No. 09-2476

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

AZUREEIAH O'CONNOR,

Defendant-Appellant.

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

Case No. 05 CR 672

Hon. Elaine E. Bucklo, Presiding Judge

REPLY BRIEF OF DEFENDANT-APPELLANT AZUREEIAH O'CONNOR

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18 U.S.C.A. §3161(h) (West 2010)

The following periods of delay shall be excluded in computing the time within which an information or an indictment must be filed, or in computing the time within which the trial of any such offense must commence:

> * * *
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> (3)(A)Any period of delay resulting from the absence or unavailability of the defendant or an essential witness.
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> * * *
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> (7)(A) Any period of delay resulting from a continuance granted by any judge on his own motion or at the request of the defendant or his counsel or at the request of the attorney for the Government, if the judge granted such continuance on the basis of his findings that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial. No such period of delay resulting from a continuance granted by the court in accordance with this paragraph shall be excludable under this subsection unless the court sets forth, in the record of the case, either orally or in writing, its reasons for finding that the ends of justice served by the granting of such continuance outweigh the best interests of the public and the defendant in a speedy trial.
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> * * * .

18 U.S.C. §3162(a)(2) (2006)

If a defendant is not brought to trial within the time limit required by section 3161(c) as extended by section 3161(h), the information or indictment shall be dismissed on motion of the defendant. The defendant shall have the burden of proof of supporting such motion but the Government shall have the burden of going forward with the evidence in connection with any exclusion of time under subparagraph 3161(h)(3). In determining whether to dismiss the case with or without prejudice, the court shall consider, among others, each of the following factors: the seriousness of the offense; the facts and circumstances of the case which led to the dismissal; and the impact of a reprosecution on the administration of this chapter and on the administration of justice. Failure of the defendant to move for dismissal prior to trial or entry of a plea of guilty or nolo contendere shall constitute a waiver of the right to dismissal under this section.

ARGUMENT

I. The indictment should be dismissed with prejudice because the district court and the government violated O'Connor's speedy-trial rights.

This criminal case lingered on the district court's docket for almost four years—from August 2005 until June 2009. Although the government repeatedly notes that the case began as a multi-count, nine-defendant, seventeen-property case, seven defendants pleaded out of the case within the first sixteen months. (Gov't Br. 3-5, 12.) The government ensured that those who pleaded guilty were sentenced expeditiously; those first seven defendants who entered pleas were all serving time by August 2007.[1] (R. 291.) Yet O'Connor, still awaiting trial, was given no such priority. *See United States v. Hall*, 181 F.3d 1057, 1062-63 (9th Cir. 1999) (co-defendants' plea-negotiation delay is inefficient use of judicial resources as to the remaining defendant). The case puttered along for over another year until March 2008, as a manageable, two-defendant case involving two transactions on a single piece of property, when the remaining co-defendant pleaded (R. 332) and the government dismissed one of the counts against O'Connor (Hr'g Tr. 3/24/08 13:17-23). Although the parties ostensibly had spent over two-and-a-half years preparing for trial, and it was now a single-count, single-defendant case, O'Connor was not tried until January 2009, over nine months later. The delays in O'Connor's case reflect the government's lack of diligence. And the district court, on whose shoulders the management of criminal cases and the Speedy Trial Act dictates rest,

[1] Co-defendants had concluded their *appeals* in this Court months before O'Connor's case even went to trial. *United States v. Cross*, 273 Fed. Appx. 557, 2008 WL 1723325 (7th Cir. 2008).

see Hall, 181 F.3d at 1060, likewise neglected the Act and its requirements by entering countless rote "ends-of-justice" continuances without any findings to support them.

The government's response to these lapses is to ask this Court to engage in interpretive gymnastics by examining hearing transcripts that span several months for the "context" that is to replace the district court's lack of actual findings. This Court should reject the government's invitation, particularly because the Act requires findings to aid appellate review and to ensure that the district court does not abuse the ends-of-justice continuance. *United States v. Williams*, 511 F.3d 1044, 1056-57 (10th Cir. 2007). At the end of its strained efforts, the government finally concedes that more than 70 non-excludable days elapsed in this four-year period. (*See* Gov't Br. 24-25 (stating that 29 days were improperly excluded between September 4, 2008 and January 5, 2009); Gov't Br. 41 (stating that 42 days were non-excludable due to the judge's travel plans).) But because the actual Speedy Trial violation is several times greater than the government's calculation, over 500 days on the most conservative estimate, this Court should reverse O'Connor's conviction with instructions to dismiss her indictment with prejudice.

A. O'Connor preserved appellate review of the entire 506-day Speedy Trial Act violation.

O'Connor has not waived her Speedy Trial Act claims for the three years of pretrial delay she suffered. (R. 389.) She timely filed a motion to dismiss for violation of the Act, which is all that §3162(a)(2) requires. 18 U.S.C. §3162 (2006). The government's waiver argument (Gov't Br. 31-32.), which it concedes is

unsupported by any direct authority,[2] cannot overcome the plain language of §3162(a)(2), the legislative history and purpose of the Act, and courts' consistent refusal to adopt overly formal and rigid pleading requirements.

First, the plain language of §3162(a)(2) simply requires the defendant to move for dismissal prior to trial in order to preserve her rights under the Act; once such a motion is made and a violation found, dismissal is mandatory. §3162(a)(2) ("If a defendant is not brought to trial within the time limit required . . . the information or indictment shall be dismissed on motion of the defendant."). Significantly, the only waiver language in the entire section is found in the final sentence of the paragraph, and makes clear that waiver arises only from a lack of timeliness, not from the breadth or substance of the motion. Therefore, according to the plain language of the Act, O'Connor's claim was preserved for appellate review when she filed her motion to dismiss.

The legislative history and purpose of the Speedy Trial Act are particularly compelling in finding against waiver. The Act was created to serve dual interests: the defendant's Sixth Amendment rights and, perhaps more importantly, the public's interest in a speedy trial for criminal defendants:

> The committee wishes to state, in the strongest possible terms, that any construction which holds that any of the provisions of the Speedy Trial Act is waivable by the defendant, other than his statutorily-

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[2] The government relies on dicta in two non-binding decisions. *See United States v. Oberoi*, 547 F.3d 436, 458 (2d Cir. 2008); *United States v. Taylor*, 497 F.3d 673, 675-76 n.3 (D.C. Cir. 2007). In any event, *Taylor* is distinguishable because the court ultimately did not find a waiver and because the issue facing the court was whether a pre-indictment challenge can preserve a post-indictment claim under a wholly different section of the Act. *Id*. at 675-76.

> conferred right to move for dismissal as cited above, is contrary to legislative intent and subversive of its primary objective: protection of the societal interest in speedy disposition of criminal cases by preventing undue delay in bringing such cases to trial.

S. Rep. No. 26-212, at 28-29 (1979). The courts and the prosecutors bear the burden of enforcing the Act in the public's interest; that responsibility does not lie with the defendant. *E.g. United States v. Nance*, 666 F.2d 353, 358 (9th Cir. 1982); *United States v. Didier*, 542 F.2d 1182, 1188-89 (2d Cir. 1976). Therefore, although the defendant has the duty of alerting the court to potential violations, once on notice, the court is tasked with determining the existence and extent of any violation and remedying it through a dismissal. *Cf. United States v. Pollock*, 726 F.2d 1456, 1464 (9th Cir. 1984) (defendant's non-specific objection was "sufficient to alert both the court below and this court to the need to examine the record to see if the defendant was indicted within the requisite number of days."). It would be inappropriate to imply a waiver of O'Connor's claims here because a waiver would undermine the public's interest.

Finally, perhaps the strongest argument against finding waiver comes from this Court's decisions. As a threshold matter, this Court construes waiver principles liberally in favor of the defendant. *United States v. Jaimes-Jaimes,* 406 F.3d 845, 848 (7th Cir. 2005). And when the Court can conceive of no tactical reason for defense counsel to intentionally relinquish a right, then waiver will not be found.[3]

[3] Although it is O'Connor's position that her motion preserved all speedy trial claims for appellate review, to the extent that this Court finds only last few months leading up to trial fully preserved, then O'Connor merely forfeited the remainder of her speedy trial claims,

Id. at 848-49. Here, O'Connor would gain no tactical advantage by intentionally relinquishing a portion of her Speedy Trial rights. With respect to speedy-trial claims in particular, this Court and other courts have reviewed claims where the defendant merely flags the speedy trial issue with little specificity. *See United States v. Turner*, 203 F.3d 1010, 1017 (7th Cir. 2000); *Hall*, 181 F.3d at 1060; *United States v. Gonzales*, 137 F.3d 1431, 1435 (10th Cir. 1998) (oral objection to continuance sufficient to raise the claim); *cf. United States v. Zukowski*, 851 F.2d 174, 175-76 (7th Cir. 1988) (defendant's oral motion preserves pre-indictment delay claim). The government's demands for specificity to avoid waiver fly in the face of widespread established practice and should be rejected.

B. The district court's summary use of the ends-of-justice continuance from January 27, 2006 through trial violates the Act and results in a 506-day delay.

Beginning on September 2, 2005, and continuing through the start of the trial on January 5, 2009, the district court excluded every single day from the Speedy Trial clock through use of the ends-of-justice exclusion. 18 U.S.C.A. §3161(h)(7)(B)(iv). This practice is expressly disfavored by federal courts. *See, e.g., United States v. Pakala*, 568 F.3d 47, 60 (1st Cir. 2009) ("Whatever administrative ease is obtained in simply allowing motions for 'ends of justice' continuances by stock electronic order, it is at odds with *Zedner*'s clear holding that a district court must make on the record findings justifying the grant of any 'ends of justice' continuance."). Furthermore, the district court's continual use of the ends-of-justice catchall is flatly

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which this Court reviews for plain error. *Jaimes-Jaimes*, 406 F.3d at 849. Given the egregious delay in this case, the plain error standards are easily satisfied.

contrary to Congress's intent that it be used only rarely. S. Rep. No. 93-1021, at 41 (1974) ("[A]s a general matter the Committee intends that . . . [§3161(h)(7)] should be rarely used.").

The government asks the Court to construct the district court's missing findings from "context," (Gov't Br. 34-35), to find a waiver, (Gov't Br. 31), to accept the government's own explanations for the district court's actions, (*e.g.,* Gov't Br. 22-25), or to apply a harmless-error standard, (Gov't Br. 33, n.11), that the Supreme Court has expressly rejected. *See Zedner v. United States*, 547 U.S. 489, 506-09 (2006); *United States v. Oberoi*, 547 F.3d 436, 447(2d Cir. 2009). Instead of reading into the tea leaves of implied reasons and contextual background that spans months, this Court should read the plain record in light of the plain language of the Speedy Trial Act, and dismiss the indictment according to its terms.

1. The January 27, 2006 *sua sponte* exclusion order is unfounded and results in at least 15 includable days.

In order to justify the district court's *sua sponte* continuance of the trial date from May 15 to July 17, 2006, (R. 103), the government asks the Court to place the order "in context" (Gov't Br. 34). Because the court neither held a hearing on that date, nor was responding to a motion or request by a party, the government attempts to substantiate this order with a status hearing that occurred three months earlier. (Gov't Br. 33.) Courts routinely forbid this precise practice. *See United States v. Barnes*, 159 F.3d 4, 12-13 (1st Cir. 1998) ("[T]he grant of [an unprompted *sua sponte*] continuance—of which there is no contemporaneous

written or oral record—fails to comply with the Act."). A proper count of the includable days between January 27, 2006 and March 17, 2006 is 15.[4]

2. The exclusion orders of March 17, 2006 and May 12, 2006 do not follow the statutorily mandated procedures and result in at least 242 includable days.

The district court's orders excluding time on March 17, 2006, (Hr'g Tr. 3/17/06 8:23-24), and May 12, 2006, (Hr'g Tr. 5/12/06 9:1-2; R. 120), are two more examples of the district court's practice of excluding time on ends-of-justice grounds without providing any findings. It is well settled law that a valid ends-of-justice exclusion requires more than a passing reference to the statutory language. *See Williams*, 511 F.3d at 1058; *United States v. Perez-Reveles*, 715 F.2d 1348, 1352-53 (9th Cir. 1983); *see also Zedner*, 547 U.S. at 507 ("§3161(h)([7])(A) is not satisfied by the District Court's passing reference to the case's complexity . . . ."). Although the government points to colloquy referencing scheduling and pleas, the district court never once accounted for the interests of the defendant and the public before excluding time. Accordingly, the district court's orders excluding time between March 17, 2006 and January 22, 2007 are invalid, and result in at least 242 includable days. (Br. 22-23); *see also Zedner*, 547 U.S. at 508-09 (counting all days resulting from improper continuance).

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[4] For ease in reference, the Speedy Trial Analysis table from the Appendix has been modified for this brief and attached.

3. The March 24, 2008 order excluded days on a basis prohibited under the Act and results in 36 includable days.

The case had evolved over three years into a single-count, single-defendant case, and trial was set to begin on March 24, 2008. The government had acknowledged well over a year earlier that it had narrowed the universe of documents pertaining to O'Connor. (Hr'g Tr. 1/5/07 17:6-18:11 (colloquy between counsel and district court stating that all documents relevant to O'Connor had been identified and disclosed).) Yet the government failed to properly certify its documents and simply did not diligently prepare for trial. When the defense objected to hold the government to its evidentiary obligations, the district court sustained the objection. (Hr'g Tr. 3/24/08 3:9-4:15; 58:1-25.) In light of these facts, the government should not now claim that the objection was strategic, complain about the onerousness of the certification process, or try to justify the district court's unsupported ends-of-justice continuance. (Gov't Br. 38-39.) At best, the exclusion order is insufficient for a lack of findings under §3161(h)(7)(A). At worst, it is expressly prohibited under §3161(h)(7)(C) because of the government's lack of diligence. Either way, there are 36 includable days between March 24, 2008 and April 29, 2008.

4. As the government concedes, the May 1, 2008 order was invalid as a matter of law, but contrary to the government's calculations 115 days should be included.

The government readily concedes that the district court's exclusion order due to its own calendar congestion was invalid. (Gov't Br. 40.) In an attempt to whittle down the number of includable days from 115 to 42, however, the government offers the unsupported suggestion that this Court count only some of those days. (Gov't

Br. 40-42.) The government attempts to supply reasons to justify the remaining days of delay, (Gov't Br. 42), a tactic that the Supreme Court has rejected. *See Zedner*, 547 U.S. at 508-09. All 115 days should be included.

5. The district court's exclusion of time on September 4, 2008 was improper as a matter of law and resulted in 98 includable days.

Once again, the government attempts to use context and implication (Gov't Br. 18-20) to supply the requisite findings. But the post-hoc rationale the district court offered on January 5, 2009 simply did not jibe with its earlier order and thus amounts to a prohibited retroactive justification. *See United States v. Janik,* 723 F. 2d 537, 545-46 (7th Cir. 1983). In any event, the government's alternative bases for excluding time cannot be reconciled with the Act and the cases interpreting it. Therefore, the period between September 4, 2008 and January 5, 2009 was improperly excluded, resulting in another 98 includable days.

a. The September 4, 2008 exclusion order is invalid because it is not supported by express findings and does not otherwise meet the Act's requirements.

Once again, in the absence of the statutorily required express findings to support an ends-of-justice continuance, the government directs this Court to the context of the hearing and the separately entered exclusion order. The context is not enough, however, and the government relies predominantly on reasons that are implied in the record. (Gov't Br. 18-19 (claiming that the court acknowledged the defendant's and public's interest in a speedy trial and construing defense counsel's unavailability as a lack of preparedness).) It is unclear how the government could

divine the district court's intent with respect to the public's "interest" and the court's supposed link between defense counsel's availability and his "preparedness" when none of those phrases were actually used in the hearing.[5] What is clear, however, is that the hearing pertained to witness availability and scheduling, and that neither the parties nor the court mentioned the Act, excluding time, or "trial preparations," which was the basis for the court's exclusion order. In short, the district court did not engage in the required ends-of-justice analysis before excluding time, which is required by both the Act and Supreme Court precedent interpreting it. §3161(h)(7)(A); *Zedner*, 547 U.S. at 506 (findings justifying the continuance must be made, "if only in the judge's mind, before granting the continuance"); *see also United States v. Crane*, 776 F.2d 600, 606 (6th Cir. 1985). This Court should reject the government's attempt to recast the hearing in order to satisfy the Act and should include the 98-day delay arising from this hearing.

b. In addition, the rationale the court provided on January 5, 2009 is at odds with the September 4, 2008 exclusion order and is therefore an invalid retroactive justification.

The only reason the district court supplied for the September 4, 2008 exclusion was "trial preparation." (R. 369.) It is equally clear, however, that only an unavailable-witness exclusion could possibly comport with what actually happened at the hearing. (R. 369; Tr. 2:11-14 ("[W]e did say in the order 'for trial preparation,' and it was pretty clear I thought from the hearing that the reason for continuing the trial was that a witness was both essential and unavailable.").)

[5] The closest the district court came to referring to the Act were its threats to dismiss the action because "it's too old." (Hr'g Tr. 9/4/08 10:22-24.)

Therefore, the district court's subsequent attempt to conform its findings to the hearing in order to deny O'Connor's speedy-trial motion was nothing more than a prohibited retroactive justification. *See Janik*, 723 F.2d at 545.

c. Even if this Court could entertain alternative bases for excluding time, the government's proposed alternative grounds and its accompanying time calculations are incorrect.

The government next suggests that this Court apply what amounts to a harmless-error review to uphold the district court's exclusion on other grounds. But this approach expressly violates the Supreme Court's decision in *Zedner*, which held that improper ends-of-justice exclusions are not subject to harmless-error review.[6] 547 U.S. at 506-09. Therefore, the government cannot now substitute other rationales to take the place of—and render harmless—the erroneous ends-of-justice exclusion. The government misconstrues the "automatically triggered" cases, which establish only that the government does not have to prove direct causation and actual delay due to the existence of those conditions. *United States v. Montoya*, 827 F.2d 143, 151 (7th Cir. 1987). And even if one were to entertain the government's attempt to create harmless-error review by excluding time through the "automatically triggered" provisions, (Gov't Br. 23), the §3161(h)(3) unavailable-

[6] The government's authority all pre-dates *Zedner* and is otherwise inapplicable. *United States v. Tibboel*, 753 F.2d 608, 611 (7th Cir. 1985); *United States v. Garrett*, 720 F.2d 705, 710-11 (D.C. Cir. 1983). This Court's passing reference in *Tibboel* to time that was "excludable anyway" can hardly supplant the Supreme Court's express dictate in *Zedner*, and *SEC v. Chenery Corp.*, 318 U.S. 80, 88 (1943) involved review of an administrative action, not a Speedy Trial Act claim, so its general proposition that harmless error review is appropriate on appeal has no bearing on *Zedner's* specific holding in the context of the Speedy Trial Act.

witness exclusion cannot be the basis for it. There is simply no precedent supporting the creation of a §3161(h)(3) exclusion on appellate review because this exclusion, like the ends-of-justice, requires additional independent proof and findings beyond those facts easily calculated from the docket sheet, and thus is ill-suited to a post-hoc automatic application. *See United States v. Fielding*, 645 F.2d 719, 721-22 (9th Cir. 1981) (comparing factual findings requirements under unavailable-witness and ends-of-justice exclusions); *see also Zedner*, 547 U.S. at 508-09.

i. Dana Powell was not an essential witness, and the government failed to meet its burden under §3161(h)(3) of proving that she was.

The government's argument fails even if §3161(h)(3) is available because it did not prove that Powell was essential. The government must offer concrete, detailed evidence to support its claim. *See United States v. McNeil*, 911 F.2d 768, 774 (D.C. Cir. 1990) (finding abuse of discretion when court relied upon "vague, unsupported assertions" to satisfy the government's burden). An essential witness is one that is:

> so essential to the proceeding that continuation without the witness would either be impossible or would likely result in a miscarriage of justice. For example, a chemist who has identified narcotics in the defendant's possession would be an "essential witness" . . . .

S. Rep. 93-1021, at 37 (1974). *See also McNeil*, 911 F.2d at 775 (stating that a witness whose testimony added only incremental credibility or was "neither the cornerstone of the Government's case . . . nor particularly important to any necessary element," was not an essential witness); *United States v. Eagle Hawk*, 815 F.2d 1213, 1218 (8th Cir. 1987).

Although Powell may have been unavailable, there is simply insufficient evidence in the record to support the government's assertion that she was essential. The only evidence offered during the hearing to support the district court's finding was the government's conclusory assertion that Powell was "essential" and "very important." (Hr'g Tr. 9/4/08 5:14-6:17; *see also* Tr. 1/5/09 2:10-3:5 (district court relied solely on statements at 9/4 hearing).) Even if the government had tried to meet its burden of proof, it would have failed because Powell could not be deemed essential as a matter of law. Powell's testimony was merely cumulative of the other six straw buyers who testified at trial. (Tr. 1/5/09 2:12-14, 22-25.) In fact, Powell's name appeared on only one of the mortgages that O'Connor allegedly submitted, one that was not the basis for the single count of wire fraud on which she was convicted.[7] (*Compare* Tr. 1/7/09 425:25-426:7 *with* 422:10-15.)

ii. The government cannot transform a ruled-on motion as either "continuing" or as an "other proceeding" in order to exclude additional days from the speedy trial clock.

The government misconstrues the reach of two provisions of §3161(h)(1) to try to exclude 69 otherwise-includable days in the period between September 2, 2008 and November 19, 2008. The plain language of the statute excludes only time during which a motion is actually pending, *i.e.*, undecided. *See* §3161(h)(1). The government claims that its September 2 Emergency Motion, which the district court

[7] Dimitra Yost was the straw buyer in the transaction with which O'Connor was charged. And although that transaction did involve Powell's sale of the property to Yost, Powell did not even testify about her role as seller. Agent Kaley and Kathleen Atnip provided the relevant information about the payoff letter. (Tr. 125:5-136:3; 302:25-304:2; 454:21-457:23.)

granted on September 4 (R. 369) somehow remained pending until November 20, 2008. (Gov't Br. 26-29.) Yet no motion was made during subsequent proceedings between September 5 and November 13, 2008, and as the record shows, the intervening hearings did not revisit the court's earlier decision to permit the deposition, but rather only dealt with the logistics of taking it. (Hr'g Tr. 9/22/08 2:11-25; Hr'g Tr. 11/20/08 5:8-24.) Nor does the Supreme Court decision in *Henderson v. United States*, on which the government heavily relies, merit a contrary result. 476 U.S. 321 (1986). *Henderson* involved a single motion that required supplemental briefing before the court could rule; it therefore remained pending for an extended period. *Id.* at 332 (describing motion to suppress).

Nor can the span be manipulated into "other proceedings concerning the defendant" under §3161(h)(1) as the government suggests. (Gov't Br. 24-25.) Although courts have construed the "other proceedings" clause broadly, *United States v. Salerno*, 108 F.3d 730, 736-37 (7th Cir. 1997), the principles of *ejusdem generis* and *noscitur a sociis*, as well as the Act's legislative history, mandate that exceptions falling within its ambit must actually relate to the defendant and be categorically similar to those listed. S. Rep. No. 93-1021, at 35-36 (1974) (stating that "other proceedings" provision is "representative of procedures of which a defendant might legitimately seek to take advantage for the purpose of pursuing his defense."); *Speedy Trial: Hearings on S. 895 Before the Subcomm. on Constitutional Rights of the S. Comm. on the Judiciary*, 92d Cong. 254 (1971) (letter of William H. Rehnquist, Asst. Att'y Gen.) (citing *ejusdem generis* principles and noting that

obtaining grand jury witnesses are not "in a strict sense" proceedings "concerning the defendant"); *Newsom v. Friedman*, 76 F.3d 813, 820 (7th Cir. 1996) (applying *ejusdem generis* and *noscitur a sociis* to limit definition of disputed term to entities similar in form and structure as enumerated term). The government's request to depose a non-essential witness and its efforts to effectuate that deposition simply do not fall within the category of "other proceedings" that Congress intended. Therefore, the speedy trial clock ran 98 days during this period.

C. This Court should order dismissal with prejudice.

All of the factors weigh in favor of dismissal with prejudice. First, O'Connor's minor role in a single wire-fraud count does not rise to the level of seriousness that has traditionally counseled for dismissal without prejudice. *See, e.g.*, *United States v. Fountain*, 840 F.2d 509, 512-13 (7th Cir. 1988) (first degree murder); *United States v. Smith*, 576 F.3d 681, 689 (7th Cir. 2009) (armed bank robbery); *United States v. Arango*, 879 F.2d 1501, 1508 (7th Cir. 1989) (drug trafficking and assaulting police officer). The government's reliance on the maximum statutory sentence as proof of the seriousness of the offense is undercut by the fact that the sentences actually imposed on most of the defendants in this case were quite low, even for those who were intimately involved in the scheme in a way that O'Connor was not. (*See, e.g.*, R. 186 (district court sentencing Scott, a straw-buyer recruiter, to only 90 days).)[8]

[8] Cross, the ringleader, received 140 months, a little over half of the maximum sentence. (R. 191.) O'Connor received the next-highest sentence of 50 months. (R. 439.) The remaining seven defendants received sentences ranging from 90 days to 32 months.

Although the government claims that the administration of justice would be served by a retrial, the administration of the Act counsels otherwise where the government has been lax in following the Act. *See United States v. Wilson*, 11 F.3d 346, 352 (2d Cir. 1993) (citing *United States v. Taylor*, 487 U.S. 326, 338-39 (1988)*; Arango*, 879 F.2d at 1508 (dismissal with prejudice deters prosecutorial neglect). Finally, the government points to unproven allegations of additional criminal activity while O'Connor was on pretrial release as a reason for dismissal without prejudice. But to the extent that those allegations arose from the government's neglect of the Act, it runs directly contrary to Congress's intent to protect the public from recidivism. 115 Cong. Rec. 34334-35 (1969) (stressing that bill sought to address "problems of crime by defendants release prior to trial"). The government should not be rewarded with another bite at the apple.

D. The "uncommonly long" pretrial delay violated O'Connor's Sixth Amendment rights.

The government readily concedes that the delay before trial was uncommonly long, which favors finding a Sixth Amendment violation, (Gov't Br. 45), and its other arguments are insufficient to overcome this error. The government continually stresses that the nine defendants asked for more continuances in gross terms than the government. But when the case involved no one but O'Connor, the government was solely responsible for ten months of delay during the year leading up to the eventual trial. The government also makes the unsupported proposition that O'Connor was not prejudiced by over three years of pretrial delay. (Gov't Br. 47.) But contrary to the government's assertion, O'Connor was prejudiced by the

witnesses' faulty memories because it was on the defense's cross examination where the witnesses' memories failed in every instance except one. (*See* Br. 29, 32.); *see also Doggett v. United States*, 505 U.S. 647, 655 (1992). Compounding the prejudice is the inevitable toll that an extended pretrial delay has on a defendant and her affairs. *Taylor*, 487 U.S. at 340 (stating that excessive delay can have extra-legal effects, including: interference with defendant's liberty, disruption of employment, exhaustion of financial assets, among other things) (citations omitted). Therefore, this Court should likewise reverse on Sixth Amendment grounds.

II. The jury instructions incorrectly stated the law, were misleading, and deprived O'Connor of a fair trial.

The government asserts on the one hand that the jury instructions in this case clearly and accurately gave the jury all of the guidance it needed to find that O'Connor herself committed wire fraud. (Gov't Br. 51 (assuring the Court that there was no error because the court instructed the jury that it "needed to find the government met its burden of proof beyond a reasonable doubt on each of the elements of wire fraud.").) In almost the same breath, however, the government claims that it did not need to prove that O'Connor committed the elements of wire fraud. (Gov't Br. 49-50 (asserting that "to be convicted of wire fraud, defendant herself need not have personally performed every act constituting the crime.").)

The government's contradictory stance is reflected in the jury instructions that it offered and that the district court accepted, instructions that could only serve to confuse and mislead the jurors as to the government's burden and the evidence that could be used to satisfy it. The government's proffered jury instructions simply

reflect the scattershot, kitchen-sink approach it used at trial by inundating the jury with heaps of evidence about Cross and his associates, but very little about O'Connor herself. But when this Court compares the jury instructions that were given, those that should have been given but were not, and the evidence at trial, it should conclude that the jury was improperly instructed and that this plain error affected O'Connor's right to a fair trial.[9]

First, the given instructions confused and misled the jury. Compare, for example, Instruction 16 (the wire fraud elements Instruction) (A124) and Instruction 27 (the joint venture instruction) (A135). These instructions and others told the jury that, although the wire fraud instruction contains three elements that appear to be personal to the defendant, the jury did not need to find that O'Connor herself actually satisfied any of those elements.

Second, and equally important, the jury was not told what the law requires: before the joint venture instruction may be used, the government must prove either a conspiracy, a conspiratorial agreement or, at a minimum, the defendant's knowledge of the scheme and agreement to participate in it. *United States v. Bernard*, 287 F.2d 715, 720 (7th Cir. 1961) (joint venture instruction is only appropriate when the government has first proved that there was an agreement to

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[9] Although defense counsel did not object to the cumulative impact of the jury instructions below, he certainly did not affirmatively relinquish it simply by agreeing to individual instructions. *United States v. Davis*, 471 F.3d 783, 791 (7th Cir. 2006). Moreover, failing to instruct the jury on an element of the offense—here the threshold agreement required as a precursor to the joint venture instruction—is not waived, even when defense counsel has agreed to the individual instructions given at trial. *United States v. Longstreet*, 567 F.3d 911, 921 n.2 (7th Cir. 2009).

join a common purpose); *see also United States v. Adeniji*, 221 F.3d 1020, 1026 (7th Cir. 2000) (defendant can be found guilty only if "the evidence adequately establishes [the defendant's] own knowing participation in the *same scheme*") (emphasis added). The government's authority says the same thing. *United States v. Jackson*, 546 F.3d 801, 815-16 (7th Cir. 2008) (requiring that a jury find defendant to be a participant in the scheme before holding him accountable for the actions of co-schemers). But the jury instructions failed to alert the jurors to this important threshold requirement. In *Adeniji*, this Court affirmed the admission of one co-defendant's actions in furtherance of a scheme against another co-defendant only because the jury:

> was instructed to give separate consideration to each defendant, to assess each defendant's culpability based on his or her own actions, and in particular to determine, based on the defendant's own acts and statements, whether each defendant was aware of the scheme's common purpose and became a willing party to the scheme.

Adeniji, 221 F.3d at 1027. Unlike *Adeniji*, the jurors in O'Connor's case were never given the additional necessary instructions that would have explained the role and limits of the joint venture instruction and its interplay with the elements instruction. The jurors were left with an incomplete and incorrect statement of the law. Thus, the jury instructions lowered the government's burden of proof on the elements of the wire fraud count and constructively amended the indictment to include an uncharged and unproven conspiracy count.[10] Moreover, the

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[10] This case is distinguishable from *United States v. Anagnostou*, 974 F.2d 939 (7th Cir. 1992), where this Court approved a joint venture instruction in a mail fraud case. In *Anagnostou*, the evidence did not pose the risk of illegitimate conviction based upon the

government's approach on appeal creates an unwarranted expansion of co-defendant liability in wire fraud cases by allowing a defendant to be convicted for others' acts even in the absence of proof that she knew of the scheme and became a willing participant in that same scheme.

The absence of necessary clarifying instructions is particularly troubling in a case like this one where the jury was inundated with the misdeeds of others, and the evidence of the defendant's guilt was so weak. First, contrary to the government's assertion, (Gov't Br. 51), the proof of O'Connor's guilt was far from overwhelming. *See* Section III, *infra.* Second, there was no evidence that O'Connor knew of the far-flung scheme the government painted at trial or knowingly agreed to participate in it. O'Connor operated at the fringes of this scheme, if at all, and was not privy to the inner-workings of Cross's scheme. (Tr. 601:15-20.) Third, the government presented overwhelming evidence of Cross's scheme, but very little of it tied back to O'Connor. The government introduced evidence of ten of Cross's fraudulent deals (Tr. 114-21, 123-36, 138-42, 145-47) and witnesses suggested as many as seventeen (Tr. 233-34, 275, 281, 285, 374, 417, 471, 553), but O'Connor was charged with only one.

The government was able to convict O'Connor without even showing that she knew of or agreed to join the scheme it presented to the jury. The jury was also never told that, before it could consider such evidence, it first needed to find that O'Connor had agreed to participate in the scheme. Even then, it was never

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behavior of other parties. Here, the bulk of the evidence pertained to Cross and his co-schemers, allowing the jury to incorrectly convict O'Connor based on those acts.

instructed to only consider the evidence to the extent that it related to the scheme, if any, O'Connor agreed to join. The jury was never told that others' acts could only establish that a scheme existed and that those acts could not, without more, satisfy the elements of wire fraud as to O'Connor herself. The district court thus plainly erred in failing to instruct the jury on the need to find the requisite agreement. This Court should vacate O'Connor's conviction.

III. The government failed to prove beyond a reasonable doubt that O'Connor possessed fraudulent knowledge and intent.

O'Connor had limited, if any, knowledge of Cross's scheme and goals. Further, it is undisputed that she believed that the mortgages would be paid, by either Cross or the putative straw buyers who, as far as O'Connor knew, were financially qualified to make those payments. Therefore, the government failed to prove her knowledge and intent to defraud beyond a reasonable doubt.

The government offers three equally unavailing arguments to refute O'Connor's sufficiency claim. First, the government attempts to expand the principle that proof of contemplated harm or loss is not required in fraud cases. (Gov't Br. 54. (citing *United States v. Leahy,* 464 F.3d 773, 786-87 (7th Cir. 2006)).) Inherent in this principle is that the defendant possesses the underlying knowledge that she is engaging in actual fraudulent activity. *See Leahy*, 464 F.3d at 794-95; *see also United States v. Davuluri*, 239 F.3d 902, 905-06 (7th Cir. 2001); *United States v. Masquelier*, 210 F.3d 756, 759 (7th Cir. 2000). The government's approach on

appeal eliminates threshold proof of fraudulent activity or knowledge, and sidesteps the personal *mens rea* requirement under the fraud statute.

Second, the government's own evidence presented at trial and on appeal affirmatively undermines its proof of O'Connor's intent. At trial, the government argued that Cross duped people by posing as a wealthy real estate investor who would pay or assume their mortgages. (Tr. 272.) Agent Kaley testified that this is precisely what O'Connor believed as well. (Tr. 105.) The straw buyers' knowledge that they could not pay the mortgages for which they were liable supports fraudulent intent on their part, but there is no evidence that O'Connor knew the straw buyers could not pay. Thus, unlike the cases on which the government relies in its brief, *see, e.g.*, *United States v. Johnson,* 927 F.2d 999, 1004 (7th Cir. 1991), there is no evidence that O'Connor knew, intended, or even suspected that Cross would cheat the lenders.

Third, the government once again invokes its theory that the scheme can supply circumstantial evidence of O'Connor's requisite intent. (Gov't Br. 53. (citing *United States v. Owens*, 301 F.3d 521, 528 (7th Cir. 2002)).); *see* Section II, *supra* (using same approach with respect to the jury instructions). But unlike the *Owens* defendant—an integral, willing member of the scheme who admitted knowledge of the land-flip transactions and haggled over his payoffs—O'Connor remained on the fringes of Cross's complex, fragmented scheme that functioned on a need-to-know basis. *Id.* at 524-25; (Tr. 122, 274, 388, 560.)

Nor can the facts the government points to on appeal supply this circumstantial evidence of fraudulent intent: (1) O'Connor's apparently false notation on some loan applications; (2) her knowledge that Cross would pay the mortgages; and (3) her receipt of money from Cross. (Gov't Br. 53-54.) With respect to the first fact, not every falsehood rises to the level of fraud. *United States v. Price*, 623 F.2d 587, 591-92 (9th Cir. 1980) (secretary did not have fraudulent intent despite falsehoods because she was not aware of scheme), *overruled on other grounds by United States v. De Bright,* 730 F.2d 1255, 1259 (9th Cir. 1984). Even if the indicated method of interview was wrong, it does not prove that O'Connor intended to defraud the banks. The second fact—O'Connor's belief that Cross would pay the mortgages—cannot prove fraudulent intent without contemporaneous proof that she knew that neither the buyers nor Cross would pay the mortgages. *Price*, 623 F.2d at 591. So, the government is left with the monies that Cross paid to O'Connor. But the mere exchange of money, without more, is insufficient to prove fraudulent intent. *United States v. Bailey*, 859 F.2d 1265, 1273-75 (7th Cir. 1988) (finding payment for involvement in a scheme with mere knowledge of "shadowy dealings" is insufficient to show fraudulent intent). In each of the government's cases, financial gain was coupled with proof of the defendant's knowledge of fraudulent activity—evidence absent from O'Connor's case. *United States v. Britton*, 289 F.3d 976, 982 (7th Cir 2002) (defendant's financial gain plus warning she improperly took funds); *Owens*, 301 F.3d at 525 (financial gain plus defendant's negotiations over fraudulent payments).

Finally, the government claims that O'Connor's inexperience is irrelevant to determining intent; however, this Court has held that reasonable reliance on a more experienced person can undermine a finding of intent to defraud. *Bailey*, 859 F.2d at 1273-75. Likewise, a defendant's lack of sophistication may prevent formation of the requisite intent "when the schemes involved are complex and the defendant is significantly less knowledgeable than his or her alleged co-conspirators." *Johnson,* 927 F.2d at 1005.[11] O'Connor's loan experience was one class and one year on the job when Cross, a well-spoken, well-dressed businessman, started using her for his deals. (Tr. 95, 105, 117, 319, 630.) O'Connor was not privy to the workings or scope of Cross's complex scheme.[12] O'Connor's ignorance, lack of sophistication, and reasonable reliance on Cross's experience, shows that she lacked the requisite knowledge for fraudulent intent.

IV. The district court's refusal to remove prejudicial surplusage from O'Connor's indictment was an abuse of discretion.

The government claims that the judge's single-sentence admonishment to the jury overcomes an eight page prejudicial document the jury carried into

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[11] The government mischaracterizes *Johnson* as barring a defendant's inexperience from rebutting intent to defraud. Actually *Johnson* found that lack of sophistication is one of many factors the court must consider as relevant evidence. *Johnson,* 927 F.2d at 1005. The government omits *Johnson's* next sentence, which states that, "the evidence may prove that a defendant's lack of sophistication prevented him or her from forming the requisite intent." *Id*.

[12] This Court recognized its complexity in affirming Cross's sentence. *Cross*, 273 Fed.Appx. at 559 (affirming Guideline enhancement for crime committed by "sophisticated means" and including "[c]onduct such as hiding assets or transactions, or both, through the use of fictitious entities" by noting that "[w]hat Cross was charged with doing and pled guilty to is exactly what the Note describes.").

deliberations. But "[t]he naïve assumption that prejudicial effects can be overcome by instructions to the jury . . . all practicing lawyers know to be unmitigated fiction." *Krulewitch v. United States*, 336 U.S. 440, 453 (1949) (Jackson, J., concurring). The indictment's inclusion of the criminal acts preformed without O'Connor's knowledge by people she did not know, which were unrelated to the indictment's only charge, was unnecessary and prejudicial. The district court abused its discretion by rejecting O'Connor's request to strike this surplusage without even attempting to balance the irrelevance of the material and the prejudice stemming from it. This Court should reverse O'Connor's conviction.

CONCLUSION

For the foregoing reasons, Azureeiah O'Connor respectfully requests that this Court reverse her conviction.

Respectfully Submitted,

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No. 09-2476

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FOR THE SEVENTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. AZUREEIAH O'CONNOR, Defendant-Appellant.	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division Case No. 05 CR 672 Hon. Elaine E. Bucklo Presiding Judge

CERTIFICATE OF COMPLIANCE WITH CIRCUIT RULE 31(e)

I, the undersigned, counsel for the Defendant-Appellant, Azureeiah O'Connor, hereby certify that I have filed electronically, pursuant to Circuit Rule 31(e), a version of this reply brief in non-scanned PDF format.

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Dated: February 12, 2010

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

I, the undersigned, counsel for the Defendant-Appellant, Azureeiah O'Connor, hereby certify that this brief conforms to the rules contained in Fed. R. App. P. 32(a)(7) for a brief produced with a proportionally spaced font. The length of this brief is 6,904 words.

_____

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CERTIFICATE OF SERVICE

I, the undersigned, counsel for the Defendant-Appellant, Azureeiah O'Connor, hereby certify that I served two copies of this reply brief 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 375 East Chicago Ave., Chicago, Illinois on February 12, 2010.

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Dated: February 12, 2010

SPEEDY TRIAL ACT TIMELINE
[Cross Referenced to Appellant's Reply Brief]

Date(s)	**Description**	**Days**
8/22/2005	Last co-defendant arraigned. Time excluded indefinitely pursuant to *United States v. Tibboel*, 753 F.2d 608 (7th Cir. 1985); §3161(h)(1)(F). (R. 44.) Speedy Trial Clock starts.	0
8/23/2005-9/1/2005	No motions pending	0 (10)[13]
9/2/2005	Status Hearing. Time excluded through 10/28/2005 for motions, trial preparations and plea negotiations under §3161(h)(7)(B)(iv). (R. 47.)	0
9/3/2005-10/19/2005	No motions pending.	0 (57)
10/20/2005-1/26/2006	Pretrial motions filed and considered.	0
Reply Sec. I.B.1		
1/27/2006	Court reschedules trial date. Time excluded through 7/17/2006 for trial preparations under §3161(h)(7)(B)(iv). (R. 103.)	0
1/27/2006-2/23/2006	Pretrial motions pending, (R. 88; R. 89; R. 90), and resolved. (R. 107; R. 108; R. 109; R. 113.)	0
2/24/2006-3/1/2006	**No motions pending.**	**6**
3/2/2006-3/7/2006	Motion filed, (R. 110.), and resolved. (R. 112.)	6
3/8/2006-3/16/2006	**No motions pending.**	**15**
Reply Sec. I.B.2		
3/17/2006	Status hearing. (R. 116.)	15
3/18/2006-3/28/2006	**No motions pending.**	**26**
3/29/2006-4/28/2006	Exclude 30 days to account for motion to adopt motions. (R. 117.)	26 (87)
4/29/2006-5/11/2006	**No motions pending.**	**39**

[13] Appellant had previously argued that certain periods of time should be included but are arguably excludable. (*See* Br. Sec. I.A., n.2; I.A.1, n.4; I.A.1.a.) Accordingly, these days are tallied separately and denoted by parentheses.

5/12/2006	Status hearing. Time excluded through January 22, 2007 for continuity of counsel and trial preparations under §3161(h)(7)(B)(iv). (R. 120.)	39
5/13/2006-11/16/2006	**No motions pending.**	**227**
11/17/2006	Status Hearing. (R. 121.)	227
11/18/2006-12/5/2006	**No motions pending.**	**245**
12/6/2006	Status Hearing. (R. 126.)	245
12/7/2006-12/14/2006	Motion filed, (R. 128.), and resolved. (R. 142.)	245
12/15/2006-12/17/2006	**No motions pending.**	**248**
12/18/2006	Change of Plea Hearing. (R. 143.)	248
12/19/2006-12/20/2006	**No motions pending.**	**250**
12/21/2006	Status Hearing. (R. 146.)	250
12/22/2006-12/28/2006	**No motions pending.**	**257**
12/29/2006-3/23/2008	Defendants requested continuances. (R. 146; R. 152; R. 159; R. 162; R. 233; R. 323; R. 325.)	257
Reply Sec. I.B.3		
3/24/2008	Pretrial Conference. Time excluded through May 19, 2008 for the interests of justice and trial preparations under §3161(h)(7)(B)(iv). (R. 346.)	257
3/25/2008-4/29/2008	**No motions pending.**	**293**
Reply Sec. I.B.4		
4/30/2008	Defendant files objection to government's trial exhibit certifications. (R. 354, Ex. C.)	293
5/1/2008	Status Hearing. Time excluded through 9/22/2008 for the interests of justice under §3161(h)(7)(B)(iv). (R. 352.)	293
5/9/2008	Defendant's objection to exhibit certifications resolved at pretrial conference. (R. 358.)	293
5/10/2008-9/1/2008	**No motions pending.**	**408**
Reply Sec. I.B.5		
9/2/2008	Emergency motion for deposition filed. (R. 367.)	408
9/4/2008	Motion Hearing. Emergency motion for deposition resolved. Time excluded through 1/5/2009 in the interests of justice for trial preparation under §3161(h)(7)(B)(iv). (R. 369.)	408
9/5/2008-9/21/2008	**No motions pending.**	**425**

9/22/2008	Status Hearing. (R. 370.)	425
9/23/2008-11/13/2008	**No motions pending.**	**477**
11/14/2008-11/20/2008	Motion filed, (R. 371.), and resolved. (R. 374.)	477
11/21/2008-12/2/2008	**No motions pending.**	**489**
12/3/2008-12/5/2008	Motion filed, (R. 375.), and resolved. (R. 378.).	489
12/6/2008-12/9/2008	**No motions pending.**	**493**
12/10/2008-12/17/2008	Motion filed, (R. 384.), and resolved. (R. 387.).	493
12/18/2008-12/30/2008	**No motions pending.**	**506**
12/31/2000	Motion filed, (R. 389.), and resolved. (R. 391.)	506
8-1/5/2009		
1/5/2009	Voir dire begins. (R. 391.)	506
	Speedy Trial Clock stops.	