IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Case No. 4:06CR337CEJ(MLM)
	)	
GARY STEPHEN KAPLAN,	)	
	)	
Defendant.	)	

DEFENDANT GARY KAPLAN'S MOTION FOR RELEASE
UNDER 18 U.S.C. § 3164 AND INCORPORATED MEMORANDUM OF LAW

Defendant Gary Kaplan has been continuously detained since March 28, 2007, over one year, without bail, trial or a determination of his guilt or innocence. He faces the near certainty of an even more extended pretrial detention since pretrial motions have not yet been fully adjudicated and a trial date has not been set. His detention violates the Speedy Trial Act, which mandates that a criminal defendant shall not be held solely to await trial for more than ninety days. 18 U.S.C. § 3164. Because Kaplan has been detained in violation of the Speedy Trial Act, his detention is subject to automatic review by the court, and he should be released from pretrial detention. *Id.* In the alternative, Kaplan requests that the Court schedule a pretrial conference in order to set a date for trial.

I. PURPOSE OF THE SPEEDY TRIAL ACT

Congress recognized that "[j]ustice delayed is not only justice denied, it is justice circumvented, justice mocked, and the system of justice undetermined," (S. Rep. No. 93-1021, at 6 (1974) (quoting a speech by President Richard Nixon to the National Conference on the Judiciary, March 1971)), and passed the Speedy Trial Act in 1975. The Act was designed to

provide statutory protections for defendants' rights to a speedy trial in addition to the protections of the Sixth Amendment. Congress was well aware that if a defendant "is incarcerated awaiting trial, unnecessary delay in the commencement of trial could result in irreparable injury to an innocent individual." H.R Rep. No. 93-1508, at 14 (1974). Congress acknowledged that "[a]nxiety and uncertainty about their fate, experienced by many defendants, is one of the obvious costs of delay." 119 Cong. Rec. 464 (1973) (statement of Rep. Keating). In enacting the Speedy Trial Act, Congress addressed these concerns, which had already been voiced by the Supreme Court:

> We have discussed previously the societal disadvantages of lengthy pretrial incarceration, but obviously the disadvantages for the accused who cannot obtain his release are even more serious. The time spent in jail awaiting trial has a detrimental impact on the individual. It often means loss of a job; it disrupts family life; and it enforces idleness. Most jails offer little or no recreational or rehabilitative programs. The time spent in jail is simply dead time. Moreover, if a defendant is locked up, he is hindered in his ability to gather evidence, contact witnesses, or otherwise prepare his defense. Imposing those consequences on anyone who has not yet been convicted is serious. It is especially unfortunate to impose them on those persons who are ultimately found to be innocent.

Barker v. Wingo, 407 U.S. 514, 532-533 (1972), *cited in* H.R Rep. No. 93-1508, at 14-15.

Troubled by "the pitiful stories of defendants, held in jail for months – even years – before they are tried, much less even convicted of a crime," (119 Cong. Rec. 3263 (1973) (statement of Sen. Ervin)), Congress concluded that "[j]udged by any standard, the approximate one-year delay in commencing trial in Federal criminal cases . . . is a disturbing revelation." S. Rep. No. 93-1021, at 7.

II. THE SPEEDY TRIAL ACT REQUIRES KAPLAN'S RELEASE

The Speedy Trial Act has two main "enforcement" provisions designed in part to insure that a criminal defendant will not be detained for an unreasonable period of time pretrial. Section 3161 requires a defendant to be indicted within thirty days of arrest, and then tried within

seventy days from indictment, or the date he appears before the court, whichever is later. 18 U.S.C. § 3161(b)-(c). In calculating this Speedy Trial Act deadline, certain periods of delay are excludable from the computation. *Id.* § 3161(h). The sanction for violation of these requirements is dismissal of the charges or indictment. *Id.* § 3162.

The second enforcement provision, and the one at issue here, provides that the trial of "a detained person who is being held in detention solely because he is awaiting trial," must commence within "ninety days following the beginning of [his] continuous detention." 18 U.S.C. § 3164(a)-(b). The excludable time provisions from Section 3161(h) apply to Section 3164, although they have been applied more narrowly to Section 3164 given the gravity of detaining persons without trial. *Id.* § 3164(b). A detained defendant whose trial has not commenced within the ninety-day requirement is entitled to "automatic review by the court of the conditions of release" and "shall [not] be held in custody." *Id.* § 3164(c). These sanctions are "the very essence of the speedy trial requirement, and the requirement without sanction for noncompliance is a hollow requirement." H.R. Rep. No. 96-390 (1979).

A. Over Ninety Days Have Passed Under 18 U.S.C. § 3164 as to Kaplan

Kaplan has been detained for over one year, and although certain time periods are excludable for the Act's purposes, ninety-one days of non-excludable time have passed under the Act as to Kaplan. This District's Speedy Trial Act Plan requires the Clerk of the Court to enter on the docket information with respect to excludable periods of time for each criminal defendant. E.D. Mo. LR Speedy Trial Act, § II.8.(b) (2007). Since this case has been designated as a complex case, such entries have not been kept in this case, making it more difficult to calculate the time that has passed. Kaplan's analysis of excludable time is therefore set out below.

Kaplan was arrested on March 28, 2007.[1] Detention Order at 7 (June 13, 2007) [Dkt. No. 387]. Seven days later, on April 4, 2007, a judge in the District of Puerto Rico signed a "commitment to another district," transferring Kaplan to this District. *United States v. Kaplan*, No. 3:07-mj-00209-MEL-1 (D.P.R. April 4, 2007) [Dkt. No. 8]. Under the Speedy Trial Act, ten days are excludable from that date for his transfer to this District. 18 U.S.C. § 3161(h)(1)(H). Kaplan was continuously detained from the end of that ten day exclusion on April 13, 2007 until May 13, 2007, adding thirty days to the speedy trial clock. On May 14, 2007 Kaplan appeared before this Court and moved for an extension of time to file his pretrial motions. This began an excludable time period that lasted through the briefing of the pretrial motions until thirty days after briefing was complete, ending the excludable time period on November 28, 2007. *Id.* § 3161(h)(1)(F), (J).[2] On November 29, 2007, the speedy trial clock began again, and another twenty days passed before Kaplan filed a motion for extension of time to respond to the Magistrate's Orders and Report and Recommendations on December 19, 2007. This began another excludable time period that lasted until thirty days after briefing was complete, ending the excludable period on February 14, 2008. Thirty-four more days passed under the Act, until the Magistrate filed the Report and Recommendations on March 20, 2008, beginning an excludable time period. During that excludable period, the Magistrate filed additional Reports

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[1] The clock for Section 3164 begins at the date of continual detention, and "Section 3164 does not speak of detention within a particular district." *United States v. Tirasso*, 532 F.2d 1298, 1300 (9th Cir. 1976) (superseded on other grounds by statutory amendment).

[2] "[W]hen a pretrial motion requires a hearing, the excludable period runs from the filing of the motions to the date of the hearing, or until the date when the parties have submitted any additional materials requested by the court. When the motions require no hearing, the excludable period runs from the date of filing until the court receives all the parties' submissions regarding the motions." *United States v. Long*, 900 F.2d 1270, 1274 (8th Cir. 1990) (citing *Henderson v. United States*, 476 U.S. 321, 328-31 (1986)).

and Recommendations on April 28 and 29, 2008, which extends the excludable time period until thirty days after briefing is completed on objections to those Reports and Recommendations. In total, ninety-one days have passed under Section 3164, therefore Kaplan is entitled to automatic review by this Court of his detention, and is entitled to release. 18 U.S.C. § 3164(c).

Dates	**Description**	**Days Passed Under 18 U.S.C. § 3164**
3/28/07-4/3/07	Arrested and Detained.	7
4/4/07-4/13/07	Order for commitment to another district signed on 4/4/07 in Puerto Rico. Up to ten days for transportation from Puerto Rico to Missouri excluded under 18 U.S.C. § 3161(h)(1)(H).	0
4/14/07-5/13/07	Time over ten days not excludable for transportation under § 3161(h)(1)(H).	30
5/14/07-11/28/07	Time excludable relating to Kaplan's pretrial motions from request for extension on 5/14/07 until 30 days after briefing completed on 10/29/07.	0
11/29/07-12/18/07	Time not excludable.	20
12/19/07-2/14/08	Time excludable from Kaplan's motion for extension of time on 12/19/07 until 30 days after briefing completed on 1/15/08 regarding appeal of denial of motion for Bill of Particulars.	0
2/15/08-3/19/08	Time not excludable.	34
3/20/08-present	Time excludable from filing of Magistrate's R&Rs until 30 days after briefing is complete.	0
	Total Days	91

B. Additional Time Periods Excludable Under Section 3161 are Not Excludable Under Section 3164 as to Kaplan

Although the excludable time periods outlined in Section 3161(h) are generally applicable in the computation of time under Section 3164, they are more limited for purposes of Section 3164 because release is required where the failure to commence trial of a detained person is "through no fault of the accused or his counsel." 18 U.S.C. § 3164(c). Hence, time periods traditionally excludable under Section 3161(h) that are not the fault of Kaplan or his counsel may not reasonably be applied to Kaplan in these circumstances for purposes of release under Section 3164. *See United States v. Cordova*, 1998 U.S. Dist. LEXIS 22890 (S.D. Ohio April 28, 1998) ("[W]hat is reasonable in regard to the 70-day, post-indictment, speedy trial clock is not necessarily reasonable when the inquiry concerns an individual who is being detained without bond, awaiting trial."); *United States v. Cafaro*, 1988 U.S. Dist. LEXIS 14032 (S.D.N.Y. Dec. 12, 1988) ("Thus, a delay that would be considered reasonable for a defendant on bail could, in like circumstance, be deemed unreasonable for an incarcerated defendant.").

1. Excludable time periods relating to motions by co-defendants and the Government do not apply to Kaplan for purposes of Section 3164

Under Section 3161(h)(F), delay resulting from pretrial motions is excludable. Courts have held in some circumstances that this exclusion applies to motions made by the government and co-defendants as well. However, in this circumstance, it is not reasonable to apply to Kaplan excludable time related to motions filed by other parties.

Kaplan's position is distinct from his co-defendants. While all of his co-defendants have been released at a minimum to home confinement, Kaplan remains the only detained defendant in the case. As released defendants, his co-defendants lack Kaplan's motivation to move the case to a speedy trial. Indeed, his co-defendants waived their rights to a speedy trial. *See* Dkt. Nos. 100, 101, 109, 113, 114, 115, 116, 117, 121. In a case involving a large number of co-

defendants, where only one is detained, if motions related to co-defendants were applied to the detained defendant, that defendant could potentially be detained for years, through no fault of his own. Such an outcome would certainly violate the spirit and letter of the Speedy Trial Act.

This issue is recognized in Section 3161(h)(7), which states that only a "reasonable period of delay" relating to co-defendants for whom the time for trial has not run may be excluded. Congress recognized that the exclusion for "delay resulting from any pretrial motion" could be subject to abuse, and intended "that potentially excessive and abusive use of this exclusion be precluded by district or circuit guidelines, rules, or procedures relating to motions practice." H.R. Rep. No. 96-390.

Courts have held that time which may be excludable for determining whether an indictment should be dismissed, may not reasonably be excluded for determining whether a defendant should continue to be detained, and that the exclusions from Section 3161(h) cannot be read literally into Section 3164. *United States v. Theron*, 782 F.2d 1510, 1516 (10th Cir. 1986). "What might be reasonable delay to accommodate conservation of public resources by trying codefendants together as an exception to the Speedy Trial Act's seventy-day limit might become unreasonable when a defendant is incarcerated for more than ninety days without a chance to make bail. Thus it is possible, as here, that subsection (h)(7) will not require dismissal of the indictment but will require that the defendant be tried or released." *Id*.; s*ee also United States v. Aguirre*, 1993 U.S. App. LEXIS 32618 (10th Cir. Dec. 8, 1993) (thirteen-month pretrial delay found to be unreasonable and punitive, requiring release); *United States v. Denogean*, 1993 U.S. App. LEXIS 31187 (10th Cir. Nov. 24, 1993) (defendant incarcerated for thirteen months with trial not set for two more months found unreasonable under the Speedy Trial Act); *United States v. Cordova*, 1998 U.S. Dist. LEXIS 22890 ("Congress' concern that an overly

strict application of the Speedy Trial Act would result in dismissed indictments, thereby preventing joint trials, is not implicated when the 90-day period applicable to pretrial detainees is at issue.").

Considering Kaplan's position as the sole incarcerated defendant, and the requirement in Section 3164(c) that he be released if failure to commence trial is not the fault of him or his counsel, time related to motions filed by other parties is not excludable as to Kaplan in these circumstances.[3]

2. Designation as a complex case does not exclude time as to Kaplan for purposes of Section 3164

Courts may grant continuances under the Speedy Trial Act if a finding is made on the record "that the ends of justice served by taking such action outweigh the best interests of the public and the defendant in a speedy trial." 18 U.S.C. § 3161(h)(8)(A). On the government's motion, the Court designated this case as complex on August 17, 2006, but did not explicitly make a finding that the ends of justice outweighed the best interest of the public and defendants in a speedy trial. Order (Aug. 17, 2006) [Dkt. No. 96]. Furthermore, the order was issued seven months before Kaplan was arrested. Therefore, unlike his codefendants, Kaplan did not have an opportunity to assert his objections at that time. Although the case has been designated as complex, the Court stated that "time *may* be excluded from the determination of compliance with the requirements of the Act." *Id.* at 2 (emphasis added). However, the court has not excluded any time from the record.

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[3] Delay resulting from an interlocutory appeal is generally excludable, but there must be delay. 18 U.S.C. § 3161(h)(1)(E). Kaplan filed an interlocutory appeal regarding the denial of his motion for release, but the appeal did not divest this Court of jurisdiction or cause delay, therefore time related to the interlocutory appeal is not excludable. *See United States v. Arrellano-Garcia*, 471 F.3d 897, 900 (8th Cir. 2006) (delay excludable because the district court was without jurisdiction to act).

Even where a case has been designated as complex, indefinite pretrial detention is not excusable. If a continuance is granted, under this District's Speedy Trial Act Plan, "the Court shall require one or both parties to file periodic reports bearing on the continued existence of such circumstances." E.D. Mo. LR Speedy Trial Act, § II.8.(e)(3) (2007). It appears from a review of the CM/ECF docket that no such reports have been filed in this case. Additionally, since the time this case was designated as complex, the circumstances regarding the case's complexity have changed. Magistrate Judge Medler has recommended that counts 14-22, almost half the charges in the case, be dismissed. Report and Recommendations (April 28, 2008) [Dkt. No. 625]. A final dismissal of these counts would significantly reduce or eliminate any complexity in the case this Court previously identified. *Cf. United States v. Theron*, 782 F.2d at 1513 (Congress intended that "the ends-of-justice exception be used rarely and only in narrow circumstances") (citing H.R. Rep. No. 1508, 93d Cong., 2d Sess. 4, *reprinted in* 1974 U.S. Code Cong. & Ad. News, 7041, 7407-08); *United States v. Lofranco*, 620 F. Supp. 1324, 1325 (N.D.N.Y. 1985) (defendant previously denied bail was released even though case had been designated as complex under the Speedy Trial Act because defendant had been detained over six months).

Over ninety days have passed under the Speedy Trial Act as to Kaplan, therefore he must be released.[4] The designation of the case as complex does not erase the violation of Kaplan's speedy trial rights. "[A]t some point a pretrial detainee denied bail must be tried or released. Although pretrial detention is permissible when it serves a regulatory rather than a punitive

[4] Kaplan must be released despite any previous finding that he is a flight risk. *United States v Tirasso*, 532 F.2d 1298 (defendants were entitled to release from custody under Section 3164 despite the high probability that they would flee to a foreign country) (superseded on other grounds by statutory amendment).

purpose . . . valid pretrial detention assumes a punitive character when it is prolonged significantly." *United States v. Theron*, 782 F.2d at 1516 .

III. CONCLUSION

For all of the reasons stated above, Kaplan respectfully requests that he be released pending trial. In the alternative, Kaplan requests that the Court schedule a pretrial conference in order to set a date for trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on May 19, 2008, the foregoing was filed electronically with the Clerk of the Court to be served by operation of the Court's electronic filing system upon the following:

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