead to a finding of no prejudice, as in *Taylor*. It would hardly be fair to view *both* timely *and* tardy Speedy Trial Act claims as evidence that the defendant was not prejudiced by the delay. In sum, the district court was incorrect in weighing against Sykes the lengthy delay before his Speedy Trial Act motion. If anything, the 163-day violation should favor dismissal *with* prejudice.

C. Sykes was prejudiced by the Speedy Trial Act violation.

Finally, the district court erred in finding that the Speedy Trial Act violation did not prejudice Sykes. The prejudice to Sykes was direct and unmistakable: the extended delay allowed the government to bring an additional bank robbery count in a superseding indictment. There is no doubt that the continued delay benefited the government, which did not actually file the superseding indictment until nearly three months after announcing its intention to do so. (Status Hr'g Tr. 2:21-23, May 2, 2007 (government stating that it intended to bring a superseding indictment "within the next couple weeks"); *see also* Status Hr'g Tr. 5:5-6, May 9, 2007 (government stating that it would "be presenting a superseding indictment certainly this month"); Status Hr'g Tr. 3:23-24, May 30, 2007 (government stating that the superseding indictment would be filed on June 7); R. 06-CR-453 at 63 (superseding indictment filed on July 24, 2007).) Moreover, the seventy-day speedy trial window had expired even before the government first revealed its plans to seek a superseding indictment; thus, the fourth bank robbery count against Sykes was the "fruit of forbidden delay." *Fountain*, 840 F.2d at 513.

In addition to the concrete injury of the additional bank robbery count, Sykes endured the self-evident burdens common to all incarcerated defendants awaiting trial: the denial of liberty and the oppressive stigma of facing unresolved criminal charges. *See Taylor*, 487 U.S. at 340. Sykes argued this point powerfully before the district court: "The government has a responsibility to make sure that trials are brought expeditiously, not to let people languish in jail or to let people languish

under an indictment to where their life is destroyed." (Status Hr'g. Tr. 15:18-21, Dec. 20, 2007.) Thus, Sykes's case is clearly distinguishable from previous decisions of this Court in which the delay did not work to the defendant's detriment. *See, e.g.*, *Killingsworth*, 507 F.3d at 1090 (defendant conceding that there was no prejudice). Because it employed an incorrect presumption favoring dismissal without prejudice, weighed the lengthy delay *against* Sykes, and failed to recognize the harm to Sykes caused by the superseding indictment, the district court abused its discretion in dismissing the indictment without prejudice. That decision should be reversed with instructions to vacate Sykes's conviction and dismiss his case with prejudice.

II. The government violated Sykes's Fifth Amendment due process right to meaningful access to the courts when it detained him for more than a month before his trial at a facility where he was unable to contact his standby counsel or access a law library.

Sykes's Fifth Amendment right to meaningful access to the courts was violated when he was detained during the month-and-a-half before his trial in Kankakee, Illinois, where he was unable to contact his standby counsel or access a law library. *See Bounds v. Smith*, 430 U.S. 817, 825 (1977). Sykes raised this Fifth Amendment due process argument during a pretrial hearing on March 6, 2008 (Status Hr'g Tr. 4:1-7, Mar. 6, 2008), and it is an issue this Court reviews *de novo*, *United States v. Kirschenbaum*, 156 F.3d 784, 792 (7th Cir. 1998). Because a pretrial *Bounds* violation affects the entire framework of a trial, it should be deemed a structural error, requiring automatic reversal. *See Washington v. Recuenco*, 548 U.S. 212, 218 (2006). But even if this Court determines that this

error is subject to harmless-error analysis, Sykes's conviction nevertheless merits reversal because he suffered prejudice when he was prevented from filing meaningful pretrial motions with the assistance of standby counsel and was hindered in preparing his defense for trial.

A. Sykes's Fifth Amendment right to meaningful access to the courts was violated when he was held without access to his standby counsel or a law library during the crucial month-and-a-half before his trial.

Under the Fifth Amendment, all criminal defendants are entitled to have meaningful access to the courts. *Bounds*, 430 U.S. at 825. This right includes "a substantial due process interest in effective communication with [defendants'] counsel and in access to legal materials." *Johnson-El v. Schoemehl*, 878 F.2d 1043, 1051 (8th Cir. 1989). To meet this constitutional requirement, prison authorities must "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." *Bounds*, 430 U.S. at 828 (emphasis added); *see also Casteel v. Pieschek*, 3 F.3d 1050, 1053 (7th Cir. 1993) (stating that "the right of access to courts extend[s] to pretrial detainees").[10] The logical inference follows that

[10] Although the Supreme Court has subsequently revisited the question of what constitutes meaningful access to the courts, it has done so under very different facts than are present in this case; therefore, the *Bounds* rule controls here. *See Lewis v. Casey*, 518 U.S. 343 (1996). The *Lewis* Court relied on standing principles to require plaintiffs to show direct "widespread actual injury" in order to prevail in a prisoner's civil rights class-action lawsuit. *Id.* at 349. *Lewis*'s injury-in-fact requirement does not apply in this case because Sykes's standing to challenge the unconstitutional denial of meaningful access to the courts on direct appeal is unquestioned. And even if *Lewis* applies, Sykes was directly injured when he was prevented from preparing his defense.

when the government denies a pretrial detainee adequate assistance of counsel *and* access to a law library without providing other meaningful access to the courts, that detainee's constitutional rights have been violated. *See United States v. Lane*, 718 F.2d 226, 229, 233 (7th Cir. 1983) (affirming the district court's decision denying a *pro se* criminal defendant's request to access a law library but assuring him that a public defender would be available via telephone from jail).

Indeed, the Eighth Circuit has applied *Bounds* to hold that a due process violation could occur where the available law library and the pretrial detainees' access to counsel were inadequate. *See Johnson-El*, 878 F.2d at 1052. In *Johnson-El*, a prisoners' rights case, the plaintiff-prisoners claimed that their due process rights were violated by an inadequate opportunity to consult with counsel. *Id.* They alleged that they were allowed only one phone call during the business week, which alternated between daytime and the evening. *Id.* Therefore, they only had one opportunity every other week to attempt to call their attorneys. *Id.* Moreover, if the attorney's phone line was busy or he was out of the office, the prisoner's call was considered completed, and he had to wait an additional two weeks to try again. *Id.* The prisoners in *Johnson-El* also alleged that the prison law library was inadequate. *Id.* They were only allowed to use the library one hour per week, and the criminal codes in the library were outdated. *Id.* The court held that the prisoners pleaded facts sufficient to state a claim for a constitutional violation and denied the defendant-city's motion for summary judgment based on qualified immunity. *Id.* at 1056. In so holding, the court recognized that a due process

violation could occur when "both avenues" were constrained in a way that prisoners were denied reasonable access to legal assistance *and* an adequate law library. *Id.* at 1052.

Sykes was denied access to both his standby counsel and a law library during the month-and-a-half before his trial. The deprivation of his rights was even more egregious than the prisoner-plaintiffs in *Johnson-El*, who had one bi-weekly phone call to their attorneys; Sykes was unable to contact his standby counsel in any way. (Status Hr'g Tr. 7:7-13, Mar. 6, 2008.) He was unable to obtain stamps or envelopes while he was in Kankakee because he had no money (Status Hr'g Tr. 7:8-9, Mar. 6, 2008) and therefore was unable to write to his standby counsel (Status Hr'g Tr. 7:13, Mar. 6, 2008).[11] Also, he could not afford the fifty cents required to call his standby counsel.[12] (Status Hr'g Tr. 7:10-11, Mar. 6, 2008.) Sykes did everything in his power to contact standby counsel but was unsuccessful.

Standby counsel Robert Korenkiewicz was similarly unable to contact Sykes. Korenkiewicz agreed that he had "no contact whatsoever" with Sykes during the month-and-a-half before trial when he was housed in Kankakee. (Status Hr'g Tr. 15:4-5, Mar. 6, 2008.) During this time, Korenkiewicz was unable to provide Sykes with trial preparation materials. (Status Hr'g Tr. 13:17-25, Mar. 6, 2008.) Initially,

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[11] In *Bounds*, the Supreme Court affirmed that "[i]t is indisputable that indigent inmates must be provided at state expense with paper and pen to draft legal documents[,] with notarial services to authenticate them, and with stamps to mail them." 430 U.S. at 825. Therefore, the failure to provide Sykes with these basic supplies is an additional error.

[12] Sykes also stated that during this time his attempts to contact his identified alibi witnesses, who were essential to his defense, were unsuccessful. (Status Hr'g Tr. 8:4-8, Mar. 6, 2008.)

Korenkiewicz was not even told that Sykes had been moved to Kankakee, so he hand-delivered trial preparation materials that he had compiled for Sykes to the MCC, where he thought Sykes was being detained. (Status Hr'g Tr. 13:9-17, Mar. 6, 2008.) The MCC failed to forward these materials to Sykes in Kankakee or return them to Korenkiewicz. (Status Hr'g Tr. 13:17-22, Mar. 6, 2008.) Because these materials were never returned, Korenkiewicz did not know that Sykes was not receiving his communications until they met at the March 6, 2008 status hearing. (Status Hr'g Tr. 13:17-19, Mar. 6, 2008.)

During the time that Sykes and Korenkiewicz were unable to contact each other, Sykes had no access to a law library because Kankakee does not have one. (Status Hr'g Tr. 7:9-10, Mar. 6, 2008.) Therefore, the restriction on his ability to conduct legal research was even greater than in *Johnson-El*, where the detainees were able to access a law library for one hour per week. In short, during the month-and-a-half before Sykes's trial, he was unable to conduct legal research in a law library, he and his standby counsel were unable to contact each other, and standby counsel was unable to provide him with trial preparation materials. This is a clear violation of the due process requirement of meaningful access to the courts, and Sykes's conviction should be reversed.

B. A pretrial *Bounds* violation is a structural error because it fundamentally affects a defendant's ability to have a fair trial.

When a pretrial detainee is denied meaningful access to the courts, as defined by *Bounds*, the error so affects the framework of the ensuing trial that it

should be deemed structural and subject to automatic reversal. The Supreme Court has held that "there are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error." *Chapman v. California*, 386 U.S. 18, 23 (1967); *see also Neder v. United States*, 527 U.S. 1, 7 (1999) (finding that structural errors "are so intrinsically harmful as to require automatic reversal . . . without regard to their effect on the outcome [of the trial]"). Although most trial errors, even those of a constitutional magnitude, can be deemed harmless, the Supreme Court has carved out several that "defy analysis by harmless-error standards." *Arizona v. Fulminante*, 499 U.S. 279, 309 (1991) (internal quotations omitted). These structural errors are: (1) total deprivation of right to counsel at trial, *Neder*, 527 U.S. at 8 (citing *Johnson v. United States*, 520 U.S. 461, 468 (1997), in turn citing *Gideon v. Wainwright*, 372 U.S. 335 (1963)); (2) biased trial judge, *Tumey v. Ohio*, 273 U.S. 510 (1927); (3) unlawful exclusion of members of the defendant's race from a grand jury, *Vasquez v. Hillery*, 474 U.S. 254 (1986); (4) deprivation of the right to self-representation at trial, *McKaskle v. Wiggins*, 465 U.S. 168 (1984); (5) denial of the right to a public trial, *Waller v. Georgia*, 467 U.S. 39 (1984); and (6) defective reasonable-doubt instruction that effectively deprived the defendant of the right to a jury trial, *Sullivan v. Louisiana*, 508 U.S. 275 (1993). These constitutional violations affect the framework within which trials proceed, *Fulminante*, 499 U.S. at 310, and deprive defendants of basic protections that are necessary to ensure that criminal trials fairly and reliably determine guilt or innocence, *Neder*, 527 U.S. at 8-9.

In contrast, the Supreme Court has found that more discrete errors that occur during the presentation of the case to the jury are not structural in nature because they do not fundamentally undermine the framework underlying the right to a fair trial. *Fulminante*, 499 U.S. at 307-08. Such errors are amenable to harmless-error review because they can be "quantitatively assessed in the context of other evidence presented [at trial] in order to determine whether [their] admission was harmless beyond a reasonable doubt." *Id* at 307. These errors include unconstitutionally overbroad jury instructions at the sentencing stage of a capital case, jury instructions containing an incorrect conclusive presumption, jury instructions misstating an element of the offense, improper comment on defendant's silence at trial, and failure to instruct the jury on the presumption of innocence. *Id.* at 306-08. Unlike structural errors, these errors do "not *necessarily* render a criminal trial fundamentally unfair." *Neder*, 527 U.S. at 9 (emphasis in original).

A pretrial *Bounds* violation is more akin to the errors that the Supreme Court has deemed structural than to other routine trial errors for three reasons. First, denial of meaningful access to the courts, when it implicates a criminal defendant's fundamental right to present his defense in the first instance, unfairly affects the entire framework of the trial because it undercuts other vital structural rights. *See Chapman*, 386 U.S. at 23; *Adams v. Carlson*, 488 F.2d 619, 630 (7th Cir. 1973) ("[An] inmate's right of unfettered access to the courts is as fundamental a right as any other he may hold. All other rights of an inmate are illusory without it.") (citations omitted). That is, if a pretrial detainee is denied meaningful access to

the courts, other rights, such as the right to a fair trial or the right to self-representation, become hollow because those rights cannot be adequately exercised if this threshold right is absent.

Moreover, in addition to undercutting other structural safeguards, a pretrial *Bounds* violation is a structural error in itself because it implicates a criminal defendant's fundamental right to present his defense in the first instance. When pretrial detainees are simultaneously denied access to counsel and a law library, they are unable to acquire the legal knowledge necessary to prepare and present their defenses at trial. Being deprived of the ability to contact alibi witnesses and file important pretrial motions, including motions *in limine* and motions to suppress, affects all future proceedings. The criminal defendant enters the courtroom at an unconstitutional disadvantage and any verdict stemming from this inadequate foundation is necessarily unfair. In short, "[t]he entire conduct of the trial from beginning to end is obviously affected," *Fulminante*, 499 U.S. at 309-10, by a pretrial detainee's inability to prepare for trial.

Finally, a pretrial *Bounds* violation is readily distinguishable from the aforementioned categories of trial errors subject to harmless-error analysis, which are discrete errors that can be separated from the whole of the trial and balanced against other evidence in the case. Unlike these kinds of errors, impeding a criminal defendant's meaningful access to the courts is so interwoven into the trial process that it can never be reliably segregated and examined next to the remaining evidence to determine whether the defendant was unduly prejudiced by the error.

Therefore, denial of meaningful access to the courts should be recognized as a structural error, and Sykes's conviction should be reversed.

C. Even if violation of Sykes's right of meaningful access to the courts is not a structural error, the violation was not harmless.

Even if this Court finds that a pretrial *Bounds* violation is subject to harmless-error review, Sykes's conviction should still be reversed because the constitutional violation in his case was not harmless. Any error "that does not affect substantial rights shall be disregarded" and deemed "harmless." Fed. R. Crim. P. 52(a). This Court examines "what effect the error had or reasonably may be taken to have had upon the jury's decision." *United States v. Jung*, 473 F.3d 837, 842 (7th Cir. 2007). Only if the court is "convinced that the error did not influence the jury or only had very slight effect" should it hold that the error was harmless. *Id.* at 842-43.

In Sykes's case, the denial of his right to meaningful access to the courts had more than a "slight effect" on the jury. Because he was unable to contact his standby counsel or access a law library during the month-and-a-half before his trial, he was not able to file standard pretrial motions, such as motions *in limine* and motions to suppress. These motions could have resulted in key evidence being excluded from the trial, thereby affecting the jury's decision. The denial of access to standby counsel and a law library was particularly prejudicial because Sykes did not receive a copy of the discovery until the end of January 2008. (Status Hr'g Tr. 10-12, Jan. 30, 2008.) Once he did receive discovery, Sykes actively began

attempting to contact Korenkiewicz (Status Hr'g Tr. 7:10-13, Mar. 6, 2008), presumably to assist him in preparing pretrial motions pertaining to that discovery. Furthermore, Sykes was unable to contact his alibi witnesses while in Kankakee (Status Hr'g Tr. 8:4-9, Mar. 6, 2008) and had these witnesses testified at trial, an acquittal would have been more likely. For these reasons, the denial of Sykes's right to meaningful access to the courts was not harmless, and his conviction should be reversed.

III. The district court erred by allowing the jurors to question witnesses during trial.

At Sykes's trial, the district court erred by issuing a blanket invitation for the jurors to "ask any questions you like of the witnesses as they appear." (Trial Tr. 38:14-15.) Although this Court typically reviews a district court's decision to allow juror questions during trial for an abuse of discretion, when a defendant fails to object this Court reviews for plain error. *United States v. Feinberg*, 89 F.3d 333, 336-37 (7th Cir. 1996). Because Sykes did not attend his trial and was thus unaware of the district court's decision to permit juror questions, he had no opportunity to object to the practice. Accordingly, this Court must determine whether there was: (1) an error; (2) that was plain; (3) that affected a substantial right of the defendant; and (4) that seriously affected the fairness, integrity, and reputation of the judicial proceedings. *United States v. Nitch*, 477 F.3d 933, 936-37 (7th Cir. 2007) (citing *United States v. Olano*, 507 U.S. 725, 732-37 (1993)).

Because the vast majority of circuits have recognized juror questions as a disfavored practice that is fraught with risks, *Feinberg*, 89 F.3d at 336, the district court's error in permitting the juror questions under the circumstances of this case was plain. These questions affected Sykes's right to a fair trial by, among other things, promoting premature jury deliberations and eliciting prejudicial expert testimony and improper judicial commentary. Finally, allowing the juror questions here also compromised the fundamental fairness, integrity, and reputation of the trial proceedings. Accordingly, this Court should reverse Sykes's conviction and remand for a new trial.

A. The district court plainly erred by inviting jurors to ask questions of witnesses because no compelling circumstances justified their use and no precautionary measures were employed to prevent prejudice to Sykes.

The district court erred by issuing a blanket invitation for the jurors to ask questions of witnesses for two reasons. First, the district court erred by failing to properly weigh the potential issue-clarification benefits to the jury against the potential risk of prejudice to Sykes, a *pro se* criminal defendant who was not even present at trial to defend himself. Second, the district court further erred by failing to employ any of the numerous recommended precautions to reduce the prejudice to Sykes.

The district court's error in permitting the juror questions under the circumstances of this case was plain because the vast majority of circuits have recognized juror questions as a disfavored practice that is fraught with risks.

Feinberg, 89 F.3d at 336; *see also United States v. Sutton*, 970 F.2d 1001, 1005 (1st Cir. 1992); *United States v. Bush*, 47 F.3d 511, 515 (2d Cir. 1995); *United States v. Hernandez*, 176 F.3d 719, 723 (3d Cir. 1999); *DeBenedetto v. Goodyear Tire & Rubber Co.*, 754 F.2d 512, 516 (4th Cir. 1985); *United States v. Collins*, 226 F.3d 457, 461 (6th Cir. 2000); *United States v. Groene*, 998 F.2d 604, 606 (8th Cir. 1993); *United States v. Richardson*, 233 F.3d 1285, 1290 (11th Cir. 2000); *United States v. Rawlings*, 522 F.3d 403, 408 (D.C. Cir. 2008). Due to the perilous nature of the practice, "juror participation in the examination of witnesses should be the long-odds exception, not the rule." *Bush*, 47 F.3d at 515; *see also Feinberg*, 89 F.3d at 337 (concluding that "[i]n the vast majority of cases, the risks outweigh the benefits"). Therefore, the district court should have proceeded with all due caution before permitting this disfavored practice.

1. The district court failed to properly weigh the potential harm to Sykes, a *pro se* defendant, against the issue-clarification benefits to the jury.

Although the practice of juror questions is generally disfavored, courts have allowed it when justified by compelling circumstances, such as in factually or legally complex cases. *See*, *e.g.*, *Sutton*, 970 F.2d at 1006 (allowing juror questions in a factually complex case involving a scheme to defraud investors via a sham real estate venture). In order to assess whether a case merits juror questioning of the witnesses, the district court must weigh the potential harm to the parties against the benefits to the jury in understanding the case. *Feinberg*, 89 F.3d at 337. Types of prejudice to criminal defendants posed by juror questions include risks that

jurors will: (1) transform from neutral fact-finders into active advocates; (2) engage in premature deliberation and adopt a particular position as to the weight of that evidence before considering all the facts; (3) give more weight and attention to questions propounded by fellow jurors; and (4) ask inappropriate questions that violate the rules of evidence. *See*, *e.g.*, *Rawlings*, 522 F.3d at 408.

The district court's calculation of the benefits to jurors is, by contrast, relatively straightforward: the court focuses on whether there are any compelling circumstances, such as legal or factual complexity, that would require juror questions for clarification. *Feinberg*, 89 F.3d at 337 (noting that there may be exceptionally complicated cases, such as conspiracy or antitrust cases, where jurors may need to "ask questions in order to perform their duties as fact-finders."). Courts have emphasized, however, that those factually complex cases are the exception, not the rule. *Id.* Because of the significant risks and limited, infrequent benefits, the balancing test "will almost always lead trial courts to disallow juror questioning, in the absence of extraordinary or compelling circumstances." *Bush*, 47 F.3d at 516.

As an initial matter, the record does not reflect that the district court engaged in any of the requisite weighing of risks and benefits. Far from considering the factors predicting an increased risk of prejudice to Sykes, the only justification that the district court offered for allowing jury questions was Sykes's absence from trial: "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." (Trial Tr. 38:13-15.) No circuit

court has ever found that the absence of a *pro se* defendant warranted the use of juror questions. Indeed, as discussed below, jury questions in this context actually *increased* the prejudice to Sykes.

Even if the district court conducted the balancing test, it erred in concluding that the benefits of juror questioning outweighed the risks. In this case, juror questions presented an acute risk of prejudice because the *pro se* criminal defendant was not present at trial and, therefore, could not object to the practice of allowing juror questions, much less the actual questions posed by the jurors. More importantly, his absence allowed the government and district court to fashion responses to questions without his input, increasing the likelihood that he would be unable to protect himself from the inherent risks posed by juror questions. Predictably, many of the risks identified by other courts actually occurred at the trial: jurors asked improper questions, elicited improper answers, and engaged in premature deliberation about a key piece of evidence. Despite these and other apparent risks, the court failed to take into account that Sykes's absence actually compounded the risk of prejudice from the jurors' questions—a practice that was already fraught with risks.

In contrast to the high risk of prejudice, juror questions offered few apparent benefits to the jurors in this unexceptional, straightforward, and unchallenged bank robbery case. The government presented its entire case, including eyewitness testimony, physical evidence, expert testimony, and simple forensic reports, in less than two days. And Sykes offered no defense. Juror questions were wholly

unnecessary to assist the jury in understanding the simple factual issues presented. Therefore, even if the district court engaged in the requisite weighing of risks and benefits, it plainly erred in allowing juror questions because the risks substantially outweighed the benefits.

2. The district court failed to institute proper safeguards to minimize the risk of prejudice to the absent *pro se* defendant.

The district court's error was compounded when it failed to employ any prophylactic measures to minimize the risks posed by juror questions. If a trial court decides to allow juror questioning, it should establish certain safeguards. *See, e.g.*, *Sutton*, 970 F.2d at 1005. First, as early as possible, counsel should be informed and given an opportunity to oppose the practice. *E.g.*, *id.* Second, the court should instruct jurors to limit questions to important issues and factual clarifications, and warn jurors that they should not draw conclusions from the rejection or rephrasing of a question. *E.g.*, *id.*; *Richardson*, 233 F.3d at 1290. Third, the district court itself should limit the practice in general; that is, the court should not solicit questions as a routine practice or repeat an invitation to ask questions of each witness before the witness leaves the stand. *United States v. Ajmal*, 67 F.3d 12, 15 (2d Cir. 1995); *see also United States v. Douglas*, 81 F.3d 324, 326 (2d Cir. 1996) (holding that a district court exceeded its allowable discretion by inviting questions both at the start of the trial and at the end of each witness's testimony even though the court employed other prophylactic measures). Fourth, jurors should submit questions to the district court in writing, without disclosing

the content to other jurors. *E.g.*, *Feinberg*, 89 F.3d at 337 (emphasizing that "where jurors are permitted to blurt out their questions, the district court almost invites a mistrial."). Fifth, if a juror asks a question, the court should have a sidebar to allow the attorneys to object out of the hearing of the jury, and then the court should pose the question to the witness. *E.g.*, *Sutton*, 970 F.2d at 1005-06; *Bush*, 47 F.3d at 516. Finally, the court should include a final jury instruction regarding the use of juror questions. *See, e.g.*, *Sutton*, 970 F.2d at 1005; *Richardson*, 233 F.3d at 1290.

The district court here employed not a single precaution from this catalogue of recommended procedures. The court initially invited the jury to pose questions at the beginning of the trial, and it continued to solicit questions before each witness left the stand. At one point, the district court even told the jurors to interrupt the witness if they had any questions. (Trial Tr. 137:11-13.) Jurors voiced their questions directly to the witnesses, eliminating any opportunity for pre-screening of the question. Finally, the court failed to give a preliminary or final instruction about juror questions. Without any prophylactic measures in place, the jury heard all of the prejudicial and improper questions posed by fellow jurors.

In sum, the district court plainly erred by engaging in the disfavored practice of permitting juror questions, failing to properly balance the benefits and risks involved, and failing to institute the prophylactic measures that would have minimized the prejudice from the questioning.

B. The district court's error affected Sykes's substantial rights by eliciting inappropriate commentary from the district court and unfairly emphasizing prejudicial expert testimony about critical fingerprint evidence.

The inappropriate juror questions negatively impacted Sykes's substantial rights, thus satisfying the third prong of the plain error standard. For an error to affect a defendant's substantial rights, the error must be prejudicial and affect "the outcome of the district court proceedings." *Olano*, 507 U.S. at 734. There must be "'a reasonable probability that, but for the error claimed, the result of the proceedings would have been different.'" *United States v. Benitez*, 542 U.S. 74, 82 (2004) (quoting *United States v. Bagley*, 473 U.S. 667, 682 (1985)). In this case, juror questions negatively affected Sykes's right to a fair trial by an impartial jury in at least two ways: (1) by prompting improper comments from the district court that cast Sykes in a poor light; and (2) by helping the government meet its burden of proof by eliciting additional expert testimony, alerting the government to gaps in its case, and educing inappropriate remarks from the court about the weight of the evidence. There is more than a reasonable probability at least one juror would have harbored a reasonable doubt as to Sykes's guilt had the juror questions not tainted his right to a fair trial.

1. Juror questions substantially affected Sykes's right to a fair trial by eliciting prejudicial comments from the court suggesting that Sykes had no meritorious defense.

One juror question elicited remarks from the court that cast Sykes in a poor light. Improper judicial comments made in the presence of the jury receive special scrutiny because "'the influence of the trial judge on the jury is necessarily and

properly of great weight, and his lightest word or intimation is received with deference, and may prove controlling.'" *United States v. Dellinger*, 472 F.2d 340, 386 (7th Cir. 1972) (quoting *Starr v. United States*, 153 U.S. 614, 626 (1894)). A court may not disparage defense counsel or the merits of the defense case, especially with remarks based on personal observations of the defendant in matters prior to the trial. *Id.* at 387 (finding reversible error where the court made deprecatory remarks "implying rather than saying outright that defense counsel was inept, bumptious, or untrustworthy, or that his case lacked merit [and] must have telegraphed to the jury the judge's contempt for the defense."); *see also United States v. Blanchard*, 542 F.3d 1133, 1148-49 (7th Cir. 2008) (holding that a court's comments based upon his own personal observations of the defendant prior to trial were impermissible judicial testimony). Moreover, improper judicial comments that are "likely to remain firmly lodged in the memory of the jury [and] preclude a fair and dispassionate consideration of the evidence" cannot be cured by cautionary instructions after the fact. *Dellinger*, 472 F.2d at 386 (quoting *Quercia v. United States*, 289 U.S. 466, 472 (1933)).

Early in Sykes's trial, a juror asked, "Does the defendant not have a defense?" (Trial Tr. 40:17.) The court responded, "That would be up to him," (Trial Tr. 40:18), and then added:

> 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. . . . 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.

(Trial Tr. 40:21-25, 41:1-13.)

The district court's comment unfairly characterized Sykes's constitutionally protected decision to remain silent as a failure to attend trial or present a defense. In this regard, the district court portrayed Sykes as a contrarian—"demanding" and "insisting" that he represent himself but declining to appear at trial despite the court's best efforts. Moreover, the district court's comments suggested that Sykes relied upon an untenable jurisdictional argument, further adding to the impression that Sykes declined to attend trial because he had no good defense to present at trial. Although the district court later admonished the jury that the defendant's absence from the trial did not indicate his guilt (Trial Tr. 43:16-23), the jury's neutrality had already been compromised by the district court's commentary about the defendant, and this cautionary instruction failed to remedy this error. *See Dellinger*, 472 F.2d at 386.

2. The juror questions about fingerprints affected Sykes's right to a fair trial by eliciting additional expert testimony that bolstered the government's case.

The juror questions affected the defendant's right to a fair trial by eliciting additional expert testimony solidifying the reliability of fingerprint evidence, as well as alerting the government to gaps in its presentation. Moreover, the questions gave the district court itself an opportunity to comment on the reliability of the

fingerprint evidence, which further strengthened the government's case. Juror questions should not be used to remedy any apparent inadequacies of the government's case or assist the government in meeting its burden of proof by allowing it to fashion specific responses to juror skepticism. *See Richardson*, 233 F.3d at 1290 (observing that juror questions should not be used "to fill in perceived gaps in the case").

In response to each of the juror questions, the expert witnesses responded with important testimony that reinforced the testimony about the reliability of fingerprint evidence. For example, during the first expert's testimony, the expert described how labs analyze multiple characteristics to match fingerprints. (Trial Tr. 129:2-19.) Although the expert had testified that fingerprints were unique (Trial Tr. 128:16-24), the expert had failed to indicate that the particular characteristics that the lab used to match the prints were also unique and would not be repeated in other individuals; this important information only came out upon questioning by the jurors (Trial Tr. 139:5-25). Furthermore, the expert dispelled a juror's concern that the fingerprints had not been compromised by the handling of the notes by other individuals. (Trial Tr. 140:9-21.) The second fingerprint expert similarly addressed a juror's skepticism about the integrity of the fingerprint evidence. The second expert testified that the fingerprints were taken from the field and transported by police messenger to the lab and examined within two days of collection. (Trial Tr. 152:4-25, 153:1-2.) Further, juror questions allowed the expert to highlight the fact that there were "no two individuals with the same

friction skin design." (Trial Tr. 153:13.) These clarifications, and others, originated from the jury itself and were no doubt important in quelling the jury's concerns about the reliability of the evidence—concerns that easily could have raised reasonable doubts about Sykes's guilt.[13]

In addition to letting the jurors air their concerns directly, the questions allowed the government to clear up areas of particular confusion. At one moment of evident misunderstanding, the prosecutor said, "Maybe I can clear this up," and then asked the witness to clarify the relationship between the fingerprint evidence from the FBI and Chicago Police Department. (Trial Tr. 155:3-8.) Indeed, the back-and-forth speculation about the fingerprint evidence among the jurors and witnesses ended only when the district court weighed in, suggesting that it had "read something about that" and that it was "an obvious proposition" that no one had ever examined and compared all the fingerprints in the world but that "there is such skepticism out there." (Trial Tr. 156:3-25.) No other jurors asked questions of the fingerprint experts after this final comment, suggesting that the jurors took the judicial comments as the last word on the subject. In fact, the court's remarks came

[13] This increased focus on fingerprint evidence may well have led the jurors to deliberate prematurely about the reliability of such evidence. Jurors could easily have conveyed skepticism or confidence about the evidence to one another through their repeated questioning of the expert witnesses. At the very least, the questions served to highlight certain jurors' belief in the critical importance of such evidence in the government's case against Sykes. Such premature deliberation is one of the primary risks involved with juror questions, *Rawlings*, 522 F.3d at 408, and should be avoided rigorously, *see Bush*, 47 F.3d at 515 (noting that "[t]he appropriate time for jurors to express skepticism is during deliberations . . . after the jury has heard all of the evidence, the arguments of counsel and the judge's charge on the law."); *see also DeBenedetto*, 754 F.2d at 517 (holding that where juror questions indicate consideration of the evidence, the questioning juror has begun deliberation with fellow jurors).

at the very end of the last witness's testimony; they were the last comments the jury heard before the government's closing argument.

There is more than a reasonable probability at least one juror would have doubted Sykes's guilt had the juror questions not tainted his right to a fair trial. In this case, juror questions negatively affected Sykes's right to a fair trial in two critical ways: (1) by eliciting comments from the district court about the defendant's absence from trial and (2) by helping the government meet its burden of proof by eliciting additional expert testimony solidifying the reliability of fingerprint evidence. Each of the prejudicial effects worked in concert to deprive Sykes of a fair trial.

C. The juror questions compromised the integrity and impartiality of the judicial proceedings.

The district court undermined the fairness of Sykes's trial when it deviated from standard courtroom procedures in the absence of both the defendant and his standby counsel. Plain errors that "'seriously affect the fairness, integrity, or public reputation of judicial proceedings'" should be remedied by appellate courts regardless of the evidence against the defendant. *Olano*, 507 U.S. at 736-37 (quoting *United States v. Atkinson*, 297 U.S. 157, 160 (1936)). The unwarranted encouragement of juror questions in Sykes's case tainted the elemental protective role of the jury and thus compromised the unique public respect reserved for our judicial system. The jury provides the "accused with . . . an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or

eccentric judge." *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968). However, "[w]hen the jury becomes an advocate or inquisitor in the process, it forsakes its role of arbiter between the government and its citizens." *United States v. Johnson*, 892 F.2d 707, 715 (8th Cir. 1989) (Lay, C.J., concurring). This role of neutral buffer between the defendant and the government is particularly critical when the defendant is not present; without a vigorous defense, the jury is the principal safeguard ensuring the fairness of the proceedings. In such a situation, refraining from unnecessary and potentially prejudicial procedures, such as allowing juror questions, is even more imperative than when both sides are zealously represented. Juror questions in this simple bank robbery case were ill-advised, and they went far in helping the government meet its burden of proof. For these reasons, Sykes's conviction should be reversed and his case should be remanded for a trial that comports with the constitutional guarantees of fairness and impartiality.

CONCLUSION

For the foregoing reasons, the appellant, Overtis Sykes, respectfully requests that this Court vacate his conviction and dismiss the indictment against him with prejudice or, in the alternative, reverse his conviction and remand his case to the district court for a new trial.

Respectfully Submitted,

Overtis Sykes
Defendant-Appellant

By: _____

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No. 08-2558

IN THE UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

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

Case No. 07 CR 857 - 1

Hon. John F. Grady
Presiding Judge

CERTIFICATE OF SERVICE

I, the undersigned, counsel for the Defendant-Appellant, Overtis Sykes, hereby certify that I served two copies of this brief and attached short appendix and one digital copy of the brief by placing them in an envelope with sufficient postage affixed and directed to the person named below at the address indicated, and depositing that envelope in the United States mail box located at 357 East Chicago Avenue, Chicago, Illinois on November 24, 2008.

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Dated: November 24, 2008

No. 08-2558

IN THE UNITED STATES COURT OF APPEALS

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UNITED STATES OF AMERICA,

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v.

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Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

Case No. 07 CR 857 - 1

Hon. John F. Grady
Presiding Judge

CIRCUIT RULE 31(e) CERTIFICATION

I, the undersigned, counsel for the Defendant-Appellant, Overtis Sykes, hereby certify that I have filed electronically, pursuant to Circuit Rule 31(e), versions of the brief and all of the Appendix items that are available in non-scanned PDF format.

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Hon. John F. Grady
Presiding Judge

CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32(a)(7)

I, the undersigned, counsel for the Defendant-Appellant, Overtis Sykes, hereby certify that this brief conforms to the rules contained in Fed. R. App. 32(a)(7) for a brief produced with a proportionally spaced font. The length of this brief is 12,629 words.

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No. 08-2558

IN THE UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

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 Case No. 07 CR 857 - 1 Hon. John F. Grady Presiding Judge

CERTIFICATE OF COMPLIANCE WITH CIRCUIT RULE 30(d)

I, the undersigned, counsel for the Defendant-Appellant, Overtis Sykes, hereby state that all of the materials required by Circuit Rules 30(a), 30(b), and 30(d) are included in the Appendix to this brief.

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Dated: November 24, 2008

No. 08-2558

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

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

Case No. 07 CR 857 - 1

Hon. John F. Grady, Presiding Judge

ATTACHED REQUIRED SHORT APPENDIX OF DEFENDANT-APPELLANT OVERTIS SYKES

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SHORT APPENDIX TABLE OF CONTENTS

No. 08-2558

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

UNITED STATES OF AMERICA,

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Case No. 07 CR 857 - 1

Hon. John F. Grady, Presiding Judge

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SHORT APPENDIX TABLE OF CONTENTS

Speedy Trial Act Timeline

DATE	ACTION	# DAYS NOT EXCLUDED
6/21/2006	Sykes arrested/detained.	
7/20/2006	Sykes indicted on three counts. **START Speedy Trial clock.** (R. 06-CR-453 at 14.)	
		18
8/07/2006	Korenkiewicz appointed as standby counsel. Psychiatric examination ordered. Time excluded under 18 U.S.C. 3161(h)(1)(A). (R. 06-CR-453 at 21.) **STOP Speedy Trial clock .**	
		–
1/10/2007	Sykes found competent. Time excluded under 18 U.S.C. 3161(h)(8)(A) and (B) to determine extent of authority of standby counsel. (R. 06-CR-453 at 38).	
		--
1/25/2007	Trial set for 5/21/07. Time excluded under 18 U.S.C. 3161(h)(8)(A) and (B) for continuity of standby counsel and plea negotiations as to defendant Barkalow. (R. 06-CR-453 at 41). **Improper exclusion.** ***See infra*** **at XXX, note 1. RE-START Speedy Trial clock.**	
		53
3/19/2007	**70-day Speedy Trial Act window expires.**	
		50
5/08/2007	Motion by USA to sever defendants. (R. 06-CR-453 at 45). **STOP Speedy Trial clock.**	
		--
7/25/2007	Sykes arraigned on superseding indictment. Trial set for November 19. Time excluded under 3161(h)(6) to permit time for trial preparation and for the arraignment of defendant Barkalow on the superseding indictment. (R. 06-CR-453). **Improper exclusion. RE-START Speedy Trial clock.**	
		8
8/2/2007	Barkalow arraigned. Time excluded under 3161(h)(8)(A)/(B) for trial preparations. **Improper exclusion.** ***See infra*** **at XXX, note 1.**	
		104
11/14/2007	Motion by Sykes to dismiss for violation of Speedy Trial Act. (R. 06-CR-453 at 77). **STOP Speedy Trial clock.**	
	TOTAL # DAYS NOT EXCLUDED:	**233**

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA	)	No. 07CR 0857
v.	)	
OVERTIS SYKES and LAURA BARKALOW	)	Violations: Title 18, United States Code, Sections 2113(a)

JUDGE NORGLE

MAGISTRATE JUDGE MASON

COUNT ONE

The SPECIAL AUGUST 2006-2 GRAND JURY charges:

On or about June 7, 2006, at Chicago, in the Northern District of Illinois, Eastern Division,

OVERTIS SYKES and
LAURA BARKALOW,

defendants herein, by force and violence, and by intimidation, took from the person and presence of a bank teller, approximately $585.00 in United States currency belonging to and in the care, custody, control, management, and possession of North Community Bank, located at 5342 North Broadway Avenue, Chicago, Illinois, the deposits of which were then insured by the Federal Deposit Insurance Corporation;

In violation of Title 18, United States Code, Sections 2113(a).

COUNT TWO

The SPECIAL AUGUST 2006-2 GRAND JURY further charges:

On or about June 13, 2006, at Chicago, in the Northern District of Illinois, Eastern Division,

OVERTIS SYKES and
LAURA BARKALOW,

defendants herein, by force and violence, and by intimidation, took from the person and presence of a bank teller, approximately $895.00 in United States currency belonging to and in the care, custody, control, management, and possession of TCF Bank, located at 5516 North Clark Street, Chicago, Illinois, the deposits of which were then insured by the Federal Deposit Insurance Corporation;

In violation of Title 18, United States Code, Sections 2113(a).

COUNT THREE

The SPECIAL AUGUST 2006-2 GRAND JURY further charges:

On or about June 15, 2006, at Chicago, in the Northern District of Illinois, Eastern Division,

OVERTIS SYKES and
LAURA BARKALOW,

defendants herein, by force and violence, and by intimidation, took from the person and presence of a bank teller, approximately $575.00 in United States currency belonging to and in the care, custody, control, management, and possession of TCF Bank, located at 4355 North Sheridan Road, Chicago, Illinois, the deposits of which were then insured by the Federal Deposit Insurance Corporation;

In violation of Title 18, United States Code, Sections 2113(a).

COUNT FOUR

The SPECIAL AUGUST 2006-2 GRAND JURY further charges:

On or about June 18, 2006, at Chicago, in the Northern District of Illinois, Eastern Division,

OVERTIS SYKES and
LAURA BARKALOW,

defendants herein, by force and violence, and by intimidation, took from the person and presence of a bank teller, approximately $2,125.00 in United States currency belonging to and in the care, custody, control, management, and possession of TCF Bank, located at 4660 West Irving Park Road, Chicago, Illinois, the deposits of which were then insured by the Federal Deposit Insurance Corporation;

In violation of Title 18, United States Code, Sections 2113(a).

A TRUE BILL:

_____
FOREPERSON

_____
UNITED STATES ATTORNEY

AO 245B (Rev. 06/05) Judgment in a Criminal Case
Sheet 1

UNITED STATES DISTRICT COURT

Northern District of Illinois

UNITED STATES OF AMERICA
V.
Overtis Sykes

JUDGMENT IN A CRIMINAL CASE

Case Number: 07 CR 857 -1

USM Number: 090802-081

Pro-Se & Stand by Counsel Robert A. Korenkiewicz
Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to count(s) _____

☐ pleaded nolo contendere to count(s) _____
which was accepted by the court.

X was found guilty on count(s) 1,2,3 & 4 of the indictment
after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18 U.S.C. §2113(a) and 2	Bank Robbery	06/07/2006	One
18 U.S.C. §2113(a) and 2	Bank Robbery	06/13/2006	Two
18 U.S.C. §2113(a) and 2	Bank Robbery	06/15/2006	Three
18 U.S.C. §2113(a) and 2	Bank Robbery	06/18/2006	Four

The defendant is sentenced as provided in pages 2 through 5 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) _____

☐ Count(s) _____ ☐ is ☐ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

FILED-ED
2008 JUN 20 PM 1:27
CLERK
U.S. DISTRICT COURT

06/17/2008
Date of Imposition of Judgment

Signature of Judge

John F. Grady - United States District Court Judge
Name and Title of Judge

6-20-08
Date

AO 245B (Rev. 06/05) Judgment in Criminal Case
Sheet 2 — Imprisonment

DEFENDANT: Overtis Sykes
CASE NUMBER: 07 CR 857 -1

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of:

240 months as to counts one, two, three and four, each term to run concurrently. In addition, he is ordered to serve 90 days custody for three findings of contempt of court, to be served consecutively to the 240 month sentence.

☐ The court makes the following recommendations to the Bureau of Prisons:

X The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____.

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on _____.

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

a _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: Overtis Sykes
CASE NUMBER: 07 CR 857 -1

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of :

3 years as to counts one, two, three and four, to run concurrently. The defendant shall participate in a drug aftercare treatment program, which may include a residential treatment program at the direction of the probation office. The defendant shall submit to drug test within 15 days of release from imprisonment and random drug tests thereafter, conducted by the U.S. Probation Office, not to exceed 104 test per year.

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

☐ The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)

X The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. (Check, if applicable.)

X The defendant shall cooperate in the collection of DNA as directed by the probation officer. (Check, if applicable.)

☐ The defendant shall register with the state sex offender registration agency in the state where the defendant resides, works, or is a student, as directed by the probation officer. (Check, if applicable.)

☐ The defendant shall participate in an approved program for domestic violence. (Check, if applicable.)

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;
3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4) the defendant shall support his or her dependents and meet other family responsibilities;
5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;
6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;
7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;
10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and
13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

Judgment — Page 4 of 5

DEFENDANT: Overtis Sykes
CASE NUMBER: 07 CR 857-1

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Fine	Restitution
TOTALS	$ 400.00	$ 0.00	$ 4180.00

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case* (AO 245C) will be entered after such determination.

X The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss*	Restitution Ordered	Priority or Percentage
North Community Bank 5342 North Broadway Ave, Chicago, Illinois	$585.00	$585.00	100%
TCF Bank 5516 North Clark Street Chicago, Illinois	$895.00	$895.00	100%
TCF Bank 4355 North Sheridan Road Chicago, Illinois	$575.00	$575.00	100%
TCF Bank 4660 West Irving Park Road Chicago, Illinois	$2,125.00	$2,125.00	100%
TOTALS	$ 4180.00 0	$ 4180.00 0	

☐ Restitution amount ordered pursuant to plea agreement $ _____

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

X The court determined that the defendant does not have the ability to pay interest and it is ordered that:

X the interest requirement is waived for the ☐ fine X restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: Overtis Sykes
CASE NUMBER: 07 CR 857-1

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows:

A X Lump sum payment of $ 400.00 due immediately, balance due

☐ not later than _____ , or
X in accordance ☐ C, ☐ D, ☐ E, or X F below; or

B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or

C ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of $ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or

D ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of $ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F X Special instructions regarding the payment of criminal monetary penalties:

Payment of restitution of $4180.00 shall paid during the course of supervision and shall be payable at a rate of 10% of the defendant's monthly income.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

ORIGINAL

SYKES-NT.APPL.wpd/d22

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

FILED

JUN 17 2008 TC
JUN 17, 2008
MICHAEL W. DOBBINS
CLERK, U.S. DISTRICT COURT

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	**No. 07 CR 857**
	)	
OVERTIS SYKES	)	**Hon. John F. Grady,**
	)	**presiding**
Defendant.	)	

NOTICE OF APPEAL

Notice is hereby given that Defendant, Overtis Sykes, hereby appeals to the United States Court of Appeals for the Seventh Circuit from the final judgment of conviction and sentence entered in this action on the 17th day of June, 2008.

Date: 6/17/08

Overtis Sykes, Pro Se*

Overtis Sykes
Reg. No. 09082-424
c/o M.C.C.
71 West Van Buren St.
Chicago, Illinois 60605

United States Attorney, 219 S. Dearborn St., Chicago, Illinois

Received a copy of the above Notice this 17th day of June, 2008.

TCM

* Defendant-Appellant, Overtis Sykes, does not wish the appointment of counsel on appeal but, rather, wishes to proceed pro se and in forma pauperis.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA	)	
	)	No. 06 CR 453
v.	)	
	)	Violations: Title 18, United States
OVERTIS SYKES and	)	Code, Sections 2113(a) and 2
LAURA BARKALOW	)	
	)	Superseding Indictment

JUDGE GRADY

MAGISTRATE JUDGE ASHMAN

COUNT ONE

The SPECIAL AUGUST 2006-1 GRAND JURY charges:

On or about June 7, 2006, at Chicago, in the Northern District of Illinois, Eastern Division,

OVERTIS SYKES and
LAURA BARKALOW,

defendants herein, by force and violence, and by intimidation, took from the person and presence of a bank teller, approximately $585.00 in United States currency belonging to and in the care, custody, control, management, and possession of North Community Bank, located at 5342 North Broadway Avenue, Chicago, Illinois, the deposits of which were then insured by the Federal Deposit Insurance Corporation;

In violation of Title 18, United States Code, Sections 2113(a) and 2.

COUNT TWO

The SPECIAL AUGUST 2006-1 GRAND JURY further charges:

On or about June 13, 2006, at Chicago, in the Northern District of Illinois, Eastern Division,

OVERTIS SYKES and
LAURA BARKALOW,

defendants herein, by force and violence, and by intimidation, took from the person and presence of a bank teller, approximately $895.00 in United States currency belonging to and in the care, custody, control, management, and possession of TCF Bank, located at 5516 North Clark Street, Chicago, Illinois, the deposits of which were then insured by the Federal Deposit Insurance Corporation;

In violation of Title 18, United States Code, Sections 2113(a) and 2.

COUNT THREE

The SPECIAL AUGUST 2006-1 GRAND JURY further charges:

On or about June 15, 2006, at Chicago, in the Northern District of Illinois, Eastern Division,

OVERTIS SYKES and
LAURA BARKALOW,

defendants herein, by force and violence, and by intimidation, took from the person and presence of a bank teller, approximately $575.00 in United States currency belonging to and in the care, custody, control, management, and possession of TCF Bank, located at 4355 North Sheridan Road, Chicago, Illinois, the deposits of which were then insured by the Federal Deposit Insurance Corporation;

In violation of Title 18, United States Code, Sections 2113(a) and 2.

COUNT FOUR

The SPECIAL AUGUST 2006-1 GRAND JURY further charges:

On or about June 18, 2006, at Chicago, in the Northern District of Illinois, Eastern Division,

OVERTIS SYKES and
LAURA BARKALOW,

defendants herein, by force and violence, and by intimidation, took from the person and presence of a bank teller, approximately $2,125.00 in United States currency belonging to and in the care, custody, control, management, and possession of TCF Bank, located at 4660 West Irving Park Road, Chicago, Illinois, the deposits of which were then insured by the Federal Deposit Insurance Corporation;

In violation of Title 18, United States Code, Sections 2113(a) and 2.

A TRUE BILL:

_____
FOREPERSON

_____
UNITED STATES ATTORNEY

AE

FILED

NOV 14 2007

NOV 14 2007
JUDGE JOHN F. GRADY
United States District Court

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Overtis Sykes
Laura Barkalow
Plaintiffs/Petitioners

v.

UNITED STATES OF AMERICA
Respondent

Case No. 06 CR 453

Judge: GRADY

MOTION TO DISMISS FOR VIOLATION OF THE SPEEDY TRIALS ACT

Comes Now Overtis Sykes and Laura Barkalow, sui juris, hereinafter jointly and severely "Petitioners" seeking dismissal with prejudice do to Governments violation of the Speedy Trial Act [18 U.S.C. § 3161(c)], waving no powers, Rights or Immunities by use of private copyrighted statutes, absent assent and proven by Contract affixed with our proper signature and seal.

The Petitioners are not attorneys, nor represented by attorneys and bring this motion to the Court in good faith that pursuant to the duty and obligation imposed by written Oath of Office to uphold the Constitution and Laws of the United States for the united States of America, that the Court will prevent or correct (as required) any act or omission that would violate and right of Petitioners protected by the Constitution of the United States for the united States of America and the Laws made pursuant thereto.

Title 18 U.S.C. § 3161 (c)(1) sets the specific time period of seventy (70) days for trial to began after the filing of the indictment or information, or from the date an individual appears before a judicial officer, whichever is later, and Ninty (90) days if the government is detaining an individual who is solely awaiting trial. The Court can exclude time for any of the reasons listed in § 3161(h).

In the current case non of the provisions that would exclude time apply. The government filed a superseding indictment in late July 2007, and since we are now in November, more than Ninty (90) days since Petitioners were presented with said superseding indictment. Petitioner are seeking sanctions in accord with 18 U.S.C. § 3162(a)(2).

F.R.Crim.P Rule 50 states "Scheduling preference must be given to criminal proceedings as far as practicable." and F.R.Crim.P Rule 48(b)(3) authorizes the court to dismiss an indictment, information or complaint if unnecessary delay occurs in bringing a defendant to trial. These support the sanctions imposed by 18 U.S.C. § 3162(a)(2) which states in part "If the defendant is not brought to trial within the time limits required by section 3161(c) as extended by 3161(h), the information or

indictment shall be dismissed on motion of the defendant" Because the delay was not the fault of Petitioners and Petitioners never agreed to any continuance, request is made that the indictment be dismissed.

18 U.S.C. § 3161(a)(2) requires that the Court in determining whether to dismiss the case with or without prejudice, the court shall consider, among others, each of the following factors: 1) the seriousness of the offence; 2) the facts and circumstances of the case that lead to the dismissal; 3) and the impact of reprosecution on the administration of this chapter and on the administration of justice.

When the Petitioners last appeared in Court in July a trial date was set for August 19, 2007. Then for some unknown reason the date was changed to November 19, 2007. This would put the time between the indictment and the trial at over 115 days. In U.S. v. Ramirez, 973 F.2d 36, 39 the court makes it clear that "Dismissal with prejudice proper because despite the seriousness of the charge, delay caused by trial court's administrative oversight; courts must be deterred from permitting such delays." this goes to the hart guaranteed substantive Due Process to which everyone is entitled as a birthright. Not to mention the fact that the prosecutor has not provided to the Petitioners a response to various affidavits to which they were ordered to respond to. If they had then this prolonged pre-trial detention would have been avoided.

The Prosecutor has acted with bad faith and by not responding to either the affidavits that were served in open court, nor responding to the Proof of Claim that the Petitioners have Privately served on Respondent, the Petitioners have nothing to go on if they are left in a position to have to defend them self. By the silence of the prosecutor the Petitioners can only assume to NO CONTROVERSY, and assumptions never lead to Due Process of Law.

This is not the first time the Petitioners have been subjected to a violation of the Speedy Trials Act. On January 25, 2007 a trial date was set of May 21, 2007, a total of 110 days. The Docket sheet shows that the Court ordered excludable delay pursuant to 18:3161 (h)(A)(B), but the record shows no reason for such a delay. There were no motions pending before the court at that time, neither Petitioner asked for nor agreed to a continuance and the Seventh Circuit Handbook states "A judge who relies on a 'ends of justice' exclusion must state his reasons orally or in writing. The Seventh Circuit reviews the district court for abuse of descretion. Neville, 82 F. 3d at 762." The record shows no reason given orally or in writing. This is a clear violation of the act and grounds for dismissal with prejudice. The Government when they filed the superseding indictment added two charges that were already in the original complaint, this does not restart the clock as to the charges contained in the original indictment which are now 8 months overdue. (See: United States v. Baker, 40 F.3d 154, 159 (7th Cir. 1994.)

The Prosecution also has a responsibility to ensure that its prosecution does not violate the provisions of the Speedy Trials Act. In U.S. v. Russo, 741 F.2d 1264, 1267-68 (11th Cir. 1984) the court makes it clear "dismissal with prejudice proper because ignorance or negligence led to government's failure to prosecute within the time allowed by the act.

The Petitioners have actually been subjected to the restraints of the court since June 20, 2006 a period of 16 months, and in that time neither Petitioner has been able to move freely, earn any income, or have access to the necessary legal

materials to properly prepare for a trial. The Petitioners counted on the prosecution to act with good faith and follow the courts order to respond to the affidavits that were submitted to the court, but instead the prosecution has ducked, dodged, and done anything it could to keep from providing the exculpatory discovery that would have proven that the Petitioners were not the defendants solely for the purpose of securing an conviction. The court has stated in U.S. v. Clymer, 25 F.3d 824, 831-33 (9th Cir. 1994) "Dismissal With Prejudice proper because seriousness of the charge outweighed by government's failure to follow precedent, and actual prejudice restricted defendant's liberty and ability to prepare for trial."

Both the court and the Prosecutor should have been diligent in protecting the right of Petitioners, the restriction on liberty have had such devastating affects that it has slipped into punishment. Under the Due Process clause of the Fifth Amendment a detainee may not be punished prior to an adjudication of guilt conducted in accordance with due process of law. Bell v. Wolfish, 444 U.S. 520, 535, 99 S.Ct. 1861, 1872, 60 L.Ed. 2d 447 (1979).

The Prosecutor has admitted that he knew from the beginning that the Petitioners were not the defendant and then allowed the trial to be set off for such a time that it would be impossible for them to defend against the charges because of diminished resources. Dismissal with prejudice is proper in this case just as stated by the court in U.S. v. Dragone, 78 F.3d 65, 66 (2nd Cir. 1996) "Dismissal with prejudice proper because despite the seriousness of the offense, delay would skew the fairness if trial and seriously undermine administration of justice.

Relief Sought

Because Petitioners have been subjected to violation of the Speedy Trial Act not once but twice and therefore denied due process not once but twice the indictment should be dismissed with prejudice and Petitioners should be released from the custody and control of any United States agency.

and any other relief that the court deems just and proper.

Respectfully submitted

Overtis Sykes, sui Juris
Secured Party

Laura Barkalow
Laura Barkalow, sui Juris

It is quite clear that the defendants' acquiescence in Speedy Trial Act violations do not cure the violations and do not deprive a defendant of standing to raise those violations at whatever time he belatedly sees fit to do so.

But, nonetheless, I think that Mr. Murray makes a very good point when he suggests that the defendants' lassitude in regard to the Speedy Trial Act is a factor that goes to whether the dismissal should be with or without prejudice.

DEFENDANT SYKES: Well, excuse me --

THE COURT: No. I have heard you fully, Mr. Sykes, and it is my turn now.

Now, the question of whether the dismissal should be with or without prejudice is not entirely a matter of the Court's discretion. The recent case of *United States against Killingsworth* from the Seventh Circuit indicates that unless there is good reason for dismissing with prejudice, the dismissal should be without prejudice; and that if, in fact, the District Court makes the wrong decision, the dismissal with prejudice will be reversed.

I think that the *Killingsworth* case applies four square to the situation that now confronts me. There has been no intentional violation of the Speedy Trial Act. Whatever violation has occurred has been actually unconscious on the part of both the government and the Court and for what

both the government and the Court perceived at the times in question to be good reason.

Moreover, the charges in this case are quite serious, four bank robberies. That was a factor that the Court pointed out in *Killingsworth*.

For me to dismiss these charges and allow these defendants to walk out of this court free and clear of the fact that they are charged with four bank robberies would be a gross miscarriage of justice, in my opinion, and a further reason for the dismissal to be without prejudice.

As far as any actual prejudice having occurred to the defendants by reason of the continuances that have been granted, as I have indicated, Mr. Sykes is largely responsible for the fact that the Court granted those continuances. Most of them were granted in some effort to understand what to do with the case that he has made into a serious challenge to the Court's ability to do justice, both to him and to his co-defendant, Ms. Barkalow.

To a very large extent, whatever delay has occurred in this case that would not ordinarily have occurred is due entirely to 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.

Now, as far as Ms. Barkalow is concerned, the

situation is somewhat different because I believe that she regards Mr. Sykes as some kind of legal guru and she relies on his advice. However, I have repeatedly informed her that that is bad strategy from her standpoint.

She has heard me say repeatedly that Mr. Sykes' legal theories, if they can be called that, are not sustainable under any view of the law and, in fact, will not be presented to any jury.

We had a question a time or two ago as to whether I would allow Mr. Sykes to testify to whatever this is he wishes to testify to in front of a jury, and the answer to that question is no. I am not going to allow Mr. Sykes to confuse a jury by getting on the witness stand and testifying about some Uniform Commercial Code defense to the bank robbery case or whatever it is that he is saying in his numerous articulations of whatever theory it is he has.

I don't see that the purpose of the Speedy Trial Act would be compromised by a dismissal without prejudice. The Seventh Circuit has stated that a dismissal without prejudice is itself a sanction that is meaningful.

It said that in a case where one of my colleagues said, "Well, I am not going to dismiss without prejudice because that doesn't mean anything," and the Court of Appeals said, "Oh, yes, it does. You should have dismissed. You shouldn't have just simply overlooked the violations. You

should have dismissed without prejudice, because that brings the government's attention and the lower court's attention to the fact that the Act has been violated."

So I don't agree that a dismissal without prejudice is a meaningless sanction. The Court of Appeals has recognized that it is a sanction. But we have the public interest involved here, and the Court has to weigh the public interest in the prosecution of these four bank robberies, alleged bank robberies, against whatever interest these defendants have in a dismissal without prejudice which would enable them to escape prosecution on charges that are quite serious.

The balancing involved there is easy to do. The public interest is obviously paramount, and the interests of defendants in a dismissal without prejudice for reasons that they never bothered to bring to the Court's attention during the pendency of the case is slight in comparison to the public interest in prosecution of the case.

For these reasons, the dismissal of the superseding indictment will be without prejudice and the order of the Court is that the government's motion to dismiss is granted. The superseding indictment is dismissed. The dismissal is without prejudice.

I will now exclude time between today and the return of any superseding indictment, but I should give the

United States District Court, Northern District of Illinois

Name of Assigned Judge or Magistrate Judge	John F. Grady	Sitting Judge if Other than Assigned Judge	
CASE NUMBER	06 CR 453 - all	DATE	12/20/2007
CASE TITLE	USA vs. Sykes, et al.		

DOCKET ENTRY TEXT

Status hearing held and continued to 1/9/08 at 9:30 a.m. Motion 45 is granted. Motions 73, 76, and 77 are granted in part as to both defendants. The motions of both defendants to dismiss for violation of the Speedy Trial Act are granted without prejudice. Oral motion by the government to dismiss the indictment without prejudice is granted. The superseding indictment is dismissed without prejudice. Defendant Overtis Sykes is discharged and ordered released from custody on the basis that there is no pending charge against him. Oral motion by defendant Laura Barkalow to discharge the bond is granted. Motions for reconsideration as to both defendants are denied. Order time excludable pursuant to 18:3161 (h)(6) until 1/9/08 to permit the return of a 2nd superseding indictment and for arraignment as to both defendants. (X-P)

Docketing to mail notices.

00:30

Courtroom Deputy Initials:	JD

A. This piece of paper here?
Q. Yes.
A. To be honest with you, I don't know.
Q. Okay. Now, when demand notes are tested for fingerprints, is it true that generally, the ink on those demand notes tends to fade?
A. It can, yes.
Q. Now, what else was found in the room that was relevant to your investigation?
A. There was $498 in U.S. currency laying on the bed where Mr. Sykes was laying when we arrested him.

MR. MURRAY: That's all for now, your Honor.

THE COURT: 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.

Yes.

JUROR: The exhibit, 5-H, could you hold that up? It looked like it was a long piece of paper, and what I've seen on the screen of the picture was a short piece. We saw 5-C, but 5-H is what he was holding in his hand.

MR. MURRAY: If we could go ahead and publish 5-H.

THE COURT: Why don't we show the jury the actual physical exhibits if we have those, pass them around the jury

THE WITNESS: I'm sorry. The question again?

THE COURT: Would you speak a little louder?

JUROR: How did you suspect that the defendants were staying in a hotel and not --

THE WITNESS: If I remember correctly, they were actually using their real names when they registered in at the hotel; and then also, a photo was showed to the employee at the hotel that advised us that they were staying there, and they verified that they were staying there.

And if I remember correctly, they were using -- I can't remember if they were using her name or his name, but they were using their true names.

JUROR: What was the arrest date?

THE WITNESS: June 20th of 2006.

JUROR: I have one question, your Honor.

THE COURT: Go ahead.

JUROR: Does defendant not have a defense?

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.

Is there another question?

JUROR: The -- I can't see on the piece of paper where the note was written. When was the picture taken, and where, of that piece of paper?

MR. MURRAY: I'll direct that question to the witness.

THE WITNESS: The photo was taken at the time of arrest. Right after we arrested both of them and we found the note, we took a picture right then.

JUROR: Okay. So it was taken in the motel?

THE WITNESS: It was taken in the motel, yes.

THE COURT: Yes.

agreement between the latent and the known print, I've come to the conclusion that the latent print was actually left by the same individual, Overtis Sykes, to the exclusion of all others.

THE COURT: All right.

JUROR: How often would you find a similar pattern between two individuals but the length of the ridges might be different?

THE WITNESS: That the length of the ridges might be different?

JUROR: Yeah. You might find the same pattern of dividing, ending, and dot ridges, but the lengths of the dividing or the ending ridge are different, and that's --

THE WITNESS: In all fingerprints, there are characteristics which pertain to all fingerprints, the dividing ridge, the ending ridge, and the dot; however, their lengths and their arrangement to each other -- so, when I went over the characteristics, you know, this dividing ridge arrangement and location, spacial relationship to the ending ridge marked as characteristic No. 2, all of those taken into account will not be the same.

There may be -- you know, some ridges may be the same length, but when you take into account all the other characteristics and the spacial arrangement and location to all of those other characteristics, they will not be repeated. That's what makes them unique.

JUROR: Thank you.

JUROR: Where was -- Exhibit 17, the latent print, where was that taken from? Was that taken from one of the notes?

THE WITNESS: Yes. This latent print was developed on one of the handwritten notes.

JUROR: Sorry to ask one more question.

THE WITNESS: No.

JUROR: How often do you think that too much of handling of any material which you've examined obliterate what you're really looking for? For instance, with this note, if you're looking to compare with the known print of the defendant, but it went through several hands, and their prints might be on the note, too. How often do you think that the other fingerprint actually sort of -- how should I put it, smudged the original ones? Can you still see the original ones through all of this messing other --

THE WITNESS: Right. For example, in this case, when I developed this latent print, I did not see any other latent prints that were over the top of this print. I didn't see any smudging that would deteriorate this latent print.

And also, you know, if there were other prints that were developed on the note, I would compare those as well. You know, I would compare those to whoever was named for comparison in that case.

JUROR: Were those the only prints you found on all the notes and the juice carton? I don't know if you looked at the juice carton.

THE WITNESS: I actually did not examine the juice carton.

JUROR: But as far as the notes, were those the only prints that you found belonging to Overtis and Laura Barkalow?

THE WITNESS: That's correct.

JUROR: You didn't find any other hand prints?

THE WITNESS: No, I did not.

JUROR: You didn't even find the teller hand prints on there?

THE WITNESS: No, I did not.

JUROR: Thank you.

THE COURT: All right.

BY MR. HAVEY:

Q. Just one follow-up. With regard to the question about where the latent note was recovered -- I'm sorry, the latent print, where it was recovered, that would be reflected on the summary chart, Government Exhibit 16, correct?

A. That's correct.

MR. HAVEY: That's all I have, Judge.

THE COURT: All right. If there's nothing further from the jury, we'll excuse the witness. Thank you.

THE WITNESS: Thank you.

MR. HAVEY: Thank you. Nothing further at this time, Judge.

THE COURT: Any questions from the jurors?

JUROR: I have one. From what time -- did you examine this onsite, or did you take it to a facility? And what's the time frame from the time -- from the bank robbery to the time that it's sent to Coronado or wherever it's sent to?

THE WITNESS: I compared the ridge details of the latent prints to the known prints in our unit, which is located at headquarters, and while the conditions -- at my desk.

JUROR: Okay. And at what point was that from the robbery? The robbery occurred on the 15th of June. What day was it that you examined it? And then was it sent somewhere else to get examined further?

THE WITNESS: I made the comparison, the identification on the 17th of June.

THE COURT: And was it sent someplace else for further examination?

THE WITNESS: Regarding the latent print from the lift itself, that was delivered by police messenger to our unit, where the comparison was subsequently made in our unit.

THE COURT: Does that answer the question?

JUROR: Yeah. So, there was no further analysis done on the fingerprints other than at your headquarters?

THE WITNESS: Once the latent image is brought,

delivered by police messenger to our unit, I'm the person who made the comparison from Lift A, from that lift.

JUROR: Thank you.

THE COURT: Yes.

JUROR: I don't know if this question is appropriate, but it seems like I've read in the literature that there's been some questions about fingerprints and their uniqueness. Is that -- is there really a basis for that, or is that --

THE COURT: That would be a question for the witness. What is your view of that?

THE WITNESS: That given in the last 100 years that identifications have been compared and made, that there have no -- no two individuals with the same friction skin design. Comparisons are made by comparing the ridge detail in both prints to see if they're the same, and we're looking at the characteristics of dot, ending ridge, bifurcation, trifurcation, enclosure, hook or spur, and bridge, and we're comparing between two prints with the intervening ridges between those characteristics, seeing that they're in the same position between those two prints.

THE COURT: Does the literature contain any evidence that any two separate persons have ever been found to have the same fingerprints?

THE WITNESS: No, sir.

THE COURT: Go ahead.

JUROR: On the note, when you compared the fingerprints, did you find any other fingerprints besides the defendant?

THE WITNESS: On the --

JUROR: You had the fingerprints from the note and fingerprints from the lift. On the note, the demand note, were there any other fingerprints besides Overtis?

THE WITNESS: There were other fingerprints that were identified on the bank robbery demand note with the digital images that we used for comparison purposes.

JUROR: Thank you.

THE COURT: Go ahead.

JUROR: With the note, that was examined by a forensic scientist in Quantico, are all notes sent to your headquarters and then sent to -- or fingerprints, are they identified by you and then sent to Quantico, typically, and what is that time frame?

THE WITNESS: Regarding the digital image, it was sent to us electronically from the computer system in our crime lab to our unit, where I subsequently made the comparison.

THE COURT: Bear in mind, this is the Chicago Police Department.

JUROR: Certainly.

THE COURT: Quantico is the FBI. I think the FBI had no involvement with the juice carton, is that correct, as far

as you know?

THE WITNESS: As far as I know, sir.

MR. MURRAY: And maybe I can clear this up.

THE COURT: Go ahead.

BY MR. MURRAY:

Q. The Chicago Police Department has a forensic laboratory entirely distinct from the forensic laboratory at the FBI, is that correct?

A. That's correct.

Q. Okay.

THE COURT: Do you have any knowledge from your reading in the literature as to approximately how many fingerprints have been examined over the 100 years or so that fingerprinting science has been recognized?

THE WITNESS: I don't have a number, but another aspect that accounts for permanence and uniqueness regarding fingerprints is a biological reason. And what accounts in part for the permanence is that the cells on our skin replenish and come to the surface of the skin; and it's the adherence of these cells to one another, through a product called desmosomes, that keeps the permanence in relation to the dermis in the inner skin.

And regarding the uniqueness, beginning at approximately 10 to 10-1/2 weeks of embryonic development, the friction ridges are going through an infinite number of

interdependent stresses, strains, and tensions across that developing ridge field.

THE COURT: Let me make this observation in regard to the question asked by the juror concerning uniqueness. I had read something about that myself, and I'm certainly not an expert on it, and I'm not prepared to make any comment on it at all, nor would I, even if I were.

But I will say this to the jury. You should not accept the testimony of any witness just because the testimony was given. It is for you to determine the weight of any testimony, including expert testimony. So, the fact that an expert testifies to something doesn't mean that you have to accept it. It's entirely a matter for you to weigh and make your own determination.

An obvious proposition is that no one has ever examined all fingerprints of all persons in the world and compared them to each other, so that any statement based on the uniqueness of those prints that have been compared to each other would only account for a small part of the universe of the total fingerprints that have been available in the history of fingerprint science for comparison had comparisons been made.

That's about all I can say concerning skepticism about the science. There is such skepticism out there, and the jury should be aware of that; but I'm not prepared to comment

any further on it.

Mr. Murray, do you want to ask this witness any further questions?

MR. MURRAY: No, we're done.

THE COURT: Does the jury have any further questions?

All right. Thank you, sir. You may be excused.

THE WITNESS: Thank you, sir.

(Witness excused.)

MR. MURRAY: Your Honor, the government's called its last witness.

THE COURT: The government rests?

MR. MURRAY: Yes.

THE COURT: All right. That completes the evidence, ladies and gentlemen. Mr. Sykes has given no indication that he's changed his mind and that he wants to appear in any way in the trial, so that closes the evidence.

Let's take a short recess, after which we'll have the final arguments of the attorneys for the government. And let's recess, say, until 10:45.

(Jury exits courtroom.)

THE COURT: I'll go get the instructions and be out. I'll excuse counsel until 10:40.

(Recess had.)

THE COURT: Here are two copies of the instructions I'm going to give. Look them over, and as soon as you're

THE DEFENDANT: Yes, your Honor.

THE COURT: Mr. Sykes.

THE DEFENDANT: I put in a motion for dismissal under the Fifth Amendment due process clause and the Sixth Amendment right to speedy trial. The Supreme Court has said that the purpose of the Sixth Amendment guarantee to speedy trial is an important safeguard to prevent undue and oppressive incarceration prior to trial. It's also to minimize anxiety and concerns accompanying public accusations and to limit even the possibility that long delay will impair the ability of the accused to defend himself.

When we were here on the 30th, when you agreed to put me out on bond, we spoke about impairment of the defense and we also spoke about prejudice to the defense. As you're aware, when the second, the superseding indictment was dismissed in this case, I had already been incarcerated for a total of 18 months. The Supreme Court has said that prejudice to the defense is the most significant, the most significant issue covered by the Sixth Amendment speedy trial.

Mr. Murray turned around and put in a motion and he put in a motion stating that once a defendant, a pro se defendant denies stand-by counsel, he no longer has the right to a law library, and Mr. Murray put some cases, he, you know, backed up his argument with some cases, and on its face it seemed like a pretty good motion.

So I brought this for Mr. Murray and I brought copies

for the court. The Supreme Court has said that due process requires that a pro se defendant has access to legal resources under Bonds v Smith. They also said a fundamental constitutional right to access to courts require prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries and adequate assistance from persons trained in the law.

Also, in the case U.S. v Kinds, it says defendant has a due process right to legal resources. So he was right, under the Sixth Amendment yes, under the Fifth Amendment no.

Also, I want to clear up some misconceptions and put them on the record.

At the last hearing the Court appointed Mr. Korenkiewicz to be what the Court said would be my investigator. Back on January 10th, the Court asked Mr. Korenkiewicz to look at the possibility of putting in legal motions on my behalf either without my consent or even above my objection. Mr. Korenkiewicz informed the Court in a memorandum that his research surprised him and what he stated was even any kind of court-appointed representation or representation on the part of stand-by counsel would be Sixth Amendment violation and grounds for reversal.

The Supreme Court has also said in the case United States v Marion that the due process clause of the Fifth Amendment may provide a basis for dismissing an indictment if a defendant can show that prosecutorial delay has prejudiced his

right to a fair trial.

So when I was released, the Court told me that I -- after my indictment was dismissed, the Court told me that I would be released on December 20th. That didn't happen. 11 days later, on December 31st, I was released.

Now, we talked at length on the 30th of January, 2008, and on December 20th, December 20th, 2007, about what the prelaw and pretrial detention had done to my ability to prepare the case, the draining of financial resources so that even this motion that I sent to the Court was sent on the account of another inmate. I have no money to send legal papers to the Court.

We also spoke about me recontacting witnesses that I had lost track of during the 18 month delay, which was obviously the government's fault, and ended in a dismissal.

So under Baker, the Supreme Court gave four things that the judge could consider when considering the Speedy Trial motion. Number one, what the length of delay, but most courts generally take one year as the trigger to say that that's presumptively prejudicial, and then it's up to the defendant to prove the prejudice. We had 18 month delay before it was ever -- had I realized I could have done a Sixth Amendment motion at that time, I would have done it.

The second thing they said is the reason for the delay. Now, whether the delay was intentional on the part of the

government or whether the delay was unintentional, the effect that the delay had was the same. They also said another was whether the defendant had asserted his Speedy Trial rights or not. Under the Sixth Amendment I would have had to assert my right to speedy trial except that the Supreme Court went on to say that this list was not extensive, nor was any one factor to be dispositive, but the fourth factor, the most important thing under the Sixth Amendment is prejudice to the defendant. They said they wanted to limit the possibility that this prolonged pretrial detention would prejudice the defendant.

So I have to ask the Court -- well, actually, the Supreme Court says that the greater the delay, the greater the presumptive or actual prejudice to the defendant in terms of his ability to prepare for trial and on the restrictions of his liberty. Whether he's free on bail or not, the delay may disrupt his employment, drain his financial resources, curtail his associations, subject him to public obloquy and create anxiety in him, his family, and his friends.

In this case, I have -- well, my question to the Court is what type of prejudice does the Court need to rule in my favor because whatever type of prejudice that the Court, the Court needs me to prove, in this case we have it in abundance and we have it on record. We spoke about it on two separate court dates, December 20th, and also we spoke about it on the 30th at length. That's the reason why you gave me a bond.

Your exact words to Mr. Murray on the 30th was that you feared if you did not allow me bail, and I only asked for 30 days to prepare my case, if you did not allow me bail, that the Supreme Court -- that the appellate or the Supreme Court would come back and reverse your decision because the Court had not allowed me to prepare a defense.

Well, by me being sent to Kankakee County where they don't have stamps, they don't give out stamps, they don't give out envelopes, they don't have typewriters, they don't have a law library, I can't make a phone call, it's 50 cents a call, I have no money, Mr. Korenkiewicz's number, which I tried to call on numerous occasions, I was on Unit 3 Northwest, would not go through. I couldn't even send him a letter.

He can't -- another misconception the Court has, Mr. Korenkiewicz rights can't send me legal books or other materials to the jail. The jail's rules are they have to come directly from the publisher, which requires four to six weeks for delivery. Also, he can't drop off papers because in Kankakee jail what has happened is attorneys have brought in contraband, so now everything must be mailed in and opened in the presence of the officer and in the presence of the inmate.

So if we were go to trial Monday, there would be no defense. Also, I brought the letter. Mr. Murray was right. He turned over discovery to Mr. Korenkiewicz on August 25, 2006. I did not receive the discovery on this case until 2008, January

30th, and then after that I was sent to a jail where I had no ability to make any sort of defense. So how can I go to trial and have a fair trial, which invokes the Fifth Amendment?

I recontacted the witnesses, and now for some reason the witnesses think I have been charged with something else so now they won't even answer calls when I have other people to try to call them because it says it's coming from a correctional institution. I don't have any money to reach them. I have no witnesses. I have absolutely, positively nothing. The trial would be a show trial.

And one more issue that I have to put on the record. I brought copies because when I put in the motion to be released under 3164, 18 USC 3164, I was absolutely right. The Court thought that my motion was being asked for the case to be dismissed. I never asked for the case to be dismissed. If the Court recalls, in the two weeks I was out I showed up in court. I filed my legal papers in the Court the day before we had court. So whether or not I was trying to run from charges, I was never trying to avoid the charges because I thought I was right.

So I brought copies for everybody. There is a 90 day detention limit once there had -- once there was a Speedy Trial violation -- if someone wants to hand that up -- once there was a 70 day Speedy Trial violation, if the defense had to prove 90 days, that's counting the provisions under 3164(h) for exclusion of time, counting that provision, it says no detainee shall be

held in custody, and that was detainees who were of high risk, after expiration of the 90 day period. Well, that motion I put in three separate times. All of the reasons that you stated for giving me the bond were the exact same reasons I had put in my motion. So what I couldn't understand was why was the motion denied, but I was granted bond for the same reasons that were in my motion.

But what happened to me is if I'm going to be released on the 20th, because I was rearrested on the 16th, that would have been 25 days and I only asked for 30 days to get prepared for trial.

The second thing is when I asked for the 30 days and he put the motion in to stop it, at this point now I would be ready for trial. These are due process violations and also Sixth Amendment violations. But I already have that trigger with the 18 month previous incarceration.

So, yeah, the incarceration has been oppressive, my anxiety level has shot through the roof, my wife's been under psychiatric care for 18 months because of the prolonged -- their prolonging of this case after the transcripts show that when me and my wife was asked if we were prepared to go to trial, the answer was yes.

So I'm going to ask the Court to dismiss the case, and if the Court doesn't want to dismiss the case, I'm going to ask the Court again to allow me to prepare my case, to give me a bond

so I can do my own legal work, I can prepare my case, I can find my witnesses, because if we go to trial Monday, it will be a show trial, there is no defense, I wasn't allowed to prepare one at all.

Oh, one more thing. He put in his motion that I was able to prepare for 16 months or 18 months or however long, not without discovery. He might as well have turned discovery over to a garbage man. If he don't give it to me, I don't have an attorney, so everything was supposed to be given to me. So giving it to me on the 30th and then putting me in a place where I couldn't do anything about it, yeah, my rights to a fair trial have been shot out the window.

THE COURT: Does that complete your statement?

THE DEFENDANT: No, actually, there's one more. I brought copies of this too because I didn't want to just be talking without being able to show the Court exactly what I was talking about.

Impairment of the defense is the most serious form of prejudice, and it's the most important inquiry under the prejudice factor. Also, in US v Cheyenne, I think this is, I'm sorry, impairment of the defense is the most serious interest protected by the Speedy Trial right because inability to sufficiently prepare a case skews fairness, exactly what the Supreme Court was trying to guard against. That's the end of my statement.

THE COURT: Mr. Korenkiewicz, I would like you to address Mr. Sykes' statements concerning his lack of contact with you and also the question of when you provided to him the discovery that the Government had provided to you.

MR. KORENKIEWICZ: As to the first part, I started becoming very concerned about the middle of February that I learned that Mr. Sykes had not been brought back to the MCC. I anticipated that he would be brought back at least about 30 days prior to trial, especially since he was pro se.

So, on February 22nd, I called Vince Shaw, he's one of the staff attorneys at the MCC, indicated who I was, the fact that Mr. Sykes is set for trial on March 10th, that your Honor indicated that your Honor did want him probably brought back and have access to a law library and could he assist me in that matter and he indicated that he would.

When I didn't get a call back by the 26th, Mr. Shaw's phone indicated he would be out of town for a few days, I should speak with a Mr. Richard Hansford, who is another staff attorney. I spoke to Mr. Hansford on the 26th, the 28th of February, and finally, on March 4th, all the messages being of the same nature. Finally on the 4th, Mr. Hansford I think somewhat sheepishly said, "You know, he's in Marshal's custody. We can't order the Marshals to do anything."

THE COURT: This is the 4th of March?

MR. KORENKIEWICZ: This is the 4th of March. This is

my fourth call -- again, always trying to see what I could do to get Mr. Sykes back into the MCC. And he finally said "All we can do is make recommendations to the Marshals. We have made those recommendations, but he's not back here since." I then called Mr. Murray on this to indicate the problems I was having.

As to the discovery, I have to take a slight exception with Mr. Sykes. My records show that shortly after I received the original discovery in the Summer of 2006, I had a rather large copying expense -- I use professional copiers when the documents are voluminous -- and my recollection was that that was to copy all of the discovery in this case and deliver it to the MCC for Mr. Sykes. I don't have an independent recollection of that, but I do have the notation in my records that I did pay a copy service -- I don't want to guess at the amount -- but probably over $25 to copy all of this, and that was about the Summer of 2006.

THE COURT: Was there any need to copy other than to provide copies to Mr. Sykes?

MR. KORENKIEWICZ: No, and that's why I'm presuming that it was for that purpose. In other words, I had my set of copies. I didn't want to give my set directly to Mr. Sykes without having anything in my possession.

THE COURT: How many copies of the discovery do you presently have?

MR. KORENKIEWICZ: I have one.

been either at Kankakee or at the MCC or at any other facility awaiting trial and specifically, he says that there has been no contact at all in recent times.

MR. KORENKIEWICZ: No, since he's been in Kankakee, your Honor, no contact whatsoever, and because of the Court's order to get him back into the MCC, I hesitated sending any more things to Mr. Sykes because of the two mail problems I just indicated to the Court. That's why I started getting on the phone with the MCC attorneys to say "Give me some help on this. Tell me where he's at, number one. Number two, he's set for trial on March 10th. He's pro se. I know Judge Grady wants him back, you know, a reasonable time before trial. Give me some assistance." And it was only after the fourth call, which I say finally Mr. Hansford said to me, "Bob, all we can do is recommend. We have been recommending. There's been no response."

So no, I have gotten no calls from Mr. Sykes. I got a call from a family member who once called me to find out where he was at and I said "Has he contacted you?" And they said no.

So I can say that there was some problem in his getting contact out of Kankakee.

THE COURT: Now, there have been a number of court appearances where you were here and Mr. Sykes were here and you had conversations with him in connection with those court appearances, correct?

MR. KORENKIEWICZ: Oh, absolutely.

THE COURT: Has --

MR. KORENKIEWICZ: We had occasion this morning before court.

THE COURT: And I don't mean to intrude upon any privilege here, but I don't think I would be doing that if I just asked you to answer the following two questions.

Has Mr. Sykes ever asked you to research a specific legal issue? And I'm not asking you what issue.

MR. KORENKIEWICZ: No, not asked. I have done that for him, but that's been on my own motion.

THE COURT: All right. Has Mr. Sykes ever asked you to locate and/or interview any witness?

MR. KORENKIEWICZ: No.

THE COURT: All right, thank you.

Mr. Sykes, do you want to respond to Mr. Korenkiewicz?

THE DEFENDANT: Yeah, I know exactly what happened to the papers that Mr. Korenkiewicz sent. When I was released on December 31st, my mailing address was Salvation Army. So what happened is when he mailed it to the MCC and I wasn't in the MCC, they forwarded it to Salvation Army. The Salvation Army, if you don't pick it up in 30 days, I don't know what happens to it, but because of my rearrest, I couldn't pick up mail. So those documents are we don't know where.

As far as the discovery that was sent, the date of Mr.

Murray's letter turning over discovery to Mr. Korenkiewicz is August 25, 2006. Here is the copy of the letter. At that time, if you recall, I was in Segregation Unit at MCC and on the psych evaluation, so my legal papers when they brought them to the MCC, what they asked me was "Where do you want these sent?" because I couldn't have anything in the room since I was on this 150 day psch evaluation, and when it concluded, the psch evaluation ended up for one interview for one hour.

THE COURT: Mr. Murray, I have a vague recollection that at one of the court appearances you handed Mr. Sykes personally some discovery material, am I correct?

MR. MURRAY: You are. That was two court appearances ago when there was some issue as to whether Mr. Sykes had personally received discovery related to the last added charge in the superseding indictment. So in an abundance of caution, I tendered him another copy.

THE COURT: Had you ever tendered him personally any discovery prior to that?

MR. MURRAY: No, that went to Mr. Korenkiewicz.

THE DEFENDANT: I have every transcript from every court proceeding, all of them, up until -- no, it was never tendered to me. But that's what happened -- that's why I never received it. The psch evaluation and then the release screwed up the mail, and the reason I couldn't call anybody is because it's 50 cents a phone call to Kankakee and I'm broke, so I couldn't even get