

**IN THE UNITED STATES DISTRICT COURT  
DISTRICT OF GUAM**

**UNITED STATES OF AMERICA,**

Plaintiff,

vs.

**HENRY PANGILINAN FRESNOZA,**

Defendant.

Criminal Case No. 10-00028

**ORDER AND OPINION RE:  
MOTION TO DISMISS**

1           Before the court is a Motion to Dismiss Pursuant to 18 U.S.C. § 3162(a)(2) (“the  
2 Motion”) filed by Defendant Henry Pangilinan Fresnoza (“Fresnoza”) on September 12, 2011.  
3 *See* ECF No. 149. Fresnoza moves to dismiss the indictment because of an alleged violation of  
4 the Speedy Trial Act. After hearing from the parties and reviewing the relevant case law and  
5 statutes, the court hereby **DENIES** the Motion for the reasons set forth herein.

6           **I. RELEVANT PROCEDURAL BACKGROUND**

7           On May 12, 2010, the grand jury returned an Indictment that charged Gina Fresnoza  
8 Medina (“Medina”), Rodean Villa (“Villa”), and Fresnoza with Conspiracy to Distribute  
9 Methamphetamine Hydrochloride, Conspiracy to Import Methamphetamine Hydrochloride,  
10 Importation of Methamphetamine Hydrochloride,<sup>1</sup> Possession of Methamphetamine  
11 Hydrochloride with Intent to Distribute, and Money Laundering. *See* Indictment, ECF No. 1.  
12 On May 18, 2010, Fresnoza made his initial appearance on the Indictment. *See* ECF No. 16.

13           On November 12, 2010, Medina pleaded guilty to one count of Conspiracy to Distribute

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<sup>1</sup> The two counts of importation only pertain to Villa and Medina, and not to Fresnoza. *See* ECF No. 1 at 2.

1 Methamphetamine Hydrochloride, one count of Conspiracy to Import Methamphetamine  
2 Hydrochloride, and one count of Money Laundering. *See* ECF Nos. 78, 82. Then, on January 6,  
3 2011, Villa pleaded guilty to one count on Conspiracy to Distribute Methamphetamine  
4 Hydrochloride and one count of Money Laundering. *See* ECF Nos. 90, 92. These plea changes  
5 left Fresnoza as the lone defendant proceeding to trial.

6 On June 1, 2011, the Grand Jury returned a Superseding Indictment that charged  
7 Fresnoza with Conspiracy to Distribute Methamphetamine Hydrochloride, Conspiracy to Import  
8 Methamphetamine Hydrochloride, Possession of Methamphetamine Hydrochloride with Intent to  
9 Distribute, and nine counts of Money Laundering. *See* Superseding Indictment, ECF No. 121.

10 On September 12, 2011, Fresnoza filed the instant Motion to Dismiss Pursuant to 18  
11 U.S.C. § 3161(a)(2). ECF No. 149. The Government filed its opposition to the Motion on  
12 September 15, 2011. ECF No. 151. Fresnoza filed his reply on September 26, 2011. ECF No.  
13 155.

## 14 **II. DISCUSSION**

15 Fresnoza moves to dismiss the Superseding Indictment for violation of the Speedy Trial  
16 Act. *See* Def.'s Motion to Dismiss, ECF No. 149. Under the Speedy Trial Act, a defendant must  
17 "be tried within 70 days of the latest of either the filing of an indictment or information, or the  
18 first appearance before a judge or magistrate." *Henderson v. United States*, 476 U.S. 321, 322  
19 (1986); 18 U.S.C. § 3161(c)(1). If a trial does not begin within 70 non-excludable days, "the  
20 defendant may move, before the start of trial or the entry of a guilty plea, to dismiss the charges,  
21 and if a meritorious and timely motion to dismiss is filed, the district court must dismiss the  
22 charges, though it may choose whether to dismiss with or without prejudice."<sup>2</sup> *See Zedner v.*  
23 *United States*, 547 U.S. 489, 499 (2006). The defendant has the burden of proving that more

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<sup>2</sup> In determining whether to dismiss with or without prejudice, the court must consider, among other factors, "the seriousness of the offense; the facts and circumstances of the case which led to the dismissal; and the impact of a reprosecution on the administration of [the Speedy Trial Act] and on the administration of justice." § 3162(a)(2).

1 than seventy non-excludable days have lapsed. *See* 18 U.S.C. § 3162(a)(2).

2 Fresnoza argues that 147 to 178 non-excludable days have passed in violation of the  
3 Speedy Trial Act. ECF Nos. 149 at 2, 155 at 4. The Government opposes the Motion and  
4 contends that only 46 days have run. ECF No. 151. The court agrees with the Government and  
5 finds that only 46 days have run on the Speedy Trial clock.

6 **A. SUMMARY OF COMPUTATION**

7 The Speedy Trial Act clock began to run on May 19, 2010, the day after Fresnoza made  
8 his initial appearance. *See* 18 U.S.C. § 3161(c)(1). Based on this starting date, the court  
9 computes the number of days that have lapsed as follows:

<b>DATES</b>	<b>JUSTIFICATION(S) FOR EXCLUSION</b>	<b>DAYS LAPSED</b>	<b>TOTAL DAYS LAPSED</b>
May 19, 2010	Non-excludable delay	1	<b>1</b>
May 20, 2010 to May 21, 2010	§ 3161(h)(1)(D)	0	<b>1</b>
May 22, 2010 to May 26, 2010	Non-excludable delay	5	<b>6</b>
May 27, 2010 to June 2, 2010	§ 3161(h)(1)(D)	0	<b>6</b>
June 3, 2010 to July 12, 2010	Non-excludable delay	40	<b>46</b>
July 13, 2010 to Today	§ 3161(h)(1)(D), (h)(7)(A)	0	<b>46</b>

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19 Thus, after accounting for the applicable exclusions, there are 24 days remaining on the Speedy  
20 Trial clock.

21 **B. JUSTIFICATION FOR EXCLUSIONS**

22 The periods of delay that are excluded from Speedy Trial Act computations are set forth  
23 in 18 U.S.C. § 3161(h). As applicable here, the Act excludes “delay resulting from any pretrial  
24 motion, from the filing of the motion through the conclusion of the hearing on, or other prompt  
25 disposition of, such motion,” as well as “delay resulting from a continuance . . . if the judge  
26 granted such continuance on the basis of his findings that the ends of justice served by taking  
27 such action outweigh the best interest of the public and the defendant in a speedy trial.” §

1 3161(h)(1)(D), (h)(7)(A). In regard to the latter, it is well held in the Ninth Circuit that  
2 “[s]imultaneous [‘ends of justice’] findings [are] unnecessary so long as the trial court later  
3 shows that the delay was motivated by proper considerations.”<sup>3</sup> *United States v. Hickey*, 580  
4 F.3d 922, 928 (9th Cir. 2009) (quoting *United States v. Ramirez-Cortez*, 213 F.3d 1149, 1154  
5 (9th Cir. 2004)) (internal quotation marks omitted) (second and third alterations in original).

6 In multiple-defendant cases where there has been no motion for severance granted, “an  
7 exclusion to one defendant applies to all co-defendants.” *United States v. Butz*, 982 F.2d 1378,  
8 1381 (9th Cir. 1993) (construing 18 U.S.C. § 3161(h)(6)). Thus, Medina and Villa’s excludable  
9 delay, that occurred prior to their respective pleas of guilty, is also excluded from Fresnoza’s  
10 Speedy Trial clock computations.

11 With these guiding principles in mind, the court finds that the following periods of delay  
12 are excludable:

- 13 • **May 19, 2010** is non-excludable delay—**ONE day lapsed**.
- 14 • **May 20, 2010 to May 21, 2010 is excluded** based on Medina’s Motion to  
15 Withdraw as Attorney (ECF No. 22), and through its disposition (ECF No. 23).  
16 See § 3161(h)(1)(D). The magistrate court relieved Mr. G. Patrick Civile as  
17 counsel for Medina and appointed Ms. Cynthia Ecube. See ECF No. 23.
- 18 • **May 22, 2010 to May 26, 2010** is non-excludable delay—**FIVE days lapsed**.
- 19 • **May 27, 2010 to June 2, 2010 is excluded** based on Villa’s first Motion to

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<sup>3</sup> At the hearing on the Motion, Fresnoza argued that this rule was abrogated by *Zedner* and *United States v. Bloate*. The court disagrees.

In *Zedner*, the Supreme Court held that a district court could not cure its failure to make “ends of justice” findings on the record by supplying its findings on remand. See *Zedner*, 547 U.S. at 506, 509. The court went on to explain that the “ends of justice” findings “must be put on the record by the time a district court rules on a defendant’s motion to dismiss under § 3162(a)(2).” *Id.* at 507. Thus, while rejecting the argument that “ends of justice” findings could be made on remand, the court did not hold that “ends of justice” findings must be made contemporaneously. See *id.*

In *Bloate*, the Supreme Court held that delay resulting from a continuance to allow a defendant to prepare pretrial motions was not automatically excluded under §3161(h)(1)(D), but that it could be excluded under § 3161(h)(7) if the court made the appropriate “ends of justice” findings. See *Bloate*, 559 U.S. \_\_, \_\_, 130 S. Ct. 1345, 1352 (2010). Again, the court did not hold that such findings must be made contemporaneously, only that such findings must be in the record. *Id.* at 1357–58.

The court finds that neither *Zedner* nor *Bloate* held that “ends of justice” findings must be made contemporaneously. Accordingly, the Ninth Circuit rule remains good law.

1 Appoint Court-Appointed Counsel (ECF No. 24), and through its disposition  
2 (ECF No. 30). *See* § 3161(h)(1)(D). The magistrate court granted the motion and  
3 permitted retained counsel, Ms. Leilani Lujan, to withdraw; Mr. Danilo Aguilar  
4 was appointed as Villa’s second counsel. *See* ECF No. 30.  
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- 6 • **May 28, 2010 is excluded** based on Fresnoza’s first Motion to Withdraw as  
7 Attorney (ECF No. 26), and through its disposition (ECF No. 28). *See* §  
8 3161(h)(1)(D). Mr. William Gavras moved to withdraw because he could not  
9 represent Fresnoza effectively at trial due to his poor health. *See* ECF No. 26 ¶¶  
10 2, 3. The magistrate court granted the motion and appointed Mr. Curtis Van de  
11 Veld as Fresnoza’s second counsel. ECF No. 28.
- 12 • **July 13, 2010 is excluded** because it was the date of the Pretrial Conference. *See*  
13 § 3161(h)(1).<sup>4</sup>
- 14 • **July 13, 2010 to August 2, 2010 is excluded** under “ends of justice” exception.  
15 *See* § 3161(h)(7)(A).<sup>5</sup>

16 At the Pretrial Conference on July 13, Medina and Fresnoza requested a continuance to  
17 review voluminous discovery, and argued that the ends of justice served by the continuance  
18 outweighed the right to a speedy trial. *See* Pretrial Conference at 9:41 to 9:44 (July 13, 2011).  
19 The court also indicated that due to extraordinary circumstances Villa would need a new  
20 attorney<sup>6</sup> and that the court could not proceed to trial until new counsel was appointed and had  
21 the necessary time to effectively prepare for trial. *See id.* at 9:41, 9:45. Fresnoza agreed that it

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<sup>4</sup> Section 3161(h)(1)(D) excludes “any periods of delay resulting from other proceedings concerning the defendant, including but not limited to” the listed proceedings. § 3161(h)(1).

<sup>5</sup> Section 3161(h)(7)(A) excludes:

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

§ 3161(h)(7)(A).

<sup>6</sup> Villa’s counsel, Danilo Aguilar, was the subject of a money laundering investigation and was unable to proceed as counsel. *See United States v. Aguilar*, Crim. Case. No. 10-00053 (D. Guam).

1 was in his interest to continue the trial to give Villa's new counsel time to get up to speed with  
2 the evidence and prepare for trial. *Id.* at 9:43.

3 The court continued the trial based on the request of the parties and the circumstances  
4 regarding Villa's counsel, and set the matter for a status hearing on August 2, 2010. *Id.* at 9:45;  
5 ECF No. 34. Although, the court did not make an express "ends of justice" finding when it  
6 granted the continuance, the record clearly reflects that the court granted the continuance only  
7 after proper consideration of the "ends of justice" factors. *See Hickey*, 580 F.3d at 928.

8 That is, the record reflects that the "the ends of justice served by [granting the  
9 continuance] outweigh[ed] the best interest of the public and the defendant in a speedy trial." §  
10 3161(h)(7)(A). The record further reflects that a failure to grant the continuance would have  
11 resulted in a miscarriage of justice and would have denied counsel for defendants the necessary  
12 time to effectively prepare for trial. *See* § 3161(h)(7)(B)(i), (h)(7)(B)(iv). Accordingly, the  
13 court finds that the delay resulting from this continuance is properly excluded under §  
14 3161(h)(7).

- 15 • **July 16, 2010 to August 24, 2010 is excluded** under "ends of justice" exception.  
16 *See* § 3161(h)(7)(A).  
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18 On July 16, 2010, Villa filed his second Motion to Withdraw as Attorney. ECF No. 32.  
19 That same day, the court relieved Mr. Danilo Aguilar as counsel and appointed Mr. F. Randall  
20 Cunliffe as Villa's third counsel.<sup>7</sup> ECF No. 34. Shortly thereafter, on July 27, 2010, Villa filed  
21 his third Motion to Substitute Attorney. ECF No. 35.

22 On August 2, 2010, the parties appeared before the court for a status hearing and the  
23 court relieved Mr. Cunliffe as counsel. Status Hrg. at 9:59. The court appointed Mr. Thomas  
24 Fisher as Villa's fourth counsel, conditional upon a conflicts check.<sup>8</sup> *Id.* at 10:00. Medina and

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<sup>7</sup> July 16, 2010 would also be excluded from the Speedy Trial clock under § 3161(h)(1)(D).

<sup>8</sup> On August 4, 2010, Mr. Fisher indicated that he had a conflict, and the court appointed Mr. Jehan'Ad Martinez as Villa's fifth counsel. *See* ECF No. 38. The time between July 27, 2010 and August 4, 2010, inclusive, would also be excluded under § 3161(h)(1)(D).

1 Fresnoza again requested that the trial be continued to allow co-counsel for Villa to get up to  
2 speed with the voluminous discovery, and that such a continuance fell under the “ends of justice”  
3 exception. *Id.* at 10:01-10:03.

4 The court granted the continuance and set the matter for a status hearing on August 24,  
5 2010. *Id.* at 10:03-10:04. The court indicated that the Speedy Trial clock would continue to be  
6 tolled until new counsel was appointed for Villa. *Id.* at 10:01. Again, as reflected by the court’s  
7 discussion with the parties, it is clear that the court properly considered the “ends of justice”  
8 factors when it granted the continuance. *See Hickey*, 580 F.3d at 928. The ends of justice  
9 furthered by granting the continuance outweighed the best interests of the public and the  
10 defendant in a speedy trial because it was necessary to prevent a miscarriage of justice and to  
11 give Villa’s counsel time necessary for effective preparation. *See* § 3161(h)(7)(A), (h)(7)(B)(i),  
12 (h)(7)(B)(iv).

13 At the status hearing on August 24, 2010, Villa, through his recently appointed counsel,  
14 Mr. Martinez, indicated that he had briefly reviewed the discovery, but was unable to  
15 substantively review it prior to the status hearing. *See Status Hrg.* at 2:13. Medina and Fresnoza  
16 also indicated that they were still reviewing the voluminous discovery and requested a further  
17 continuance. *See id.* at 2:14-2:15. The parties indicated that a trial in late November or  
18 December would give them the time necessary to effectively prepare for trial. *See id.* at 2:13 to  
19 2:16. The court granted the continuance and indicated that it would issue an amended  
20 scheduling order. *See id.* at 2:16.

21 At the same status hearing, the court clarified that the Speedy Trial clock was previously  
22 tolled from the time that “there was a motion for . . . [Villa] to have another court-appointed  
23 counsel”<sup>9</sup> through August 24. *See id.* at 2:22-2:23. The court stated that the ends of justice  
24 served by the continuance outweighed the interest of defendant and the public in a speedy trial

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<sup>9</sup> Although the court indicated that Villa would need a new attorney at the Pretrial Conference on July 13, 2010, Villa did not file a Motion to Withdraw as Attorney until July 16, 2010.

1 because the delay was needed to find a new attorney for Villa, and for Villa's new attorney to  
2 ascertain how much time he would need to effectively prepare for trial. *See id.* Based on the  
3 court's findings on August 24, 2010, the time between July 16, 2010 to August 24, 2010 is  
4 excluded from the Speedy Trial clock. The record reflects that the delay from the continuance  
5 was necessary to prevent a miscarriage of justice and to give counsel for defendants the time  
6 necessary to effectively prepare for trial. *See* § 3161(h)(7)(B)(i), (h)(7)(B)(iv).

- 7 • **August 24, 2010 to November 15, 2010 is excluded** under "ends of justice"  
8 exception. *See* § 3161(h)(7)(A).

9 On August 24, 2010, the court issued an Amended Trial Scheduling Order. ECF No. 45.  
10 In the order, the court found that the failure to grant a continuance of the trial "would deny  
11 counsel for the defendant[s] . . . the reasonable time necessary for effective preparation, taking  
12 into account the exercise of due diligence." *See id.* at 1 (quoting 18 U.S.C. § 3161(h)(7)(B)(iv)).  
13 Accordingly, the court excluded the time between August 24, 2010 and November 15, 2010,  
14 inclusive, because "the ends of justice served by taking such action outweigh[ed] the best  
15 interest of the public and the defendants in a speedy trial." *See id.* (quoting 18 U.S.C. §  
16 3161(h)(7)(A)).

- 17 • **October 1, 2010 to December 3, 2010** is excluded due to Villa's Motion for  
18 Specific Kyles and Brady Information (ECF No. 46), and through the 30-day time  
19 limit that the court can hold a motion under advisement (ECF No. 75). *See* 18  
20 U.S.C. § 3161(h)(1)(D), (h)(1)(H). The magistrate court heard the motion on  
21 November 3, 2010 and took it under advisement. *See* ECF No. 75. The motion  
22 was under advisement for more than 30 days, and accordingly, the time after the  
23 thirtieth day is not excludable. *See* 18 U.S.C. § 3161(h)(1)(H).<sup>10</sup>
- 24 • **October 1, 2010 to November 3, 2010 is excluded** due to Villa's Motion to  
25 Sever Defendants (ECF No. 47), and through its disposition (ECF No. 75). *See*  
26 18 U.S.C. § 3161(h)(1)(D). On November 3, 2010, the magistrate court heard the  
27 motion and denied it. ECF No. 75.
- 28 • **October 1, 2010 to January 6, 2011 is excluded** due to Villa's Motion *in Limine*  
29 to Exclude Evidence of Prior Convictions and Other Bad Acts and Motion *in*

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<sup>10</sup> Section 3161(h)(1)(H) excludes "delay reasonably attributable to any period, *not to exceed thirty days*, during which any proceeding concerning the defendant is actually under advisement by the court." § 3161(h)(1)(H) (emphasis added).



1 *Limine* to Exclude Prejudicial Imagery (ECF Nos. 48, 49) through the date Villa  
2 entered his pleas of guilty (ECF No. 90). *See* 18 U.S.C. § 3161(h)(1)(D).  
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4 The court set the motions *in limine* for a hearing on December 1, 2010. *See* ECF No.  
5 84. At the hearing, Villa moved to continue the hearing in light of a possible plea agreement.  
6 *See id.* The court granted the motion. *See id.* The pretrial motions to exclude were still pending  
7 at the time Villa entered his guilty pleas, and thus the time from the filing of the motions to his  
8 change of plea hearing is excludable. *See United States v. Gorman*, 314 F.3d 1105, 1115 (9th  
9 Cir. 2002) (holding that the district court properly excluded the period between defendant's filing  
10 of a motion to exclude evidence and the defendant's entering of a guilty plea even though the  
11 court never ruled on the motion).<sup>11</sup>

- 12 • **October 1, 2010 to November 3, 2010 is excluded** due to Villa's Motion to  
13 Disclose Confidential Informants (ECF No. 50), and through its disposition (ECF  
14 No. 75). *See* § 3161(h)(1)(D). The magistrate court heard the motion and denied  
15 it as moot on November 3, 2010. *See* ECF No. 75.
- 16 • **October 1, 2010 to October 5, 2010 is excluded** due to Medina's Motion for  
17 Investigator (ECF No. 51), and through its disposition (ECF No. 55). *See* 18  
18 U.S.C. § 3161(h)(1)(D).
- 19 • **November 1, 2010 to November 3, 2010 is excluded** due to Medina's second  
20 Motion to Withdraw as Counsel (ECF No. 70), and through its disposition (ECF  
21 No. 75). *See* § 3161(h)(1)(D). The magistrate court denied the motion to  
22 withdraw at the hearing on November 3, 2010. ECF No. 75.
- 23 • **November 1, 2010 to November 3, 2010 is excluded** due to Government's  
24 Motion to Continue Hearing (ECF No. 72), and through its disposition (ECF No.  
25 75). *See* § 3161(h)(1)(D). The court denied the motion as moot at the hearing on  
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<sup>11</sup> *See also United States v. Medina*, 524 F.3d 974, 979 (9th Cir. 2008) (“In general, the district court must exclude . . . periods of delay [resulting from a pending pretrial motion that requires a hearing] whether or not the delay was reasonably necessary. *Henderson*, 476 U.S. at 330, 106 S.Ct. 1871; *see also United States v. Clymer*, 25 F.3d 824, 830 (9th Cir. 1994) (‘Where delay in commencing a trial results from the pendency of a motion ... the delay will automatically be excluded from the Speedy Trial Act calculation, no matter how unreasonable or unnecessary that delay might seem.’). Moreover, the district court must exclude time while the motion is pending even if the court ultimately does not hold a hearing or rule on the motion. *See United States v. Gorman*, 314 F.3d 1105, 1115 (9th Cir. 2002) (holding that the district court properly excluded the nearly 10-month period between defendant's filing of a motion to exclude evidence and the defendant's entering of a guilty plea even though the court never ruled on the suppression motion). ‘Congress clearly envisioned that any limitations [on the exclusion of time while the pretrial motion is pending] should be imposed by circuit or district court rules rather than by the statute itself.’ *Henderson*, 476 U.S. at 328, 106 S.Ct. 1871.”).

1 November 3, 2010. ECF No. 75.

- 2 • **November 8, 2010 to November 12, 2010 is excluded** due to Medina's request  
3 for change of plea hearing through the date of the hearing (ECF No. 78). *See* 18  
4 U.S.C. § 3161(h)(1)(D); *United States v. Santiago-Becerril*, 130 F.3d 11, 19–20  
5 (1st Cir. 1997) (excluding period of delay resulting from codefendant's motion  
6 for a change of plea hearing to the date of the hearing).
- 7 • **December 16, 2010 to January 6, 2011 is excluded** due to Villa's request for  
8 change of plea hearing through the date of the hearing (ECF No. 90). *See* 18  
9 U.S.C. § 3161(h)(1)(D); *Santiago-Becerril*, 130 F.3d at 19–20.
- 10 • **December 23, 2010 to January 14, 2011 is excluded** due to Fresnoza's second  
11 Motion to Withdraw as Attorney (ECF No. 87) through its disposition (ECF No.  
12 94). *See* § 3161(h)(1)(D).

13 Fresnoza's second attorney, Mr. Van de Veld, indicated that he discovered a conflict and  
14 could no longer represent Fresnoza.<sup>12</sup> *See* ECF No. 87. The magistrate court granted the motion  
15 and appointed Mr. Gavras as Fresnoza's third counsel on January 14, 2011. *See* ECF No. 94.

- 16 • **January 14, 2011 to January 20, 2011 is excluded** under the "ends of justice"  
17 exception. *See* § 3161(h)(7)(A).

18 Magistrate court made a finding that the delay resulting from continuance was excluded  
19 under "ends of justice" exception to allow Fresnoza's new counsel, Mr. Gavras, time to review  
20 discovery and determine how much time he needed to prepare for trial. *See* ECF No. 94.

- 21 • **January 20, 2011 to February 23, 2011 is excluded** under the "ends of justice"  
22 exception. *See* § 3161(h)(7)(A).

23 At a status hearing on January 20, 2011, Fresnoza requested a 30-day continuance to  
24 effectively prepare for trial. *See* ECF No. 95. The magistrate court granted the motion and  
25 found that the ends of justice served by granting the continuance outweighed the interests of the  
26 public and defendant in a speedy trial and excluded the time between January 20, 2011 and  
27 February 23, 2011, inclusive. *See id.*

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<sup>12</sup> At the hearing on the Motion to Dismiss on September 30, 2011, Fresnoza argued that Mr. Van de Veld's late discovery of a conflict was unreasonable. However, the court is not persuaded by the argument as the timing of Mr. Van de Veld's conflict discovery does not affect Speedy Trial Act computations.

- 1 • **February 16, 2011<sup>13</sup> to February 28, 2011 is excluded** under the “ends of  
2 justice” exception. *See* § 3161(h)(7)(A).  
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4 At the Pretrial Conference on February 16, 2011, the court pointed out that neither of the  
5 parties had filed trial documents, and questioned the parties as to whether they were ready to go  
6 to trial. *See* PTC at 2:26-2:29. The parties indicated that the Government offered Fresnoza the  
7 option of taking a polygraph examination. *See id.* at 2:27-2:30. The Government explained that  
8 if Fresnoza passed the polygraph examination, the charges against him would be dismissed. *Id.*  
9 at 2:28. And, if the polygraph examination indicated that Fresnoza was distributing less than  
10 five grams of ice, the Government would offer him a plea agreement based on that lesser  
11 amount. *Id.* Mr. Gavras also represented to the court that he had been ill, and that he needed  
12 time to discuss the offer with Fresnoza and work out the logistics of the polygraph examination  
13 with the Government. *Id.* at 2:29-2:33. The parties requested a two-week to determine whether  
14 they would proceed with trial or conduct the polygraph examination. The court granted the  
15 continuance and set the matter for a status hearing on February 28, 2011. *Id.* at 2:34–2:35.

16 The delay resulting from the continuance is excludable under the “ends of justice”  
17 exception.<sup>14</sup> The court reiterates that it need not make simultaneous “ends of justice” findings so  
18 long as it later shows that the delay was motivated by proper considerations. *See Hickey*, 580  
19 F.3d 922 at 928. The record reflects that neither party was ready to go to trial because they had  
20 not filed their trial documents. Moreover, Fresnoza was seriously considering the offer to  
21 undergo a polygraph examination, which if passed would have exonerated him and saved the  
22 Government the expense of going to trial.

23 Based on the record developed during the hearing, “the ends of justice served by  
24 [granting the continuance] outweigh[ed] the best interest of the public and the defendant in a  
25 speedy trial.” § 3161(h)(7)(A). Granting the continuance was necessary to prevent a miscarriage

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<sup>13</sup> February 16, 2011, the day of the Pretrial Conference, is also excludable under § 3161(h)(1).

<sup>14</sup> The court misspoke when it excluded the delay from February 16, 2011 to the February 28, 2011 under § 3161(h)(1)(G) as it was not considering a plea agreement. *See* Status Hrg. at 2:36.

1 of justice and to give both the Government and Fresnoza the necessary time for effective  
2 preparation. *See* § 3161(h)(7)(B)(i), (h)(7)(B)(iv).

- 3 • **February 28, 2011 to April 19, 2011 is excluded** under the “ends of justice”  
4 exception. *See* § 3161(h)(7)(A).

5 At the status hearing, the parties indicated that Fresnoza wanted to take the polygraph  
6 examination and requested a continuance of the trial. 2:52–2:53. The court granted the  
7 continuance and found that the time between February 28, 2011 and April 19, 2011 was  
8 excluded under the “ends of justice” exception to allow Fresnoza to take the polygraph  
9 examination.<sup>15</sup> Granting the continuance was necessary to prevent a miscarriage of justice and  
10 give both the Government and Fresnoza the necessary time for effective preparation. *See* §  
11 3161(h)(7)(B)(i), (h)(7)(B)(iv).

12 Fresnoza argues that the court cannot exclude time for plea negotiations from Speedy  
13 Trial clock computations under the “ends of justice” exception. The court agrees with Fresnoza,  
14 as that is the law in the Ninth Circuit. *See United States v. Perez-Reveles*, 715 F.2d 1348, 1353  
15 (9th Cir. 1983) (holding that negotiation of plea bargain is not a permissible “ends of justice”  
16 factor); *United States v. Ramirez-Cortez*, 213 F.3d 1149 (9th Cir. 2000) (following *Perez-*  
17 *Reveles*).

18 However, the continuance to allow Fresnoza to take a polygraph examination was not a  
19 continuance for mere plea negotiations,<sup>16</sup> rather, the continuance is more appropriately  
20 characterized as a continuance to permit the parties to engage in additional discovery. *United*

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<sup>15</sup> The court notes that the minutes for the hearing reflect that the delay from the continuance was excludable under § 3161(h)(1)(G). *See* ECF No. 101. However, during the hearing the court did not cite § 3161(h)(1)(G), and only indicated that the time was excluded under the “ends of justice” exception.

<sup>16</sup> In *Ramirez-Cortez*, the court acknowledged that “there may be good reasons for allowing the need for plea negotiations to factor into the ‘ends of justice’ analysis,” but it felt bound by the circuit precedent holding that plea negotiations could not support an “ends of justice” finding. 213 F.3d at 1156. The court went on to suggest that presented with the right plea negotiation scenario, the *Perez-Reveles* holding could be revisited through the en banc process. *See id.* Thus, even if the delay for the polygraph examination was attributed to plea negotiations, this is precisely a situation that would justify reconsidering *Perez-Reveles* as it is clear that it would have been a miscarriage of justice for the court to deny Fresnoza a continuance to undergo a polygraph examination that could have resulted in his exoneration. *See id.*; 18 U.S.C. § 3161(h)(7)(B)(i).

1 *States v. Benavidez-Benavidez*, 217 F.3d 720, 724 (9th Cir. 2000) (explaining the standard of  
2 admissibility for polygraph evidence). As discussed previously, if Fresnoza passed the  
3 polygraph, he would have been exonerated and the charged against would have been dismissed;  
4 and if the polygraph examination results indicated that Fresnoza was distributing less than five  
5 grams of ice, the Government would have offered him a plea agreement for the lesser amount of  
6 drugs. *See* Status Hrg. at 2:52 to 2:53. *See id.* On the other hand, if Fresnoza failed the  
7 polygraph examination, the parties agreed that the Government could use incriminating  
8 statements made by Fresnoza as evidence at trial. *See* U.S.’s Supp. Trial Memo. at 2, ECF No.  
9 141. Based on the conditions of the polygraph examination, the court finds that the continuation  
10 was granted to allow the parties to conduct additional discovery, and not merely for plea  
11 negotiations.

12 Fresnoza also argues that the length of the continuance for the polygraph examination  
13 was unreasonable. However, at the hearing on February 28, the parties indicated that the length  
14 of the continuance was necessary because the parties needed to arrange for a polygraph examiner  
15 to come to Guam; the polygraph examiner’s superior would need to review the results of the  
16 exam; and if Fresnoza failed the exam, Mr. Gavras would need time to review the results in  
17 preparation for trial. *Id.* at 2:53 to 2:55. Based on the reasons set forth by the parties at the  
18 hearing, the length of the continuance was reasonable. Thus, the time resulting from delay is  
19 properly excluded under the “ends of justice” exception.

- 20 • **April 19, 2011 to April 26, 2011 is excluded** under the “ends of justice”  
21 exception. *See* § 3161(h)(7)(A).

22 On April 19, 2011, the parties appeared before the magistrate court for a status hearing  
23 and indicated that they were still awaiting the final results of the polygraph examination. *See*  
24 Status Hrg. at 2:52–2:53. At the request of the parties, the magistrate court continued the status  
25 hearing to April 26, 2011. *Id.* at 2:55. The magistrate court found that the delay was excluded  
26 from the Speedy Trial clock because the ends of justice served by granting the continuance  
27 outweighed the interests of the public and defendant in a speedy trial in that it was necessary to

1 allow defense counsel time for effective preparation. *See* Status Hrg. at 2:56 (quoting 18 U.S.C.  
2 § 3161(h)(7)(A), (h)(7)(B)(iv)).

- 3 • **April 26, 2011 to June 13, 2011 is excluded** under the “ends of justice”  
4 exception. *See* § 3161(h)(7)(A).

5 At the request of Fresnoza, the court continued the trial and made an “ends of justice”  
6 finding (ECF No. 107). The continuance was necessary to give defense counsel time to  
7 effectively prepare for trial. *See* § 3161(h)(7)(B)(iv).

- 8 • **May 25, 2011 is excluded** due to the Government’s Motion to Continue Trial  
9 (ECF No. 111) through its disposition (ECF No. 112). *See* § 3161(h)(1)(D). The  
10 Government moved to continue the trial from June 13, 2011 to June 16, 2011.  
11 *See* ECF No. 111. The court granted the motion and found that the time from  
12 June 13, 2011 to June 16, 2011, inclusive, was excluded under the “ends of  
13 justice” exception. *See* ECF No. 112.
- 14 • **May 27, 2011 to June 1, 2011 is excluded** due to the Government’s Motion to  
15 Release Grand Jury Transcripts (ECF No. 118) through its disposition (ECF No.  
16 120). *See* 18 U.S.C. § 3161(h)(1)(D).
- 17 • **May 31, 2011 is excluded** as it is the day of Fresnoza’s initial appearance on the  
18 superseding indictment. *See* § 3161(h)(1)(B).
- 19 • **May 31, 2011 to June 6, 2011 is excluded** due to Fresnoza’s Motion to Appoint  
20 New Counsel (ECF No. 124) through its disposition (ECF No. 133). *See* 18  
21 U.S.C. § 3161(h)(1)(D).

22 On June 2, 2011, the magistrate court heard the Motion to Appoint New Counsel. *See*  
23 Hrg. Minutes, ECF No. 127. The magistrate court granted Fresnoza’s motion and relieved Mr.  
24 Gavras as appointed counsel. *Id.* The magistrate court appointed Mr. F. Randall Cunliffe as  
25 Fresnoza’s fourth counsel that same day, and tolled the Speedy Trial clock pending Mr.  
26 Cunliffe’s acceptance of representation. *Id.*

27 On June 3, 2011, Fresnoza appeared for a status hearing before the magistrate court. *See*  
28 Hrg. Minutes, ECF No. 130. The magistrate court indicated that Mr. Cunliffe had yet to accept  
29 representation and continued to toll the Speedy Trial clock until an attorney accepted  
30 representation. *See id.*

31 On June 6, 2011, Fresnoza appeared before the court for another status hearing. *See* Hrg.  
32 Minutes, ECF No. 133. Mr. Cunliffe appeared at this status hearing and accepted representation

1 of Fresnoza. *See id.*

- 2 • **June 6, 2011 to August 30, 2011 is excluded** under the “ends of justice”  
3 exception. *See* § 3161(h)(7)(A).

4 At the June 6 status hearing, Mr. Cunliffe indicated that he had several trials  
5 scheduled in the Superior Court of Guam and requested that trial be scheduled for August so that  
6 he could adequately prepare for trial. *See* ECF No. 133. The magistrate court granted  
7 Fresnoza’s request to continue the trial to August, and excluded the delay from the Speedy Trial  
8 clock based on its finding that the ends of justice served by granting the continuance outweighed  
9 the best interests of the public and the defendant in a speedy trial because it was necessary to  
10 provide Fresnoza’s counsel the time needed to adequately prepare for the trial. *See id.*; 18  
11 U.S.C. § 3161(h)(7)(A)(iv).

12 The court notes that it was difficult to appoint an attorney for Fresnoza because of the  
13 many defendants<sup>17</sup> and witnesses involved in the Medina conspiracy coupled with the small pool  
14 of attorneys on Guam. Mr. Cunliffe was one of the last attorneys available who did not have a  
15 conflict with representation, and thus it was reasonable to consider his local trial schedule when  
16 determining an appropriate date for trial.

- 17 • **August 23, 2011 to September 12, 2011 is excluded** under the “ends of justice”  
18 exception. *See* § 3161(h)(7)(A).<sup>18</sup> The court granted Fresnoza’s oral motion to  
19 continue trial and found that the delay was excludable under the “ends of justice”  
20 exception. *See* 18 U.S.C. § 3161(h)(7)(A)(iv).

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<sup>17</sup> In addition to the three defendants named in this case, there were other co-conspirators who were also charged in this court. *See e.g., United States v. Sotelo*, Crim. Case No. 10-00024 (D. Guam 2010); *United States v. Ladonga*, Crim. Case. No. 10-00042.

<sup>18</sup> After reviewing the delays excluded under the “ends of justice” exception, the court notes that eleven of the twelve continuances were based on the defendants’ motions and their representations to the court that there was voluminous discovery in this case and that the delays were necessary to effectively prepare for trial. While a defendant cannot waive his right to speedy trial, “this does not mean that [he] may deliberately obtain an [“ends of justice”] continuance for [his] own convenience . . . and then later claim that the court abused its discretion in granting the requested continuance” to support a motion to dismiss. *United States v. Gallardo*, 773 F.3d 1496, 1505 (9th Cir. 1985).

The court further notes that there were eight changes in defense counsel—Fresnoza himself has had three changes in counsel—and in light of the amount of discovery, the continuances were necessary to allow new counsel to get up to speed with the case and effectively prepare for trial.

- 1 • **September 12, 2011 to today is excluded** due to Fresnoza's Motion to Dismiss  
2 Pursuant to 18 U.S.C. § 3162(a)(2) (ECF No. 149) through its disposition. *See* §  
3 3161(h)(1)(D).

4 **IV, CONCLUSION**

5 Based on the foregoing, the court finds that only 46 days have run on the Speedy Trial  
6 clock, and correspondingly, that 24 days are remaining on the clock. Thus, Fresnoza has failed  
7 to carry his burden of demonstrating that there has been a violation of the Speedy Trial Act.  
8 Accordingly, the court hereby **DENIES** Fresnoza's Motion to Dismiss Pursuant to 18 U.S.C. §  
9 3161(a)(2).

10 At the hearing, Mr. Cunliffe indicated that he would be off-island through October 17,  
11 2011. The parties agreed that October 25, 2011 would be a reasonable date to begin trial, and  
12 that such delay was necessary to give the parties reasonable time for effective preparation and to  
13 allow Defendant to have continuity of counsel. *See* 18 U.S.C. § 3161(h)(7)(B)(iv).

14 Accordingly, the parties shall appear before the court for a Pretrial Conference on  
15 October 24, 2011 at 9:30 a.m. Trial and jury selection will begin on October 25, 2011 at 9:30  
16 a.m. The court finds that the ends of justice served by the delay between the issuance of this  
17 order and the trial date, October 25, 2011, outweigh the best interests of Defendant and the  
18 public in a speedy trial. Thus, the delay resulting from this continuance is excluded from the  
19 Speedy Trial clock.

20 **SO ORDERED.**



**/s/ Frances M. Tydingco-Gatewood**  
**Chief Judge**  
**Dated: Oct 14, 2011**