

Two). Initial appearances were made by both defendants on October 1, 2003, and at that time their joint trial was set to begin on November 17, 2003. On October 10, a motion was filed on behalf of codefendant Jarrell to substitute counsel, which motion was granted by the magistrate judge on that same day. On October 20, Jarrell's new attorney filed a Motion for Continuance, seeking to continue the trial date on the ground that he had "previously calendered obligations" on that day. (Mot. for Cont. ¶ 4.) On October 22, the magistrate judge entered an order granting the motion and continuing the trial until January 29, 2004, a delay of 120 days from the defendants' initial appearance.

The magistrate judge's order of continuance recited that "the court finds that the ends of justice served by the granting of [the requested] continuance outweigh the best interest of the public and the defendants in a speedy trial. The court makes this finding based in part because a failure to grant such a continuance would deny the movant the continuity of counsel" (Order Oct. 22, 2003.)

On December 30, 2003, Lovell filed a Motion to Dismiss, contending that because his trial had not commenced within seventy days of his initial appearance, the indictment against him must be dismissed.

Under the Speedy Trial Act, a defendant's trial must commence within seventy days from the date of his indictment or his initial appearance before a judicial officer,

whichever date last occurs. 18 U.S.C.A. § 3161(c)(1). However, the Act provides that certain “periods of delay shall be excluded . . . in computing the time within which the trial . . . must commence.” *Id.* § 3161(h). Where the case involves multiple defendants, “time excludable for one defendant is excludable for all defendants.” *United States v. Jarrell*, 147 F.3d 315, 316 (4th Cir. 1998).

Excludable time under the Speedy Trial Act includes continuances granted under certain specified circumstances if there is a judicial finding that “the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial.” 18 U.S.C.A. § 3161(h)(8)(A). One of the permissible grounds for such a continuance is where the failure to grant the continuance “would unreasonably deny the defendant . . . continuity of counsel.” *Id.* § 3161(h)(8)(B)(iv).

Since it is clear from her order that the magistrate judge conducted the necessary balancing test prior to granting the continuance, the delay resulting from the continuance is properly excludable under the Act. *See United States v. Keith*, 42 F.3d 234, 237 (4th Cir. 1994)

The defendant also contends that the delay caused by the continuance was unreasonable as to him. The burden is on the movant to show unreasonableness. *See United States v. Cordova*, 157 F.3d 587, 599 (8th Cir. 1998). I find that no such showing has been made in this case.

A case on point is *United States v. Sarno*, 24 F.3d 618 (4th Cir. 1994). There the defendant Sarno moved for a severance from his codefendant when the codefendant sought a trial continuance because he obtained a new lawyer. Sarno claimed that the continuance prejudiced him because he was losing good-time credit from an existing federal sentence while awaiting trial on the current charge. *Id.* at 622. The court denied the severance and continued the trial, which eventually commenced eighty-one days later. *Id.* On appeal, the Fourth Circuit found no violation of the Speedy Trial Act, holding that the exclusion of the delay based on the codefendant's motion for a continuance was "entirely proper." *Id.*

Lovell claims no specific prejudice because of the continuance in this case other than that he has been incarcerated awaiting trial.¹ Under the circumstances, I do not find that a delay of fifty days beyond the prescribed seventy-day limit is unreasonable.

In his motion, Lovell also claims a violation of his Sixth Amendment right to a speedy trial.² A balancing test is ordinarily applied to such a claim. *See Barker v. Wingo*, 407 U.S. 514, 530-33 (1972). The court must consider (1) the length of the

¹ Lovell was initially held in jail for a state parole violation, but has introduced evidence that the state has now decided not to revoke his parole.

² "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial" U.S. Const. amend. VI.

delay; (2) the reason for the delay; (3) the timeliness of the assertion of the claim; and (4) any prejudice suffered by the defendant as a result of the delay. *See id.* The length-of-delay factor also operates as a threshold requirement, meaning that further analysis is unnecessary if the delay was not “uncommonly long.” *Doggett v. United States*, 505 U.S. 647, 651-52 (1992). Delays are “presumptively prejudicial” as they approach one year. *Id.* at 652 n.1.

I find that there has been no violation of Lovell’s constitutional right to a speedy trial. The time period of 162 days from the filing of the criminal charge against Lovell³ to his scheduled trial date is not presumptively prejudicial. *See, e.g., Knox v. Johnson*, 224 F.3d 470, 477 (5th Cir. 2000) (holding eleven-month delay not presumptively prejudicial because “[a]bsent extreme prejudice or a showing of willfulness by the prosecution to delay the trial in order to hamper the defense, a delay of less than one year is not sufficient to trigger an examination of the *Barker* factors.”) (internal citation omitted); *United States v. Lugo*, 170 F.3d 996, 1002 (10th Cir. 1999) (seven-month delay); *United States v. Patterson*, 140 F.3d 767, 772 (8th Cir. 1998) (five-month delay); *United States v. Derosé*, 74 F.3d 1177, 1184 (11th Cir. 1996) (eight-month delay); *United States v. Hammer*, No. 94-5063, 1994 WL

³ The Sixth Amendment speedy trial right attaches when formal criminal charges are instituted, including the time before indictment. *See United States v. MacDonald*, 456 U.S. 1, 6-7 (1982).

644903, at *2 (4th Cir. Nov. 16, 1994) (unpublished) (seven-month delay); *United States v. Gerald*, 5 F.3d 563, 566 (D.C. Cir. 1993) (eleven-month delay).

Accordingly, no further consideration of the *Barker* factors is required.

For these reasons, the Motion to Dismiss is without merit.

DATED: January 15, 2004

United States District Judge