2011
DISTRICT OF ARIZONA
ANNUAL CONFERENCE

CRIMINAL LAW – HOT TOPICS

- *The Implications and Complications of "Speedy Trial"*
- *Current Indian Country Issues*

Presented by

THE ARIZONA LAWYER REPRESENTATIVES
TO THE NINTH CIRCUIT

Friday, March 11, 2011

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THE SPEEDY TRIAL ACT[1]

I. SPEEDY TRIAL ACT BASICS

A. Basic Rule Regarding Timing of Indictments

"Any information or indictment charging an individual with the commission of an offense shall be filed within thirty days from the date on which such individual was arrested or served with a summons in connection with such charges." 18 U.S.C. § 3161(b).

B. Basic Rules Regarding Timing of Trial

1. Trial shall commence within 70 days of the latter of either:

   a. the date of the filing and making public of the indictment or information, or

   b. the date the defendant has appeared before a judicial officer in the district where such charge is pending.

   18 U.S.C. § 3161(c)(1).

2. Thus, when a defendant is indicted prior to his arrest, the 70 day pretrial period runs from the date of his initial appearance/arraignment. ***United States v. Haiges***, 688 F.2d 1273, 1274 (9th Cir. 1982).

3. But, when the defendant is arrested prior to indictment, and makes an initial appearance before a magistrate who orders him held to answer the charges in the district court, the 70 day period runs from the date of the indictment. ***United States v. Haiges***, 688 F.2d 1273, 1274 (9th Cir. 1982).

4. Unless the defendant consents in writing, trial cannot commence less than 30 days of when the defendant first appears with counsel or expressly waives counsel. 18 U.S.C. § 3161(c)(2).

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C. Definition

1. The time limits for the Speedy Trial Act apply to "offenses." 18 U.S.C. § 3161(b) and (c).

2. An "offense" is defined for the purpose of the Act as "any Federal criminal offense which is in violation of any Act of Congress and is triable by any court established by Act of Congress (other than a Class B or C misdemeanor or an infraction, or an offense triable by court-martial, military commission, provost court, or other military tribunal)." 18 U.S.C. § 3172(2).

D. The Act Does Not Create A Right To A Speedy Sentence

"The Speedy Trial Act addresses the time requirements between indictment and trial, but does not address sentencing." ***United States v. Parks***, 285 F.3d 1133, 1143 (9th Cir. 2002) (16 month delay between conviction and sentencing).

E. Effect of Emergency Declaration

1. On January 20, 2011, Chief Judge Silver ordered that the 70 day period in 18 U.S.C. § 3161(c) temporarily be extended to 180 days pursuant to 18 U.S.C. § 3174(e).

2. On March 2, 2011, the Judicial Conference of the Ninth Circuit entered an order extending this judicial emergency until February 19, 2012.

3. An emergency declaration allows, for a period not to exceed one year, for the time limit from indictment to trial to be increased to up to 180 days. 18 U.S.C. § 3174(b).

4. The time limits for the trial of cases of detained persons who are being detained solely because they are awaiting trial is not be affected by the emergency declaration. 18 U.S.C. § 3174(b).

5. The emergency declaration also does not extend the time limit from arrest to indictment. 18 U.S.C. § 3174(b).

II. SPEEDY TRIAL TIME REQUIREMENT CANNOT BE WAIVED BY THE PARTIES

A. Because the right to a speedy trial belongs not only to the defendant, but to society as well, the parties cannot stipulate to a waiver of the time requirements of the Speedy Trial Act. ***Zedner v. United States***, 547 U.S. 489, 502 (2006) ("[a]llowing prospective waivers would seriously undermine the Act because there are many cases . . . in which the prosecution, the defense, and the court would all be happy to opt out of the Act, to the detriment of the public interest").

B. Thus, the parties cannot simply a stipulate to a continuance.

C. In comparison, where a defendant stipulates to *facts* underlying a district court's conclusion that time is excludable under the Speedy Trial Act, the defendant cannot later challenge that finding. ***United States v. Shetty***, 130 F.3d 1324, 1328 (9th Cir. 1997); ***United States v. Sutter***, 340 F.3d 1022, 1033 (9th Cir. 2003), *amended on other grounds*, 348 F.3d 789 (9th Cir. 2003).

III. TIMING OF INDICTMENTS

A. Under the Speedy Trial Act, an indictment "shall be filed within thirty days" from the date of arrest or the date of the service of a summons. 18 U.S.C. § 3161(b).

1. "Arrest" means arrest for federal criminal offense. ***United States v. Benitez***, 34 F.3d 1489, 1493 (9th Cir. 1994). Thus, if a defendant is arrested and detained by INS for deportation, the 30 days starts to run from the date of the arrest for a criminal offense, unless the civil detention is merely a ruse to avoid the requirements of the Speedy Trial Act. ***United States v. Ortiz-Lopez***, 24 F.3d 53, 54-55 (9th Cir. 1994); ***United States v. Cepeda-Luna***, 989 F.2d 353, 355-57 (9th Cir. 1993).

2. Section 3161(b)'s 30-day limitation applies only to persons who are arrested and charged or otherwise restrained. ***United States v. Candelaria***, 704 F.2d 1129, 1131 & n.2 (9th Cir.1983). That is, it does not apply to a person who was arrested and released without being charged. ***Id***. A complaint must be issued at the time of arrest in order to trigger the 30-day limitation. ***United States v. Boyd***, 214 F.3d 1052, 1056 (9th Cir. 2000). A violation notice will not be equated with a complaint to begin the Speedy Trial Act's clock. ***Id***.

3. Similarly, tribal arrests and state arrests do not start the 30 day time period. ***United States v. Manuel***, 706 F.2d 908, 914-15 (9th Cir. 1983) (four month delay between tribal arrest and federal indictment did not violate the Speedy Trial Act); ***United States v. Johnson***, 953 F.2d 1167, 1172 (9th Cir. 1992) (although FBI actively participated in investigation, Speedy Trial Act period did not commence upon defendant's arrest by state authorities).

4. The requirement of indicting within 30 days only applies to charges contained in the complaint. Additional charges not contained in the complaint can be brought later. ***United States v. Gastelum-Almeida***, 298 F.3d 1167, 1173 (9th Cir. 2002) (superseding indictment that added charges not contained in the complaint did not violate the Speedy Trial Act).

B. In cases where the government requests detention, the time period between initial appearance and the court's order regarding detention will be excluded in calculating the 30 days.

1. Under the Speedy Trial Act, in computing the time in which an indictment must be filed, any period of delay resulting from "any pretrial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion" is excluded. 18 U.S.C. § 3161(h)(1)(D). (*See* Section VI, *infra*.)

2. Thus, the time from the initial appearance (when the government makes both a motion for detention and a motion to continue the detention hearing) to the court's ruling on detention is excluded. ***United States v. Vo***, 413 F.3d 1010, 1013-16 (9th Cir. 2005) (time that a motion for detention was pending was excludable time under the Speedy Trial Act); ***United States v. Wright***, 990 F.2d 147, 149 (4th Cir. 1993) (government's motion for temporary detention resulted in excludable time); ***United States v. Bowers***, 834 F.2d 607, 609 (6th Cir. 1987) (delay attributable to government's motion for pretrial detention was excludable); ***United States v. Moses***, 15 F.3d 774, 776-77 (8th Cir. 1994) (same); *see* ***United States v. Morales***, 875 F.2d 775, 777 (9th Cir. 1989) (under the Speedy Trial Act, the exclusion of time resulting from "any" pretrial motion applies to any motion, not just necessary motions).

C. In calculating time under the Speedy Trial Act, the date an event occurs is excluded. ***United States v. Yunis***, 723 F.2d 795, 797 (11th Cir. 1984). Thus, the date of initial appearance does not count towards the thirty day limit. *See* ***United States v. Haiges***, 688 F.2d 1273, 1275 (9th Cir. 1982) (date of arraignment excluded from computation as a proceeding concerning the defendant).

IV. TIMING OF TRIALS

A. The 70-day time limit established by 18 U.S.C. § 3161(c)(1) is subject to many periods of excludable delay. *See* 18 U.S.C. § 3161(h).

B. The Speedy Trial Act makes no distinction regarding the applicability of the exclusions under § 3161(h)(1) to the 30-day pre-indictment period and the 70-day post-indictment period. ***United States v. Pete***, 525 F.3d 844, 852 (9th Cir. 2008). In other words, the exclusions are applicable equally in calculating both time frames.

C. The Judicial Administration and Technical Amendments Act of 2008, 122 Stat. 4291, made technical changes to the Speedy Trial Act, eliminating references to the obsolete Narcotic Addict Rehabilitation Act. These changes resulted in the renumbering of most of the subsections in § 3161(h). The amendments did not change the language of the renumbered provisions. For ease of use, this outline will use the citations for the current version of the Act (even when discussing pre-2008 cases). When researching, be aware of the change. For example, what is currently § 3161(h)(7) was, in older cases, § 3161(h)(8).

V. EXCLUDABLE TIME – CONTINUANCES

A. Section 3161(h)(7), the subsection regarding the exclusion of time as a result of a motion to continue, excludes any period of delay resulting from a continuance granted by the judge on its own motion or motion of either party, "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." 18 U.S.C. § 3161(h)(7)(A).

B. For the time period of a continuance to be excludable, the Court must set forth, "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." 18 U.S.C. § 3161(h)(7)(A).

C. The Speedy Trial Act contains the following non-exclusive list of factors that the Court "shall consider" in determining whether to grant a continuance (18 U.S.C. § 3161(h)(7)(B)(i) through (iv)):

> (i) Whether the failure to grant such a continuance in the proceeding would be likely to make a continuation of such proceeding impossible, or result in a miscarriage of justice.
>
> (ii) Whether the case is so unusual or so complex, due to the number of defendants, the nature of the prosecution, or the existence of novel questions of fact or law, that it is unreasonable to expect adequate preparation for pretrial proceedings or for the trial itself within the time limits established by this section.
>
> (iii) Whether, in a case in which arrest precedes indictment, delay in the filing of the indictment is caused because the arrest occurs at a time such that it is unreasonable to expect return and filing of the indictment within the period specified in section 3161(b), or because the facts upon which the grand jury must base its determination are unusual or complex.
>
> (iv) Whether the failure to grant such a continuance in a case which, taken as a whole, is not so unusual or so complex as to fall within clause (ii), would deny the defendant reasonable time to obtain counsel, would unreasonably deny the defendant or the Government continuity of counsel, or 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)(7)(B).

D. The Ninth Circuit repeatedly has held that this "ends of justice" continuance is not to be granted "as a matter of course but rather to be used sparingly and only when necessary." *E.g.*, ***United States v. Ramirez-Cortez***, 213 F.3d 1149,1155 (9th Cir. 2000).

E. In considering whether to grant an "ends of justice" continuance, the Court must make a "particularized inquiry" as to the actual need and reasons for the continuance. ***Ramirez-Cortez***, 213 F.3d at 1154.

1. Case by case findings regarding the need for the continuance are required. ***Ramirez-Cortez***, 213 F.3d at 1155.

2. The Court may not simply credit "vague statements by one party's lawyer about possible scheduling conflicts or general desires for a continuance of the other parties or their attorneys." ***United States v. Lloyd***, 125 F.3d 1263, 1269 (9th Cir. 1997) (findings that one defense counsel had a conflict on one specific day, and that other defense counsel and prosecutors had conflicts with unspecified "later dates" were "woefully inadequate").

3. Rather, the Court "must conduct an appropriate inquiry to determine whether the various parties actually want and need a continuance, how long a delay is actually required, what adjustments can be made with respect to the trial calendars or other plans of counsel, and whether granting the requested continuance would 'outweigh the best interest of the public and the defendant[s] in speedy trial.'" ***Lloyd***, 125 F.3d at 1269 (quoting 18 U.S.C. § 3161(h)(7)(A)).

4. In the Ninth Circuit, the desire to engage in additional plea negotiations is **not** a factor that the Court may use to justify excluding time under the Speedy Trial Act. ***United States v. Ramirez-Cortez***, 213 F.3d 1149, 1155-56 (9th Cir. 2000); ***United States v. Perez-Reveles***, 715 F.2d 1348, 1352 (9th Cir. 1983).

5. General congestion of the Court's calendar, lack of diligent preparation or failure to obtain available witnesses on the part of the attorney for the Government also are not proper bases for excluding time. 18 U.S.C. § 3161(h)(7)(C).

6. Although court congestion cannot serve as a basis for a continuance, "where a trial date is set and later changed at the request of the parties, district courts certainly cannot be required to reset cases in unworkable or 'unavailable' time slots." ***United States v. Shetty***, 130 F.3d 1324, 1328 (9th Cir. 1997).

7. Having a case designated as a "complex case" (Local Rule Criminal 16.4) does not mean that the Speedy Trial Act does not apply. The complexity of the case, however, is a factor that the Court can use to justify excluding time under the Act. 18 U.S.C. § 3161(h)(7)(B)(ii). *See* ***United States v. Perez-Reveles***, 715 F.2d 1348, 1352-53 (9th Cir.

1983) ("mere conclusion" that the case is complex is insufficient to justify excluding time).

a. ***United States v. Lewis***, 611 F.3d 1172, 1176 (9th Cir. 2010) (continuance justified because the "case involved voluminous discovery, a large number of counts, several defendants, ongoing investigations in other districts, and potential witnesses from other countries").

b. ***United States v. Dota***, 33 F.3d 1179, 1183 (9th Cir.1994) (holding that an "ends-of-justice continuance may be justified on grounds that one side needs more time to prepare for trial").

c. ***United States v. Butz***, 982 F.2d 1378, 1381 (9th Cir.1993) (holding that an "ends of justice" continuance is proper when a case is complex and involves multiple "codefendants and multiple overt acts occurring in [multiple] states," and in which the complexity "outweigh[s] the interests of individual defendants").

8. When a failure to continue would unreasonably deny continuity of either government or defense counsel, an "ends of justice" continuance may be appropriate. 18 U.S.C. § 3161(h)(7)(iv); ***United States v. Medina***, 524 F.3d 974, 985-86 (9th Cir. 2008); ***United States v. Nance***, 666 F.2d 353, 358 (9th Cir.1982) (unavailability of defense counsel was a valid reason for ends of justice continuance).

a. For a continuance based on continuity of defense counsel, there must be some substance to the prior attorney-client relationship. ***United States v. Lloyd***, 125 F.3d 1263, 1270 (9th Cir. 1997).

b. For continuity of government counsel, factors to consider include (1) the size of the prosecutor's office, (2) whether there is another qualified prosecutor available, (3) how much special knowledge the first prosecutor has developed about the case, (4) how difficult the case is, and (5) how different it is from other cases generally handled by the particular United States Attorney's office. ***Lloyd***, 125 F.3d at 1271.

9. "The death penalty consideration process is a valid reason to grant an ends of justice continuance." ***United States v. Murillo***, 288 F.3d 1126, 1133 (9th Cir. 2002).

F. When the Court grants an "ends of justice" continuance pursuant to § 3161(h)(7), the continuance:

1. must be "specifically limited in time," and

2. must be "justified [on the record] with reference to the facts as of the time the delay is ordered."

United States v. Lewis, 611 F.3d 1172, 1176 (9th Cir. 2010) (quoting ***United States v. Lloyd***, 125 F.3d 1263, 1268 (9th Cir. 1997)).

3. The justification can be made by the court referring to the reasons supplied by the motion to continue. ***United States v. Brickey***, 289 F.3d 1144, (9th Cir. 2002), *overruled on other grounds*, ***United States v. Contreras***, 593 F.3d 1135 (9th Cir. 2010) (en banc).

G. "Although the Act is clear that the findings must be made, if only in the judge's mind, before granting the continuance (the continuance can only be 'granted ... on the basis of [the court's] findings'), the Act is ambiguous on precisely when those findings must be 'se[t] forth, in the record of the case.' However this ambiguity is resolved, at the very least the Act implies that those findings must be put on the record by the time a district court rules on a defendant's motion to dismiss under § 3162(a)(2)." ***Zedner v. United States***, 547 U.S. 489, 506-07 (2006) (rejecting argument that the required findings could be made on remand); ***United States v. Medina***, 524 F.3d 974, 980 (9th Cir. 2008) (citing ***United States v. Bryant***, 726 F.2d 510, 511 (9th Cir. 1984) (setting forth the reasons for the continuance at the time of denying the defendant's motion to dismiss was sufficient)). The Supreme Court noted that "[t]he best practice, of course, is for a district court to put its findings on the record at or near the time when it grants the continuance." ***Zedner***, 547 U.S. at 507 n.7.

H. If a court neglects to make the required record, harmless error analysis is not applicable on appeal. ***Zedner***, 547 U.S. at 507-09.

VI. EXCLUDABLE TIME – MOTIONS

A. The Act provides for an automatic exclusion (*i.e.* excludable without district court findings) of a period of "delay resulting from any pretrial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion." 18 U.S.C. § 3161(h)(1)(D).

B. The Act further automatically excludes any "delay reasonably attributable to any period, not to exceed thirty days, during which any proceeding concerning the defendant is actually pending." 18 U.S.C. § 3161(h)(1)(H).

C. In applying these two provisions, the Supreme Court has divided pretrial motions into two types: (1) those motion that do not require a hearing and (2) those motions that need a hearing. ***Henderson v. United States***, 476 U.S. 321, 328-30 (1986).

D. <u>Motions That Do Not Require A Hearing</u>

1. "If a pretrial motion does not require a hearing, the period from the date the motion was taken under advisement until the court rules on the motion, but no more than 30 days, may be excluded." ***United States v. Medina***, 524 F.3d 974, 978-79 (9th Cir. 2008) (citing ***Henderson***, 476 U.S. at 329).

2. The Supreme Court has indicated that a motion that does not require a hearing is "under advisement" from "the time the court receives all the papers it reasonably expects." ***Henderson***, 476 U.S. at 329.

E. <u>Motions That Require A Hearing</u>

1. If a pretrial motion is of the sort that requires a hearing, a district court must exclude the following periods of delay: (i) the period from the date the motion was filed to the conclusion of the hearing, (ii) the period from the conclusion of the hearing until the date the district court "receives all the submissions by counsel it needs to decide that motion," and (iii) the period from the last day of the period described in (i) or (ii), as applicable, until the court rules on the motion, but no more than 30 days. ***United States v. Medina***, 524 F.3d 974, 979 (9th Cir. 2008) (citing ***Henderson***, 476 U.S. at 329-32).

2. In general, the district court must exclude these periods of delay whether or not the delay was reasonably necessary. ***United States v. Medina***, 524 F.3d 974, 979 (9th Cir. 2008) (citing ***Henderson***, 476 U.S. at 330); ***United States v. Clymer***, 25 F.3d 824, 830 (9th Cir.1994) ("Where delay in commencing a trial results from the pendency of a motion . . . the delay will automatically be excluded from the Speedy Trial Act calculation, no matter how unreasonable or unnecessary that delay might seem").

3. The district court must exclude time while the motion is pending even if the court ultimately does not hold a hearing or rule on the motion. ***United States v. Medina***, 524 F.3d 974, 979 (9th Cir. 2008); ***United States v. Gorman***, 314 F.3d 1105, 1115 (9th Cir.2002) (holding that the district court properly excluded the nearly 10-month period between defendant's filing of a motion to exclude evidence and the defendant's entering of a guilty plea even though the court never ruled on the suppression motion).

4. If a district court continues a motion until after trial, the court may not exclude the time while the postponed motion is pending. ***United States v. Medina***, 524 F.3d 974, 979 (9th Cir. 2008); ***United States v. Lewis***, 349 F 3d 1116, 1121-22 (9th Cir.2003).

5. The Ninth Circuit also has created an exception to the general rule for "pro forma motions to compel discovery," where the motions require no decision by the court "unless and until future discovery disputes arose." ***United States v. Medina***, 524 F.3d 974, 979 (9th Cir. 2008); (quoting ***United States v. Sutter***, 340 F.3d 1022, 1029-32 (9th Cir. 2003), *amended on other grounds*, 348 F.3d 789 (9th Cir. 2003)). If such a motion is not continued to a date certain or the happening of an event certain, then the motion is deemed "under advisement" for the purpose of 18 U.S.C. § 3161(h)(1)(H), as of the date of the last hearing or filing of supporting papers, whichever is later. ***Sutter***, 340 F.3d at 1031-32.

6. The Ninth Circuit also held that where it is clear that the delay in the trial caused the delay in the hearing on a motion, rather than the other way around, and where the defendant repeatedly asked the court to set the case for trial and was otherwise ready to proceed to trial, the government's pending (and relatively unimportant) pretrial motion relating to the order of calling witnesses could not serve as a basis for

exclusion. ***United States v. Lewis***, 349 F.3d 1116, 1121 (9th Cir. 2003).

7. Delay resulting from pending motions will not be excluded if the defendant shows that he attempted unsuccessfully to obtain hearings on the pretrial motions or that hearings were deliberately refused with intent to evade the Speedy Trial Act. ***United States v. Clymer***, 25 F.3d 824, 831 n.6 (9th Cir. 1994).

F. Computation With A Magistrate Judge's Report and Recommendation

1. Courts that have considered the issue have held that a Magistrate Judge who takes a motion under advisement is subject to the 30 day "under advisement" limit of § 3161(h)(1)(H). ***United States v. Harris***, 566 F.3d 422, 430 (5th Cir. 2009), *cert. denied*, 130 S.Ct. 1687 (2010); ***United States v. Long***, 900 F.2d 1270, 1275 (8th Cir. 1990); ***United States v. Mora***, 135 F.3d 1351, 1356-57 (10th Cir. 1998).

2. When a Magistrate Judge concludes that a transcript of the hearing is necessary to prepare the Report and Recommendation, the 30-day under advisement period begins when the transcript is filed. ***United States v. Blankenship***, 67 F.3d 673, 676-77 (8th Cir. 1995); ***United States v. Mora***, 135 F.3d 1351, 1355 n.2 (10th Cir. 1988).

3. Circuits apparently are split on how to calculate the time after the Magistrate Judge files the Report and Recommendation.

   a. The Fifth, Sixth and Eighth Circuits hold that once a Report and Recommendation is issued, the speedy trial clock is tolled under § 3161(h)(1)(D) for a period of ten days or until objections are filed, whichever is earlier. At that point, the motion is deemed "under advisement" for another thirty-day period of excludable delay under § 3161(h)(1)(H). ***United States v. Harris***, 566 F.3d 422, 430 (5th Cir. 2009); ***United States v. Long***, 900 F.2d 1270, 1275 (8th Cir. 1990); ***United States v. Andress***, 943 F.2d 622, 626 (6th Cir. 1991).

   b. The Tenth and Eleventh Circuit hold that when the Report and Recommendation is filed, the District Judge gets a new 30 day "under advisement" period. ***United States v. Mora***, 135 F.3d 1351, 1357 (10th Cir. 1998); ***United States v. Mers***, 701 F.2d

1321, 1336-37 (11th Cir. 1983) (expressly not deciding whether the statutory time in which to file objections to a Report and Recommendation is excluded).

c. *But see* ***United States v. Thomas***, 788 F.2d 1250, 1256-58 (7th Cir. 1986) (cautioning, but not holding, that Magistrate Judge and District Judge may not each have a separate 30-day under advisement period).

G. Courts are to calculate the 70-day period excluding the day the motion was filed and the day it was heard. ***United States v. Daychild***, 357 F.3d 1082, 1093 (9th Cir. 2004).

H. Any period of delay necessary for the *preparation* of pretrial motions is not automatically excludable under § 3161(h)(1)(D). ***Bloate v. United States***, 130 S.Ct. 1345, 1352-53 (2010) (abrogating ***United States v. Lewis***, 980 F.2d 555, 564 (9th Cir. 1992)). Such a period of delay may be excluded under § 3161(h)(7) (*see* Section V, *supra*), which requires findings by the court. ***Bloate***, 130 S.Ct. at 1354.

VII. EXCLUDABLE TIME – JOINDER WITH CODEFENDANT

A. The act provides for the exclusion of a "reasonable period of delay when the defendant is joined for trial with a codefendant as to whom the time for trial has not run and no motion for severance was granted." 18 U.S.C. § 3161(h)(6).

B. Any period of time excluded under this subsection must be "reasonable." ***United States v. Lewis***, 611 F.3d 1172, 1176 (9th Cir. 2010).

C. The Court "gauge[s] the reasonableness of delay on a case by case basis, given the fact-bound nature of the inquiry." ***Lewis***, 611 F.3d at 1177 (quoting ***United States v. Messer***, 197 F.3d 330, 337 (9th Cir. 1999)).

C. In evaluating reasonableness, the court should look to the totality of circumstances, including, for example, prejudice to the defendant, whether the sheer length of the delay was "egregious," the defendant's failure to move for severance or otherwise assert his speedy trial rights, and whether the defendant was free on bond. ***United States v. Messer***, 197 F.3d 330, 337-38 (9th Cir. 1999).

D. The addition of other codefendants in a superseding indictment may make a delay reasonable. ***Lewis***, 611 F.3d at 1177-78 (the importance of allowing Lewis' codefendants time to prepare for trial furthered the policy of favoring joint trials, and, thus, outweighed any prejudice that may have resulted from having one of those codefendants eventually decide to plead guilty and testify against Lewis).

E. Allowing codefendant time to file pretrial motions also is reasonable. ***Lewis***, 611 F.3d at 1178.

VIII. EXCLUDABLE TIME – INTERLOCUTORY APPEALS

A. The Act provides for an automatic exclusion for any "delay resulting from any interlocutory appeal." 18 U.S.C. § 3161(h)(1)(C).

B. The excludable period begins when a notice of appeal is filed. ***United States v. Pete***, 525 F.3d 844, 848-49 n. 5 (9th Cir. 2008).

C. The excludable period ends when the Court of Appeals *issues* its mandate. ***Pete***, 525 F.3d at 853; ***United States v. Crooks***, 826 F.2d 4, 5 (9th Cir. 1987). The operative date is the date of the issuance of the mandate, not the date of its receipt by the district court. ***Crooks***, 826 F.2d at 5.

D. The time during which a petition for writ of certiorari is pending also is excluded under § 3161(h)(1)(C). ***Pete***, 525 F.3d at 850.

E. In cases where the mandate has issued before the time to file a petition for writ of certiorari has expired, "once the defendant has clearly announced in a court document an intention to file a certiorari petition, the time following such an announcement is excludable under the STA as a 'delay resulting from an[ ] interlocutory appeal' until (1) the defendant formally disclaims that intent; (2) the period for filing a petition for a writ of certiorari expires; (3) the petition is filed but denied; or (4) the petition is granted, decided on the merits, and any further court of appeals proceedings are concluded." ***Pete***, 525 F.3d at 854.

F. An interlocutory appeal interrupts, but does not restart, the Speedy Trial Act clock. ***United States v. Pitner***, 307 F.3d 1178, 1182 (9th Cir. 2002). In other words, 18 U.S.C. § 3161(e) (*see* Section XV, *infra*) does not apply to interlocutory appeals. ***Id***. at 1182-83.

IX. EXCLUDABLE TIME – PLEA AGREEMENTS

A. The Act provides for an automatic exclusion for any "delay resulting from consideration by the court of a proposed plea agreement to be entered into by the defendant and the attorney for the Government." 18 U.S.C. § 3161(h)(1)(G).

B. The period of excludable delay begins when the defendant enters his plea. ***United States v. Solorzano-Rivera***, 368 F.3d 1073, 1077 (9th Cir. 2004).

C. The period ends when the Court when the court grants the defendant's motion to withdraw from the plea. ***United States v. Solorzano-Rivera***, 368 F.3d 1073, 1077 (9th Cir. 2004).

D. In any event, if a defendant who has entered a plea of guilty subsequently withdraws his plea, for the purpose of the Speedy Trial Act, the defendant is deemed to be indicted on the day the order permitting his withdrawal becomes final. 18 U.S.C. § 3161(i); ***United States v. Solorzano-Rivera***, 368 F.3d 1073, 1078 (9th Cir. 2004).

X. EXCLUDABLE TIME – COMPETENCY EXAMS AND INCOMPETENCE

A. The Act provides for automatic exclusion for any period of delay "resulting from any proceeding, including any examinations, to determine the mental competency or physical capacity of the defendant." 18 U.S.C. § 3161(h)(1)(A).

B. In applying this provision, the 45 day time limit for a psychiatric examination under 18 U.S.C. § 4247(b) has no bearing on the Speedy Trial Act calculation. ***United States v. Daychild***, 357 F.3d 1082, 1094 (9th Cir. 2004) (affirming exclusion of 65 days relating to competency exam).

C. The Act also excludes "[a]ny period of delay resulting from the fact that the defendant is mentally incompetent or physically unable to stand trial." 18 U.S.C. § 3161(h)(4).

D. Section 3161(h)(1)(F) excludes:

> delay resulting from transportation of any defendant from another district, or to and from places of examination or hospitalization, except

that any time consumed in excess of ten days from the date an order of removal or an order directing such transportation, and the defendant's arrival at the destination shall be presumed to be unreasonable.

XI. EXCLUDABLE TIME – FUGITIVES

A. The act contains an exclusions of time if a defendant is absent or "unavailable." 18 U.S.C. § 3161(h)(3)(A).

B. A defendant is considered absent:

1. when his whereabouts are unknown and,

2. he is attempting to avoid apprehension or prosecution or his whereabouts cannot be determined by due diligence. 18 U.S.C. § 3161(h)(3)(B).

C. A defendant is considered unavailable whenever his whereabouts are known but his presence for trial cannot be obtained by due diligence or he resists appearing at or being returned for trial. 18 U.S.C. § 3161(h)(3)(B).

D. If the defendant is "absent" on the day set for trial, and does not appear again in court until more than 21 days have passed from the trial date, the speedy trial clock is restarted as of the date of the defendant's subsequent appearance. 18 U.S.C. § 3161(k)(1).

E. If the defendant is "absent" on the day set for trial, and appears again in court within 21 days from the trial date, in addition to the time excluded pursuant to § 3161(h)(3), 21 days are added to the speedy trial clock.

XII. OTHER EXCLUDABLE TIME PERIODS

A. Section 3161(h)(1) contains a "catchall" provision which excludes "[a]ny period of delay resulting from other proceedings concerning the defendant, uncluding but not limited to" certain specified proceedings. *See* ***United States v. Pete***, 525 F.3d 844, 849 (9th Cir. 2008) ("a

certiorari petition undoubtedly comes within § 3161(h)(1)'s catchall language").

B. Section 3161(h)(1)(B) excludes "delay resulting from trial with respect to other charges against the defendant."

C. Section 3161(h)(1)(E) excludes "delay resulting from any proceeding relating to the transfer of a case or the removal of any defendant from another district under the Federal Rules of Criminal Procedure."

D. The Act excludes any period of delay during which prosecution is deferred pursuant to a written agreement with the defendant, and approval of the court (i.e. pretrial diversion). 18 U.S.C. § 3161(h)(2).

E. Time is excluded if an "essential witness" is absent or unavailable. 18 U.S.C. § 3161(h)(3)(A). The definitions of "absent" and "unavailable" are the same as for a missing defendant. (*See* Section XI.B, *supra*.)

F. The court can also exclude up to one year, based on the application of a party, if the court finds by a preponderance of the evidence that an official request, as defined in 18 U.S.C. § 3292(d), has been made to obtain evidence that reasonably appears to be in a foreign country. 18 U.S.C. § 3161(h)(8).

XIII. SUPERSEDING INDICTMENTS

A. "[T]he filing of a superseding indictment will not automatically reset the STA clock where the new indictment does not charge a new crime, but only corrects a defect in the original indictment." ***United States v. King***, 483 F.3d 969, 972 (9th Cir. 2007); ***United States v. Alvarez-Perez***, 629 F.3d 1053, 1058 (9th Cir. 2010).

B. Similarly, "[w]hen a superseding indictment contains charges which, under double-jeopardy principles, are required to be joined with the original charges, Speedy Trial Act calculations begin from the date of the original indictment." ***United States v. Clymer***, 25 F.3d 824, 827 n.2 (9th Cir. 1994).

C. When a superseding indictment adds new charges that are not required to be joined under double jeopardy principles, the case could have two speedy trial

clocks: the original clock for the initial charge(s), and a new clock for the new charges. ***United States v. Young***, 528 F.3d 1294, 1295-98 (11th Cir. 2008) (in a case with a superseding indictment, the count that was in the original indictment was dismissed for a violation of the Speedy Trial Act, while counts added by superseding indictment were not); ***United States v. Jones***, 601 F.3d 1247, 1254-58 (11th Cir. 2010) (same); ***United States v. Alford***, 142 F.3d 825, 828-29 (5th Cir. 1998) (same); ***United States v. Kelly***, 45 F.3d 45, 48 (2d Cir. 1995) (same); .

D. As a general rule, the filing of a superseding indictment charging an additional defendant will reset the Speedy Trial Act clock as to the previous indicted defendants. That is, all the defendants will be on same clock as the last indicted defendant. ***United States v. King***, 483 F.3d 969, 972-74 (9th Cir. 2007); ***Henderson v. United States***, 476 U.S. 321, 323 n.2 (1986) ("All defendants who are joined for trial generally fall within the speedy trial computation of the latest codefendant"). The Ninth Circuit recognizes that this rule has exceptions: where it would be unreasonable or the government acted in bad faith. ***King***, 483 F.3d at 974; ***United States v. Liu***, ___ F.3d ___, 2011 WL 182228 at *3 (9th Cir. Jan. 21, 2011).

E. The filing of a superseding indictment does not restart the 30 day trial preparation provision of 18 U.S.C. § 3161(c)(2), which provides that unless the defendant consents in writing, trial shall not commence "less than 30 days from the date the defendant first appears through counsel." ***United States v. Rojas-Contreras***, 474 U.S. 231, 234 (1985) (in light of the statute's clear language, the Court had "no choice but to conclude that Congress did not intend that the 30 day trial preparation period begin to run from the date of filing of a superseding indictment"); ***United States v. Flores-Sanchez***, 477 F.3d 1089, 1092 (9th Cir. 2007) (the commencement of the defendant's trial one day after being arraigned on the superseding indictment was not error).

XIV. DISMISSALS OF INDICTMENT

A. When an indictment is dismissed as a result of a motion of the defendant, if the case is re-indicted, a new speedy trial clock starts. 18 U.S.C. § 3161(d)(1); ***United States v. Duque***, 62 F.3d 1146, 1150 (9th Cir. 1995).

B. When an indictment is dismissed as a result of a motion of the government, if the case is re-indicted, the speedy trial clock for the original indictment restarts, with the time between the dismissal and the re-indictment excluded.

18 U.S.C. § 3161(h)(5); ***United States v. Duque***, 62 F.3d 1146, 1150 (9th Cir. 1995).

XV. MISTRIALS AND APPELLATE REVERSALS

A. "If the defendant is to be tried again following a declaration by a trial judge of a mistrial or following an order of such judge for a new trial, the trial shall commence within seventy days from the date the action occasioning the retrial becomes final." 18 U.S.C. § 3161(e).

B. "If the defendant is to be tried again following an appeal or collateral attack, the trial shall commence within seventy days from the date the action occasioning the retrial becomes final, except that the court retrying the case may extend the period for retrial not to exceed one hundred and eighty days from the date the action occasioning the retrial becomes final if unavailability of witnesses or other factors resulting from passage of time shall make trial within seventy days impractical." 18 U.S.C. § 3161(e).

C. The same time limits applicable to a trial following an appeal or collateral attack also apply if an indictment that was dismissed by the trial court is reinstated by the appellate court. 18 U.S.C. § 3161(d)(2).

XVI. CONSEQUENCE OF FAILURE TO COMPLY WITH THE ACT

A. If the Speedy Trial Act is violated, the indictment must be dismissed. 18 U.S.C. § 3162(a)(2); ***United States v. Taylor***, 487 U.S. 326, 332 (1988) ("the statute admits no ambiguity in its requirement that when such a violation has been demonstrated, 'the information or indictment shall be dismissed on motion of the defendant'").

1. The Court has discretion to dismiss the case with or without prejudice. ***United States v. Engstrom***, 7 F.3d 1423, 1427 (9th Cir. 1993).

2. On a motion to dismiss, the defendant has the burden of proving that the delay meets the criteria for dismissal. 18 U.S.C. § 3162(a)(2); ***United States v. Medina***, 524 F.3d 974, 980 (9th Cir. 2008). The exception to this rule is that the government has the burden of going forward with evidence in connection with any exclusion under 18 U.S.C. § 3161(h)(3), relating to the unavailability of the defendant or an essential witness. 18 U.S.C. § 3162(a)(2).

3. In determining whether the dismissal should be with or without prejudice, the Court must consider, *among others*, the following factors:

   a. the seriousness of the offense,

   b. the facts and circumstances which led to the dismissal, and

   c. the impact of a reprosecution on the administration of the Speedy Trial Act and the administration of justice.

   18 U.S.C. § 3162(a)(2); ***United States v. Taylor***, 487 U.S. 326, 336-37 (1988).

4. The phrase "among others" incorporates prejudice to the defendant. ***Taylor***, 487 U.S. at 333-34.

5. The Ninth Circuit has recognized crimes with maximum penalties of five years in prison are "serious." ***United States v. Lewis***, 611 F.3d 1172, 1180 (9th Cir. 2010) (citing cases).

6. When considering the "facts and circumstances" of the delay, "[t]he length of delay standing alone is a significant 'measure of the seriousness of the speedy trial violation.'" ***United States v. Clymer***, 25 F.3d 824, 832 (9th Cir. (9th Cir. 1994) (quoting ***United States v. Taylor***, 487 U.S. 326, 340 (1988)).

7. The "facts and circumstances" of the delay includes consideration of which party was responsible for the delay. ***Bloate v. United States***, 130 S.Ct. 1345, 1358 (2010).

B. Although the defendant cannot waive the time requirements under the Speedy Trial Act (*see* § II, *supra*), the defendant's right to a dismissal of the indictment based on a violation of the Speedy Trial Act is waived if the defendant does not move for dismissal prior to trial or entry of a plea of guilty. 18 U.S.C. § 3162(a)(2); ***United States v. Rodriguez-Preciado***, 399 F.3d 1118, 1132 (9th Cir. 2005).

C. The Act also provides for monetary sanctions, denial of the right to practice, and referral to the appropriate attorney disciplinary committee against an attorney who:

1. knowingly allows a case to be set for trial without disclosing the fact that a necessary witness would be unavailable,

2. files a motion solely for the purpose of delay that he or she knows is totally frivolous and without merit,

3. knowingly makes a materially false statement for the purpose of obtaining a continuance, or

4. otherwise willfully fails to proceed to trial without justification.

18 U.S.C. § 3162(b).

XVII. LOCAL RULES

Local Rule Criminal 12.2 provides, in pertinent part:

(a) Content of Motions. Any motion submitted for filing in a criminal case must contain a statement as follows:

> "Excludable delay under 18 U.S.C. § 3161(h)____ will occur as a result of this motion or of an order based thereon." (In the blank space provided, the counsel will insert the specific subparagraph involved, e.g., (1)(A), competency examination of defendant; (3)(A), absence or unavailability of defendant or essential witness.)

(b) Content of Orders. Any written order prepared for signature by a United States District Judge or United States Magistrate Judge must contain a final paragraph or statement as follows:

> "Excludable delay under 18 U.S.C. § 3161(h)____ is found to commence on ___ for a total of __ days."

(c) Content of Minute Entries. All minute orders relating to disposition of criminal motions ruled upon in open court shall contain a statement comparable to that outlined in (b) above.

XVIII. NEW CHARGES AGAINST INCARCERATED INDIVIDUALS

The act contains procedures to follow if the "attorney for the Government knows that a person charged with an offense is serving a term of imprisonment in any penal institution." 18 U.S.C. § 316(j)(1).

XIX. JUVENILES

A. The Speedy Trial Act does not apply to juvenile delinquency proceedings. 18 U.S.C. § 3172(2) (defining "offense[s]" to which the Act applies in a manner that does not include juvenile delinquency proceedings); ***United States v. Pete***, 525 F.3d 844, 848 (9th Cir. 2008).

B. The Juvenile Delinquency Act contains its own speedy trial provision, 18 U.S.C. § 5036, which provides:

> If an alleged delinquent who is in detention pending trial is not brought to trial within thirty days from the date upon which such detention was begun, the information shall be dismissed on motion of the alleged delinquent or at the direction of the court, unless the Attorney General shows that additional delay was caused by the juvenile or his counsel, or consented to by the juvenile and his counsel, or would be in the interest of justice in the particular case. Delays attributable solely to court calendar congestion may not be considered in the interest of justice. Except in extraordinary circumstances, an information dismissed under this section may not be reinstituted.

18 U.S.C. § 5036.

C. "A juvenile defendant must be detained in 'physically restrictive detention amounting to institutionalization' before the speedy trial protection of 18 U.S.C. § 5036 applies." ***United States v. Doe***, 149 F.3d 945, 950 (9th Cir. 1998). Thus, conditional release to a halfway house is not detention. ***Id***. at 949-50.

D. If a juvenile is transferred to adult status, the 30 day time limit to indict under the Speedy Trial Act begins to run when the district court grants the government's motion to proceed against the juvenile as an adult. ***United States v. Pete***, 525 F.2d 844, 848 (9th Cir. 2008).

Tribal Law & Order Act Summary and Discussion

United States Attorney's Office
District of Arizona
US Department of Justice

Tribal Law & Order Act

- Signed in to law by President Obama on July 29, 2010.
- Public Law 111-211.

Enhanced Sentencing Provisions

TLOA Section 234(a)-(b)

- Amends Indian Civil Rights Act (25 USC 1302).
- Prior to TLOA: tribal courts limited to one year per count.
- Now: tribal courts limited to 3 years per count and 9 years per case.

TLOA Section 234(a)-(b)

- Qualification- Tribal courts exercising felony jurisdiction must provide:
- State Bar licensed indigent counsel,
- Judge having received “sufficient training” to conduct criminal trial
- Tribal criminal laws, rules must be publicly available
- Proceedings must be recorded

TLOA Section 234(c)

- Creates BOP Tribal Prisoner Pilot Program.
- Up to 100 prisoners at BOP expense.
- Must be sentenced under new tribal court felony sentencing authority.
- Must be for a violent crime.
- Sentence must be for at least two years.

Detention Facilities

TLOA Section 211(b)

- Amends ILERA (25 USC 2802).
- DOI, in coordination with DOJ, must develop a long term tribal detention plan.
- Report must be submitted to Congress within one year.

Detention Funding

- Requires AG to set aside $35M per year for FY 2011-2015 for construction, repair and operation of regional adult detention facilities
- $2M per year FY 11-15 for Juvenile detention

Reporting and Consultation

Including Crime Data Reporting

TLOA Section 211(b)

- Amends ILERA (25 USC 2802). New responsibilities of BIA OJS now include:

- Collection, analysis, and reporting of crime data,
- Reporting UCR crime data to FBI CJIS on a tribe-by-tribe basis,

TLOA Section 211(b)

- Amends ILERA (25 USC 2802). New responsibilities of BIA OJS now include:

- Annual report to Congress addressing unmet need for OJS & tribal law enforcement, prosecution, judicial, corrections, etc. resources.

TLOA Section 235

- Amends ILERA.
- Creates new Tribal Law & Order Commission to conduct a comprehensive study of IC criminal justice system.
- Will submit report to President & Congress.

DOJ-Tribal Leadership Communication and Reporting

TLOA Section 212

- Amends ILERA (25 USC 2809).
- When federal investigation terminated or USAO declines prosecution, US “shall coordinate” with tribal law enforcement officials.
- EOUSA to submit annual reports to Congress.

TLOA Section 213

- Amends 28 USC 543.
- Prior to TLOA: some USAOs designated tribal prosecuting attorneys as SAUSAs.
- Now: tribal prosecuting attorneys specifically set forth as eligible for SAUSA status.
- USAO–Arizona Implementation – letter agreement forthcoming

TLOA Section 213

- Amends ILERA.
- Prior to TLOA: most USAOs with IC designated an AUSA as a Tribal Liaison.
- Now: all USAOs with IC must designate a Tribal Liaison; duties set forth.

TLOA Section 214(a)

- Amends Indian Tribal Justice Technical & Legal Assistance Act
- Prior to TLOA: DOJ Office of Tribal Justice was a “detailee” office.
- Now: OTJ will become a permanent DOJ component.

TLOA Section 214(b)

- Amends ILERA.
- Statutorily confirmed existing EOUSA Native American Issues Coordinator position; duties set forth.

TLOA Section 261(a)

- Amends 18 USC 4042.
- BOP (a component of DOJ) must notify tribe's chief law enforcement officer when releasing to tribal jurisdiction a prisoner convicted of violent crime, drug trafficking, or sex offense.

Enhanced Law Enforcement Tools and Program Changes

TLOA Section 211(b)

- Amends ILERA (25 USC 2802). New responsibilities of BIA OJS now include:

- Dispatch,
- “911” emergency services,
- Training for NCIC access,

TLOA Section 233

- Amends 28 USC 534.
- Statutorily confirms existing FBI CJIS policy to allow tribal law enforcement access to “Federal criminal information databases” including NCIC.

TLOA Section 211(c)(2)(B)

- Amends ILERA (25 USC 2803) regarding BIA OJS warrantless arrest standard.
- Prior to TLOA: “reasonable grounds”.
- Now: “probable cause”.

TLOA Section 211(c)(2)(D)

- Amends ILERA (25 USC 2803) by expanding offenses for which warrantless arrest authorized to now include:

- Controlled substances, federal firearms offenses, assault, and bootlegging.

TLOA Section 231(a)

- Amends ILERA (25 USC 2802(e)).
- BIA OJS required to recognize state & tribal police academies and other programs that meet Peace Officer Standards of Training.
- Maximum age of new BIA OJS officers moved from 37 to 47.

TLOA Section 231(b)

- Amends ILERA (25 USC 2804).
- Requires DOI to establish procedures for establishment of SLEC MOA.
- Time deadlines set forth.

TLOA Section 231(c)

- Amends Indian Self-Determination & Education Assistance Act.
- Creates Indian Law Enforcement Foundation.
- Receive donations and grant awards to OJS & tribal public safety & justice services programs.

Mental Health and Substance Abuse Provisions

TLOA Section 241(a)(2)

- Amends Indian Alcohol & Substance Abuse Prevention & Treatment Act (25 USC 2412).
- DOJ OJP & HHS IHS/SAMHSA to develop tribal action plans upon tribal request.

TLOA Section 245

- Amends Indian Tribal Justice Technical & Legal Assistance Act.
- Authorizes Federal Pretrial & Probation Services to appoint officers in IC which can provide for substance abuse & other treatment services.

Violence Against Women/ Sexual Assault

TLOA Section 265

- Amends ILERA.
- IHS shall coordinate with tribes, DOJ OVW, & BIA OJS to develop standardized sexual assault policies and protocol.

TLOA Section 263

- Amends ILERA.
- Prior to TLOA: BIA & IHS employees served with tribal or state court subpoenas invoked ***Touhy*** regulations for approval.
- Now: subpoenas approved if no disapproval within 30 days.

Miscellaneous Issues

TLOA Section 211(a)(4)

- Amends 25 USC 2801 of the Indian Law Enforcement Reform Act of 1990 (ILERA).

- Confirms BIA's 2005 administrative name change from OLES to BIA Office of Justice Services (OJS).

TLOA Section 221

- Amends mandatory “Public Law 280” (18 USC 1162 & 25 USC 1321(a)).
- Prior to TLOA: retrocession required State concurrence; Secretary of Interior decided.
- Now: allows for re-assumption to concurrent federal jurisdiction; no State concurrence; AG decides.

- Dennis K. Burke
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Tribal Law & Order Act

Office of Tribal Justice
US Department of Justice

Tribal Law & Order Act

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TLOA Section 102(a)

- Amends Indian Arts & Crafts Act.
- Before TLOA: FBI had responsibility to investigate violations.
- Now: any federal law enforcement officer can investigate violations.

TLOA Section 103

- Amends Indian Arts & Crafts Act.
- Before TLOA: all violations were felonies regardless of value.
- Now: violations of $1,000 or more are felonies; violations of less than $1,000 are Class A (1 year maximum) misdemeanors.

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- Creates new Tribal Law & Order Commission to conduct a comprehensive study of IC criminal justice system.
- Will submit report to President & Congress.

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- DOJ OJP & HHS IHS/SAMHSA to develop tribal action plans upon tribal request.

TLOA Section 241(g)(1)

- DOJ & DOI, in consultation with tribes, must develop long-term plan for juvenile detention, treatment centers & alternatives to detention.

- Plan to be developed by no later than 1 year after TLOA enactment.

TLOA Section 244

- Amends Violent Crime Control & Law Enforcement Act (42 USC 13709).
- Prior to TLOA: grant authority limited tribes to construction of facilities for incarceration; matching funds required.
- Now: allows for construction of “tribal justice centers”; no match required.

TLOA Section 245

- Amends Indian Tribal Justice Technical & Legal Assistance Act.
- Authorizes Federal Pretrial & Probation Services to appoint officers in IC which can provide for substance abuse & other treatment services.

TLOA Section 246

- Amends Juvenile Justice & Delinquency Prevention Act (42 USC 5783).
- Adds grant program authorization for grants to tribes & tribal consortia for delinquency prevention & response programs.

TLOA Section 247

- Addresses Village Public Safety Officer (VPSO) programs in Alaska.
- VPSO programs eligible for DOJ COPS grants.
- VPSO officers authorized to attend BIA OJS Indian Police Academy.

TLOA Section 251(b)

- Amends Omnibus Crime Control & Safe Streets Act (42 USC 3732).
- Requires DOJ BJS, jointly with FBI & BIA-OJS, to consult with tribes to establish & implement tribal data collection systems.
- Requires annual BJS report to Congress on Indian country crime data collection.

TLOA Section 261(a)

- Amends 18 USC 4042.
- BOP must notify tribe's chief law enforcement officer when releasing to tribal jurisdiction a prisoner convicted of violent crime, drug trafficking, or sex offense.

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- www.justice.gov/otj

Tribal Law and Order Act of 2010: Duties Required from USAO	**Current Functions of USAO in Tribal Communities (from Operations Plan)**
If a U.S. Attorney declines to prosecute, or acts to terminate prosecution of an alleged violation of Federal criminal law in Indian country, the U.S. Attorney shall coordinate with the appropriate tribal justice officials regarding the status of the investigation and the use of evidence relevant to the case in a tribal court with authority over the crime alleged.	• Upon receiving a referral of an investigation into a criminal matter on one of the tribal nations the United States Attorney's Office ("USAO") will assign an Assistant United States Attorney ("AUSA") to monitor the investigation. This AUSA will be responsible for conferring with the appropriate investigating agency within one week of the referral to determine the status of the investigation. • Assigned AUSA will determine whether to charge, decline, or direct specific additional furthering investigation into a matter within 30 days of receipt of final prosecution report from referring agent. • If AUSA declines to prosecute, the AUSA will prepare a written notice of that declination, setting forth the reasons for that declination in sufficient detail that a tribal prosecutor assessing her or his own case under applicable tribal code, would understand those reasons well and would be able to assess whether any evidentiary shortfalls in the contemplated federal case would similarly render a tribal case unviable; the AUSA will send the declination letter to the tribal prosecutor, and if appropriate, the tribal police chief, at the same time as it's sent to the referring federal agent. • With the copy of the declination letter, the AUSA will also invite the tribal prosecutor to visit with the AUSA, to discuss the matter with the AUSA, and to gain access to the evidence in the matter that the AUSA has maintained. • AUSA will encourage the investigating federal agency to share evidence in its possession with the tribal prosecutor, though AUSA cannot compel it to do so. • These practices will give the tribal prosecutor every chance to succeed in that endeavor within the tribal limitations period.

The United States Attorney for each district that includes Indian country shall appoint no less than one assistant AUSA to serve as a Tribal Liaison for the district. Duties Include: • Coordinate the prosecution of Federal crimes that occur in Indian Country; • Develop multidisciplinary teams to combat child abuse and domestic and sexual violence offenses; • Consult and coordinate with tribal justice officials and victims' advocates to address any backlog in the prosecution of major crimes in Indian country in the district; • Develop working relationships and maintain communication with tribal leaders, tribal community and victims' advocates, and tribal justice officials to gather information from, and share appropriate information with tribal justice officials; • Coordinate with tribal prosecutors in cases in which a tribal government has concurrent jurisdiction over an alleged crime, in advance of the expiration of any applicable statute of limitation; • Provide technical assistance and training regarding evidence gathering techniques and strategies to address victim and witness protection to tribal justice officials and other individuals and entities that are instrumental to responding to Indian country crimes; • Conduct training sessions and seminars to certify special law enforcement commissions to tribal justice officials and other individuals and entities responsible for responding to Indian country crimes; • Coordinate with the Office of Tribal Justice, as necessary; and • Conduct other activities to address and prevent violent crime in Indian country as the applicable United States Attorney determines to be appropriate.	In addition to its Tribal Liaison, this District has created the position of Deputy Tribal Liaison to double the attention it pays on a senior management level to tribal affairs. • Duties Consistent with Tribal Law and Order Act of 2010: ➢ The Tribal Liaison and Deputy Tribal Liaison will be responsible for communicating with tribal officials at all levels about general matters of importance to the tribes, as well as conveying appropriate information about specific cases and their statuses. ➢ Each AUSA having Indian Country responsibility will also undertake liaison duties with their assigned tribe to address specific case-related matters with tribal law enforcement, tribal prosecution, and related tribal government agencies. ➢ Each AUSA and victim advocate in the USAO will be assigned to at least one multidisciplinary ("MDT") team. ➢ Each AUSA assigned to a tribe will be responsible for attending all MDT meetings for that jurisdiction. If that MDT ceases to function meaningfully, the AUSA is responsible for making concerted efforts to revive that MDT. ➢ AUSAs are also strongly encouraged to seek the establishment of MDTs for all other violent crimes on their assigned reservations. ➢ Each AUSA will make visits to his/her assigned reservation to gain familiarity with the reservation and its government. Such visits might include, for example, observing proceedings in tribal court or meetings with tribal police and prosecutors to discuss the training needs of the agencies and to market our availability to provide that training.

	➢ Keep tribal leaders and the public in general informed of significant events in criminal justice matters through the media and public outreach. ➢ AUSAs are in contact with federal case agents, tribal police (where applicable) and tribal prosecutors to consider whether prosecution under the tribal code on one hand, or pursuant to the Major Crimes Act or Indian Country Crimes Act or assimilated state statutes, on the other, is more appropriate. ➢ The USAO has assumed responsibility for conducting all training of tribal officers under the Special Law Enforcement Commission (SLEC) program, and staffs approximately six, three-day-long training sessions throughout the calendar year. ➢ The USAO supports and encourages the following federal-state-tribal task forces in Indian Country and the Office will pursue similar new opportunities in order to address and prevent violent crime in Indian Country : o FBI's Project Safe Trails on the Navajo Nation o Project Safe Neighborhoods Pilot on the Tohono O'odham Nation o La Paz County Task Force ➢ The USAO will develop a pilot program for the appointment of tribal prosecutors from participating tribes as SAUSAs to address criminal issues of particular interest to the participating communities. ➢ The Tribal Liaison will pursue expansion of cross-deputization agreements with county and state law enforcement to make more trained and certified officers available for patrol and operations on those tribal communities who want them.

	➢ The Operations Plan heavily emphasizes a program of standardized and customized training of tribal police, delivered by Indian Country AUSAs and federal agents, principally at tribal police facilities to maximize attendance. ➢ Indian Country AUSAs have developed and will continue to develop presentation materials for topics that include: crime scene and evidence preservation, witness interviews, report writing, suspect interviews, chain of custody, search and seizure, sex crime investigation, federal criminal procedure, and advice of rights under both federal law and ICRA. • Additional Duties per Operations Plan ➢ Flagstaff Branch Chief will perform informal liaison duties between the representatives of tribal governments in the five northern Arizona counties and the USAO. ➢ Tucson office's Branch Chief and Section Chief for Violent Crimes will perform informal liaison duties between the representatives of the Tohono O'odham Nation and Pascua Yaqui Tribe and the USAO. ➢ Tribal Liaison and Deputy Tribal Liaison will develop and maintain at least one close contact, where possible, with a member of each of the following entities within each tribe, nation, or community: the tribal council, the tribal Executive's Office (where it's distinct from the Council), the Tribal Prosecutor's Office, and the Tribal Police Chief. ➢ Tribal Liaison, Deputy Tribal Liaison, Flagstaff and Tucson Branch Chiefs and all Indian Country AUSAs and supervisors will maintain a same-day call-back policy for inquiries or requests for assistance from

	tribal representatives, even if the return call is only to say that the AUSA or manager received the request and is working on it. ➢ The Tribal Liaison, Deputy Tribal Liaison, Law Enforcement Coordinator or an Indian Country AUSA will attend all monthly Indian Country Intelligence Network (ICIN) meetings and will use those meetings to solicit input and concerns about law enforcement issues from police chiefs, to gauge and respond to training needs, and to share updates with the chiefs about federal criminal law and USAO activities of interest to them. The USAO representative will make regular presentations at the ICIN meetings on topics requested by the ICIN membership. ➢ The Tribal Liaison, Deputy Tribal Liaison or both will attend all quarterly Arizona Tribal Prosecutors' Association (AZTPA) meetings and will use those meetings to solicit concerns about law enforcement issues from the prosecutors and to share updates with them about federal criminal law and USAO activities of interest to them. The USAO representative will make regular presentations at the AZTPA meetings on topics requested by the membership. ➢ The USAO will petition the department of the Interior, Indian Police Academy to allow the Tribal Liaison to revise the curriculum and examination for the SLEC course, so that tribal officers can receive training that is more aligned with the needs of federal criminal investigations. In addition, the U.S. Attorney, Tribal Liaison, Deputy Tribal Liaison, and all Indian Country supervisors and AUSAs will actively market to tribal police departments, whether SLEC-certified or not, the

	availability of standard or customized training presentations on any law enforcement topic they desire. ➢ Tribal Liaison will review the status of all existing MOUs and, after consulting with the federal agencies and seeking input from the affected tribes, will recommend to the United States Attorney on a reservation-by-reservation basis, whether the creation of a new MOU allocating the responsibilities of the federal agencies is warranted and if so, how they should be apportioned. ➢ This office will encourage that tribes utilize the Central Violations Bureau (CVP) citation process to address minor offenses by non-Indians in Indian Country.
In order to enhance prosecution of minor crimes, each United States Attorney serving a district that includes Indian country is authorized and encouraged to: • appoint Special Assistant United States Attorneys (pursuant to section 543(a) of title 28, United States Code) to prosecute crimes in Indian country as necessary to improve the administration of justice, particularly when- ➢ The crime rate exceeds the national average crime rate; or ➢ The rate at which criminal offenses are declined to be prosecuted exceeds the national average declination rate; and ➢ In appointing a Special Assistant United States Attorney, a United States Attorney should consult with tribal justice officials of each Indian tribe that would be affected by the appointment. • provide to appointed Special Assistant United States Attorneys appropriate training, supervision, and staff support; • coordinate with the applicable United States district courts	• To address criminal issues of particular interest to Tribal nations, the USAO has developed a pilot program for the appointment of tribal prosecutors as SAUSAs. Tribes have expressed a desire to use federal criminal law to reduce domestic violence, violence against women in general, drug and bootlegging crime, and minor crimes against tribal casinos and other tribal facilities. • This District will aggressively pursue the Attorney General's priority of reducing violence against women and children in Indian Country. According to the Tribal Law and Order Act of 2010 sec. 2(a)(5)(A), "domestic and sexual violence against American Indian and Alaska Native women has reached epidemic proportions." Because of the gravity of this issue, it may be advisable that USAO appoint a Special Assistant United States Attorney to prosecute these crimes.

regarding scheduling of Indian country matters and holding trials or other proceedings in Indian country, as appropriate; and • provide technical and other assistance to tribal governments and tribal court systems to ensure that the goals of this subsection are achieved.	
Native American Issues Coordinator: established in the Executive Office for United States Attorneys of the Department of Justice • Duties: ➢ Coordinate with the United States Attorneys that have authority to prosecute crimes in Indian country; ➢ Coordinate prosecutions of crimes of national significance in Indian country, as determined by the Attorney General; ➢ Coordinate as necessary with other components of the Department of Justice and any relevant advisory groups to the Attorney General or the Deputy Attorney General; and ➢ Carry out such other duties as the Attorney General may prescribe.	
On an annual basis, and by Federal judicial district, U.S. Attorneys shall submit to information to the Native American Issues Coordinator regarding all declinations of alleged violations of Federal criminal law that occurred in Indian country that were referred for prosecution by law enforcement agencies, including: • The types of crimes alleged; • The statuses of the accused as Indians or non-Indians; • The statuses of the victims as Indians or non-Indians; and • The reasons for deciding to decline or terminate the prosecutions.	Operations plan does not specifically address this requirement.

	Additional USAO functions: • The USAO continues its annual Indian Country Report, which summarizes violent felony, narcotics, bootlegging, white collar and public corruption prosecutions in Indian Country, both District-wide and by reservation. The Report highlights reportable events on cases of particular interest, including tribal law enforcement training accomplished. • USAO's Victim Witness Advocate Unit has extensive and well-defined procedures for servicing victims of violent crimes. • The USAO's Law Enforcement Coordinator and Community Outreach Coordinator, along with the U.S. Attorney and other senior management will actively seek out and develop worthwhile outreach efforts to assist tribal communities and their governments in their efforts to reduce and eliminate criminal behavior. • Respective criminal chiefs and violent crime section supervisors maintain statistics on each Indian Country AUSA's total number of files opened, number of cases and defendants charged, number of please, sentencings, trials, declinations and appeals achieved month-by-month. • The USAO is actively engaged in notifying tribal governments of all opportunities for governmental grants, which it does through direct contact and through the Inter-Tribal Council of Arizona. Additionally, the USAO will seek to act as a clearinghouse to monitor the status of tribes' pending grant applications within DOJ components and report that status to the inquiring tribes.

The Honorable Frank R. Zapata

Born 1944 in Safford, AZ

Federal Judicial Service:
Judge, U. S. District Court, District of Arizona
Nominated by William J. Clinton on March 29, 1996, to a seat vacated by Richard Mansfield Bilby; Confirmed by the Senate on July 31, 1996, and received commission on August 1, 1996. Assumed senior status on August 3, 2010.

U.S. Magistrate Judge, U.S. District Court for the District of Arizona, 1994-1996

Education:
Eastern Arizona College, A.A., 1964
University of Arizona, B.A., 1966
University of Arizona College of Law, J.D., 1973

Professional Career:
Staff attorney, Pima County Legal Aid Society, Arizona, 1973-1974
Assistant federal public defender, Arizona, 1974-1984
Chief assistant federal public defender, Arizona, 1984-1994
Assistant adjunct professor, University of Arizona College of Law, 1988-1990

The Honorable Cindy K. Jorgenson

Born 1953 in Fort Ord, CA

Federal Judicial Service:
Judge, U. S. District Court, District of Arizona
Nominated by George W. Bush on September 10, 2001, to a new seat created by 113 Stat. 1501; Confirmed by the Senate on February 26, 2002, and received commission on March 6, 2002.

Education:
University of Arizona, B.S., 1974
University of Arizona College of Law, J.D., 1977

Professional Career:
Deputy county attorney, Pima County Attorney's Office, Arizona, 1977-1986
Assistant U.S. attorney, U.S. Attorney's Office, District of Arizona, 1986-1996
Judge, Pima County Superior Court, Arizona, 1996-2002

Dean Kevin K. Washburn

Kevin Washburn, a citizen of the Chickasaw Nation of Oklahoma, graduated from Yale Law School in 1993. Following law school he clerked for Judge William C. Canby Jr. of the U.S. Court of Appeals for the Ninth Circuit. After serving in the DOJ honors program in Washington, he worked as a federal prosecutor in New Mexico, a trial attorney with the U.S. Justice Department, and general counsel of the National Indian Gaming Commission.

Washburn joined the University of New Mexico School of Law as dean in June 2009, and previously taught at the University of Arizona James E. Rogers College of Law, University of Minnesota Law School, and Harvard Law School.