In the
UNITED STATES COURT OF APPEALS
for the Seventh Circuit

No. 08-2558

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

OVERTIS SYKES,

Defendant-Appellant.

On Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 07 CR 857-1 — John F. Grady, *Judge*.

BRIEF OF THE UNITED STATES

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TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

JURISDICTIONAL STATEMENT 1

ISSUES PRESENTED FOR REVIEW 1

STATEMENT OF THE CASE 1

STATEMENT OF FACTS 3

SUMMARY OF ARGUMENT 7

ARGUMENT 9

I. The District Court Did Not Abuse Its Discretion In Dismissing The Indictment Without Prejudice 9

A. Standard of Review 9

B. Analysis 9

1. The District Court Did Not Specifically Find That The Speedy Trial Act Was Violated 9

2. The District Court Did Not Abuse Its Discretion In Applying the 18 U.S.C. § 3162(a)(2) Factors 15

II. The District Court Did Not Infringe Upon Defendant's Constitutional Right To Meaningful Access To The Courts Because Defendant Declined The Representation Of A Court-Appointed Attorney And Defendant Was Not Prevented From Preparing His Own Defense. 22

A. Standard of Review 22

B. Background 22

C. Analysis 24

III. The District Court Did Not Commit Plain Error In Permitting Jurors To Question Witnesses And Defendant Was Not Prejudiced By The Questions 30

A. Standard of Review 30

B. Background 30

C. Analysis 32

CONCLUSION 36

TABLE OF AUTHORITIES

CASES

Barker v. Wingo, 407 U.S. 514 (1972) 15

Bounds v. Smith, 430 U.S. 817 (1977) 25-26

Johnson v. Brelje, 701 F.2d 1201 (7th Cir. 1983) 26

Johnson-El v. Schoemehl, 878 F.2d 1043 (8th Cir. 1989) 26-27

Kane v. Espitia, 546 U.S. 9 (2005) 24

Lewis v. Casey, 518 U.S. 343 (1996) 26

Maust v. Headley, 959 F.2d 644 (7th Cir. 1992) 26

Neder v. United States, 527 U.S. 1 (1999) 29

Simpson v. Battaglia, 458 F.3d 585 (7th Cir. 2006) 25

United States v. Arango, 879 F.2d 1501 (7th Cir. 1989) 16, 19

United States v. Byrd, 208 F.3d 592 (7th Cir. 2000) 24-26

United States v. Chapman, 954 F.2d 1352 (7th Cir. 1992) 23-26

United States v. Curry, 538 F.3d 718 (7th Cir. 2008) 35-36

United States v. Dellinger, 472 F.2d 340 (1972) 36

United States v. Feinberg, 89 F.3d 333 (7th Cir. 1996) 30, 32, 33, 35

United States v. Fountain, 840 F.2d 509 (7th Cir. 1988) 17, 19

United States v. Hook, 471 F.3d 766 (7th Cir. 2006) 15

United States v. Killingsworth, 507 F.3d 1087 (7th Cir. 2007) 9, 16-17, 20-22

United States v. Lane, 718 F.2d 2226 (7th Cir. 1983) 23-26

United States v. Larson, 417 F.3d 741 (7th Cir. 2005) 9, 17, 20

United States v. Menzer, 29 F.3d 1223 (7th Cir. 1994) 12

United States v. Montoya, 827 F.2d 143 (7th Cir. 1987) 10, 12

United States v. Moutry, 46 F.3d 598 (7th Cir. 1995) 13

United States v. Moya-Gomez, 860 F.2d 706 (7th Cir. 1988) 24-26

United States v. Nava-Salazar, 30 F.3d 788 (7th Cir. 1994) 10

United States v. Olano, 113 S. Ct. 1770 (1993) 33

United States v. Oriedo, 498 F.3d 593 (7th Cir. 2007) 15, 18

United States v. Rawlings, 522 F.3d 403 (D.C. Cir. 2008) 34-35

United States v. Richardson, 233 F.3d 1285 (11th Cir. 2000) 32, 34, 35

United States v. Rollins, 544 F.3d 820 (7th Cir. 2008) 11

United States v. Santos, 201 F.3d 953 (7th Cir. 2000) 13

United States v. Sutton, 970 F.2d 1001 n.3 (1st Cir. 1992) 32

United States v. Taylor, 196 F.3d 854 (7th Cir. 1999) 14

United States v. Taylor, 487 U.S. 326 (1988) 16, 18-19

United States v. Tejeda, 476 F.3d 471 (7th Cir. 2007) 33

United States v. Thomas, 788 F.2d 1250 (7th Cir. 1986) 12-13

United States v. Tibboel, 753 F.2d 608 (7th Cir. 1985) 10

United States v. Wanigasinghe, 545 F.3d 595 (7th Cir. 2008) 22

United States v. White, 443 F.3d 582 (7th Cir. 2006) 10

Zedner v. United States, 547 U.S. 489 (2006) 14, 16

STATUTES

18 U.S.C. § 3161(c)(1) 10

18 U.S.C. § 3161(h)(1)(F) 10, 12

18 U.S.C. § 3161(h)(6) 12

18 U.S.C. § 3161(h)(8)(A) 13-214

18 U.S.C. § 3161(h)(8)(B)(iv) 13

18 U.S.C. § 3585(b) 21

18 U.S.C. § 3161(h)(6) 15

18 U.S.C. § 3162(a)(2) 16

JURISDICTIONAL STATEMENT

Defendant's jurisdictional statement is complete and correct.

ISSUES PRESENTED FOR REVIEW

1. Whether the district court abused its discretion in dismissing the indictment, without prejudice, where the court never found a specific violation of the Speedy Trial Act and where Defendant was charged with a serious offense, was largely responsible for the delay, and any slight prejudice Defendant may have suffered was substantially outweighed by society's interest in reprosecution.

2. Whether the district court denied Defendant meaningful access to the courts where Defendant declined the representation of court-appointed counsel, and where Defendant was not prevented from preparing his own defense.

3. Whether the district court committed plain error by permitting jurors to question witnesses, under the unique circumstance that Defendant chose not to attend his trial, and where Defendant was not prejudiced by the juror questions.

STATEMENT OF THE CASE

On June 21, 2006, Overtis Sykes ("Defendant"), and his wife Laura Barkalow, were arrested and charged by criminal complaint with bank robbery.

06-CR-453, R. 1, 3, 6.[1] On July 20, 2006, the grand jury returned an indictment charging Defendant (and his wife) with three counts of bank robbery. 06-CR-453, R. 14. On July 24, 2007, the grand jury returned a superseding indictment, adding an additional count of bank robbery (a total of four). 06-CR-453, R. 63. On November 14, 2007, Defendant moved to dismiss the superseding indictment, alleging violations of the Speedy Trial Act (06-CR-453, R. 74), a motion the court granted without prejudice on December 20, 2007. 06-CR-453, R. 83; 12/20/2007 Tr. at 22. The grand jury returned a new indictment the same day, containing the same charges. 07-CR-857, R. 1. Defendant pleaded not guilty to the new indictment on January 16, 2008 (07-CR-857, R. 13), and on March 10, 2008, a jury trial commenced. 07-CR-857, R. 42. Defendant refused to attend the trial and also instructed stand-by counsel not to appear on his behalf. *See, e.g.*, Tr. at 2, 4, 40-41, 180. After a two-day trial, a jury found Defendant guilty on all four counts. 07-CR-857, R. 44. On June 17, 2008, Defendant was sentenced to 240 months' imprisonment. 07-CR-857, R. 62.

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[1] This brief employs the following citation conventions: (1) numbered items in the official record on appeal are cited as "06-CR-453, R. _ or 07-CR-857, R. _"; (2) the trial transcript is cited as "Tr. at _"; (3) other transcripts contained in the record are cited as "[Date] Tr. at _"; (4) trial exhibits are cited as "Ex. _"; and (5) Defendant's appellate brief is cited as "Br. at _."

STATEMENT OF FACTS

The Trial

Defendant chose not to attend his own trial, and instructed his stand-by counsel to likewise abstain from attending. *See, e.g.*, 3/6/2008 Tr. at 33, 35; Tr. at 2, 4, 40-41, 180. Defendant and his stand-by counsel viewed jury selection, via a video/audio monitor, but chose not to be present for the trial. *E.g.*, Tr. at 2, 4, 22, 25. In Defendant's absence, the Government presented evidence that Defendant robbed four banks over the course of 11 days in June 2006. *See, generally,* Tr. at 30-157.

The evidence at trial showed the following. Defendant walked into four separate banks, on June 7, June 13, June 15, and June 18, 2006, each time handing the teller a note which stated that he had a gun, and each time making off with the bank's money. Tr. at 66, 71, 86, 88, 92, 100, 105, 111, 117. Each demand note concluded with the statement: "You have 15 seconds." Tr. at 51-52; Exs. 1K, 2G, 3E, 4C.

Evidence presented at trial linked Defendant to each of the four bank robberies. Tellers from the first and fourth banks picked Defendant out of a photo lineup.[2] Tr. at 53, 77, 118, 124; Exs. 1M, 4H. Tellers from each of the

[2] The FBI agent who administered the photo lineups testified that the photograph selected by the tellers portrayed Defendant, as he appeared at the time the FBI agent arrested him. Tr. 52-53.

banks described the robber as an individual who fit Defendant's general description – a large, heavy set, black male. Tr. at 66, 76, 85, 92, 104, 111; *see also* Exs. 1H (surveillance footage from first bank), 2C (second bank), 3C (third bank), 4F (fourth bank). In addition, Defendant's fingerprints were found on the demand notes from the second and third banks, and Defendant's wife's fingerprints were found on the demand notes from the first, second, and third banks. Tr. at 49-50, 133-34, 149-51. A fifth demand note – containing similar language to the first four, including the "[y]ou have 15 seconds" threat – was found in the hotel room in which Defendant and his wife were arrested. Tr. at 37; Ex. 5C.

Pretrial Proceedings

Defendant and his wife were arrested and charged by criminal complaint on June 21, 2006. 06-CR-453, R. 1, 6. Two days later, Defendant was ordered detained pending trial on the grounds that he was a flight risk and a danger to the community. 06-CR-453, R. 7. An indictment was returned on July 20, 2006, charging Defendant and his wife with robbing three banks, on June 7, June 15, and June 18, 2006. 06-CR-453, R. 14. Within one month of the indictment being returned, Defendant exercised his right to proceed *pro se*, at which point the district court appointed stand-by counsel and ordered Defendant to undergo a mental competency examination. 06-CR-453, R. 21, 23, 24. Over the next

several months, defendants filed a number of pretrial motions (*e.g.*, 06-CR-453, R. 28, 29), all before the district court eventually found Defendant competent to stand trial on January 10, 2007. *See* 1/10/2007 Tr. at 20. On January 25, 2007, the district court set a trial date of May 21, 2007. 06-CR-453, R. 41.

On May 2, 2007, the Government requested a short continuance of the trial date pending receipt of forthcoming fingerprint evidence linking Defendant to at least one additional bank robbery. 5/2/2007 Tr. at 2-3. On May 8, 2007, the Government, citing *Bruton* issues raised by Defendant's stand-by counsel, moved to sever the trial of the two defendants (06-CR-453, R. 45); the district court eventually granted the motion on December 20, 2007. 06-CR-453, R. 83. Six days later, on May 14, defendants again moved to dismiss the indictment. 06 CR 453, R. 47, 48. On May 30, the Government informed the court that it was seeking a superseding indictment, but that it did not foresee the superseding indictment delaying the trial. 5/30/2007 Tr. at 3-4. While defendants' motions to dismiss were still pending, on July 24, 2007, the grand jury returned a superseding indictment adding a new charge that Defendant had robbed a fourth bank on June 13, 2006. 06-CR-453, R. 63. The district court denied defendants' outstanding motions the next day, July 25, and set a trial date of November 19. 06-CR-453, R. 66.

On November 14, Defendant made an oral motion to dismiss the superseding indictment for violations of the Speedy Trial Act. 06-CR-453, R. 74. The court took Defendant's motion under advisement, and set a hearing for December 20. 06-CR-453, R. 75. At the December 20 hearing, the Government stated that – while not conceding a Speedy Trial Act violation – it did not oppose Defendant's motion to dismiss so long as the dismissal was without prejudice. 12/20/2007 Tr. at 3. The district court then heard arguments from both sides before deciding to dismiss the indictment without prejudice. 12/20/2007 Tr. at 11-23; 06-CR-453, R. 83. The court then ordered Defendant released from pretrial incarceration. 12/20/2007 Tr. at 24.

On December 20, the grand jury returned a new indictment containing the same charges. 07-CR-857, R. 1. On January 16, 2008, Defendant was arraigned on the new indictment and detained as a flight risk and a danger to the community. 07-CR-857, R. 13. On January 30, upon Defendant's motion, the court ordered Defendant released from custody so that he could prepare for trial. 1/30/2008 Tr. at 12, 14. The next day, after considering additional legal authority, the court reversed course and ordered Defendant detained pending trial. 07-CR-857, R. 20, 23, 26.

The pretrial proceedings were not smooth. On three occasions, Defendant's conduct in court caused the district court to find him in contempt.

07-CR-857, R. 14, 35. Throughout the course of pretrial proceedings, Defendant also vehemently advocated a number of unorthodox legal theories, including arguing that he could "settle" this case via the exchange of some sort of bonds (*e.g.*, 1/10/2007 Tr. at 4-6; 06-CR-453, R. 51), that the Uniform Commercial Code somehow released him from criminal liability (*e.g.*, 06-CR-453, R. 51; 1/10/2007 Tr. at 7-8), and that Title 18 of the United States Code was not properly enacted. 06-CR-453, R. 31; 5/30/2007 Tr. at 2-3. All the while, Defendant refused to cooperate with, or heed the advice of, his stand-by counsel. *E.g.* 1/10/2007 Tr. at 15, 17; 7/25/2007 Tr. at 5; 11/7/2007 Tr. at 5; 1/30/2008 Tr. at 28, 31. Defendant also never asked his stand-by counsel to perform legal research or contact witnesses on his behalf. 3/6/2008 Tr. at 15-16.

SUMMARY OF ARGUMENT

1. Defendant's appeal assumes a 163-day violation of the Speedy Trial Act that the district court did not find. A reasonable review of the record shows that the Speedy Trial Act was not violated, or that if it was violated, the infraction was relatively minor. More importantly, even if the Act was violated, the district court applied the proper analysis in determining that the indictment should be dismissed without prejudice. The court's conclusions that Defendant was facing very serious charges (4 bank robberies), that Defendant was largely responsible for the delays, and that the interests of justice in reprosecution

substantially outweighed any prejudice Defendant may have suffered were far from an abuse of discretion. They were right on point.

2. The district court was also correctly held that because Defendant refused to accept the representation of court-appointed counsel, Defendant was not entitled to exceptional accommodations to facilitate a legal defense. This Court has consistently held that a court's obligation to grant defendants meaningful access to the courts is satisfied when a district court offers to appoint counsel. In addition, Defendant's representations that he was unable to access legal materials or contact his stand-by counsel while in pretrial detention are unsupported by the record.

3. Finally, given the unusual facts of this case – neither Defendant nor his lawyer showed up for the trial – the district court did not err in attempting to level the playing field by permitting jurors to question the Government's witnesses. While the district court did not implement the most risk-averse measures to prevent jurors from eliciting improper testimony, fortunately, the jurors asked only questions which sought to clarify the evidence or untangle unclear testimony. Defendant was not prejudiced by these questions, and there was no error in allowing them.

ARGUMENT

I. The District Court Did Not Abuse Its Discretion In Dismissing The Indictment Without Prejudice.

A. Standard of Review

Absent legal error, this Court reviews both a district court's exclusions of time and its decision to dismiss an indictment for violation of the Speedy Trial Act for an abuse of discretion. *United States v. Larson*, 417 F.3d 741, 745 (7th Cir. 2005); *United States v. Killingsworth*, 507 F.3d 1087, 1090 (7th Cir. 2007).

B. Analysis

1. The District Court Did Not Specifically Find That The Speedy Trial Act Was Violated.

On December 20, 2007, the district court granted, without prejudice, Defendant's motion to dismiss the indictment for violation of the Speedy Trial Act. But the district court never specifically found a violation of the Act. *See generally,* 12/20/2007 Tr. 1-27. Defendant devotes a footnote to the threshold issue of whether the Speedy Trial Act was violated in the first place. *See* Br. at 19 n.8. Defendant asserts that "at least 233 days of non-excludable time" passed. *Id.* Specifically, Defendant argues first that the 18 days from indictment (on July 20, 2006) through August 7, 2006, were not properly excluded. Defendant next argues that the 103 days from January 25, 2007 through May 8, 2007 were improperly excluded, and that the 112 days from July

25, 2007 through November 14, 2007 should have counted toward the Speedy Trial clock. A closer look at the record reveals that Defendant has substantially overshot his calculation. In any event, as discussed *infra* at 15-21, even if there was a Speedy Trial Act violation, the district court did not abuse its discretion in dismissing the indictment without prejudice, rather than with prejudice.

July 20, 2006 through August 7, 2006

Defendant is correct that the 14 days between indictment on July 20, 2006, and arraignment on August 3, 2006 count against the clock. *See* 18 U.S.C. § 3161(c)(1); *United States v. White*, 443 F.3d 582, 589 (7th Cir. 2006). However, the district court properly excluded (06-CR-453, R. 19) the four days from August 3 to August 7 for preparation of pretrial motions, under 18 U.S.C. § 3161(h)(1)(F). *See United States v. Nava-Salazar*, 30 F.3d 788, 801 (7th Cir. 1994); *United States v. Tibboel*, 753 F.2d 608, 610 (7th Cir. 1985).

January 25, 2007 through May 8, 2007

The district court stated on the record that time was excluded from January 25, 2007 "until further order of the court," for plea negotiations. *See* 1/25/2007 Tr. at 12. It is well established in this Circuit that time spent in the "plea bargaining process" may be excluded, pursuant to Section 3161(h)(1). *See United States v. Montoya*, 827 F.2d 143, 150 (7th Cir. 1987). Defendant does not contest this legal principle, but argues, without citing any facts in the record,

that the district court's finding that plea negotiations were ongoing is unsupported by the record.

The record reveals that the district court did not abuse its discretion in finding an exclusion for plea negotiations. For starters, the district court stated on the record that plea negotiations were on-going, specifically with respect to defendant Barkalow. *See* 1/25/2008 Tr. at 12; *see United States v. Rollins*, 544 F.3d 820, 829 (7th Cir. 2008). Moreover, when asked by the court, on January 25, 2007, if she lacked any desire to plead guilty, defendant Barkalow stated "I didn't say that." *Id.* at 5. In addition, the prosecution also mentioned plea discussions with Barkalow's stand-by counsel on a number of occasions. *See* 1/25/2007 Tr. at 6, 10; *see also* 5/2/2007 Tr. at 3. That plea negotiations were on-going is also, at least to an extent, supported by the final resolution of the case; defendant Barkalow pleaded guilty. 07-CR-857, R. at 52. Moreover, Defendant Barkalow (and her stand-by counsel) were present at the January 25 hearing, and did not object to the judge excluding time for the purpose of plea negotiations. Of course, the details of plea negotiations are often not found in the record, and nothing here suggests that the district court abused its discretion in excluding this time for plea negotiations. And because the time was properly excluded against defendant Barkalow, it was also properly excluded against Defendant Sykes. *See Rollins*, 544 F.3d at 829 ("An excludable delay of one

defendant may be excludable as to all co-defendants, absent severance."); *Larson*, 417 F.3d at 745. As such, none of those 103 days count against the Speedy Trial clock.

July 25, 2007 through November 14, 2007

On July 25, 2007, the district court excluded time under 18 U.S.C. § 3161(h)(6) because co-defendant Barkalow had yet to be arraigned on the superseding indictment. 06-CR-453, R. 67. Because Barkalow was not arraigned until August 2, the eight preceding days of delay were properly excluded. *See* 18 U.S.C. §§ 3161(h)(6), (c)(1); *see also United States v. Menzer*, 29 F.3d 1223, 1228 (7th Cir. 1994). At the tail end of this period, on November 9, defendant Barkalow filed a pretrial motion (06-CR-453, R. 73), which the district court denied on November 14. 06-CR-453, R. 74. The five intervening days, in which defendant's pretrial motion was pending, are automatically excluded. *See* 18 U.S.C. § 3161(h)(1)(F); *Montoya*, 827 F.2d at 150-51.

The 99 days between August 2 and November 9 are more problematic. The district court ordered that, pursuant to 18 U.S.C. § 3161(h)(8)(A) and (B), time was excluded between August 2 and November 19 (the scheduled trial date) to "permit trial preparations." 06-CR-453, R. at 68; 8/1/2007 Tr. at 4-5.

Defendant argues that this Court, in *United States v. Thomas*, 788 F.2d 1250, 1256 (7th Cir. 1986), "soundly rejected exclusions for 'trial preparations.'"

Br. at 21 n.8. That case does not stand for any such proposition; it merely holds that time can be excluded under one of the "few categories" enumerated in the Act. *Thomas*, 788 F.2d at 1256. But Defendant has overlooked the statutory category which explicitly covers this situation. *See* 18 U.S.C. § 3161(h)(8)(B)(iv); *United States v. Santos*, 201 F.3d 953, 959 (7th Cir. 2000); *United States v. Moutry*, 46 F.3d 598, 601 (7th Cir. 1995). Indeed, Section 3161(h)(8)(B)(iv) specifically permits excusable delay where not doing so "would deny counsel for the defendant or the attorney for the Government the reasonable time necessary for effective preparation, taking into account the exercise of due diligence." § 18 U.S.C. § 3161(h)(8)(B)(iv). Accordingly, continuances for trial preparation are excludable.

Here, Defendant was acting as his own attorney, thus the Court might have been concerned that Defendant needed more time to prepare for trial.[3] Of course, to exclude time under Section 3161(h)(B), the district court must specifically find that the ends of justice served by such delay outweighs the best interests of the public and the defendant in a speedy trial. *See* 18 U.S.C. §

[3] The district court did not specify who needed this time for trial preparation, but the court had previously asked the Government how much time Defendant would need to respond to the superseding indictment (the Government indicated that a "couple weeks" may be necessary). 5/9/2007 Tr. at 5. Moreover, the Government did not request a continuance at any time after the second superseding indictment was returned.

3161(h)(8)(A); *Zedner v. United States*, 547 U.S. 489, 508 (2006). While the district court did not conduct a pointed cost/benefit analysis on the record, the court did make statements supporting its decision. 8/1/2007 Tr. at 4-5; *see also* 5/9/2007 Tr. at 5 (inquiring into how much time it would take defendant to prepare for trial, given new evidence related to the superseding indictment); *see also United States v. Taylor*, 196 F.3d 854, 861 (7th Cir. 1999) ("[W]e have long held that the judge need not contemporaneously state the reasons for granting a continuance."). The court did not abuse its discretion in finding that additional time was necessary to prepare for trial.

Defendant does not argue that the amount of time excluded for trial preparation was unreasonable. But to the extent 99 days was an unreasonable amount of time for trial preparation, only those days this Court deems unreasonable would count towards the clock. At a minimum, given Defendant's *pro se* status, his vehement advocacy of far-fetched legal theories, and his refusal to work with stand-by counsel, it is reasonable that at least 44 of these days were needed for trial preparations. Accordingly, the Speedy Trial Act was not

violated.[4] In any event, as discussed next, the district court did not abuse its discretion to enter a without-prejudice dismissal.

2. The District Court Did Not Abuse Its Discretion In Applying the 18 U.S.C. § 3162(a)(2) Factors.

To the extent the Speedy Trial Act was violated, the district court did not abuse its discretion in dismissing the indictment without prejudice. In determining whether to dismiss an indictment without prejudice, the Speedy Trial Act requires the district court to consider (1) the seriousness of the offense, (2) the facts and circumstances which led to the dismissal, and (3) the impact of reprosecution on the administration of the Speedy Trial Act and on the

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[4] Defendant also argues, in a footnote, that the pretrial delay violated the Sixth Amendment, under the factors set forth in *Barker v. Wingo*, 407 U.S. 514 (1972). Br. at 20 n.9. This perfunctory argument was not properly raised on appeal. *See United States v. Hook*, 471 F.3d 766, 775 (7th Cir. 2006) ("[P]erfunctory and undeveloped arguments . . . are waived (even where those arguments raise constitutional issues."). Even so, while the length of this case likely triggers a presumption that the delay was prejudicial, *United States v. Oriedo*, 498 F.3d 593, 597 (7th Cir. 2007), that prejudice is insufficient to carry the day for a defendant absent a strong showing on the other *Barker* factors. *See id.* at 600-01 (delay of three years was "substantial," but was insufficient to constitute Sixth Amendment violation). Defendant was responsible for most of the delay in this case (*see, e.g.,* 1/30/08 Tr. at 11), and the district court found that the Government did not intentionally delay the proceedings. 12/20/2007 Tr. at 19-20. In addition to having caused most of the delay, Defendant was also lax in asserting his speedy trial rights. 12/20/2007 Tr. at 18-19, 20; *see Oriedo*, 498 F.3d at 596 (the fact that a defendant failed to assert his right to a speedy trial is entitled to significant weight in an inquiry into the deprivation of the speedy trial right). Finally, as discussed below, Defendant was not prejudiced.

administration of justice. 18 U.S.C. § 3162(a)(2); *Zedner*, 547 U.S. at 499; *Killingsworth*, 507 F.3d at 1090.

After hearing argument from both sides, on December 20, 2007, the district court made the following detailed findings concerning the Section 3162(a)(2) factors, as it was required to do. *See United States v. Taylor,* 487 U.S. 326, 336 (1988). First, the court expressly noted that the seriousness of the charged offenses – four bank robberies – weighed heavily in favor of dismissal without prejudice. *See* 12/20/2007 Tr. at 20. Second, the court found that the delay was unintentional, and that any violation that had occurred had been "unconscious on the part" of the Government and the court. 12/20/2007 Tr. at 19; *see Killingsworth*, 507 F.3d at 1091 (absence of bad faith by the government favors dismissal without prejudice); *United States v. Arango*, 879 F.2d 1501, 1508 (7th Cir. 1989) (proper for district court to focus on the cause of delay). The court further found that Defendant was "largely responsible" for the continuances that the court had granted; the judge explained:

> 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 upon notions that he knows are far-fetched and not supported by any rational legal basis.

Id. at 20, 22; *see Larson*, 417 F.3d at 746 (a defendant's complicity in causing delay weighs in favor of dismissal without prejudice).[5] Third, the court addressed the potential prejudice to Defendant of reprosecution, finding that any prejudice Defendant suffered was outweighed by the public's interest in reprosecution. 12/20/2007 Tr. at 22. The court also held that, given the seriousness of the offenses charged, it would be a "gross miscarriage of justice" to dismiss the indictment with prejudice, and that the public interest in reprosecution was "paramount" on these facts. 12/20/2007 Tr. at 20, 22; *see Killingsworth*, 507 F.3d at 1091 (district court must explain how the seriousness of the offense factored into its decision). The court also recognized (12/20/2007 Tr. at 22) that a dismissal without prejudice is a sanction in itself. *See Killingsworth*, 507 F.3d at 1091. Far from an abuse of discretion, the district court's balancing of the Section 3162(a)(2) factors squares exactly with this Court's teachings.

Defendant faults the district court for relying on this Court's decision in *United States v. Fountain*, 840 F.2d 509, 513 (7th Cir. 1988) in holding that Defendant's "lassitude in regard to the Speedy Trial Act" weighs in favor of a non-prejudicial dismissal. *See* 12/20/2007 Tr. at 12 (quoting *Fountain*, 840 F.2d

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[5] On appeal, Defendant does contest the district court's finding that Defendant was largely responsible for the delay.

at 513). Defendant does not challenge the factual basis underlying this statement,[6] but argues that it was error to fault Defendant for passively watching the clock tick by. This was not error. First, the Supreme Court's decision in *Taylor,* 487 U.S. 326*,* does nothing to undermine *Fountain's* holding 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." *Fountain*, 840 F.2d at 513. There is nothing about *Taylor's* actual holding – the length of delay should factor into the court's prejudice analysis – that is inconsistent with the principle that a defendant should not be permitted to sit on his hands as the clock runs. Nor is it a "perverse result" (Br. at 23) that a defendant's tardiness in exercising his rights weighs against a prejudicial dismissal. *Cf. United States v. Oriedo*, 498 F.3d 593, 597 (7th Cir. 2007) ("just as we give significant weight to the defendant's assertion of the right, a failure to assert it will make it difficult for a defendant to prove that he was denied a speedy trial.") (internal quotations omitted).

Defendant also argues that the district court failed to take into account the length of delay in considering the facts and circumstances which led to the

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[6] The record indicates that Defendant was present at a number of hearings where exclusions were made, and Defendant did not object. *See, e.g.*, 5/30/2007 Tr. at 11; 7/25/2007 Tr. at 10. Moreover, Defendant's stand-by counsel was present at every hearing involving Defendant, and did not object to the exclusions of time.

dismissal. While it is true that the court did not expressly count the number of non-excused days – because, as discussed above, the court never specifically found a Speedy Trial violation – the court did address the prejudice to Defendant, which concern is inherent in the length of delay analysis. *See Taylor*, 487 U.S. at 340 ("The length of delay, a measure of the seriousness of the speedy trial violation, in some ways is closely related to the issue of the prejudice to the defendant."). Moreover, as discussed above, the period of non-excludable delay was, at worst, far less than other instances in which this Court has upheld a dismissal without prejudice. *See, e.g.*, *Arango*, 879 F.2d at 1507-08 (seventy-two to ninety-three day violation).

Defendant next argues that the district court failed to properly weigh the prejudice resulting from the Government's superseding of the indictment to add the June 13th robbery. 06-CR-453, R. 63 at 2. This argument makes little sense. The Government could have charged Defendant with this crime at any time prior to the expiration of the limitations period (June 13, 2011). Defendant points to no authority suggesting that a defendant in his situation was prejudiced by an additional charge.[7] To the extent Defendant suggests that the

[7] In the case Defendant relies on for the colorful "fruit of the forbidden delay" language, this Court found no prejudice where the Government acquired evidence outside of the Speedy Trial period because the delay did not work to the defendant's detriment. *Fountain,* 840 F.2d at 513.

Government somehow exploited the delay to gather further evidence against him on the three charged counts, that suggestion is unsupported by the record. Moreover, the Government sought only one continuance in this case, in May 2007, while it was awaiting the results of fingerprint analysis related to the June 13th robbery. 5/2/2007 Tr. at 2-3. But, at the time the continuance was sought (on May 2), and the superseding indictment returned (on July 24), the 70-day Speedy Trial clock was still ticking. Defendant was not prejudiced in any way by the superseding indictment.

Defendant further argues that he was prejudiced by the "self-evident burdens common to all incarcerated defendants awaiting trial." On this score Defendant is correct, his pretrial detention was no more prejudicial than that endured by any pretrial detainee. As this Court has recently commented:

> [W]hether a defendant is detained pending trial is not an explicit factor of § 3162(a)(2), much less its primary focus. If the fact that a defendant is detained during the period of delay were to dictate the nature of the dismissal, all pretrial detainees whose rights were violated under the Speedy Trial Act would receive a dismissal with prejudice. This would render Congress's designation of two types of dismissal largely irrelevant.

Killingsworth, 507 F.3d at 1091. Indeed, the prejudice cognizable under Section 3162(a)(2) is that which is caused by "delays intended to hamper defendant's ability to present his defense," *Larson*, 417 F.3d at 746; Defendant cannot argue that his defense was hampered by the delays. Defendant also fails to mention

the reason he was detained pretrial: because the court found that Defendant's substantial criminal history rendered him a danger to the community (and a flight risk). 06-CR-453, R. 7; 07-CR-857, R. 13; 1/31/2008 Tr. at 2-3, 7. What is more, Defendant was ultimately convicted, and therefore his pretrial detention will be credited toward his sentence of incarceration. 18 U.S.C. § 3585(b). Defendant was not prejudiced by his pretrial detention.

Finally, Defendant argues that the district court applied a presumption in favor of dismissal without prejudice. Defendant mis-characterizes the district court's comments, *see* 12/12/2007 Tr. at 16, 12/20/2007 Tr. at 19,[8] to argue that the court applied a presumption. The record reflects no such thing. Rather, the district court's statements align with this Court's statement that "the fact that a [Speedy Trial] violation occurred does not alone tip the scales in favor of a dismissal with prejudice." *Killingsworth*, 507 F.3d at 1091. The district court never used the word "presumption," it merely commented on the state of the case as the judge knew it to be. After all, the judge was intimately familiar with the

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[8] On December 12, the district court, candidly assessing the issue based on the court's intimate knowledge of the circumstances and the history of the proceedings, noted that "it would take a very strong argument by the defendant[] to persuade [the court] that the dismissal should be with prejudice." 12/12/2007 Tr. at 16.

On December 20, the district court noted: "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." 12/20/2007 Tr. at 19.

proceedings up to that point. It is simply unfair to take the district court's words out of the context in which they were spoken. In any event, the district court adhered to this Court's teachings in *Killingsworth*, *see* 12/20/2007 Tr. at 16-23, and nothing in the record suggests the court favored one outcome over the other.

II. The District Court Did Not Infringe Upon Defendant's Constitutional Right To Meaningful Access To The Courts Because Defendant Declined The Representation Of A Court-Appointed Attorney And Defendant Was Not Prevented From Preparing His Own Defense.

A. Standard of Review

The question of whether the district court violated Defendant's right to access the courts is a mixed question of law and fact. This Court reviews questions of law *de novo* and factual findings for clear error. *United States v. Wanigasinghe*, 545 F.3d 595, 597 (7th Cir. 2008).

B. Background

Defendant argues that his Fifth Amendment right to meaningfully access the courts was denied when he was held in custody – purportedly without access to his lawyer or legal materials – in the weeks leading up to his trial. Br. at 25. This section provides additional background facts relevant to that argument.

On December 20, 2007, Defendant was ordered released from pretrial incarceration because the district court dismissed the indictment against him. 12/20/2007 Tr. at 24. Defendant remained free until he was arraigned on the

new indictment on January 16, 2008. 07-CR-857, R. 13; *see also* 1/30/2008 Tr. at 8. At the arraignment, the district court ordered Defendant detained as a flight risk and danger to the community. 07-CR-857, R. 13. On January 30, Defendant argued that he should be released in order to prepare his case for trial, and the district court agreed to release him. 1/30/2008 Tr. at 9, 22-25.

The next day, January 31, 2008, the Government moved to reconsider the district court's order releasing Defendant on bond. 1/31/2008 Tr. at 2. The district court noted Defendant's serious criminal record, stating that "[t]here are no conditions . . . that would insure that Mr. Sykes would not commit another crime in light of his extensive criminal record." 1/31/2008 Tr. at 2-3, 7. Then, relying on this Court's decisions in *United States v. Chapman*, 954 F.2d 1352 (7th Cir. 1992) and *United States v. Lane*, 718 F.2d 2226 (7th Cir. 1983), the court vacated its prior order and detained Defendant. 1/31/2008 Tr. at 5.

At a March 6, 2008 status hearing, Defendant again moved for pretrial release. *See generally* 3/6/2008 Tr. at 1-36. Defendant did not seek a continuance of the trial at this hearing, but the record suggests the district court may have been inclined to grant one. 3/6/08 Tr. at 26-27. At this hearing, the district court also found that Defendant had received discovery in August 2006 – over a year and a half before the trial. 3/6/2008 Tr. at 7-8.

C. Analysis

Having declined the assistance of appointed counsel, Defendant cannot argue that he lacked meaningful access to the courts. The law is clear on this. *See Kane v. Espitia*, 546 U.S. 9, 11 (2005) (noting long-established precedent that a pretrial detainee who waives his right to counsel also relinquishes any enhanced access to materials purportedly needed to prepare a legal defense) (citing *Lane*, 718 F.2d at 231 ("the offer of court-appointed counsel to represent a defendant satisfies the constitutional obligation of a state to provide a defendant with legal assistance under the Sixth and Fourteenth Amendments.")); *see also United States v. Byrd*, 208 F.3d 592, 593 (7th Cir. 2000) ("The rule is that [a detainee] has the right to legal help through appointed counsel, and when he declines that help, other alternative rights, like access to a law library, do not spring up."); *Chapman*, 954 F.2d at 1362; *United States v. Moya-Gomez*, 860 F.2d 706, 743 (7th Cir. 1988). That Defendant has recast his Sixth Amendment claim as a Fifth Amendment due process argument changes nothing. *See Moya-Gomez*, 860 F.2d at 743 (no due process violation where a pre-trial detainee claimed he was not given access to, among other things, a law library).

Defendant also argues that his lack of library access coupled with his purported inability to speak with stand-by counsel violated due process. This

argument fails for at least four reasons. First, the law is clear that a defendant who chooses to relinquish his right to the assistance of counsel is not entitled to any special privileges. This principle is not limited to library access, as Defendant maintains. *See Moya-Gomez*, 860 F.2d at 743 (rejecting *pro se* defendant's claim that he was entitled to access "other defense attorneys and codefendants"). Second, Defendant has no Constitutional right to stand-by counsel. *See Simpson v. Battaglia*, 458 F.3d 585, 597 (7th Cir. 2006) ("Certainly there is no Supreme Court precedent clearly establishing [a right to stand-by counsel]."). Third, a defendant who refuses the assistance of stand-by counsel (*see, e.g.,* 1/10/2007 Tr. at 15, 17; 7/25/2007 Tr. at 5; 11/7/2007 Tr. at 5; 1/30/2008 Tr. at 28, 31) cannot argue that the lack of access to counsel prejudiced him. *See Byrd*, 208 F.3d at 594; *Chapman*, 954 F.2d at 1362. Fourth, as discussed in detail below, the record undermines Defendant's claims he was unable to access stand-by counsel.

Having failed to address the *Lane*/*Moya-Gomez*/*Chapman*/*Byrd* line of cases, Defendant relies heavily on the Supreme Court's decision in *Bounds v. Smith*, 430 U.S. 817, 825 (1977). That case, which considered a *habeas corpus* petition by prisoners who claimed that they lacked access to a law library, actually supports the authority relied upon by the district court to detain Defendant. *Bounds* "did not create an abstract, freestanding right to a law

library or legal assistance." *Lewis v. Casey*, 518 U.S. 343, 350 (1996). Rather, *Bounds* makes clear that access to a law library is merely "one constitutionally acceptable method to assure meaningful access to the courts." *Id.* As the Supreme Court stated:

> "[T]he fundamental constitutional right of access to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries *or adequate assistance from persons trained in the law*.

Bounds, 430 U.S. at 828 (emphasis supplied). In other words, *Bounds* sets forth at least two alternate avenues by which a defendant can gain access to the courts: (1) through adequate law libraries; or (2) through the adequate assistance of a lawyer. *See Johnson v. Brelje*, 701 F.2d 1201, 1208 (7th Cir. 1983) (citing *Bounds* for the proposition that "[T]he right of access is satisfied if, in lieu of a law library, adequate assistance of counsel is provided.") *abrogated on other grounds by Maust v. Headley*, 959 F.2d 644, 647 (7th Cir. 1992). Defendant claims to have been denied the former, but does not mention that he was offered – and rejected – the latter. Having rejected this (preferred) method of ensuring access to the courts, Defendant was entitled to nothing more. *See Lane*, 718 F.2d at 231; *see also Byrd*, 208 F.3d at 593; *Chapman*, 954 F.2d at 1362; *Moya-Gomez*, 860 F.2d at 743. The case relied upon by Defendant does not involve *pro se* pretrial detainees, and is therefore inapplicable. *See Johnson-El*

v. Schoemehl, 878 F.2d 1043, 1051 (8th Cir. 1989) (noting that while inmates had attorneys, they were not granted access to those attorneys *or* to a law library).

A number of Defendant's factual contentions on appeal warrant clarification. In particular, Defendant argues that "during the month-and-a-half before Sykes' trial, he was unable to conduct legal research in a law library, he and his stand-by counsel were unable to contact each other, and stand-by counsel was unable to provide him with trial preparation materials." Br. at 29. Defendant also claims that he was unable to mail legal documents or contact potential witnesses. *Id.* at 8. The record suggests otherwise.

In the weeks leading up to trial, Defendant filed three separate motions with the court; in each, he quoted verbatim from a number of legal authorities, and in two of the three, he attached excerpts of legal authorities. *See* 07-CR-857, R. 30, 31, 32, 41; *see also* 3/6/2008 Tr. at 3-7 (wherein Defendant quotes from a number of legal authorities). In one of these filings, Defendant certified that he had sent a copy of a motion (from Kankakee prison) to the prosecutor in the U.S. Mail. 07-CR-857, R. 31. In addition, at the March 6 hearing, Defendant stated that he *was able* to contact potential witnesses, but that they wouldn't take his calls. 3/6/2008 Tr. at 8. Defendant also stated that he tried to call his stand-by lawyer "on numerous occasions" but the call "would not go through." *Id.* at 7. Nothing in the record suggests that the prison was responsible for these

uncompleted calls. The record is clear though that Defendant was able to speak with his stand-by counsel on days Defendant was in court (3/6/2008 Tr. at 15-16), and nothing in the record suggests that Defendant's stand-by counsel could not have simply gone to visit him. Although he argues otherwise on appeal, this record suggests that Defendant had access to legal authorities, to the mails, to his stand-by lawyer, and to a telephone.

Defendant also re-asserts on appeal that he did not receive discovery materials in this case until January 2008. *See* Br. at 10. The district court found otherwise. 3/6/2009 Tr. at 30. As noted in a footnote by Defendant, the district court actually rejected Defendant's version of events and credited Defendant's stand-by counsel's representation that Defendant received the discovery in 2006. *See id.* In addition, the record clearly indicates that Defendant received "all" discovery from his counsel, again, on January 30, 2008. 1/30/2008 Tr. at 19, 29. So, even under Defendant's (discredited) version of events, he had all of the discovery material nearly six weeks before trial commenced.

It also bears noting that while Defendant now complains of the resources he was given, he failed to take advantage of the resources (and offers of resources) that were available to him. Defendant, for example, never sought to issue trial subpoenas, nor did he ask stand-by counsel to research any legal

issues or contact witnesses for him. 3/6/2008 Tr. at 15-16. Moreover, approximately six weeks before trial, the Government made arrangements which would have permitted Defendant additional privileges in order to prepare his defense. 1/30/2008 Tr. at 21-22. When it became apparent that Defendant had been unable, through no fault of his own, to take advantage of these arrangements (3/6/2008 Tr. at 11-12), the district court asked Defendant if he wanted a continuance. 3/6/2008 Tr. at 26. At this hearing – just four days before trial – Defendant said "no." *Id.* Defendant has no one but himself to blame for his complained of injuries.

Finally, to the extent there was any error here, Defendant was not harmed by it.[9] The weight of the evidence in this case was overwhelming. Four Chicago banks were robbed over the course of eleven days. Two tellers picked Defendant out of a photo lineup (Exs. 1M, 4H) and tellers from each of the four banks described the robber as an individual who fit Defendant's general description.

[9] Defendant argues that his "lack of access to the courts" was a structural error. Defendant cites no authority in support of this position. Nor is the situation presented on this appeal akin to the circumstances in which the Supreme Court has found structural error. Defendant had access to the courts in the form of a court-appointed lawyer. He chose not to exercise that right and to instead rely on the less than ideal legal resources available to incarcerated *pro se* defendants. This was perhaps a bad decision, but it was *his* decision. This situation is a far cry from the "very limited class" of circumstances recognized as structural error. *See Neder v. United States*, 527 U.S. 1, 7 (1999).

See Exs. 1H, 2C, 3C, 4F. In addition, Defendant's (or his wife's) fingerprints were found on the demand notes from three of the banks. Not to mention, all five demand notes – including the note found on Defendant's wife at the time she was arrested – contained the same "[y]ou have 15 seconds" threat. *See* Exs. 1K, 2G, 3E, 4C, 5C.

III. The District Court Did Not Commit Plain Error In Permitting Jurors To Question Witnesses And Defendant Was Not Prejudiced By The Questions.

A. Standard of Review

Because no objection was made at trial, the Court reviews the district court's decision to allow juror questions for plain error. *United States v. Feinberg*, 89 F.3d 333, 336 (7th Cir. 1996).

B. Background

Following the testimony of the Government's first witness, the district court made the following statement to the jury:

> 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.

Tr. at 38. The jury took the court up on its offer, and asked several questions of the Government's witnesses throughout the course of the trial. *See* Tr. at 38-43, 78, 119, 139-141, 152-56. On one occasion, a juror asked, presumably in

response to the empty defense table, "does defendant have a defense?" Tr. at 40. The district court responded by explaining the peculiar posture of the case, and noting that "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." Tr. at 40-41. Shortly after this exchange, the district court admonished the jury that "Mr. Sykes's absence has nothing to do with whether he's guilty or not. . . . You should not hold against him the fact that he's not present." Tr. at 43. Later, the district court also gave the following instruction: "Neither by these instructions nor by any ruling or remark I have made have I meant to indicate any opinion as to the facts or as to what your verdict should be." Tr. at 174.

On other occasions, jurors asked witnesses to clarify testimony, *id.* at 38-39, 41-43, 78, or inquired into the existence of evidence that was not mentioned. *Id.* at 39-40, 119, 152, 154-55. Jurors also asked a number of questions of the Government's fingerprint experts, including questions about the uniqueness of fingerprint evidence. Tr. at 139-41, 153-56. One of the Government's experts[10] responded to a juror's question about the uniqueness of fingerprint evidence by explaining that in the history of the science, no two fingerprints have been the same. Tr. at 153. In response to this line of questions, the district judge asked

[10]Two fingerprint experts testified at trial.

a further clarifying question about the uniqueness of fingerprints, to which the expert answered by explaining the biological underpinnings of the science. *Id.* at 155. After this exchange, the judge admonished the jury that they should not accept expert testimony unless they believed the expert. *Id.* at 155-157.

C. Analysis

Whether to permit juror questions is a decision best left to the discretion of the district judge. *Feinberg*, 89 F.3d at 337. In exercising that discretion, this Court has suggested that a district court weigh the potential costs associated with juror questions against the potential benefits. *Id.* On one side of the scale, permitting juror questions allows jurors to clarify and understand the evidence presented. *See id.*; *United States v. Richardson*, 233 F.3d 1285, 1289 (11th Cir. 2000); *United States v. Sutton*, 970 F.2d 1001, 1005 n.3 (1st Cir. 1992). On the other side, juror questions entail a number of downside risks, including compromising juror neutrality, encouraging premature deliberation, and placing attorneys in the tough situation of objecting to questions proffered by the jurors they are attempting to influence. *See Feinberg*, 89 F.3d at 337. Given the potential downside risks, this Court has cautioned district courts to permit juror questions only in unique circumstances. *See Feinberg*, 89 F.3d at 337; *see also Sutton*, 970 F.2d at 1005. When juror questions are permitted, this Court has suggested that it is a good practice for the district court to institute prophylactic

measures to guard against some of the inherent risks. *See Feinberg,* 89 F.3d at 337.

Defendant contends that the district court committed plain error in allowing juror questions. To show plain error, Defendant must prove that (1) an error has occurred, (2) it was plain, (3) it affected a substantial right of Defendant, and (4) that it seriously affected the fairness, integrity, or public reputation of the judicial proceedings. *United States v. Tejeda*, 476 F.3d 471, 474 (7th Cir. 2007). Defendant has the burden of establishing that an error was prejudicial. *Id.* In this particular context, Defendant must show that "but for the jurors' questions, the outcome of the trial probably would have been different." *Feinberg*, 89 F.3d at 336 (*citing United States v. Olano*, 113 S. Ct. 1770, 1778 (1993)).

The district court here was faced with a very unique circumstance in that neither Defendant, nor his counsel, were present for trial. Given this unusual posture, the district court concluded that the potential risks of permitting juror questions were outweighed by the need to address the apparent lopsidedness of the proceedings. Although the court did not expound upon its reasoning, it can be reasonably inferred from the court's statement, Tr. at 38, that the court believed allowing juror questions would, in some respects, help to level the playing field. This is a reasonable concern given the absence of a defense lawyer

(or defendant) to question the Government's witnesses. Defendant cites no authority stating that the district court's weighing of the costs/benefits in this particular situation was *per se* improper. As such, the district court did not commit error in weighing the costs and benefits of juror questioning.

Defendant's argument that the district court committed plain error by not instituting prophylactic measures is similarly without support. While it may be a preferred practice, Defendant cited no authority *requiring* a district court to institute measures to guard against improper juror questions.

Defendant assumes that because juror questioning is a practice "fraught with risks," that the feared risks actually materialized. As the record shows, they (fortunately) did not. Importantly, Defendant concedes that the testimony elicited by the jurors either clarified or reinforced prior testimony. *See, e.g.* Br. at 45 (referring to the testimony elicited by the jurors as "clarifications"), *id.* ("the questions allowed the government to clear up areas of particular confusion"), 46 (jurors elicited "important testimony that reinforced the testimony about the reliability of fingerprint evidence"). Far from being prejudicial, the jury's ability to elicit clarifications on factual issues is the primary benefit of juror questioning. *See United States v. Rawlings*, 522 F.3d 403, 407 (D.C. Cir. 2008) ("[Juror questions] can help focus the jurors, clear up confusion, alert counsel to evidentiary lacunae and generally ensure that the

jurors have the information needed to reach a reasoned verdict."); *Richardson*, 233 F.3d at 1290 ("Juror-inspired questions may serve to advance the search for truth by alleviating uncertainties in the jurors' minds, clearing up confusion, or alerting the attorneys to points that bear further elaboration."); *see also Feinberg*, 89 F.3d at 337 (juror questions which seek to clarify issues are generally innocuous). Nor does Defendant claim that the jurors elicited improper testimony. Instead, Defendant argues that the testimony elicited by the jurors was "prejudicial" in that it clarified or reinforced evidence that supported a guilty verdict. *See* Br. at 43-46. This is exactly the type of testimony advocates of juror questioning hope jurors will elicit. *See Richardson*, 233 F.3d at 1290. Given this, and the overwhelming weight of the evidence, Defendant cannot show that the trial would have come out differently had it not been for the jurors' questions.

Finally, there is nothing inherently improper about the judge or the prosecutor following up after a juror has asked a question. *See* Fed. R. Evid. 614(b) (authorizing trial judge to interrogate witnesses); *Rawlings*, 522 F.3d at 408 ("after a particular witness has responded to the [juror] questions, the court should permit counsel to re-question the witness"). Defendant does, however, contend that one particular juror question caused the district court to make an inappropriate comment "that cast [Defendant] in a poor light." Br. at 41.

Understood in the context in which it was spoken, *United States v. Curry*, 538 F.3d 718, 728 (7th Cir. 2008), the district court's comment could have had no such effect. Unlike the decision relied upon by Defendant, *United States v. Dellinger*, 472 F.2d 340, 386 (1972), the district court showed no hint of bias throughout the trial, and certainly did not express a "deprecatory" or "antagonistic attitude toward the defense." *Id.* The district court merely explained to a (not surprisingly) confused juror why Defendant was not present for the proceedings. Tr. at 40-41. The statement was isolated and, at worst, ambiguous. *See Curry*, 538 F.3d at 728. Moreover, to the extent the district court's comments somehow suggested an opinion about the case, the court gave two separate curative instructions. *See Id.*

CONCLUSION

For the reasons set forth above, the United States respectfully requests that this Court affirm the conviction.

Respectfully submitted,

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CIRCUIT RULE 31(e) CERTIFICATION

Pursuant to Circuit Rule 31(e), I hereby certify that I have filed one copy of the foregoing "Brief of the United States" on digital media. The disk contains the text of the brief in non-scanned .pdf format.

____

STEVEN GRIMES
Assistant United States Attorney

RULE 32 CERTIFICATION

I hereby certify that this brief complies with the type volume limitation of Fed. R. App. P. 32(a)(7)(B), in that the government's brief contains 9,259 words. This certification is based on the word count of the word-processing system used in preparing the government's brief, specifically WordPerfect X3 for Windows. The brief was prepared in a proportionately-spaced font, namely, Century Schoolbook, 13-point in the text and 12-point in the footnotes.

STEVEN GRIMES
Assistant United States Attorney

CERTIFICATE OF SERVICE

I hereby certify that on February 5, 2009, I caused two paper copies and one digital media copy of the foregoing "Brief of the United States" to be mailed to the attorneys for Appellant Overtis Sykes at the following address:

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