

No. _____

**In The
Supreme Court of the United States**

—◆—
JACKIE E. PORCHAY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

—◆—
**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit**

—◆—
PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

When the Government seeks a continuance of a criminal trial based on the unavailability of essential witnesses, does the Speedy Trial Act, 18 U.S.C. § 3162(a)(2), require the Government to identify the witnesses, state why they are essential, and state why they are unavailable as a condition of obtaining the continuance?

TABLE OF CONTENTS

	Page
Question Presented	i
Table of Authorities	iv
Citation of the Official Report of the Opinion Entered in the Case.....	1
Basis for Jurisdiction in this Court.....	1
Statutes Involved in the Case	2
Statement of the Case	3
Argument.....	8
I. <i>Porchay</i> Conflicts With Five United States Circuit Courts And Involves An Important Question Of Federal Law That Has Not Been, But Should Be, Settled By This Court.....	8
II. The Speedy Trial Act And What It Re- quires.....	9
III. Speedy Trial Act Violation In This Case ...	11
IV. <i>Porchay</i> Conflicts With Five United States Circuit Courts.....	15
Conclusion.....	20

APPENDIX

Eighth Circuit Opinion in <i>United States v.</i> <i>Porchay</i> , 651 F.3d 930 (8th Cir. 2011) (Au- gust 29, 2011)	A-1
Eighth Circuit Order Granting Motion for Ex- tension of Time to File Petition for Rehearing (September 13, 2011)	A-46

TABLE OF CONTENTS – Continued

	Page
Order Denying Motion to Dismiss for Lack of Speedy Trial (May 4, 2009).....	A-47
Order Granting Government’s Motion for Continuance (December 8, 2008).....	A-49
Eighth Circuit Order Denying Petition for Rehearing (October 30, 2011)	A-51
Government’s Motion for Continuance (December 3, 2008).....	A-52
Government’s Amended Motion for Continuance (December 4, 2008)	A-54
Response to the Government’s Motion for Continuance (December 5, 2008).....	A-56
Defendant’s Motion to Dismiss for Lack of Speedy Trial (April 26, 2009).....	A-60
Response to Motion to Dismiss for Lack of Speedy Trial (April 30, 2009).....	A-68
Reply to Response to Motion to Dismiss for Lack of Speedy Trial (April 30, 2009).....	A-72

TABLE OF AUTHORITIES

Page

CASES

<i>Bloate v. United States</i> , 130 S. Ct. 1345 (2010).....	10
<i>United States v. Burrell</i> , 634 F.3d 284 (5th Cir. 2011)	9, 14, 15, 16, 19
<i>United States v. Clinger</i> , 681 F.2d 221 (4th Cir. 1982)	14
<i>United States v. Eagle Hawk</i> , 815 F.2d 1213 (8th Cir. 1987)	10, 11
<i>United States v. Hamilton</i> , 46 F.3d 271 (3d Cir. 1995)	<i>passim</i>
<i>United States v. Hohn</i> , 8 F.3d 1301 (8th Cir. 1993)	13
<i>United States v. Koller</i> , 956 F.2d 1408 (7th Cir. 1992)	9, 15, 19
<i>United States v. McNeil</i> , 911 F.2d 768 (D.C. Cir. 1990) (per curiam).....	9, 14, 15, 18, 19
<i>United States v. Meyer</i> , 903 F.2d 246 (6th Cir. 1986)	20
<i>United States v. Patterson</i> , 277 F.3d 709 (4th Cir. 2002)	11
<i>United States v. Porchay</i> , 651 F.3d 930 (8th Cir. 2011)	<i>passim</i>
<i>United States v. Ray</i> , 250 F.3d 596 (8th Cir. 2001)	12
<i>United States v. Saeku</i> , 436 F. App'x 154 (4th Cir. 2011) (per curiam).....	9, 14, 15, 16, 19

TABLE OF AUTHORITIES – Continued

Page

STATUTORY PROVISIONS

The Speedy Trial Act, 18 U.S.C. §§ 3161-3174..	<i>passim</i>
18 U.S.C. § 3161(c)(1)	2, 10
18 U.S.C. § 3161(e)	2
18 U.S.C. § 3161(h).....	10
18 U.S.C. § 3161(h)(3)	3, 15
18 U.S.C. § 3161(h)(3)(A).....	<i>passim</i>
18 U.S.C. § 3161(h)(3)(B).....	2, 11
18 U.S.C. § 3162(a)(2).....	<i>passim</i>
28 U.S.C. § 1254(1).....	1

RULES

Sup. Ct. R. 10(c).....	9
Sup. Ct. R. 13.1	1
Sup. Ct. R. 13.3.....	1

OTHER AUTHORITIES

1974 U.S.C.C.A.N. 7401	10
S. Rep. No. 93-1021 (1984)	10

CITATION OF THE OFFICIAL REPORT OF THE OPINION ENTERED IN THE CASE

The opinion of the United States Court of Appeals for the Eighth Circuit is reported. *United States v. Porchay*, 651 F.3d 930 (8th Cir. 2011). This opinion is reprinted in the Appendix (“Pet’r’s App.”) at Pet’r’s App. A-1 – A-25. The orders of the district court are not reported, but are printed in the Appendix at Pet’r’s App. A-55, A-73.



BASIS FOR JURISDICTION IN THIS COURT

The United States Court of Appeals for the Eighth Circuit filed its opinion on August 29, 2011. Pet’r’s App. A-1 – A-25. On September 13, 2011, the court entered an order extending the time to file a petition for rehearing until September 26, 2011. Pet’r’s App. A-26. Jackie E. Porchay (“Ms. Porchay”), the Petitioner in this case and the Appellant in the Eighth Circuit, timely filed a petition for rehearing on September 26, 2011. On October 20, 2011, the court denied the petition for rehearing. Pet’r’s App. A-27.

This petition has been filed within ninety days of October 20, 2011 as required by Rules 13.1 and 13.3 of this Court. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1) as Ms. Porchay seeks review on a writ of certiorari of a final decision of a United States circuit court in a criminal case.



STATUTES INVOLVED IN THE CASE

18 U.S.C. § 3161(c)(1) provides in relevant part, “In any case in which a plea of not guilty is entered, the trial of a defendant charged in an information or indictment with the commission of an offense shall commence within seventy days from the filing date (and making public) of the information or indictment, or from the date the defendant has appeared before a judicial officer of the court in which such charge is pending, whichever date last occurs.”

18 U.S.C. § 3161(e) provides in relevant part, “If the defendant is to be tried again following a declaration by the 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 . . . The periods of delay enumerated in section 3161(h) are excluded in computing the time limitations specified in this section.”

18 U.S.C. § 3161(h)(3)(A) provides, “The following periods of delay shall be excluded in computing the time within which an information or an indictment must be filed, or in computing the time within which the trial of any such offense must commence: Any period of delay resulting from the absence or unavailability of the defendant or an essential witness.”

18 U.S.C. § 3161(h)(3)(B) provides, “For purposes of subparagraph (A) of this paragraph, a defendant or an essential witness shall be considered absent when his whereabouts are unknown and, in addition, he is

attempting to avoid apprehension or prosecution or his whereabouts cannot be determined by due diligence. For purposes of such subparagraph, a defendant or an essential witness shall be 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. § 3162(a)(2) provides in relevant part, “If a defendant is not brought to trial within the time limit required by section 3161(c) as extended by section 3161(h), the information or indictment shall be dismissed on motion of the defendant. The defendant shall have the burden of proof of supporting such motion but the Government shall have the burden of going forward with the evidence in connection with any exclusion of time under subparagraph 3161(h)(3).”



STATEMENT OF THE CASE

On February 15, 2006, on Interstate 30 near Sulphur Springs, Texas, Carey Barnett (“Officer Barnett”), an officer with the Texas Department of Safety pulled over a white Chevrolet Monte Carlo for speeding. (Trial Tr. vol. 2, 69-84, Nov. 19, 2008). Harold Kelley (“Mr. Kelley”) was driving the car and Theresa Speed (“Ms. Speed”) was his sole passenger. (Trial Tr. vol. 2, 69-84, Nov. 19, 2008). Officer Barnett checked the registration of the vehicle and it showed Ms. Porchay as the record owner. (Trial Tr. vol. 2,

69-84, Nov. 19, 2008). Officer Barnett also ran a criminal history check on Mr. Kelley and Ms. Speed and it disclosed a lengthy list of offenses for Mr. Kelley. (Trial Tr. vol. 2, 71-84, Nov. 19, 2008).

After interrogating Mr. Kelley and Ms. Speed, Officer Barnett asked for permission to search the vehicle. (Trial Tr. vol. 2, 71-84, Nov. 19, 2008). Mr. Kelley refused to give consent, so Officer Barnett called in a K-9 unit, which arrived thirty minutes later. (Trial Tr. vol. 2, 87, Nov. 19, 2008). The dog alerted, which led Officer Barnett to conduct a full scale search of the car and Mr. Kelley's and Ms. Speed's persons. (Trial Tr. vol. 2, 71-87, Nov. 19, 2008). The search of Mr. Kelley disclosed \$1,700 in cash. (Trial Tr. vol. 2, 71-87, Nov. 19, 2008). The search of Ms. Speed disclosed cocaine powder and a pipe used for smoking crack cocaine. (Trial Tr. vol. 2, 71-87, Nov. 19, 2008). The vehicle search turned up \$200,000 in the trunk and \$2,600 in the center console. (Trial Tr. vol. 2, 46-53, Dec. 11, 2009).

Officer Barnett arrested Mr. Kelley and Ms. Speed and transported them to the Hopkins County, Texas Sheriff's Office. (Trial Tr. vol. 2, 46-53, Dec. 11, 2009). While in custody, Mr. Kelley agreed to cooperate, which meant assisting in a sting operation to capture one of his confederates, Frederick Coleman ("Mr. Coleman"). (Trial Tr. vol. 2, 46-53, Dec. 11, 2009). The operation succeeded and federal agents eventually took Mr. Coleman into custody, where he proceeded to provide information to James Woodie ("Agent Woodie"), an agent with the Federal Bureau

of Investigation (“FBI”). (Trial Tr. vol. 4, 607-620, 625-629, 631-640, Dec. 16, 2009). According to Agent Woodie, Mr. Coleman said that Ms. Porchay was a paramour of Mr. Kelley’s and they lived together at 10005 Bradley Drive in Little Rock, Arkansas. (Trial Tr. vol. 4, 607-620, 625-629, 631-640, Dec. 16, 2009). Mr. Coleman also allegedly told Agent Woodie that Mr. Kelley always kept firearms on his person and at 10005 Bradley. (Trial Tr. vol. 4, 607-620, 625-629, 631-640, Dec. 16, 2009). During the course of an extensive interview with Agent Woodie, Mr. Coleman did not implicate Ms. Porchay as a co-conspirator in his and Mr. Kelley’s drug trafficking. (Trial Tr. vol. 4, 614-629, Dec. 16, 2009).

Based in large measure on what he learned from Mr. Coleman, Agent Woodie prepared an affidavit to obtain a search warrant of 10005 Bradley, and on April 19, 2006, presented the affidavit to a United States Magistrate Judge. (Trial Tr. vol. 4, 614-629, Dec. 16, 2009). The judge signed the affidavit the same day, and on April 21, 2006, the FBI searched Ms. Porchay’s residence. (Trial Tr. vol. 4, 614-629, Dec. 16, 2009). Ms. Porchay was not present for the search. (Trial Tr. vol. 4, 620, Nov. 21, 2008). The search did not disclose any drugs or unlawful firearms. (Trial Tr. vol. 4, 631-646, Dec. 16, 2009). The officers did find and seize in excess of \$190,000 in cash and some small caliber handguns for which Ms. Porchay had a license. (Trial Tr. vol. 4, 631-646, Dec. 16, 2009). They also seized a Honda automobile and a Suzuki motorcycle, although neither was listed in the

warrant as things that could be seized. (Trial Tr. vol. 4, 631-646, Dec. 16, 2009).

The Government indicted Ms. Porchay on August 9, 2006, charging her with conspiracy to possess with the intent to distribute cocaine, conspiracy to conduct a financial transaction involving illegal proceeds, and multiple counts of money laundering. (Indictment, Case No. 4:06-cr-00082-JLH, Aug. 9, 2006, ECF No. 36). The district court had jurisdiction pursuant to 18 U.S.C. § 3231, which gives United States district courts original jurisdiction, exclusive of the courts of the states, of all offenses against the laws of the United States.

On September 12, 2006, the Government dismissed the indictment without prejudice. (Dismissal of Indictment, Case No. 4:06-cr-00082-JLH, Sept. 12, 2006, ECF No. 82). The Government indicted Ms. Porchay a second time on October 4, 2006. (Second Superseding Indictment, Case No. 4:06-cr-00082-JLH, Oct. 4, 2006, ECF No. 93). On March 8, 2007, the Government filed a third superseding indictment, which it dismissed on May 16, 2007. (Indictment, Case No. 4:06-cr-00082-JLH, Mar. 8, 2007, ECF No. 196; Order, Case No. 4:06-cr-00082-JLH, May 16, 2007, ECF No. 223).

The Government indicted Ms. Porchay a fourth and final time on October 3, 2007. (Indictment, Oct. 3, 2007, ECF No. 1). Her first trial commenced on November 18, 2008, and on November 26, 2008, the jury acquitted her of one count of the eight count

indictment, but could not reach a unanimous verdict on the other counts, so the court declared a mistrial. (Nov. 18, 2008, ECF No. 106; Trial Tr. vol. 7, 1021, Nov. 26, 2008). Ms. Porchay's second trial commenced on May 12, 2009, but ended in a mistrial on May 14, 2009 because the Government failed to disclose exculpatory and impeachment information about two of its witnesses. (Trial Tr. vol. 1, 3-10, May 12, 2009; Trial Tr. vol. 2, 265-271, May 13, 2009; Trial Tr. vol. 3, 365-374, May 14, 2009).

The third and final trial of Ms. Porchay commenced on December 10, 2009, and ended on December 17, 2009, with the jury convicting her on the remaining seven counts of the indictment, plus two forfeiture counts. (Dec. 10, 2009, ECF No. 106; Jury Verdict, Dec. 17, 2009, ECF Nos. 206-208). On April 20, 2010, the court sentenced Ms. Porchay to 150 months' imprisonment. (J., Apr. 20, 2010, ECF No. 254). That same day the court entered the criminal judgment, and Ms. Porchay filed a timely notice of appeal on April 28, 2010. (J. Apr. 20, 2010, ECF No. 254, Notice of Appeal, Apr. 28, 2010, ECF Nos. 257, 257-1).

On August 29, 2011, the United States Court of Appeals for the Eighth Circuit affirmed Ms. Porchay's conviction. *United States v. Porchay*, 651 F.3d 930, 933 (8th Cir. 2011); Pet'r's App. A-1. The decision was not unanimous. *Porchay*, 651 F.3d at 943-946 (Bye, J., dissenting); Pet'r's App. A-19. One of the arguments Ms. Porchay pressed on appeal was that the district court should have dismissed the indictment because

the Government violated the Speedy Trial Act, specifically 18 U.S.C. § 3162(a)(2), when it obtained a continuance based on the unavailability of essential witnesses without putting forth any evidence of who the witnesses were, why they were essential, or what efforts it undertook to secure their presence for trial. *Porchay*, 651 F.3d at 937-939; *Porchay*, 651 F.3d at 943-946 (Bye, J., dissenting); Pet'r's App. A-9 – A-12, A-19 – A-25. The majority rejected Ms. Porchay's argument, and in so doing, held that when the Government seeks a continuance based on unavailable essential witnesses, it need not put into evidence the identity of its witnesses, why they are essential, or whether they are in fact unavailable. *Porchay*, 651 F.3d at 937-939; *Porchay*, 651 F.3d at 943-946 (Bye, J., dissenting); Pet'r's App. A-9 – A-12, A-19 – A-25.

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ARGUMENT

I. *Porchay* Conflicts With Five United States Circuit Courts And Involves An Important Question Of Federal Law That Has Not Been, But Should Be, Settled By This Court.

The Eighth Circuit's ruling in *Porchay* that when the Government seeks to continue a criminal trial based on unavailable essential witnesses, it need not put into evidence the identity of the witnesses, why they are essential, or whether they are in fact unavailable, is problematic for at least two reasons. First, the ruling contravenes the plain text of the Speedy Trial Act, 18 U.S.C. § 3162(a)(2), which requires the

Government to produce evidence showing it is entitled to a continuance because of an unavailable witness. Second, and more importantly for this Court's jurisdiction, *Porchay* conflicts with five United States circuit courts that have addressed what the Government must do in order to obtain an unavailable witness continuance. *United States v. Saeku*, 436 F.App'x 154, 158-163 (4th Cir. 2011) (per curiam); *United States v. Burrell*, 634 F.3d 284, 286-292 (5th Cir. 2011); *United States v. Hamilton*, 46 F.3d 271, 275-279 (3d Cir. 1995); *United States v. Koller*, 956 F.2d 1408, 1412-1413 (7th Cir. 1992); *United States v. McNeil*, 911 F.2d 768, 771-776 (D.C. Cir. 1990) (per curiam). This conflict should be resolved by this Court. Sup. Ct. R. 10(a). Additionally, what the Government must do to fulfill its burden of proof under 18 U.S.C. § 3162(a)(2) is an important question of federal law that has not been, but should be, settled by this Court. Sup. Ct. R. 10(c).

II. The Speedy Trial Act And What It Requires.

The Speedy Trial Act, 18 U.S.C. §§ 3161-3174, is designed to give effect to the Sixth Amendment right to a speedy trial. *United States v. Hamilton*, 46 F.3d 271, 275 (3d Cir. 1995). Thus, any time excluded under it is a matter of statutory and constitutional import. When the Government seeks to continue a trial based on the unavailability of essential witnesses, the extent to which it must prove who those witnesses are, why they are essential, and whether

they are in fact unavailable is a matter of exceptional importance under the Speedy Trial Act.

Under the Speedy Trial Act, the trial of a defendant charged in an information or indictment must commence within seventy days from the later of the filing date (and making public) of the information or indictment, or the date the defendant appears before a judicial officer of the court in which the charge is pending. 18 U.S.C. § 3161(c)(1). If the defendant's trial does not commence by the date specified in § 3161(c)(1), the information or indictment must be dismissed on the defendant's motion. 18 U.S.C. § 3162(a)(2).

Certain delays, however, are excluded from the seventy-day calculation. *Bloate v. United States*, 130 S. Ct. 1345, 1349 (2010) (citing 18 U.S.C. § 3161(h)). One such excludable delay is one occasioned by the unavailability of an essential witness. 18 U.S.C. § 3161(h)(3)(A). The Speedy Trial Act does not define the phrase "essential witness," however, the Senate Judiciary Committee report accompanying the bill that became the Speedy Trial Act explained that an essential witness is a witness so essential to the proceeding that continuing without the witness would be impossible or would likely result in a miscarriage of justice. *United States v. Eagle Hawk*, 815 F.2d 1213, 1218 (8th Cir. 1987) (citing S. Rep. No. 93-1021, at 37 (1984), reprinted in 1974 U.S.C.C.A.N. 7401).

In considering a Government motion for a continuance based on the unavailability of a witness, an

“essential witness” shall be 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). Due diligence requires reasonable efforts, not maximum feasible diligence. *United States v. Patterson*, 277 F.3d 709, 711-712 (4th Cir. 2002). A witness is deemed essential if he is unquestionably important, and the Government has a good faith belief that it will use his testimony at trial. *United States v. Eagle Hawk*, 815 F.2d 1213, 1218 (8th Cir. 1987). On the other hand, if the witness’s anticipated testimony will be cumulative or substantially irrelevant, the witness will not be deemed essential. *Eagle Hawk*, 815 F.2d at 1218. When the Government seeks a continuance based on the unavailability of an essential witness, it bears the burden of producing evidence proving that the witness is both unavailable and essential. 18 U.S.C. § 3162(a)(2).

III. Speedy Trial Act Violation In This Case.

The first of Ms. Porchay’s three trials commenced on November 18, 2008. (Nov. 18, 2008, ECF No. 106). It ended on November 26, 2008, with the jury acquitting her on Count Six of an October 3, 2007 indictment.¹ (Trial Tr. vol. 7, 1021, Nov. 26, 2008). Because the jury could not reach a unanimous verdict on the remaining counts, the court declared a mistrial. (Trial

¹ This was the fourth indictment in this one case.

Tr. vol. 7, 1021, Nov. 26, 2008). On December 1, 2008, the court entered the mistrial order and set the date for Ms. Porchay's second trial for December 9, 2008. (Decl. of Mistrial, Dec. 1, 2008, ECF No. 123). Under the Act, a mistrial resets the speedy trial clock, and the new trial must occur within seventy days from the date the action occasioning the retrial becomes final. *United States v. Ray*, 250 F.3d 596, 601 (8th Cir. 2001) (citing 18 U.S.C. § 3161(e)).

On December 3, 2008, the Government filed a motion to continue the second trial. (Mot. to Continue Trial, Dec. 3, 2008, ECF No. 125); Pet'r's App. A-48. The Government amended its motion the next day. (Am. Mot. to Continue Trial, Dec. 3, 2008, ECF No. 127); Pet'r's App. A-50. The crux of the Government's request was what it claimed to be the impossibility of getting ready for the second trial on December 9, 2008 due to the number and location of witnesses. (Am. Mot. to Continue, Dec. 3, 2008, ECF No. 127); Pet'r's App. A-48, A-50. The Government did not specify the identity of the witnesses, their locations, or why it could not produce them for a trial slated to begin eight days following the first trial. Moreover, the Government did not assert that any of its unnamed witnesses were "essential witnesses."

On December 5, 2008, Ms. Porchay filed her opposition to the Government's motion to continue her second trial. (Resp. in Opp'n to Mot. to Continue Trial, Dec. 5, 2008, ECF No. 128); Pet'r's App. A-52. Three days later, the district court granted the Government's motion, set the second trial date for May

12, 2009, and excluded December 8, 2008 to May 12, 2009 – a period of 155 days – from the speedy trial calculation. (Order to Continue, Dec. 8, 2008, ECF No. 129); Pet'r's App. A-55. In its order, the court found that the Government's "essential witnesses" could not be available by the original date for the second trial.

On April 26, 2009, Ms. Porchay filed a motion to dismiss based on a violation of the Speedy Trial Act. (Mot. to Dismiss, Apr. 26, 2009, ECF No. 132); Pet'r's App. A-56. The Government responded on April 30, 2009, and Ms. Porchay replied that same day. (Resp. in Opp'n to Mot. to Dismiss, Apr. 30, 2009, ECF No. 139; Reply to Resp., Apr. 30, 2009, ECF No. 140); Pet'r's App. A-62, A-65. On May 4, 2009, the district court denied Ms. Porchay's motion to dismiss. (Order, May 4, 2009, ECF No. 141); Pet'r's App. A-73. Because the Government never demonstrated that any of its witnesses were "essential" or unavailable, the trial court should have denied the continuance or included the 155-day delay occasioned by the continuance in the speedy trial calculation and dismissed the case.

Although a district court is not required to state on the record the reasons for granting a continuance due to the unavailability of an essential witness, *United States v. Hohn*, 8 F.3d 1301, 1305 (8th Cir.

1993),² the Government should at least be required to identify who its witnesses are, state why they are essential, and state why they are unavailable. The Fourth Circuit requires that the Government prove the following before a trial can be continued to secure the attendance of a witness: (1) the identity of the witness; (2) what the witness's testimony will be; (3) how the witness's testimony will be relevant and competent; (4) that the witness can be secured if the continuance is granted; and (5) that due diligence has been used to secure the witness for the trial as set. *United States v. Clinger*, 681 F.2d 221, 223 (4th Cir. 1982). In this case, the Government's request for a continuance did not satisfy any of the *Clinger* criteria.

It is an abuse of discretion for a district court to grant a § 3161(h)(3)(A) continuance when the Government has not put anything in the record providing the identity of an unavailable witness, an explanation of why he is unavailable, and reasons why his testimony is essential to its case. *United States v. Burrell*, 634 F.3d 284, 290-292 (5th Cir. 2011); *United States v. Hamilton*, 46 F.3d 271, 277-279 (3d Cir. 1995); *United States v. McNeil*, 911 F.2d 768, 773-775 (D.C. Cir. 1990) (per curiam).

² In a recent decision, the Fourth Circuit stated that although not required, it would be better if trial courts relying on the essential witness exclusion expressly find that the requirements of that exclusion have been satisfied. *United States v. Saeku*, 436 F. App'x 154, 161 n.8 (4th Cir. 2011) (per curiam).

The rulings of the district court and the Eighth Circuit in this case render nugatory the requirement that the Government prove its witnesses are unavailable and essential before it can be granted a continuance under 18 U.S.C. § 3161(h)(3)(A). *United States v. Burrell*, 634 F.3d 284, 287 (5th Cir. 2011) (the Government has the burden of going forward with evidence in connection with an exclusion of time under § 3161(h)(3)); *United States v. Hamilton*, 46 F.3d 271, 275 (3d Cir. 1995) (same).

IV. *Porchay* Conflicts With Five United States Circuit Courts.

Five United States circuit courts have addressed the issue of what the Government must prove before it can be granted a continuance based on the unavailability of an essential witness, and each requires more than a threadbare assertion that a witness is not available. *United States v. Saeku*, 436 F. App'x 154, 158-163 (4th Cir. 2011) (per curiam); *United States v. Burrell*, 634 F.3d 284, 286-292 (5th Cir. 2011); *United States v. Hamilton*, 46 F.3d 271, 275-279 (3d Cir. 1995); *United States v. Koller*, 956 F.2d 1408, 1412-1413 (7th Cir. 1992); *United States v. McNeil*, 911 F.2d 768, 771-776 (D.C. Cir. 1990) (per curiam).

In *United States v. Saeku*, the Fourth Circuit affirmed a district court's granting of a continuance based on the essential witness exclusion because the United States Attorney's representations regarding

the unavailability of two witnesses went unchallenged by the defendant. 436 F. App'x 154, 158-163 (4th Cir. 2011) (per curiam). Moreover, the Government adduced detailed proof of what the two witnesses' testimony would be. *Saeku*, 463 F. App'x at 162-163. In the instant case, Ms. Porchay vigorously challenged the Government's reed-thin allegation that its witnesses were unavailable, and the Government did not even attempt to proffer what its witnesses' testimony would be. *United States v. Porchay*, 651 F.3d 930, 944-946 (8th Cir. 2011) (Bye, J., dissenting); Pet'r's App. A-19 – A-25.

In *United States v. Burrell*, the Fifth Circuit reversed a conviction and vacated the sentence because of the paucity of proof in the district court record that the Government met its burden of proof under the Speedy Trial Act. 634 F.3d 284, 290-292 (5th Cir. 2011). In *Burrell*, the Government's motion for a § 3161(h)(3)(A) continuance identified the witness by name and occupation, stated why he would not be available, and asserted he was essential to its case. 634 F.3d at 288-290. Based on these representations, the district court granted the motion. *Burrell*, 634 F.3d at 289-290. The Fifth Circuit reversed the district court, finding that the Government failed to prove the applicability of the unavailable essential witness exclusion. *Id.* at 290-292. The appellate court found that the Government did not prove that it could obtain its witness by due diligence, which it has to do if it does not allege that the witness's whereabouts are unknown. *Id.* at 290-292. Here, the Government

also did not allege that its witnesses' whereabouts were unknown; therefore, it had to prove that it exercised due diligence to secure them. It did not do so, and the district court's and appellate court's decisions ratified this untenable deviation from the Speedy Trial Act's requirements.

In *United States v. Hamilton*, the Third Circuit affirmed a district court's dismissal of an indictment because of the Government's violation of the Speedy Trial Act. 46 F.3d 271, 275-279 (3d Cir. 1995). On the day the defendant's trial was scheduled to start, the Government sought a continuance, stating that three material witnesses were unable to testify until the district court disposed of some pending motions filed by those witnesses. *Hamilton*, 46 F.3d at 273. The court granted the motion and continued the trial to August 23, 1993. *Id.* The trial did not proceed on that date. *Id.* The court set another trial date of January 31, 1994, but once again the Government sought a continuance based on the unavailable essential witness exclusion. *Id.* at 274. The district court denied the motion, stating it needed additional proof to support the Government's contention that the witnesses were unavailable. *Id.*

On appeal, the Government argued the district court erred by failing to agree with its argument that its witnesses were unavailable and essential. *Id.* at 274-275. The Third Circuit agreed with the Government that the witnesses were essential; it disagreed, however, that they were unavailable because the Government offered insufficient proof of their lack of

availability. *Hamilton*, 46 F.3d at 276-279. Likewise in this case, the Government offered no proof that its witnesses were either essential or unavailable.

Finally, in *United States v. McNeil*, the District of Columbia Circuit reversed a conviction because the district court abused its discretion in finding that a government witness was essential within the meaning of the Speedy Trial Act. 911 F.2d 768, 773-775 (D.C. Cir. 1990) (per curiam). The appellate court recognized that when a district court has to decide whether to grant a continuance over the objection of the defendant it may not know with specificity what the witness will say or what alternative evidence the Government could use to establish the same facts. *McNeil*, 911 F.2d at 773. It held, however, that an appellate court should not, based on hindsight informed by the putatively essential witness's actual testimony, second-guess the district court's determination as long as it was reasonable in light of the information it had or *should have asked for at the time the decision had to be made*. *Id.* (emphasis added).

The appellate court found that the district court erred, not in overvaluing the putative witness's testimony based on the Government's representations, but in granting the continuance with no information whatsoever upon which to make a reasoned decision. *Id.* All the Government asserted was that the witness was not cumulative or corroborative. *Id.* at 773-774. The appellate court held that such vague, unsupported assertions do not satisfy the Government's burden of going forward with evidence in

connection with any exclusion of time under § 3161(h)(3)(A). *McNeil*, 911 F.2d at 774 (citing 18 U.S.C. § 3162(a)(2)). The Government must show how the testimony of the witness will fit within the overall framework of its case and why his testimony is essential. *Id.* at 774.

McNeil is consistent with the Third, Fourth, Fifth, and Seventh Circuits in requiring the Government to actually produce proof that its witnesses are unavailable and essential when it seeks a continuance under § 3161(h)(3)(A). *United States v. Saeku*, 436 F. App'x 154, 158-163 (4th Cir. 2011) (per curiam); *United States v. Burrell*, 634 F.3d 284, 286-292 (5th Cir. 2011); *United States v. Hamilton*, 46 F.3d 271, 275-279 (3d Cir. 1995); *United States v. Koller*, 956 F.2d 1408, 1412-1413 (7th Cir. 1992).

Porchay, on the other hand, conflicts with *McNeil*, *Saeku*, *Burrell*, *Hamilton*, and *Koller*. In fact, *Porchay* did precisely what *McNeil* admonished appellate courts not to do; it based its review of the district court's decision to grant a continuance based on its hindsight informed view of the witnesses' trial testimony. *United States v. Porchay*, 651 F.3d 930, 937-939 (8th Cir. 2011); 651 F.3d at 945-946 (Bye, J., dissenting); Pet'r's App. A-9 – A-12, A-19 – A-25. Additionally, *Porchay* failed to follow *McNeil*'s injunction to require the Government to put forth proof in support of its unavailable essential witness motion. *McNeil*, 911 F.2d at 774 (the Government must show how the testimony of the witness will fit within the

overall framework of its case and why his testimony is essential).



CONCLUSION

In *Porchay*, the Eighth Circuit conflicts with its sister circuits on the issue of how much proof the Government has to adduce in support of a motion for an unavailable essential witness continuance. There is now a circuit split on that question, which frustrates the uniform application of federal law. The Government's burden of proof when seeking an essential witness continuance is not onerous. *United States v. Meyer*, 803 F.2d 246, 247-248 (6th Cir. 1986) (a witness's wedding and honeymoon rendered him unavailable). No matter how slight that burden is, however, it is not non-existent; the Government must put forth some proof in support of its motion. What *Porchay* has done is lower a slight burden to a non-existent one. This is not consonant with the text of the Speedy Trial Act, 18 U.S.C. § 3162(a)(2), or the majority of courts that have interpreted and applied the law.

For the foregoing reasons, Ms. Porchay requests that this Court grant this petition for writ of certiorari.

Respectfully submitted,

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**United States Court of Appeals
FOR THE EIGHTH CIRCUIT**

No. 10-1997

United States of America, *
Plaintiff-Appellee, * Appeal from the
v. * United States
Jackie E. Porchay, * District Court for
Defendant-Appellant. * the Eastern District
of Arkansas.

Submitted: January 12, 2011
Filed: August 29, 2011

Before MURPHY, BYE, and MELLOY, Circuit Judges.

MURPHY, Circuit Judge.

This case has a long history. Jackie E. Porchay was indicted in October 2007 for conspiracy to possess with intent to distribute cocaine, conspiring to conduct a financial transaction involving illegal proceeds, and six counts of money laundering. After two mistrials, a jury convicted Porchay of seven of the eight

counts in December 2009. The district court¹ sentenced Porchay to concurrent 150 month sentences on each count. Porchay appeals the denial of her motions to dismiss, to suppress, for a mistrial, and for a bond pending appeal, alleging violations of the Fourth and Sixth Amendments, the Speedy Trial Act, and *Franks v. Delaware*, 438 U.S. 154 (1978). After a thorough review of the record and applicable law, we affirm.

I.

In February 2006 an officer with the Texas Department of Public Safety stopped a white Chevrolet Monte Carlo for speeding. He learned that Harold Kelley was the driver, then checked the registration of the vehicle and discovered that the car was registered to Porchay at 10005 Bradley Drive in Little Rock, Arkansas. A subsequent search of the vehicle revealed \$1,700 in cash on Kelley, cocaine powder and a crack pipe in the purse of a passenger named Theresa Speed, \$2,600 in the center console, and over \$200,000 in the trunk.

After Kelley and Speed were arrested, Kelley agreed to cooperate. He confessed that he had been transporting the money to Dallas to pay \$158,000 towards the purchase of 20 kilograms of cocaine. The remainder of the money found in the car, \$51,000, was intended for a coconspirator named Frederick

¹ The Honorable William R. Wilson, Jr., United States District Judge for the Eastern District of Arkansas.

Coleman to settle a previous drug transaction. Kelley agreed to lure Coleman to a motel parking lot in a sting operation where federal agents arrested him. Federal agents then executed a search of Coleman's home in Benton, Arkansas and found financial records documenting a number of drug transactions.

In March, FBI agent James Woodie interviewed Coleman regarding the drug distribution scheme. Coleman explained that the Monte Carlo registered in Porchay's name had been modified to contain compartments to conceal drugs. At Kelley's suggestion, Coleman fortified his Benton home with steel security bars and doors. Coleman also told Woodie that Porchay and Kelley lived together at the Bradley Drive address in Little Rock, and that Kelley carried firearms on his person and kept them at the Bradley Drive location.

Woodie then attempted to confirm this information. Public records searches revealed that Porchay had recently purchased a \$118,000 home in Benton with metal bars on the inside of the windows. A search of the Pulaski County Assessor's database showed that Porchay also owned four vehicles, including the Monte Carlo in which Kelley and Speed were stopped. The address on each of their registrations was Porchay's home on Bradley Drive. Despite these significant expenditures, Arkansas income tax records showed that Porchay had not filed tax returns in 2005 and had only declared income of roughly \$13,000 per year for 2003 and 2004. Based on this information and the statements that Coleman provided,

Woodie prepared an affidavit supporting a search warrant for the Little Rock house. A magistrate judge authorized the search, which yielded over \$190,000 in cash and some small caliber hand guns licensed to Porchay. Police also seized money counting machines and two vehicles.

The government indicted Porchay in August 2006 on charges of conspiring to possess with intent to distribute cocaine, conspiring to conduct a financial transaction involving illegal proceeds, and numerous counts of money laundering. After the indictment was dismissed due to a misnomer, Porchay was charged in a second superseding indictment. When the government decided to indict an additional codefendant, Yolanda Summons, it filed a third superseding indictment. Porchay was later indicted a fourth time in October 2007 along with a new codefendant, Michelle McBride.

Porchay's first trial began in November 2008. The jury could not reach a unanimous verdict on seven counts of the indictment charging her with drug and money laundering offenses. It acquitted her on one count of illegal use of drug proceeds. The district court declared a mistrial on December 1 and scheduled a second trial on the remaining charges for December 9, just over one week later.

The government moved for a continuance on December 3, 2008 in part because it would be "physically impossible" to produce some witnesses held by the Bureau of Prisons by December 9. It explained

that because the witnesses were incarcerated, the United States Marshal required three weeks notice to produce them and it “would plainly be impossible to provide such notice given the current trial date.”

On December 8 the district court granted the government’s motion to continue the December 9 trial date on the ground that “essential witnesses, who are incarcerated in the Bureau of Prisons, cannot be made available by the trial date because the U.S. Marshal requires three weeks to produce incarcerated witnesses.” The court granted the motion “[f]or good cause shown,” and found that “[a]ny delay commencing the trial of this case occasioned by this continuance will be excludable under the provisions of the Speedy Trial Act, as provided by 18 U.S.C. § 3161(h)(3)(A).” The court also ordered the trial to begin on May 12, 2009.

After waiting more than seventy days, Porchay moved on April 26, 2009 to dismiss the indictment for lack of a speedy trial. She argued that the government had “failed to identify any essential witness” and that the court had “failed to make a factual determination of whether any witness was essential over Porchay’s objections, [so] this case must be dismissed.” On April 30 the government filed its opposition to Porchay’s motion to dismiss, stating that its December continuance motion had been grounded on the “unavailability of witnesses, including two witnesses, Fred Coleman and Dondrick James, who were housed at FCI Forrest City, Arkansas,” and that Coleman and James were both essential witnesses

because their testimony was “material” to the prosecution’s case. It added that the district court had been well “aware of the policy of the United States Marshal requiring three weeks advance notice to transport incarcerated witnesses for trial” because it had granted writs to produce those witnesses for Porchay’s first trial.

The district court denied Porchay’s motion to dismiss on May 4, 2009. Its order stated that it had “already ruled on this issue [excludable time due to the unavailability of an essential witness] when [it] granted the Prosecution’s Amended Motion to Continue Trial Date” on December 8, 2008. Trial began on May 12, 2009 as scheduled, but two days into it the court granted another mistrial because the government had failed to disclose impeachment information about two witnesses. It set the date for a new trial to start the next week in May, but Porchay’s counsel moved for a continuance because of other professional and personal conflicts at the time.

Porchay’s third trial began on December 10, 2009 and ended with the jury convicting her of the remaining seven counts of the indictment. The district court sentenced Porchay to 150 months in prison. It is from this final judgment that Porchay now appeals. First, she alleges that the district court erred in denying her motion to dismiss for violations of the Speedy Trial Act and the Sixth Amendment. Second, she argues that the court erred in denying her motion to suppress evidence seized in a search of the Bradley Drive home because the affidavit supporting the

search warrant contained material misstatements in violation of *Franks v. Delaware*, 438 U.S. 154 (1978). Third, she argues that the court abused its discretion in denying her motion to dismiss after the government allegedly committed *Brady* violations. Fourth, she argues that the court abused its discretion at trial by denying her motion for a mistrial when her former codefendant Kelley invoked the Fifth Amendment in the presence of the jury. Finally, she argues that the court clearly erred in denying her motion for bond pending appeal.

II.

Porchay first contends that the district court erred in denying her motion to dismiss because the government violated her rights under the Speedy Trial Act and the Sixth Amendment. In the context of Speedy Trial Act rulings, we review a district court's legal conclusions de novo, its factual findings for clear error, and its ultimate determination for an abuse of discretion. *United States v. Lucas*, 499 F.3d 769, 782 (8th Cir. 2007) (en banc), *cert. denied*, 552 U.S. 1281 (2008).

Under the Speedy Trial Act, a defendant must be brought to trial within seventy days from the indictment or the first appearance, whichever occurs later. 18 U.S.C. § 3161(c)(1). If the defendant is not brought to trial within this period, the indictment must be dismissed on the defendant's motion. *Id.* § 3162(a)(2). Excluded from the seventy day limit

are delays granted for certain specific reasons. *Id.* § 3161(h). As relevant here, excludable periods include delays resulting from the filing of pretrial motions, § 3161(h)(1)(D), the unavailability of an essential witness, § 3161(h)(3)(A), the joinder of a co-defendant for whom the Speedy Trial Act clock has not yet run, § 3161(h)(6), and a finding by the district court that “the ends of justice . . . outweigh the best interests of the public and the defendant in a speedy trial.” § 3161(h)(7)(A).

A.

Porchay argues that her Speedy Trial Act rights were first violated in early 2007. Her trial was scheduled to begin on February 20, 2007, but on February 17, she moved for a continuance so that her attorney would have more time to prepare for trial. On February 20 a district court judge² granted Porchay’s motion to continue the trial. Citing what is now codified at 18 U.S.C. § 3161(h)(7)(A),³ the district court found that “the interests of justice served by granting the continuance outweigh[ed] the best interest of the

² The Honorable J. Leon Holmes, United States District Judge for the Eastern District of Arkansas.

³ After the district court issued its order, Congress passed the Judicial Administration and Technical Amendments Act of 2008, 122 Stat. 4291, which made technical changes to the Speedy Trial Act, including renumbering several provisions. The amendments did not change the substance of any provision that is relevant here.

public and defendant for a speedy trial,” because failure to continue the trial would “deny counsel for defendant the reasonable time necessary for effective preparation for trial and to develop any and all proper defenses which might be averred in the defendant’s behalf.” It also stated that a “new trial date will be set by separate order.” On April 9, 2007 the court referenced its February 20 order, set the trial date for May 21, and again indicated that “the delay occasioned by this continuance shall be excludable under the provisions of the Speedy Trial Act.”

Porchay argues that the district court violated the Act because “[e]ighty-five days elapsed between the court’s February 20, 2007 order granting [her] request for a continuance and the May 16, 2007 order dismissing the third indictment.” She contends (without citation to authority) that the district court was required to set the trial date at the time it granted her requested continuance. Since the court did not set the trial date until its April 9 order, she claims that it was the “functional equivalent of [the] nunc pro tunc order” disapproved in *United States v. Suarez-Perez*, 484 F.3d 537 (8th Cir. 2007).

In *Suarez-Perez*, we reversed a nunc pro tunc order for violating the Speedy Trial Act. In that case an August 9, 2004 motion to continue was granted, the time from August 6 to September 2004 was excluded, and the running of the speedy trial clock was stopped under § 3161(h)(8)(A). *Id.* at 541. An order then issued on January 20, 2005, long after the period covered by the continuance, purporting to amend

the prior order to stop the clock at an earlier date (starting on June 29 rather than August 6). *Id.* We pointed out that the function of a nunc pro tunc order is “to correct clerical or ministerial errors,” but “not to make substantive changes” or “rewrite history.” *Id.* The court’s January 20 order violated the defendant’s right to a speedy trial because the change was a substantive correction and “fail[ed] to declare the requisite findings to support an ends of justice continuance.” *Id.* at 542.

The district court in this case made ends of justice findings in the same order granting Porchay’s continuance and in the order setting the trial date. The February 20, 2007 order expressly granted a continuance because of the scheduling needs of Porchay’s attorney and excluded the time from the continuance to a new trial date in the ends of justice. The May 21 trial date was then set in a separate April 9 order providing that the period between April 9 and May 21 was also excludable under the ends of justice provision. The April 9 order had no retroactive effect for it only excluded a prospective period from the running of the clock. This was a forward looking order, making an independent ends of justice finding which covered the time between the order and the trial; it had no retroactive effect. *Suarez-Perez* is inapposite. Furthermore, Porchay’s 85 day calculation disingenuously included the time excluded by the continuance she herself sought. There were only 37 days between the subsequent April 9 order and the dismissal of the

indictment on May 16. Her rights under the Speedy Trial Act were not violated.

Moreover, there was in addition an independent reason why there was no Speedy Trial Act violation in 2007. On March 8 (less than seventy days from the court's February 20, 2007 order), the government filed a third superseding indictment joining Porchay's sister Yolanda Summons. That started the running of the speedy trial clock anew. When a newly indicted defendant "is joined with a defendant whose speedy trial clock has already started running, the latter defendant's speedy trial clock will be reset" to that of the new defendant. *United States v. Lightfoot*, 483 F.3d 876, 885-86 (8th Cir.), *cert. denied*, 552 U.S. 1053 (2007); *see* 18 U.S.C. § 3161(h)(6). The joinder of Summons thus reset Porchay's speedy trial clock under *Lightfoot* and § 3161(h)(6). For all these reasons, the district court did not err in denying Porchay's September 2009 motion to dismiss.⁴

B.

Porchay next argues that her Speedy Trial Act rights were violated after her first trial ended in a

⁴ For reasons that are unclear Porchay waited until September 2009 to argue that the district court's actions in early 2007 had violated the Act. Because Porchay's argument is without merit, we need not address whether her motion should be barred as untimely.

mistrial.⁵ On December 1, 2008, the district court scheduled a new trial for December 9, but the government immediately moved for a continuance, arguing that several of its essential witnesses were unavailable on such short notice, either because they were out of state or incarcerated in federal prison facilities. On December 8, the district court granted the government's motion. Rejecting Porchay's arguments that it needed to make "specific findings" to exclude any delay due to unavailable essential witnesses, the court held that some of the government's essential witnesses were incarcerated and could not be made available by the trial date. It ordered that any "delay commencing the trial of this case occasioned by this continuance will be excludable under the provisions of the Speedy Trial Act, as provided by 18 U.S.C. § 3161(h)(3)(A)" and set a new trial date of May 12, 2009.

After waiting more than seventy days, Porchay moved in April 2009 to dismiss for lack of a speedy trial. She argued that the government had not "even allege[d] that any witness is an essential witness" and that the delay from December 8, 2008 to the May 12, 2009 trial date had exceeded the seventy day statutory limit. The district court denied Porchay's motion on the basis that it had "already ruled on this

⁵ Under the Act a mistrial requires the clock to be reset and the speedy trial period begins to run anew. *See* 18 U.S.C. § 3161(e); *United States v. Ray*, 250 F.3d 596, 601 (8th Cir. 2001), *cert. denied*, 535 U.S. 980 (2002).

[essential witness] issue” in its December 8, 2008 order.

On appeal, Porchay repeats her argument that the government’s failure to state early on the identity or location of its essential witnesses undermines any finding under § 3161(h)(3)(A) that the speedy trial clock was properly tolled. Porchay also argues that neither the court nor the government identified a single witness “who was so essential to the second trial that proceeding without him would be impossible or likely to result in a miscarriage of justice.” According to Porchay, the 155 day delay from December 8, 2008 to May 12, 2009 was not excludable and her indictment should be dismissed. *See* 18 U.S.C. § 3162(a)(2).

Only one of the statutory provisions providing for tolling periods requires detailed findings. As the Supreme Court has observed, some periods of delay are “automatically excludable, *i.e.*, they may be excluded without district court findings,” while others are excludable “only if the district court makes certain findings enumerated in the statute.” *Bloate v. United States*, 130 S. Ct. 1345, 1351 (2010). The only statutory provision which requires detailed findings is § 3161(h)(7), which excludes periods of delay when the district court finds “that the ends of justice served by [a continuance would] outweigh the best interests of the public and the defendant in a speedy trial.” In contrast, a continuance to ensure the availability of essential witnesses is one of the statutory grounds for excludable delay for which detailed findings are not

required. *See id.* §§ 3161(h)(1)-(6); *Bloate*, 130 S. Ct. at 1351.

Porchay's argument is based on the erroneous premise that the district court was required to make detailed findings to justify delay caused by the unavailability of the government's essential witnesses. This argument is contrary to our case law. In *United States v. Hohn*, we rejected the argument that a district court must make "explicit" factual findings to support exclusions of time under the Speedy Trial Act other than under the "ends of justice" section which does require them. *See* 8 F.3d 1301, 1305 (8th Cir. 1993). In *Hohn*, the district court had excluded time under what is now § 3161(h)(1)(D), for delay resulting from a pretrial motion, but had not made explicit factual findings to support it.⁶ We rejected appellant's argument that the court had to make findings in order for pretrial motion delay to be excluded. That is because under the Act a district court "is not required to make explicit findings for § 3161(h)(1) delays." *Hohn*, 8 F.3d at 1305. The district court thus "did not err when it allowed the hearing to be continued without making findings." *Id.*

While the present case involves the essential witness exclusion instead of the pretrial motion provision, the reasoning in *Hohn* also controls here. Both cases involve statutory provisions for stopping the

⁶ In *Hohn* the pretrial motion exclusion was codified at § 3161(h)(1)(F).

running of time which do not require findings to justify the exclusion. The district court in its December 8 order did not exclude time for delay under the ends of justice section, which does require findings. Instead, it expressly cited the essential witness provision in its order. It therefore did not need to make further findings about the identity of the witnesses or their specific locations. All that the essential witness exclusion requires are findings that a witness is either absent or unavailable and also essential. *See* 18 U.S.C. § 3161(h)(3). The district court made these findings twice – in its orders of December 8, 2008 and again on May 4, 2009. The requirements of the Act were thus satisfied.

Contrary to Porchay's assertions, the district court was well aware of the identity and location of the government's essential witnesses. It was already quite familiar with the case in December 2008, and the government's April 30 response in opposition to Porchay's motion to dismiss specifically named Frederick Coleman and Dondrick James as essential witnesses. The government's response also stated they were unavailable without three weeks advance notice because they were incarcerated at the federal prison in Forrest City, Arkansas. It further added that the district court had been well "aware of the policy of the United States Marshal requiring three weeks advance notice to transport incarcerated witnesses for trial" because it had granted writs to produce those witnesses for Porchay's first trial.

A witness is “essential” if he is “unquestionably important” to the case and the government has a “good faith belief that it will use that witness’s testimony at trial.” *United States v. Eagle Hawk*, 815 F.2d 1213, 1218 (8th Cir. 1987), *cert. denied*, 484 U.S. 1012 (1988); *see also* S.Rep. No. 93-1021, at 37 (1974), *as reprinted in* Anthony Partridge, *Legislative History of Title I of the Speedy Trial Act of 1974*, at 123 (1980). A witness is “unavailable” whenever “his whereabouts are known but his presence for trial cannot be obtained by due diligence.” 18 U.S.C. § 3161(h)(3)(B).

After reviewing the record, we conclude that the district court did not clearly err in finding that Coleman was an unavailable essential witness. As a convicted coconspirator, he could testify to Porchay’s role in the charged conspiracy, including her ownership of a car in which over \$200,000 was found and which had been modified to conceal kilograms of drugs. *See Eagle Hawk*, 815 F.2d at 1218. We reject Porchay’s argument that Coleman’s testimony would be merely cumulative or substantially irrelevant. *Id.* As a federal prisoner, he was not available until the Marshals Service could produce him for retrial. *See* 18 U.S.C. § 3161(h)(3)(B); *United States v. Patterson*, 277 F.3d 709, 711-12 (4th Cir. 2002). The district court did not abuse its discretion in denying Porchay’s April 2009 motion to dismiss.

C.

Porchay argues for the first time on appeal that the 209 day delay between the second mistrial on May 15, 2009 and the start of her third trial on December 10, 2009 should have been counted under the speedy trial clock because the delay would not have occurred but for alleged *Brady* violations by the government. The government responds that there is no authority for Porchay's position and that much of the delay was due to the unavailability of her own attorney for the scheduled retrial date of May 18, 2009. The government also notes that Porchay filed numerous motions and appeals between September and December 2009 and that much of this period would be independently excludable under the Act.

We agree with the government that there was no Speedy Trial Act violation between May 15 and December 10, 2009. Porchay cites no authority to support her argument that a mistrial caused by the government's failure to disclose impeachment information necessarily requires that all additional delays be counted against it regardless of the reasons for them. Moreover, Porchay's counsel asked for the continuance following the second trial due to personal and professional conflicts. Wanting to protect Porchay's Sixth Amendment right to effective assistance by counsel of her choosing, the district court selected a convenient retrial date that worked for her attorney as well as the government. It was not an abuse of discretion to do so.

D.

Porchay asserts also that the district court erred by not dismissing her case for violation of her right to a speedy trial under the Sixth Amendment. “[F]our separate enquiries” are relevant to determining whether a defendant’s right under the Sixth Amendment have been violated. The pertinent questions are: “whether delay before trial was uncommonly long, whether the government or the criminal defendant is more to blame for that delay, whether, in due course, the defendant asserted his right to a speedy trial, and whether he suffered prejudice as the delay’s result.” *Doggett v. United States*, 505 U.S. 647, 651 (1992). Porchay argues that the thirty nine months between her first appearance and her third trial are “presumptively prejudicial,” that she cannot be blamed for any delays, that she aggressively pressed her speedy trial rights, and that she suffered prejudice by “having a Sword of Damocles hovering over her” for more than three years. *See, e.g., United States v. Titlbach*, 339 F.3d 692, 699 (8th Cir. 2003); *United States v. Walker*, 92 F.3d 714, 717 (8th Cir. 1996).

We have previously explained that it would be “unusual to find the Sixth Amendment has been violated when the Speedy Trial Act has not.” *Titlbach*, 339 F.3d at 699. Even if we were to assume the delay between Porchay’s arrest and ultimate trial was presumptively prejudicial, *see Walker*, 92 F.3d at 717, we would conclude that much of the delay in her case was attributable to her own actions. She filed well over fifty documents during the nearly three years

she was under indictment, including motions which required responses and hearings, notices of interlocutory appeal, and written motions for continuance. *See United States v. Aldaco*, 477 F.3d 1008, 1019 (8th Cir. 2007) (presenting more than forty five oral and written motions meant the delay was attributable to the defendant). More specifically, Porchay litigated property issues, sought the return of cash and property, and sought Hyde Amendment attorney fees and costs. After she lost these motions, she brought an unsuccessful appeal to our court. *See United States v. Porchay*, 533 F.3d 704 (8th Cir. 2008). Porchay even sought a stay of the proceedings in this appeal while her previous appeal was pending. We conclude that Porchay's Sixth Amendment speedy trial rights were not violated.

III.

Porchay next argues that the district court erred by denying her motion to suppress based on an argument that Agent Woodie's affidavit supporting the search warrant contained material misrepresentations and omissions in violation of *Franks v. Delaware*. We review the district court's factual findings in support of its denial of a motion to suppress for clear error and its legal determination of probable cause de novo. *United States v. Stevens*, 530 F.3d 714, 717 (8th Cir.), *cert. denied*, 129 S. Ct. 654 (2008). The evidence obtained from a search warrant must be suppressed if the defendant proves by a preponderance of the evidence that the search warrant affiant knowingly

and intentionally, “or with reckless disregard for the truth, included a false statement in the warrant affidavit and the affidavit does not establish probable cause without the false statement.” *Id.* at 718.

In her motions to suppress, Porchay argued that Agent Woodie misrepresented the amount and nature of his experience in drug cases and falsely stated that Coleman saw weapons in the Bradley Drive residence, misleading the magistrate judge into believing that evidence of crime would be located there. The district court denied this motion without comment.

On appeal, Porchay renews her argument that Agent Woodie inflated his biography to hold himself out as a “trained FBI narcotics field agent,” and misrepresented what Coleman had told him “regarding Kelley and weapons.” Porchay specifically argues that Woodie misrepresented that Coleman saw numerous firearms at her residence when in fact Coleman told him nothing about the place, had never been there, and had never seen weapons, drugs, or other signs of unlawful activity there. The government responds that the warrant affidavit reported Woodie’s sufficient experience and training. With regard to what Coleman saw at Porchay’s residence, the government denies that his statements were misrepresentations. It further argues that “plenty of probable cause remains” even if those statements were excised from the affidavit.

Woodie’s training and experience were adequately set forth in the warrant affidavit. He did not need to

explain in detail that his experience in some drug cases was as a FBI paraprofessional rather than as a special agent or field agent. There is also additional probable cause to support the search warrant, including Kelley's confession, his criminal history, his and Porchay's lack of significant legitimate income, and the joint residence he and Porchay shared on Bradley Drive. See *Stevens*, 530 F.3d at 719; *United States v. Engler*, 521 F.3d 965, 971 (8th Cir. 2008); *United States v. Barr*, 32 F.3d 1320, 1322 (8th Cir. 1994). The Bradley Drive location was also the registered address for the car in which Kelley was stopped by the police and in which admitted drug proceeds and paraphernalia were found.

Porchay's *Franks* argument also fails because nothing in the record indicates that Agent Woodie's statements were made with intentional or reckless disregard for the truth. Without adducing any evidence that Woodie at least "entertained serious doubts" as to the truth of the statements he made, *Stevens*, 530 F.3d at 718, Porchay cannot succeed on her *Franks* claim. See also *United States v. Clapp*, 46 F.3d 795, 801 (8th Cir. 1995); *United States v. Falls*, 34 F.3d 674, 681-82 (8th Cir. 1994). The district court did not err in denying Porchay's motion to suppress.

IV.

Porchay next argues that the indictment should have been dismissed with prejudice because the government withheld impeachment information that

would have resulted in a different verdict. We review for abuse of discretion the district court's denial of a motion to dismiss an indictment due to improperly withheld information. See *United States v. Babiar*, 390 F.3d 598, 600 (8th Cir. 2004), *cert. denied*, 543 U.S. 1174 (2005); *United States v. Manthei*, 979 F.2d 124, 126-27 (8th Cir. 1992).

At Porchay's second trial in May 2009, several jailhouse informants testified against her in exchange for reduced sentences. Two of these witnesses had not identified Porchay at the time Agent Woodie showed them her photo before trial, but the government did not inform the defense before trial that in fact they had mistaken other people for her. During the second day of trial, the defense was informed about this oversight, and Porchay moved for a mistrial and for dismissal with prejudice. On May 14, 2009, the district court declared a mistrial but denied the motion to dismiss. Porchay moved to dismiss the indictment for prosecutorial misconduct. The district court denied that motion in November 2009, stating that it did "not believe that the withholding of the line-up information was deliberate" and that it was an "unfortunate oversight" but not deliberate misconduct.

On appeal Porchay points to the government's duty to disclose this information before trial. The government does not claim otherwise. Porchay argues that because the witnesses' misidentification of her was impeachment information required to be disclosed under *Brady v. Maryland*, 373 U.S. 83 (1963), its nondisclosure was "so egregious as to warrant not

only a new trial, but a dismissal following the second mistrial” as well. The government responds by pointing out that disclosure of impeachment information during trial is not a *Brady* violation unless the disclosure comes too late to respond to it. See *United States v. Almendares*, 397 F.3d 653, 664 (8th Cir. 2005). In this case, the delayed disclosure did not prejudice Porchay because she became aware of it in time to use it for impeachment purposes, which is exactly what she did at her third trial.

The government’s reasoning on this point is supported by the case law. “Where the prosecution delays disclosure of evidence, but the evidence is nonetheless disclosed during trial, *Brady* is not violated.” *United States v. Gonzales*, 90 F.3d 1363, 1368 (8th Cir. 1996); see *United States v. Boykin*, 986 F.2d 270, 276 n.6 (8th Cir.), *cert. denied*, 510 U.S. 888 (1993); *Nassar v. Sissel*, 792 F.2d 119, 121 (8th Cir. 1986). We agree that the government should have produced this information before trial, but its inadvertent failure to do so did not require the district court to dismiss Porchay’s indictment with prejudice. The district court’s decision to grant a mistrial permitted Porchay to have a new trial, and it is significant that newly available evidence did not lead a defense verdict. The district court did not abuse its discretion in denying Porchay’s motion to dismiss the indictment with prejudice.

V.

Porchay further argues that the district court abused its discretion in denying her motion for a mistrial at her third trial after her former codefendant Harold Kelley invoked the Fifth Amendment in the presence of the jury. We review the district court's decision to permit a witness to invoke the Fifth Amendment privilege for abuse of discretion. *United States v. Washington*, 318 F.3d 845, 856 (8th Cir.), *cert. denied*, 540 U.S. 884 (2003).

At her third trial, the government called Kelley to testify about certain nonincriminatory details of his contact with Porchay. Kelley had already pled guilty to conspiring to possess with intent to distribute cocaine and had been sentenced, and had not filed an appeal during the time permitted. The government's position is that he therefore had no residual Fifth Amendment rights at the trial when he was called to testify. *See Mitchell v. United States*, 526 U.S. 314, 326 (1999). Before the government could even ask a question Kelley stated that he "would like to take my Fifth Amendment right." The prosecutor assured the court that Kelley would only be asked questions that would not incriminate him. Porchay's attorney, who also represented Kelley, objected. Kelley refused to answer any questions, including what his name was. Porchay then moved for a mistrial which the district court denied.

Porchay now renews her argument that the government called Kelley merely to force him to invoke

his Fifth Amendment right in front of the jury, raising an inference that his privilege assertion negatively implicated her. *See Namet v. United States*, 373 U.S. 179, 186 (1963); *United States v. Doddington*, 822 F.2d 818, 822 (8th Cir. 1987). The government responds by arguing that Kelley's invocation of his Fifth Amendment privilege was frivolous in those circumstances. Moreover, it did not allude to Kelley's refusal to testify after he was dismissed.

We agree that Kelley's invocation of the Fifth Amendment was frivolous since it came after judgment had been entered in his case which he had not appealed. The government did not try to use his mention of the Fifth Amendment to create a negative inference against Porchay. When it is "perfectly clear, from a careful consideration of all the circumstances" that a [sic] "answer[s] cannot possibly have such [a] tendency to incriminate" the witness, the Fifth Amendment privilege may not be invoked. *Hoffman v. United States*, 341 U.S. 479, 488-89 (1951), and cases cited. Porchay did not demonstrate any prejudice caused by Kelley's five minutes of ineffectual testimony. We conclude that the district court did not abuse its discretion in denying Porchay's motion for a mistrial.

VI.

Finally, Porchay argues that the district court clearly erred in denying her request to remain on release after sentencing but pending appeal. It had

earlier allowed a codefendant, Michelle McBride, to remain free pending sentencing. This issue might have been raised by way of interlocutory appeal, *see* 18 U.S.C. § 3145(c), but it was not. At this point we conclude that the district court did not clearly err in denying Porchay’s motion for release. In cases like hers a judicial officer shall order a defendant detained unless there is a substantial likelihood that a motion for acquittal or new trial will be granted, or the government has recommended that no imprisonment be imposed. *See* 18 U.S.C. § 3143(a)(2)(A). Neither exception applies here, and the district court did not err in denying her request.

VII.

After a thorough review of the lengthy record and resolution of the issues raised, we affirm the judgment of the district court.

BYE, Circuit Judge, dissenting.

Under the Speedy Trial Act (“the Act”), “[a]ny period of delay resulting from the absence or unavailability of the defendant or an essential witness” is excluded from the seventy-day time limit. 18 U.S.C. § 3161(h)(3)(A). In Jackie Porchay’s case, the district court excluded time pursuant to § 3161(h)(3)(A) without a single mention by the government of the identity of its witnesses, why they were essential, or whether they were, in fact, unavailable. Due to the

government's failure to meet its burden of proof by demonstrating its essential witnesses were unavailable, as well as its failure to even move for a continuance under § 3161(h)(3), I would conclude Porchay's rights under the Act were violated. I therefore dissent.

Under the Act, if the defendant is not brought to trial within seventy days from the later of the indictment or the first appearance, 18 U.S.C. § 3161(c)(1), the indictment must be dismissed on the defendant's motion. *United States v. Suarez-Perez*, 484 F.3d 537, 540 (8th Cir. 2007). However, certain "periods of delay" are excluded from the time computation, including any period resulting from the unavailability of an essential witness. 18 U.S.C. § 3161(h)(3)(A). While the defendant ordinarily bears the burden of proof to show her rights under the Act have been violated, *United States v. Williams*, 605 F.3d 556, 572 (8th Cir. 2010), the government bears the burden of proof with regard to exclusions for procuring essential witnesses under § 3161(h)(3). *United States v. Elmardoudi*, 501 F.3d 935, 941 n.6 (8th Cir. 2007).

In the instant matter, after the first mistrial occurred on November 26, 2008, the district court desired to retry the matter on December 9, 2008. Believing it was impossible to be ready for trial on that date, the government moved to continue the trial. The government's motion for a continuance stated, in its entirety:

This matter is currently set for re-trial on Tuesday, December 9, 2008.

The United States respectfully requests that the trial be continued on the grounds that it is physically impossible for the United States to be ready for trial on that date due to the number and location of witnesses, some of whom live out of state, which the government would have to serve with subpoenas to compel attendance. Further, the Marshal's [sic] require three weeks notice to obtain the attendance of witnesses who are incarcerated and it would plainly be impossible to provide such notice given the current trial date. And finally, the parties do not have a copy of the trial transcript.

Because of time constraints, the Assistant United States Attorney has not [had] time to contact the defendant's attorney to see if he opposes the continuance or not.

Therefore, for good cause shown, the United States respectfully requests that its Motion for Continuance be granted and that the time be excluded for purposes of the Speedy Trial Act.

Porchay filed an extensive response in opposition to the government's motion, challenging each of the government's asserted bases for its motion. Despite Porchay's various objections, the government failed to file a reply brief providing any more information to support its motion.

On December 8, 2008, without holding an evidentiary hearing on the matter, the district court granted the government's motion, stating:

According to the Prosecution's motion, essential witnesses, who are incarcerated in the Bureau of Prisons, cannot be made available by the trial date because the U.S. Marshal requires three weeks to produce incarcerated witnesses. For good cause shown, the motion is GRANTED. Accordingly, this case is removed from the Court's current trial docket of December 9, 2008, and is rescheduled to begin Tuesday, May 12, 2009, at 9:00 a.m.

In its order, the court also noted the delay resulting from the continuance would be excluded from the speedy trial calculation pursuant to § 3161(h)(3)(A).

Porchay contends the court erred by granting the government's motion for continuance because the government failed to identify any witnesses it claimed were unavailable, the witnesses' locations, or why it could not produce the witnesses for trial. In effect, Porchay argues the government failed to demonstrate its witnesses were essential, and thus the court should have denied the continuance or included the resulting 155-day delay in the speedy trial calculation and dismissed the case.

I agree. While the Act does not define who constitutes an "essential witness," this court has held "[w]here a witness is unquestionably important, and the government has a good faith belief that it will use that witness's testimony at trial, that witness may be

deemed ‘essential’ for purposes of the Speedy Trial Act.” *United States v. Eagle Hawk*, 815 F.2d 1213, 1218 (8th Cir. 1987). On the other hand, if “the witness’s anticipated testimony will be merely cumulative, or substantially irrelevant, that witness should be deemed non-essential.” *Id.* In this case, the district court simply had no information with which to make the determination alluded to in *Eagle Hawk* as to whether the government’s witnesses were essential. In its motion before the district court, the government failed to identify a single witness, much less allege why any witness was essential. *Cf. United States v. Saeku*, No. 08-4949, 2011 WL 1594918, at *7 (4th Cir. April 28, 2011) (per curiam) (concluding the government showed its witnesses were essential because “the descriptions of anticipated testimony in the continuance motion were sufficiently detailed – the motion precisely (if briefly) described the anticipated testimony of both witnesses and how that evidence related to the charges”). In fact, the word “essential” did not even appear in the government’s motion, which is not surprising given the government’s concession it was unaware of the existence of the essential witness exclusion. Similarly, although the government blindly invoked the Marshals’ advance notice requirement, it neglected to mention the location of its witnesses or whether the Marshals had transferred the incarcerated individuals back to their original facilities after the mistrial. *See* 18 U.S.C. § 3161(h)(3)(B) (“[A]n essential witness shall be considered absent when his whereabouts are unknown and, in addition, he is attempting to avoid

apprehension or prosecution or his whereabouts cannot be determined by due diligence.”). Thus, the district court also had before it no information with which to make a determination as to the witnesses’ availability.

In the face of these obvious shortcomings in the government’s motion, the majority focuses primarily on two tangential procedural aspects. First, the majority places great weight on the absence of any requirement placed upon the district court to make detailed findings when ruling on a § 3161(h)(3) exclusion. While it is certainly true a district court need not make detailed findings in granting a § 3161(h)(3) exclusion, *United States v. Carrillo*, 230 F.3d 1364, at *1 (8th Cir. 2000) (per curiam), this is a red herring to the central issue of whether the government met its burden of proof in moving for the continuance. Namely, regardless of whether the district court was required to make detailed factual findings, it still had to have a basis to exclude time under § 3161(h)(3). Given the absence of the requisite information in the government’s motion and the lack of a hearing on the matter, it is difficult to conceptualize how the district court made such a determination.

Second, the majority cites two witnesses the government alleged were essential in the government’s April 30, 2009, response to Porchay’s motion to dismiss. The majority also goes into some detail about the importance of one of these witnesses in particular, Frederick Coleman. As an initial matter, I disagree with the majority’s efforts to address Coleman’s value

to the government's case because it was within the district court's province to make such a determination. *See United States v. Koller*, 956 F.2d 1408, 1413 (7th Cir. 1992) ("The determination of preliminary questions, such as the unavailability of a witness, is normally determined by the district judge in the exercise of his or her discretion."); *Saeku*, 2011 WL 1594918, at *7 ("Whether a witness is essential is a quintessential question of fact.") (internal quotation marks and citation omitted). More importantly, I would conclude the government acted too little and too late in identifying and explaining the essential nature of its witnesses for the first time in its response on April 30, 2009 – which was long after the seventy-day limit had passed. As the district court had already granted the continuance on December 8, 2008, the information presented by the government four months later is irrelevant.

In sum, the government failed to present any evidence demonstrating who its witnesses were, why they were essential, or what efforts it had undertaken in order to secure their presence for trial. I would thus conclude the district court erred by excluding time pursuant to § 3161(h)(3). *See United States v. McNeil*, 911 F.2d 768, 773 (D.C. Cir. 1990) (per curiam) ("[T]he court, when it granted the Government's motion for a continuance, had no information whatsoever upon which to make a reasoned decision."). Moreover, the government's conclusory statement regarding the Marshals' advance notice requirement did not, standing alone, provide the court

with a basis upon which to grant a continuance under § 3161(h)(3). Compare *United States v. Burrell*, 634 F.3d 284, 292 (5th Cir. 2011) (per curiam) (concluding the essential witness exclusion could not apply where the government failed to present any evidence showing its witness's presence could not be obtained through reasonable efforts) and *United States v. Ferguson*, 574 F. Supp. 2d 111, 115 (D.D.C. 2008) (concluding an exclusion of time under § 3161(h)(3) was not warranted where the government failed to present any evidence to support its claim the Marshals were unable to transport two of its witnesses in time for trial) with *United States v. Patterson*, 277 F.3d 709, 711-12 (4th Cir. 2002) (holding the district court did not err in granting a continuance where the government presented testimony from a Deputy Marshal describing the hardship it would work on the agency).

After concluding the district court violated Porchay's rights under the Act, I would proceed to consider the proper sanction. Under the Act, dismissal of the indictment is mandatory upon the defendant's motion. See 18 U.S.C. § 3162(a)(2) ("If a defendant is not brought to trial within the time limit required by section 3161(c) as extended by section 3161(h), the information or indictment shall be dismissed on motion of the defendant."). "Although the Act mandates a dismissal of the indictment, the trial court retains discretion as to whether the dismissal should be with or without prejudice." *United States v. Dezeler*, 81 F.3d 86, 89 (8th Cir. 1996); see also *Zedner v. United*

States, 547 U.S. 489, 499 (2006) (“[T]he district court must dismiss the charges, though it may choose whether to dismiss with or without prejudice.”). Accordingly, I would remand to the district court to determine whether to dismiss the indictment with or without prejudice.

Based on the violation of Porchay’s speedy trial rights, I respectfully dissent from the majority’s decision to affirm the district court’s denial of Porchay’s motion to dismiss. Because I would reverse Porchay’s convictions, vacate her sentence, and remand to the district court with instructions to dismiss the indictment and to determine whether the dismissal is with or without prejudice, I express no opinion regarding Porchay’s other arguments on appeal.

UNITED STATES DISTRICT COURT
 Eastern District of Arkansas

UNITED STATES) **JUDGMENT IN A**
 OF AMERICA) **CRIMINAL CASE**
 v.) (Filed Apr. 20, 2010)
 JACKIE E. PORCHAY) Case Number:
) 4:07CR00308-01-WRW
) USM Number: 24282-009
) LARRY JARRETT
) Defendant's Attorney

THE DEFENDANT:

- pleaded guilty to count(s) _____
- pleaded nolo contendere to count(s) _____
 which was accepted by the court.
- was found guilty on count(s) 1-5, 7-8 of the Indictment
 after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

<u>Title & Section</u>	<u>Nature of Offense</u>	<u>Offense Ended</u>	<u>Count</u>
21 U.S.C. §§ 841(a)(1) and (b)(1)(A) and 846	Conspiracy to Possess With Intent to Distribute More Than 5 kilograms of Cocaine Hydrochloride, a Class A Felony	8/31/2007	1
18 U.S.C. § 1956(h)	Conspiracy to Launder Drug Proceeds, a Class C Felony	8/31/2007	2

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

- The defendant has been found not guilty on count(s) 6 of the Indictment
- Count(s) _____ is are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

4/20/2010
Date of Imposition of Judgment

/s/ William R. Wilson, Jr.
Signature of Judge

Wm. R. WILSON, JR. U.S. District Judge
Name of Judge Title of Judge

4/20/2010
Date

ADDITIONAL COUNTS OF CONVICTION

<u>Title & Section</u>	<u>Nature of Offense</u>	<u>Offense Ended</u>	<u>Count</u>
18 U.S.C. §§ 2 and 1956(a)(1)(B)(i)	Aiding and Abetting Money Laundering, Class C Felonies	8/31/2007	3-5, 7-8

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of:

150 MONTHS on each count to run concurrently.

The court makes the following recommendations to the Bureau of Prisons:

The defendant is to participate in educational and vocational programs during incarceration.

The defendant is to be placed at the Carswell correctional facility in Fort Worth, Texas.

The defendant is remanded to the custody of the United States Marshal.

The defendant shall surrender to the United States Marshal for this district:

at _____ a.m. p.m. on _____ .

as notified by the United States Marshal.

The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

- before 2 p.m. on _____ .
- as notified by the United States Marshal.
- as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____
a _____ , with a certified copy of this judgment.

UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of:

5 YEARS

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state, or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

- The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. (*Check, if applicable.*)
- The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. (*Check, if applicable.*)
- The defendant shall cooperate in the collection of DNA as directed by the probation officer. (*Check, if applicable.*)
- The defendant shall comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. § 16901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which he or she resides, works, is a student, or was convicted of a qualifying offense. (*Check, if applicable.*)
- The defendant shall participate in an approved program for domestic violence. (*Check, if applicable.*)

If this judgment imposes a fine or restitution, it is a condition of supervised release that the

defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

- 1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
- 2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;
- 3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
- 4) the defendant shall support his or her dependents and meet other family responsibilities;
- 5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;
- 6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;
- 7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or

any paraphernalia related to any controlled substances, except as prescribed by a physician;

- 8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
- 9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;
- 10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;
- 11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
- 12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and
- 13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	<u>Assessment</u>	<u>Fine</u>	<u>Restitution</u>
TOTALS	\$ 700.00	\$ 0.00	\$ 0.00

- The determination of restitution is deferred until _____ . An *Amended Judgment in a Criminal Case (AO 245C)* will be entered after such determination.
- The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

<u>Name of Payee</u>	<u>Total Loss*</u>	<u>Restitution Ordered</u>	<u>Priority or Percentage</u>
TOTALS	\$ _____ 0.00	\$ _____ 0.00	

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

- Restitution amount ordered pursuant to plea agreement \$ _____
- The defendant must pay interest on restitution and a fine or more than \$2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).
- The court determined that the defendant does not have the ability to pay interest and it is ordered that:
 - the interest requirement is waived for the fine restitution.
 - the interest requirement for the fine restitution is modified as follows:

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

- A** Lump sum payment of \$ 700.00 due immediately, balance due
 - not later than _____, or
 - in accordance C, D, E, or F below; or
- B** Payment to begin immediately (may be combined with C, D, or F below); or

- C** Payment in equal _____ (*e.g., weekly, monthly, quarterly*) installments of \$ _____ over a period of _____ (*e.g., months or years*), to commence _____ (*e.g., 30 or 60 days*) after the date of this judgment; or
- D** Payment in equal _____ (*e.g., weekly, monthly, quarterly*) installments of \$ _____ over a period of _____ (*e.g., months or years*), to commence _____ (*e.g., 30 or 60 days*) after release from imprisonment to a term of supervision; or
- E** Payment during the term of supervised release will commence within _____ (*e.g., 30 or 60 days*) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or
- F** Special instructions regarding the payment of criminal monetary penalties:

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

- Joint and Several

Defendant and Co-Defendant Names and Case Numbers (*including defendant number*), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

- The defendant shall pay the cost of prosecution.
- The defendant shall pay the following court cost(s):
- The defendant shall forfeit the defendant's interest in the following property to the United States:

2002 Yukon, VIN #1GKFK66U82J316765

Payments shall be applied in the following order:
(1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

**UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

No: 10-1997

United States of America

Appellee

v.

Jackie E. Porchay

Appellant

Appeal from U.S. District Court for the
Eastern District of Arkansas – Little Rock
(4:07-cr-00308-WRW-1)

ORDER

The motion of Appellant Porchay for a 14-day extension of time until September 26, 2011, to file a petition for rehearing is granted.

September 13, 2011

Order Entered Under Rule 27A(a):
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

**IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION**

UNITED STATES OF AMERICA

v. 4:07-CR-00308-01-WRW

JACKIE E. PORCHAY

ORDER

Pending is Defendant's Motion to Dismiss for Lack of Speedy Trial (Doc. No. 132). The Prosecution has responded,¹ and Defendant has replied.²

For good cause shown, Defendant's motion is DENIED. It seems I already ruled on this issue when I granted the Prosecution's Amended Motion to Continue Trial Date.³

Further, Defendant's Motion for Return of Property (Doc. No. 131) is taken under advisement. I will hear from the parties with respect to this issue when the pretrial hearing commences at 8:30 a.m., Tuesday, May 12, 2009.

¹ Doc. No. 139.

² Doc. No. 140.

³ Doc. No. 127.

IT IS SO ORDERED this 4th day of May, 2009.

/s/ Wm. R. Wilson, Jr.
UNITED STATES
DISTRICT JUDGE

**IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION**

UNITED STATES OF AMERICA

v. 4:07-CR-00308-01-WRW

JACKIE E. PORCHAY

ORDER

Pending is the Prosecution's Amended Motion to Continue (Doc. No. 127). Defendant has responded.¹

According to the Prosecution's motion, essential witnesses, who are incarcerated in the Bureau of Prisons, cannot be made available by the trial date because the U.S. Marshal requires three weeks to produce incarcerated witnesses. For good cause shown, the motion is GRANTED. Accordingly, this case is removed from the Court's current trial docket of December 9, 2008, and is rescheduled to begin Tuesday, May 12, 2009, at 9:00 a.m.

Since the Order granting the mistrial was entered on December 1, 2008, it became final and the new Speedy Trial clock commenced on that date.²

Any delay commencing the trial of this case occasioned by this continuance will be excludable

¹ Doc. No. 128. Also pending is the Prosecution's original Motion to Continue (Doc. No. 125), which is now moot.

² 18 U.S.C. § 3161(e).

under the provisions of the Speedy Trial Act, as provided by 18 U.S.C. § 3161(h)(3)(A).

All parties must submit jury instructions (agreed-on instructions, to the extent possible, would be appreciated) by 5 p.m., Tuesday, April 21, 2009. Objections to the proposed jury instructions must be filed by 5 p.m., Friday, May 1, 2009. A pretrial hearing will commence at 8:30 a.m., Tuesday, May 12, 2009, with jury selection beginning at 9:00 a.m.

IT IS SO ORDERED this 8th day of December, 2008.

/s/ Wm. R. Wilson, Jr.
UNITED STATES
DISTRICT JUDGE

**UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

No: 10-1997

United States of America

Appellee

v.

Jackie E. Porchay

Appellant

Appeal from U.S. District Court for the
Eastern District of Arkansas – Little Rock
(4:07-cr-00308-WRW-1)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

October 20, 2011

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

**IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION**

UNITED STATES)
OF AMERICA)
v.) **NO. 4:07CR00308 WRW**
)
JACKIE PORCHAY)

GOVERNMENT'S MOTION FOR CONTINUANCE

This matter is currently set for re-trial on Tuesday, December 9, 2008.

The United States respectfully requests that the trial be continued on the grounds that it is physically impossible for the United States to be ready for trial on that date due to the number and location of witnesses, some of whom live out of state, which the government would have to serve with subpoenas to compel attendance. Further, the Marshal's require three weeks notice to obtain the attendance of witnesses who are incarcerated and it would plainly be impossible to provide such notice given the current trial date. And finally, the parties do not have a copy of the trial transcript.

Therefore, for good cause shown, the United States respectfully requests that its Motion for Continuance be granted and that the time be excluded for purposes of the Speedy Trial Act.

Respectfully submitted,

JANE W. DUKE
UNITED STATES ATTORNEY

/s/ Angela S. Jegley
By: Angela S. Jegley
Bar No. 79100
Assistant U.S. Attorney
for United States
P.O. Box 1229
Little Rock, AR 72203
Angela.Jegley@usdoj.gov
501-340-2600

CERTIFICATE OF SERVICE

I hereby certify that on December 3, 2008, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which shall send notification of such filing to the attorney for the defendant.

/s/ Angela S. Jegley
ANGELA S. JEGLEY

**IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION**

UNITED STATES)
OF AMERICA)
v.) **NO. 4:07CR00308 WRW**
)
JACKIE PORCHAY)

**AMENDED GOVERNMENT'S
MOTION FOR CONTINUANCE**

This matter is currently set for re-trial on Tuesday, December 9, 2008.

The United States respectfully requests that the trial be continued on the grounds that it is physically impossible for the United States to be ready for trial on that date due to the number and location of witnesses, some of whom live out of state, which the government would have to serve with subpoenas to compel attendance. Further, the Marshal's [sic] require three weeks notice to obtain the attendance of witnesses who are incarcerated and it would plainly be impossible to provide such notice given the current trial date. And finally, the parties do not have a copy of the trial transcript.

Because of time constraints, the Assistant United States Attorney has not time to contact the defendant's attorney to see if he opposes the continuance or not.

Therefore, for good cause shown, the United States respectfully requests that its Motion for Continuance be granted and that the time be excluded for purposes of the Speedy Trial Act.

Respectfully submitted,

JANE W. DUKE
UNITED STATES ATTORNEY

/s/ Angela S. Jegley
By: Angela S. Jegley
Bar No. 79100
Assistant U.S. Attorney
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CERTIFICATE OF SERVICE

I hereby certify that on December 4, 2008, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which shall send notification of such filing to the attorney for the defendant.

/s/ Angela S. Jegley
ANGELA S. JEGLEY

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

UNITED STATES	§	
OF AMERICA	§	
Plaintiff,	§	
v.	§	No. 4:07-CR-00308 WRW
JACKIE PORCHAY	§	
Defendant.	§	

**PORCHAY'S RESPONSE TO GOVERNMENT'S
MOTION FOR CONTINUANCE**

The defendant, Jackie Porchay (Porchay), through her attorney, Larry E. Jarrett would ask this Honorable Court to deny the United States Motion for Continuance. Porchay would show:

During the trial of this matter which commenced on November 18, 2008, this court learned that Porchay has been under some court ordered supervision for in excess of two and one-half years. The government has for the past two and one-half years had the opportunity to prepare its best case against Porchay and co-defendant Major Yolanda Summons. As the court is aware, a federal jury completely exonerated Major Summons, and found Porchay not guilty on one count. The jury was hung on the remaining counts.

On December 1, 2008, this court ordered the government and Porchay back to court for a re-trial on the remaining counts on December 9, 2008. The government filed its motion for continuance on Wednesday, December 3, 2008. Said Motion was rejected by the Clerk of the Court on December 4, 2008, for failure to comply with Local Rule 7.2(b). The government re-filed the same motion on December 5, 2008, stating that there was no time to comply with Local Rule 7.2(b). On December 5, 2008, Porchay was contacted by the Court asking whether Porchay objected to the government's motion. Counsel for Porchay indicated that he did object to the Motion for Continuance, and Porchay was ordered to respond in writing December 5, 2008.

In the government's motion it states:

1. "It is physically impossible for the United States to be ready for trial" on December 9, 2008.

2. Because a large number of witnesses are required, some witnesses are located out of state, and others would be compelled to attend.

3. The parties do not have the trial transcript.

4. Finally, the government requests that time be excluded for purposes of the Speedy Trial Act.

Porchay assert that none of the reasons pro-pounded by the government deserve any weight whatsoever. Porchay only asks how long must she be held hostage by the government for matters beyond her control. This case has been pending since March

2006. Porchay was added as a defendant during the summer of 2006. As the court is aware, Porchay did not put on a case. Therefore, one would only ask why would the government need a transcript of their witnesses' testimony. With respect to out of state witnesses, to Porchay's recollection there were only four Texas witnesses that would be required to testify and two of the four are law enforcement personnel. The Washington State witnesses would no longer be required since their testimony was offered to support the court involving Major Summons. Porchay directs the court to the fact that the court gave the government every opportunity to develop its best case and the jury just did not accept the facts as presented by the government.

The government filed its motion without a suggestion as to when the government would be prepared to try the case. Porchay was not conferenced and any date this court may determine appropriate may conflict with the Porchay's attorney's schedule.

Finally, without any support for its position the government asks that if the motion is granted that all time be excluded for purposes of the Speedy Trial Act. With no case cite or statutory authority the government asks for exclusion of any delay. Without specific findings, this court is constrained from excluding any delay from the computation of the 70 day rule.

Porchay requests that this Court deny this motion for continuance.

Respectfully submitted,

/S/ Larry E. Jarrett
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972.496.6394 facsimile
J_man_86@msn.com
Texas Bar No. 10583500

CERTIFICATE OF SERVICE

I, Larry E. Jarrett, hereby certify that on December 5, 2008, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which shall send notification of such filing to opposing counsel.

/S/ Larry E. Jarrett
LARRY E. JARRETT
Attorney at Law
SBN: 10583500

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

UNITED STATES §
OF AMERICA §
v. § No. 4:07-CR-00308-WRW
 §
JACKIE PORCHAY §

**MOTION TO DISMISS FOR
LACK OF SPEEDY TRIAL**

During the trial of this matter which commenced on November 18, 2008, this court learned that Porchay has been under some court ordered supervision for in excess of two and one-half years. Presently, Porchay has been under some court ordered supervision for in excess of three years. The government has for the past three years had the opportunity to prepare its best case against Porchay and co-defendant Major Yolanda Summons. As the court is aware, a federal jury completely exonerated Major Summons, and found Porchay not guilty on one count. The jury was hung on the remaining counts.

On December 1, 2008, this court ordered the government and Porchay back to court for a re-trial on the remaining counts on December 9, 2008. The government filed its motion for continuance on Wednesday, December 3, 2008. Said Motion was rejected by the Clerk of the Court on December 4, 2008, for failure to comply with Local Rule 7.2(b). The

government re-filed the same motion on December 5, 2008, stating that there was no time to comply with Local Rule 7.2(b). On December 5, 2008, Porchay was contacted by the Court asking whether Porchay objected to the government's motion. Counsel for Porchay indicated that he did object to the Motion for Continuance, and Porchay was ordered to respond in writing December 5, 2008.

In the government's motion it states:

1. "It is physically impossible for the United States to be ready for trial" on December 9, 2008.
2. Because a large number of witnesses are required, some witnesses are located out of state, and others would be compelled to attend.
3. The parties do not have the trial transcript.
4. Finally, the government requests that time be excluded for purposes of the Speedy Trial Act.

On December 8, 2008 this Court granted the government's Motion for Continuance, stating, "According to the Prosecution's motion, essential witnesses, who are incarcerated in the Bureau of Prisons, cannot be made available by the trial date because the U.S. Marshal requires three weeks to produce incarcerated witnesses . . . Any delay commencing the trial of this case occasioned by this continuance will be excludable under the provision of the Speedy Trial Act, as provided by **18 U.S.C. § 3161(h)(3)(A)**. (Emphasis [sic] added).

At no time did the government assert that any witness was essential. The court made this determination without any fact being discussed during any proceeding. Indeed there was no assertion by the government that any federal prisoner that testified during the trial had been returned to his permanent facility. As of this writing the government has not requested any trial testimony except that of co-defendant Yolanda Summons, who was acquitted.

Porchay assert that none of the reasons propounded by the government deserve any weight whatsoever. Porchay only asks how long must she be held hostage by the government for matters beyond her control. This case has been pending since March 2006. Porchay was added as a defendant during the summer of 2006. As the court is aware, Porchay did not put on a case. Therefore, one would only ask why would the government need a transcript of their witnesses' testimony. With respect to out of state witnesses, to Porchay's recollection there were only four Texas witnesses that would be required to testify and two of the four are law enforcement personnel. The Washington State witnesses would no longer be required since their testimony was offered to support the court involving Major Summons. Porchay directs the court to the fact that the court gave the government every opportunity to develop its best case and the jury just did not accept the facts as presented by the government.

BRIEF IN SUPPORT

18 U.S.C. Section 3161(c)(1) provides, in any case in which a plea of not guilty is entered, the trial of a defendant charged in an information or indictment with the commission of an offense shall commence within seventy days from the filing date (and making public) of the information or indictment, or from the date the defendant has appeared before a judicial officer of the court in which such charge is pending, whichever date last occurs.

The Speedy Trial Act does not define “essential witness.” The Senate Judiciary Committee report accompanying the bill that became the Speedy Trial Act defined “essential witness” as “a witness so essential to the proceeding that continuation without the witness would either be impossible or would likely result in a miscarriage of justice.” S.Rep. No. 1021, 93rd Cong., 2d Sess. 37 (1984), U.S.Code Cong. & Admin.News 1974, p. 7401.

Pursuant to 18 U.S.C. § 3161(h)(3)(A), “[a]ny period of delay resulting from the absence or unavailability of the defendant or an essential witness” is excludable from the seventy-day speedy trial requirement. *Id.*; see *United Spates [sic] v. Barragan*, 793 F.2d 1255, 1258 (11th Cir. 1986). An essential witness is considered *absent* whenever his or her “whereabouts are unknown and, in addition, . . . cannot be determined by due diligence.” 18 U.S.C. § 3161(h)(3)(B). An essential witness is considered *unavailable* whenever his or her “whereabouts are

known but his [or her] presence for trial cannot be obtained by due diligence. . . .” *Id.*; *Barragan*, 793 F.2d at 1258.

It has been held that a district court must give careful consideration to all of the factors enumerated by Congress and clearly articulate how each is affected by the facts of the case and how each weighs into the court’s determination. *United States v. Taylor*, 487 U.S. 326, 336-37, 108 S.Ct. 2413, 2419-20, 101 L.Ed.2d 297 (1988). When reviewing dismissal for a violation of the Act, we have said that “[a]n abuse of discretion occurs when a relevant factor that should have been given significant weight is not considered, when an irrelevant or improper factor is considered and given significant weight, or when all proper and no improper factors are considered, but the court in weighing those factors commits a clear error of judgment.” *Kramer*, 827 F.2d at 1179. The reviewing court’s role is not to substitute its judgment for that of the trial court, but to ensure that the purposes of the Act are given effect. *Taylor*, 487 U.S. at 336, 108 S.Ct. at 2419. To this end, “[f]actual findings by a district court are, of course, entitled to substantial deference and will be reversed only for clear error.” *Id.* at 337, 108 S.Ct. at 2419-20. Thus, “when the statutory factors are properly considered, and supporting factual findings are not clearly in error, the district court’s judgment of how opposing considerations balance should not lightly be disturbed.” *Id.* We consider in turn each factor of 18 U.S.C. § 3162 in relation to the district court’s dismissal of the first

indictment. In the present case there has been no finding of any fact alleged by the government. Indeed the government does not even allege that any witness is an essential witness.

CONCLUSION

Since the government failed to identify any essential witness and this court failed to make a factual determination of whether any witness was essential over Porchay's objections, this case must be dismissed.

WHEREFORE, premises considered, Porchay moves this Court to return all personal property to her.

Respectfully submitted,

/S/ Larry E. Jarrett

LARRY E. JARRETT

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J_man_86@msn.com

Texas Bar No. 10583500

CERTIFICATE OF SERVICE

I, Larry E. Jarrett, hereby certify that on April 26, 2009, a copy of the foregoing motion was electronically generated and forwarded to the government counsel in this case.

/s/ Larry E. Jarrett
Larry E. Jarrett

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

UNITED STATES §
OF AMERICA §
v. § No. 4:07-CR-00308-WRW
 §
JACKIE PORCHAY §

ORDER

Came on April ___, 2009, the Defendant's Motion To Dismiss, and the Court finding that the Motion is meritorious, the Court grants the Defendant's Motion To Dismiss.

SO ORDERED: _____

UNITED STATES DISTRICT
COURT JUDGE

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

UNITED STATES)
OF AMERICA)
v.) No. 4:07CR00308 WRW
)
JACKIE PORCHAY)

**UNITED STATES' RESPONSE IN OPPOSITION
TO PORCHAY'S MOTION TO DISMISS**

The first trial in this matter began on November 18, 2008 and concluded on November 26, 2008 when the jury returned their verdicts. On December 1, a mistrial was declared and the trial was reset for December 9, 2008. The United States moved for a continuance on December 3, 2008 and Porchay opposed the motion on December 5, 2008. On December 9, 2008, the district court granted the continuance motion.

Porchay now contends that the indictment should be dismissed primarily on the grounds that the United States did not specifically assert in its continuance motion that "essential witnesses" were unavailable at the re-trial which was scheduled on December 9, 2008, and that no findings of fact were made by the court. In its continuance motion, the United States alleged among other things that it would be physically impossible for the trial to occur because of the number and location of witnesses and that some witnesses would be compelled to testify.

While the motion did not use the precise words of the statute, it is clear that the basis of the motion was grounded on the large number of witnesses and their unavailability of witnesses, including two witnesses, Fred Coleman and Dondrick James, who were housed at FCI Forrest City, Arkansas. The court was aware of their circumstances as writs had been requested of the court to secure their attendance at the trial and the district court had heard their testimony during the trial. "Essential witness" is not defined in the Speedy Trial Act itself. However, the Senate Judiciary Committee report accompanying the bill which became the Act defined "essential witness" as a "witness so essential to the proceeding that continuation without the witness would either be impossible or would likely result in the miscarriage of justice." See *United States v. Eagle Hawk*, 815 F.2d 1213, 1218 (8th Cir. 1987). Both now and at the time of the filing of the motion for continuance the government has and had a good faith belief that it would use the testimony of a large number of witnesses including out of state witnesses and witnesses incarcerated at the Forrest City FCI at trial, those witnesses may be deemed "essential" for purposes of the Speedy Trial Act. See *Id.* It is obvious from the content of the motion that the government conveyed the concept that the testimony of these witnesses was material and therefore essential. Moreover, the district court was aware of the policy of the United States Marshal requiring three weeks advance notice to transport incarcerated witnesses for trial. Thus, the court correctly determined that witnesses were essential

and unavailable. While the Speedy Trial Act requires findings to be made where a continuance is granted if the delay serves the interests of justice, there is no similar requirement where the court grants a continuance due to the unavailability of an essential witness under Title 18, United States Code, Section 3161(h)(3). See *United States v. Carillo*, 230 F.3d 1364, 2000 WL 1341531, *2 (C.A.8 (Mo.)) citing *United States v. Hohn*, 8 F.3d 1301, 1305 (8th Cir. 1993).

THEREFORE, for the foregoing reasons and citations to authority, the United States respectfully requests that the motion to dismiss be denied.

Respectfully submitted,

JANE W. DUKE
UNITED STATES ATTORNEY

/s/ Angela S. Jegley
By: ANGELA S. JEGLEY
Bar No. 79100
Assistant U.S. Attorney
P.O. Box 1229
Little Rock, AR 72203
501-340-2600
Angela.Jegley@usdoj.gov

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Response was filed by the district court's electronic filing system and same will forward a copy to the

defendant's attorney of record, on this 30th day of
April, 2009.

/s/ Angela S. Jegley
ANGELA S. JEGLEY

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

UNITED STATES §
OF AMERICA §
v. § No. 4:07-CR-00308-WRW
 §
JACKIE PORCHAY §

**PORCHAY'S REPLY TO GOVERNMENT'S
RESPONSE TO PORCHAY'S MOTION TO
DISMISS FOR LACK OF SPEEDY TRIAL**

On April 30, 2009, the United States filed its response to Porchay's Motion to Dismiss for Lack of Speedy Trial. The Government stated:

1. That it would be physically impossible for the trial to occur because of the number and location of witnesses and that some witnesses would be compelled to testify.
2. It is clear that the basis of the motion was grounded on the large number of witnesses and their unavailability of witnesses, including two witnesses, Fred Coleman and Dondrick James, who were housed at FCI Forrest City, Arkansas.
3. Both now and at the time of the filing of the motion for continuance the government has and had a good faith belief that it would use the testimony of a large number of witnesses including out of state witnesses and witnesses incarcerated at the Forrest City FCI.

4. That those witnesses may be deemed “essential” for purposes of the Speedy Trial Act.
5. It is obvious from the content of the motion that the government conveyed the concept that the testimony of these witnesses was material and therefore essential.
6. Moreover, the district court was aware of the policy of the United States Marshal requiring three weeks advance notice to transport incarcerated witnesses for trial.

Porchay will address each of these factors individually. First, there is absolutely no showing by the government what witnesses would be called at a retrial. As Porchay stated in her motion many of the witnesses called during the trial would not be necessary since a co-defendant was acquitted and Porchay was acquitted of Count 6. So how can the court know who would be an essential witness and who would not? The government was required to present to the court who would be called, designate who would be essential, and the court would be required to make a finding of fact that the witness was essential.

Second, in Porchay’s Motion to Dismiss she alludes to the fact that “there was no assertion by the government that any federal prisoner that testified during the trial had been returned to his permanent facility.” And, they still have not made that disclosure. If the prisoners have NOT been returned, and have been in the Little Rock area since the trial that would be very disingenuous on the part of the government, and the court would have to make a factual

determination whether the putative witness is located in a federal institution or not.

Third,/Fourth as to the large number of witnesses the government had a good faith belief that it would use the testimony of these witnesses “may be deemed ‘essential’ for purposes of the Speedy Trial Act”, is wrong. There has to be some statement as to who these witnesses are, the substance of their testimony and a finding by the court on some level that the witness is essential. It does not matter that the court sat through the testimony. What matters is the Court ordered acquittals, after a jury verdict, in the case of Major Summons, and Porchay, so the witnesses who testified as to those counts were no longer needed. Therefore, what other witnesses are left? The Court was required to make a finding of fact after a representation by the government as to who the witnesses would be.

Fifth, it is obvious from the content of the motion that the government conveyed the concept that the testimony of these witnesses was material and therefore essential. This statement defies belief.

Sixth, the district court was not aware of the Bureau of Prisons policy requiring three weeks notice to transfer a prisoner. The words of the Court in its order, “According to the Prosecution’s motion, essential witnesses, who are incarcerated in the Bureau of Prisons, cannot be made available by the trial date because the U.S. Marshal requires three weeks to produce incarcerated witnesses.” The clear wording in

the Court's order demonstrates that the Court made a finding of fact, without a hearing, without evidence, in total reliance of the representations of the government. How can the court make a determination of what is required by the Bureau of Prisons without a hearing, affidavit or any objective fact that what was being represented is fact?

Rule 12(d) states: "Ruling on a Motion. The Court **MUST** decide **EVERY** pretrial motion before trial unless it finds good cause to defer a ruling. The court **MUST** not defer ruling on a pretrial motion if the deferral will adversely affect a party's right to appeal. **WHEN FACTUAL ISSUES ARE INVOLVED IN DECIDING A MOTION, THE COURT MUST STATE ITS ESSENTIAL FINDINGS ON THE RECORD.** (Emphasis added).

A finding of fact was necessary to determine whether on December 3, 2009 the two prisoners had in fact been returned to their permanent facility as well as many other issues presented by the government's motion. It is not enough for the Court to conclude from the content of the motion that the government conveyed the concept that the testimony of these witnesses was material and therefore essential.

In the government's motion it states:

1. "It is physically impossible for the United States to be ready for trial" on December 9, 2008.

2. Because a large number of witnesses are required, some witnesses are located out of state, and others would be compelled to attend.

3. The parties do not have the trial transcript.

4. Finally, the government requests that time be excluded for purposes of the Speedy Trial Act.

On December 8, 2008 this Court granted the government's Motion for Continuance, stating, "According to the Prosecution's motion, essential witnesses, who are incarcerated in the Bureau of Prisons, cannot be made available by the trial date because the U.S. Marshal requires three weeks to produce incarcerated witnesses . . . Any delay commencing the trial of this case occasioned by this continuance will be excludable under the provision of the Speedy Trial Act, as provided by **18 U.S.C. § 3161(h)(3)(A)**. (Emphasis [sic] added).

At no time did the government assert that any witness was essential. The court made this determination without any fact being discussed during any proceeding. Indeed there was no assertion by the government that any federal prisoner that testified during the trial had been returned to his permanent facility. As of this writing the government has not requested any trial testimony except that of co-defendant Yolanda Summons, who was acquitted.

Porchay assert that none of the reasons pro-pounded by the government deserve any weight whatsoever. Porchay only asks how long must she be

held hostage by the government for matters beyond her control. This case has been pending since March 2006. Porchay was added as a defendant during the summer of 2006. As the court is aware, Porchay did not put on a case. Therefore, one would only ask why would the government need a transcript of their witnesses' testimony. With respect to out of state witnesses, to Porchay's recollection there were only four Texas witnesses that would be required to testify and two of the four are law enforcement personnel. The Washington State witnesses would no longer be required since their testimony was offered to support the court involving Major Summons. Porchay directs the court to the fact that the court gave the government every opportunity to develop its best case and the jury just did not accept the facts as presented by the government.

The government stated that it had not reviewed the transcripts on December 3, 2009. To date, the government has not even requested the transcripts.

BRIEF IN SUPPORT

18 U.S.C. Section 3161(c)(1) provides, in any case in which a plea of not guilty is entered, the trial of a defendant charged in an information or indictment with the commission of an offense shall commence within seventy days from the filing date (and making public) of the information or indictment, or from the date the defendant has appeared before a judicial

officer of the court in which such charge is pending, whichever date last occurs.

The Speedy Trial Act does not define “essential witness.” The Senate Judiciary Committee report accompanying the bill that became the Speedy Trial Act defined “essential witness” as “a witness so essential to the proceeding that continuation without the witness would either be impossible or would likely result in a miscarriage of justice.” S.Rep. No. 1021, 93rd Cong., 2d Sess. 37 (1984), U.S.CodeCong. & Admin.News 1974, p. 7401.

Pursuant to 18 U.S.C. § 3161(h)(3)(A), “[a]ny period of delay resulting from the absence or unavailability of the defendant or an essential witness” is excludable from the seventy-day speedy trial requirement. *Id.*; see *United Spates [sic] v. Barragan*, 793 F.2d 1255, 1258 (11th Cir. 1986). An essential witness is considered *absent* whenever his or her “whereabouts are unknown and, in addition, . . . cannot be determined by due diligence.” 18 U.S.C. § 3161(h)(3)(B). An essential witness is considered *unavailable* whenever his or her “whereabouts are known but his [or her] presence for trial cannot be obtained by due diligence. . . .” *Id.*; *Barragan*, 793 F.2d at 1258.

It has been held that a district court must give careful consideration to all of the factors enumerated by Congress and clearly articulate how each is affected by the facts of the case and how each weighs into the court’s determination. *United States v. Taylor*, 487

U.S. 326, 336-37, 108 S.Ct. 2413, 2419-20, 101 L.Ed.2d 297 (1988). When reviewing dismissal for a violation of the Act, we have said that “[a]n abuse of discretion occurs when a relevant factor that should have been given significant weight is not considered, when an irrelevant or improper factor is considered and given significant weight, or when all proper and no improper factors are considered, but the court in weighing those factors commits a clear error of judgment.” *Kramer*, 827 F.2d at 1179. The reviewing court’s role is not to substitute its judgment for that of the trial court, but to ensure that the purposes of the Act are given effect. *Taylor*, 487 U.S. at 336, 108 S.Ct. at 2419. To this end, “[f]actual findings by a district court are, of course, entitled to substantial deference and will be reversed only for clear error.” *Id.* at 337, 108 S.Ct. at 2419-20. Thus, “when the statutory factors are properly considered, and supporting factual findings are not clearly in error, the district court’s judgment of how opposing considerations balance should not lightly be disturbed.” *Id.* We consider in turn each factor of 18 U.S.C. § 3162 in relation to the district court’s dismissal of the first indictment. In the present case there has been no finding of any fact alleged by the government. Indeed the government does not even allege that any witness is an essential witness.

CONCLUSION

Since the government failed to identify any essential witness and this court failed to make a

factual determination of whether any witness was essential over Porchay's objections, this case must be dismissed.

WHEREFORE, premises considered, Porchay moves this Court to return all personal property to her.

Respectfully submitted,

/S/ Larry E. Jarrett
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J_man_86@msn.com
Texas Bar No. 10583500

CERTIFICATE OF SERVICE

I, Larry E. Jarrett, hereby certify that on April 30, 2009, a copy of the foregoing motion was electronically generated and forwarded to the government counsel in this case.

/S/ Larry E. Jarrett
Larry E. Jarrett
