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ARTICLE

Problems With Tolling The Speedy Trial Act During Pandemic

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Among so many other things to address, the coronavirus pandemic has caused law enforcement agencies and courts to reschedule everything from grand jury presentations to arraignments to motions, trials and sentencing. The immediate question these delays raise is the impact of constitutional, statutory and rule-based deadlines.

Two of the most important of these are Speedy Trial Act requirements and statutes of limitations. This article discusses federal courts' tolling of the time limits under the Speedy Trial Act and analyzes the validity and duration of those orders. An article to be published Thursday will address certain federal courts' purported efforts to toll the statutes of limitations and the likely invalidity of those judicial orders.

Can Courts Enter Blanket Orders Tolling the Time Limits Under the Speedy Trial Act Without an Individualized Consideration of Each Case?

The coronavirus pandemic has forced courts to grapple with the tension between protecting public safety by restricting access to the courts and the rights of criminal defendants to a speedy trial.

Although the Speedy Trial Act, or STA, is designed to enforce the Sixth Amendment's speedy trial guarantee, the universal need for social distancing to respond to COVID-19 has hindered the operation of the courts and made it more difficult for the government to comply with STA requirements.

A plethora of federal courts have responded by entering blanket orders tolling compliance with STA deadlines. Because these have been applied generally, without a case-by-case analysis of their need and other factors, the orders raise questions about whether such tolling efforts are valid and, if so, for how long.[1]

The Speedy Trial Act

The STA establishes maximum time periods for different stages of a federal criminal prosecution.[2] The time period between an arrest and indictment cannot exceed 30 days (Phase 1),[3] and the time period between arraignment and trial cannot exceed 70 days (Phase 2).[4] Failure to comply with either of those time limits necessarily results in a dismissal of all charges, either with or without prejudice.[5] The STA, however, provides for permissible extensions of those time periods under certain circumstances.

Phase 1 may be continued, as relevant here, under two provisions of the STA. Under Section 3161(b), Phase 1 may be extended for 30 days if a grand jury was not convened in the district during the original 30-day period.[6] Under Section 3161(h)(7)(A), Phase 1 also may be extended when a district court judge finds, by her own or a party's motion, that "the ends of justices served by taking such action outweigh the best interest of the public and the defendant in a speedy trial."[7]

Although courts recognize that there must be some conceivable limit to the length of any extension, courts vary in terms of whether any extension must specify a definitive end date or whether the end date may be left open-ended.[8]

Phase 2 may be continued, as relevant here, under two provisions of the STA: Sections 3174 and 3161(h)(7)(A). Under Section 3174, the chief judge of a district court may declare a judicial emergency of up to 30 days.[9] If the chief judge seeks a judicial emergency declaration lasting longer than 30 days, she must apply to the judicial council of the circuit court for approval.[10] The judicial council may then agree to declare a judicial emergency based on "calendar congestion resulting from a lack of resources," and if "no remedy for such congestion is reasonably available," it may suspend the 70-day time limit in Phase 2 for the length of the judicial emergency, or up to one year, although trials must commence within 180 days of indictment.[11]

An emergency declaration does not affect the time limits for trying detained persons "who are being detained solely because they are awaiting trial."[12] Courts rarely invoke Section 3174's "judicial emergency" provision, and prior to the COVID-19 pandemic, only three circuit courts had ever approved judicial emergencies since the STA was enacted in 1974.[13]

Courts' Statutory Justifications for Tolling the Speedy Trial Act

U.S. Code Title 18 Section 3161(h)(7)(A): The "Ends of Justice"

In attempting to justify blanket tolling of both phases of the STA, most court orders reference Section 3161(h)(7)(A), noting that the "ends of justice" served by continuing those time periods outweigh the interests of the parties and the public in a speedy trial.

For example, the U.S. District Court for the Central District of Illinois's order noted the need to protect public health and safety.[14] Similarly, the U.S. District Court for the Eastern District of Virginia declared that "the ever-expanding risk of exposure to COVID-19 ... causes it to be practically impossible to seat a jury and/or obtain a quorum of grand jurors while maintaining compliance with the current public health and safety recommendations from the [Centers for Disease Control and Prevention] and the President."[15]

Albeit with some exceptions, little effort has generally been made to explain in detail how the "ends of justice" that are purportedly served by a continuation of the STA's time periods outweigh the interests of the parties and the public in a speedy trial. Nor does it seem that courts have applied the balancing test in each defendant's individual record, as required by Section 3161(h)(7)(A).[16]

The problem with this one-size-fits-all approach is that, by definition, each case is different, either requiring more or less delays or none at all. In those that can be pursued, any delay that sweeps those matters along with others with a greater justification renders the orders in those unnecessarily delayed cases subject to challenge.

Furthermore, it is unclear why these across-the-board court orders are reasonable measures given other alternatives that could potentially more closely safeguard defendants' constitutional right to a speedy trial under the Sixth Amendment. Indeed, nobody doubts the serious health concerns posed by COVID-19, but many facets of society have been able to continue to function in its midst.

It is difficult to reconcile the fact that certain retail shops, such as firearm retailers and golf courses, may remain open as essential businesses (subject, of course, to social distancing requirements), but certain court functions are somehow less essential and must therefore be suspended. While not likely for jury trials, some alternatives (e.g., teleconferences and videoconferences and certain matters being addressed with limited hearings) may be both reasonable and feasible options rather than blanket STA extensions.

Indeed, in some ways, the current restrictions on the courts may inadvertently worsen the COVID-19 problem. Court restrictions, in certain circumstances, mean that detainees may be spending more time in overcrowded jails (the antithesis of social distancing), places that are not known for either good hygiene or quality medical care, and that have, in fact, seen some of the worst outbreaks in the country.[17] There have been a number of releases from prisons under various statutory or administrative programs or executive clemency, and while that is one interim solution, they may not be able to be processed fast or well enough to address blanket speedy trial extensions.

In a case-by-case approach, courts could consider whether alternatives, such as sitting 6 feet apart (as journalists do at the president's daily press briefings) or videoconferencing, could be employed. Again, jury trials may be different, but creative approaches can be considered.[18] Perhaps none of the alternatives would be viable in a particular case, but as other businesses are addressing phased-in and other reopening methods to take health concerns into consideration, it seems something other than blanket STA extension orders should get greater use.

U.S. Code Title 18 Section 3161(b): The Availability of a Grand Jury

Having suspended grand juries, some courts also have tolled Phase 1 pursuant to Section 3161(b). For example, the U.S. District Court for the District of Maine cites Section 3161(b) in announcing that, "[d]ue to the unavailability of a grand jury in this District in May 2020, the 30-day time period for filing an indictment is tolled as to each defendant until this General Order terminates."[19] The U.S. District Court for the District of Utah's order includes nearly identical language.[20]

But Section 3161(b) is of limited utility, as it strictly provides for only a 30-day extension. Grand juries are now being suspended for longer than 30 days, and courts are responding by extending the time for filing an indictment beyond the 30 days permitted under Section 3161(b).

To address that 30-day limit for filing an indictment, courts (such as the Districts of Maine and Utah, both discussed above) are now repeatedly invoking Section 3161(b) in supplemental court orders. Doing so, however, renders the statutory 30-day limit surplusage and undermines the STA's purpose of encouraging the government to convene grand juries to keep the criminal justice system moving.

U.S. Code Title 18 Section 3174: A Judicial Emergency

Three district courts, all in California, have continued Phase 2 for 30 days by declaring judicial emergencies under Section 3174(e) due to the effects of COVID-19 on court functions. The U.S. District Court for the Southern District of California was the first such court,[21] followed by the U.S. District Court for the Central District of California[22] and the U.S. District Court for the Eastern District of California.[23]

The Judicial Council of the Ninth Circuit found that no proposals for alleviating court congestion were currently workable and thus approved and continued all three district courts' emergency declarations for a year, citing various ways in which COVID-19 exacerbated existing conditions in each district court that have strained their resources.[24]

Notably, in all the approvals, the council acknowledged that Section 3174(e) "does not specify what qualifies as an emergency or what factors to assess before determining that there is 'no reasonably available remedy,'" but cited Congress' emphasis on the "importance of a court's resources to be able to comply with the [STA's] time limits, and the ability to suspend time limits if a court could not meet those requirements."[25]

Yet questions remain, as the council noted, as to whether judicial emergencies under Section 3174(e) apply to pandemics, such as COVID-19. The statutory focus is upon court congestion due to a lack of resources, but COVID-19 does not now pose a congestion problem (although a congestion problem may exist when courts reopen). The COVID-19 safety concern is not driven by a lack of resources. Courts have halted certain of their judicial operations on their own and are not utilizing their resources.

Furthermore, it is debatable whether courts — like the Southern District of California[26] — may repeatedly invoke the 30-day period for a judicial emergency under Section 3174(e), when the statute expressly provides that the chief judge of the district "may order the limits suspended for a period not to exceed thirty days."[27]

Defendants' Ability to Waive Tolling of the Speedy Trial Act

Although many courts have issued orders that mandate the blanket tolling of the time periods set forth under the STA, as discussed above, some courts, like the U.S. District Court for the Middle District of Tennessee, have issued orders that explicitly provide that defendants who object to the courts' decisions to toll the time periods under the STA may move for reconsideration in their respective, individual cases.[28] Allowing for such individual case consideration is a preferred approach.

Nevertheless, some courts that follow this approach may risk inviting additional errors. For example, the U.S. District Court for the District of Nebraska's order expressly states that the "failure of any defendant to object … will be deemed a waiver of any right to later claim the time should not have been excluded under the Speedy Trial Act."[29] This provision stands in tension with the U.S. Supreme Court's holding that a defendant cannot prospectively waive his or her rights under the Speedy Trial Act.[30]

Factors to be Considered in Terminating the Tolling Orders

As with other institutions, courts are unable yet to provide much clarity as to what circumstances will lead to a return to normalcy. At what point will grand juries reconvene and civil and criminal juries be seated again? Just as it was unclear what specific factors courts considered as to why certain court functions had to be suspended when they implemented their blanket tolling orders, it remains uncertain what kinds of progress in combating COVID-19 will need to be made in kind and degree before courts will reopen which of their normal functions.

To be sure, in some of the orders, courts pronounce that their orders may be extended or updated as situations change, but they offer no informational guidance on what factors will affect their decision-making. Their orders thus offer no practical clarity to defendants about the duration of the tolled periods under the STA.[31]

Conclusion

Despite courts' blanket continuances and tolling of the time periods under the STA, individual defendants should remain free to challenge the tolling of their individual cases. A defendant who seeks to enforce his or her speedy trial rights should not hesitate to pursue them. For those who have been denied bail, and who are to be indefinitely detained in a jail or prison in the midst of a pandemic, the right to a speedy trial may be more important than it otherwise would be or has ever been.

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[1] Given the rapidity in which courts throughout the country are issuing orders in response to the COVID-19 pandemic, the analysis of court orders in this article is accurate as of May 6, unless otherwise noted.

[2] 18 U.S.C. §§ 3161-3174.

[3] 18 U.S.C. § 3161(b).

[4] 18 U.S.C. § 3161(c).

[5] 18 U.S.C. § 3162.

[6] 18 U.S.C. § 3161(b).

[7] 18 U.S.C. § 3161(h)(7)(A). The court must consider a list of non-exhaustive factors, including whether the failure to grant a continuance would result in a "miscarriage of justice," and whether a delay in filing an indictment was caused because an arrest occurred when it would have been "unreasonable to expect" the return and filing of the indictment within the original 30-day period. 18 U.S.C. § 3161(h)(7)(B).

[8] The Ninth Circuit, for example, requires an "ends of justice" continuance to be limited in duration, whether through the specification of a set number of days or a fixed end date. The majority of circuits to have addressed the issue have adopted a more flexible approach that permits open-ended continuances for "reasonable" durations. The Third Circuit, for instance, has held that open-ended continuances are permissible "if they are reasonable in length," and at least the Fifth and Tenth Circuits have followed suit. See Greg Ostfeld, Comment, Speedy Justice and Timeless Delays: The Validity of Open-Ended "Ends of Justice" Continuances Under the Speedy Trial Act, 64 U. Chi. L. Rev. 1037, 1042-52 (Summer 1997).

[9] 18 U.S.C. § 3174(e).

[10] Id.

[11] 18 U.S.C. § 3174(b).

[12] Id.

[13] The Ninth Circuit approved the District of Arizona's declaration of judicial emergency in 2011 due to the district court's "crushing criminal caseload and inadequate judicial resources," as well as the death of its chief judge that contributed to the lack of sufficient judicial resources. In re Approval of the Judicial Emergency Declared in the Dist. of Ariz., 639 F.3d 970, 970-71 (9th Cir. 2011). In the early 1980s, the Sixth Circuit's Judicial Council suspended the Speedy Trial Act's time limits for one year in the Western District of Tennessee due to "administrative reasons." United States v. Bilsky, 664 F.2d 613, 619-20 (6th Cir. 1981). Around the same time, the Second Circuit's Judicial Council also declared a judicial emergency in the Eastern District of New York due to that district court's "burgeoning caseload and calendar congestion." United States v. Rodriguez-Restrepo , 680 F.2d 920, 921 n.1 (2d Cir. 1982).

[14] U.S. District Court for the Central District of Illinois, Second Amended General Order No. 20-01, dated Apr. 30, 2020, at 2.

[15] U.S. District Court for the Eastern District of Virginia, General Order No. 2020-06, dated March 23, 2020, at 4-5; see also U.S. District Court for the Eastern District of Virginia, General Order No. 2020-12, dated Apr. 10, 2020 ("Eastern District of Virginia Order"), at 6-7 (citing reasons set forth in Order No. 2020-06 to exclude time between May 2, 2020 and June 10, 2020 under Speedy Trial Act).

[16] One notable exception is the Eastern District of Virginia Order, which requires the U.S. Attorney for the Eastern District of Virginia to file a motion and proposed order in each criminal case in which an indictment would be delayed, or purportedly delayed, due to the absence of a grand jury. See Eastern District of Virginia Order at 7.

[17] See, e.g., Cases Surge in an Ohio Prison, Making It the Top Known U.S. Hot Spot, N.Y. Times (Apr. 20, 2020), available at https://www.nytimes.com/2020/04/20/us/coronavirus-live-news.html#link-58dfe2ae (identifying a state prison in Ohio with the largest reported source of virus infections in the United States as of April 20, 2020, with almost three-quarters of the prison population, or 1,828 inmates, testing positive); Zak Cheney-Rice, Who 'Deserves' Jail During a Pandemic?, New York Magazine (Apr. 10, 2020), available at https://nymag.com/intelligencer/2020/04/cook-county-jail-coronavirus.html ("The Cook County Jail in southwest Chicago is America's biggest known source of coronavirus infections.... [A]ccording to the New York Times, no other

localized outbreak where analysts have been able to track how the virus was contracted and how it's spreading outpaces Illinois's largest jail.").

[18] See, e.g., United States v. Sadr, No. 18-cr-224 (S.D.N.Y. Mar. 16, 2020); Law360, SDNY Judge Lets Sick Juror Deliberate Via Videoconference (Mar. 16, 2020), available at https://www.law360.com/articles/1253726/sdny-judge-lets-sick-juror-deliberate-via-videoconference.

[19] U.S. District Court for the District of Maine, General Order 2020-05, dated Apr. 29, 2020, at ¶ G.

[20] U.S. District Court for the District of Utah, General Order 20-012, dated Apr. 28, 2020, at ¶ 4.

[21] U.S. District Court for the Southern District of California, Order of the Chief Judge No. 18, dated Mar. 17, 2020, at 3 ("Southern District of California Order").

[22] See In re Approval of the Judicial Emergency Declared in the Central District of California, Judicial Council of the Ninth Circuit, dated Apr. 9, 2020, at 1 (Order) (stating Central District of California declared a judicial emergency under Section 3174(e) on March 13, 2020).

[23] See In re Approval of the Judicial Emergency Declared in the Eastern District of California, Judicial Council of the Ninth Circuit, dated Apr. 16, 2020, at 1 (Order) (stating Eastern District of California declared a judicial emergency under Section 3174(e) on March 17, 2020).

[24] See In re Approval of the Judicial Emergency Declared in the Southern District of California, Judicial Council of the Ninth Circuit, dated Apr. 2, 2020 (Order); Report of the Judicial Council of the Ninth Circuit Regarding a Judicial Emergency in the Southern District of California, dated Apr. 2, 2020, at 3-4, 6-7 ("Judicial Council Approval of Southern District Emergency Declaration"); In re Approval of the Judicial Emergency Declared in the Central District of California, Judicial Council of the Ninth Circuit, dated Apr. 9, 2020 (Order); Report of the Judicial Council of the Ninth Circuit Regarding a Judicial Emergency in the Central District of California, dated Apr. 9, 2020, at 3-4, 7-8 ("Judicial Council Approval of Central District Emergency Declaration"); see In re Approval of the Judicial Emergency Declared in the Eastern District of California, Judicial Council of the Ninth Circuit, dated Apr. 16, 2020 (Order); Report of the Judicial Council of the Ninth Circuit Regarding a Judicial Emergency in the Eastern District of California, dated Apr. 16, 2020, at 3-4, 7-8 ("Judicial Council Approval of Eastern District Emergency Declaration").

[25] See Judicial Council Approval of Southern District Emergency Declaration at 3; Judicial Council Approval of Central District Emergency Declaration at 3; Judicial Council Approval of Eastern District Emergency Declaration at 3.

[26] U.S. District Court for the Southern District of California, Order of the Chief Judge No. 24, dated Apr. 15, 2020 (updating March 17, 2020 Southern District of California Order and extending the judicial emergency an additional 30 days).

[27] 18 U.S.C. § 3174(e).

[28] See, e.g., U.S. District Court for the Middle District of Tennessee, Administrative Order No. 209 (Second Amended), dated Apr. 29, 2020, at ¶2 (excluding time periods of continuances implemented under Section 3161(h)(7)(A) and holding that "[t]he Court recognizes the right of criminal defendants to a speedy and public trial under the Sixth Amendment to the United States Constitution and the particular application of that right in cases involving defendants who are detained pending trial. Therefore, in the event any affected party disagrees with the Court's analysis regarding the time excluded under the Speedy Trial Act, he or she may move for reconsideration in the individual cases [sic]. Likewise, the government may seek reconsideration.").

[29] U.S. District Court for the District of Nebraska, General Order 2020-08, dated Apr. 14, 2020, at ¶ 2.

[30] Zedner v. United States , 547 U.S. 489, 500 (2006) ("Petitioner contends, and the Government does not seriously dispute, that a defendant may not prospectively waive the application of the Act. We agree.").

[31] Apart from tolling the STA, the government also may find its ability to delay constrained by the applicable statute of limitations. While some courts have purported to toll statutes of limitations in civil and criminal matters, their

authority to do so is questionable. This issue regarding the tolling of the statutes of limitations is addressed in a separate article that will be published tomorrow.

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