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17 **IN THE UNITED STATES DISTRICT COURT**  
18 **FOR THE DISTRICT OF ARIZONA**

19 United States of America,  
20  
21 Plaintiff,

22 v.

23 Michael Lacey, et al.,  
24 Defendant.  
25

CR-18-422-PHX-DJH

**UNITED STATES' NOTICE OF  
RETRIAL PURSUANT TO COURT  
ORDER (Doc. 2025)**

26  
27  
28

1     **I.     United States’ Intent to Retry Defendant Michael Lacey**

2             The United States files this notice of intent to retry Defendant Michael Lacey on the  
3 84 counts for which the jury was unable to reach a verdict and requests that the Court set  
4 the case for retrial. On November 16, 2023, the jury found Defendant Lacey guilty of  
5 Count 100 and not guilty of Count 63. For the remaining 84 charges (Counts 1-62, 64-70,  
6 81, 83-84, 86, 88-92, and 94-99), the jury reached no verdict, and the Court declared a  
7 mistrial. (Docs. 1977, 1978, 1992.)

8     **II.    Speedy Trial Act**

9             **a.     Standard**

10            Under the Speedy Trial Act, “[i]f the defendant is to be tried again following a  
11 declaration by the trial judge of a mistrial . . . the trial shall commence within seventy days  
12 from the date the action occasioning the retrial becomes final.” 18 U.S.C. § 3161(e).  
13 Seventy days from the date the Court declared the mistrial (November 16, 2023) is January  
14 25, 2024. The Speedy Trial Act, however, has delineated a number of circumstances where  
15 “periods of delay shall be excluded in computing the time . . . within which the trial of any  
16 such offense must commence.” 18 U.S.C. § 3161(h).

17            In other circuits, filing motions under Rules 29 and 33 serve to exclude time. *See,*  
18 *e.g., In re U.S.*, 565 F.2d 173, 179 (1st Cir. 1977) (“Defendant waived claims that his  
19 constitutional right to a speedy trial and protection against double jeopardy would be  
20 violated by a retrial when he moved for Rule 33 relief.”); *United States v. Gaffney*, 689 F.  
21 Supp. 1578, 1580 (M.D. Fla. 1988) (“[I]n the interest of justice and judicial economy, the  
22 Court waited to reset the trial on the mistried counts until it had resolved the issues raised  
23 by defendant regarding the three counts upon which he had been convicted. Any other  
24 action by the Court would have defied logic. . . . The Court, moreover, finds that the entire  
25 time the motions with respect to jury misconduct were pending is excludable under 18  
26 U.S.C. § 3161(h)(1)(F). While this section applies to pretrial motions, motions filed after  
27 the mistrial was declared can be viewed as pretrial in nature.”)

28            The Ninth Circuit, however, appears to take a stricter view on the question of the

1 time that is excluded after a defendant files motions under Rules 29 or 33. In *United States*  
2 *v. Tertrou*, 742 F.2d 538 (9th Cir. 1984), the district court excluded time after the defendant  
3 filed a Rule 29 motion. The Ninth Circuit, however, held that the “trial court erred in  
4 considering a motion for acquittal under Fed.R.Crim.P. 29 as a pre-trial motion. Rule 29,  
5 by its very terms, indicates that a motion for acquittal must be a post-trial motion. Thus,  
6 only the period that the motion is under advisement is excluded.” *Id.* at 539; *see also*  
7 *United States v. Symington*, 195 F.3d 1080, 1091-92 (9th Cir. 1999). In *Symington*, a  
8 mistrial occurred on September 3, 1997, and on that same day defendant moved for an  
9 extension to file his post-trial motion. *Id.* at 1091. On October 10, 1997, defendant filed  
10 a post-trial motion under Rules 29 and 33. The district court heard oral argument on the  
11 motion on December 1, 1997, and took the matter under advisement until issuing an order  
12 resolving it on January 20, 1998. *Id.* The government argued on appeal that the entire  
13 period from September 3, 1997 (when defendant filed his extension motion) to January 20,  
14 1998 (when the court ruled on defendant’s post-trial motion) should be excluded because  
15 it was a “period of delay resulting from other proceedings concerning the defendant.” *Id.*  
16 (citing 18 U.S.C. § 3161(h)(1)). The *Symington* court ruled that the government’s  
17 argument was foreclosed by the *Tertrou* decision.

18 **b. Speedy Trial Act Has Been Tolled**

19 Despite the *Tertrou* and *Symington* decisions, the Speedy Trial Act has been tolled  
20 for Defendant Lacey for two independent reasons. First, Defendants’ motion to dismiss  
21 (Doc. 1972) has been fully briefed and pending before the Court since Defendants filed  
22 their reply on December 4, 2023. (Doc. 2005.) That excluded, at a minimum, 30 days  
23 from the Speedy Trial Act. 18 U.S.C. § 3161(h)(1)(H) (“delay reasonably attributable to  
24 any period, not to exceed thirty days, during which any proceeding concerning the  
25 defendant is actually under advisement by the court”).

26 Second, the ends of justice will be served by excluding time under the Speedy Trial  
27 Act. 18 U.S.C. § 3161(h)(7)(A). In similarly situated cases, trial courts have found that  
28 the ends of justice support a continuance until either (a) sentencing or (b) after the appeal.

1 *United States v. Sandford*, 293 F. Supp. 3d 370 (W.D.N.Y. 2018); *United States v.*  
2 *Dusenbery*, 246 F. Supp. 2d 802 (N.D. Ohio 2002); *United States v. Mapp*, 945 F. Supp.  
3 43 (E.D.N.Y. 1996); *United States v. Levasseur*, 635 F. Supp. 251 (E.D.N.Y. 1986). All  
4 these cases involved trials where a defendant was convicted on certain counts and a mistrial  
5 was declared as to other counts. For each of these cases, the trial court ruled that “the ends  
6 of justice” would be served by stopping the Speedy Trial clock until after the defendant  
7 was sentenced or the appellate court issued a mandate.

8 *Levasseur* is the “seminal” case in this area. *Sandford*, 293 F. Supp. 3d at 374. In  
9 that case, seven defendants were charged with a variety of counts. The jury reached a  
10 verdict as to some counts but was unable to reach a verdict as to others. After the trial  
11 court imposed sentence as to the counts of conviction and denied the defendants’ motions  
12 to dismiss the mistried counts, the defendants then requested a new trial date. *Levasseur*,  
13 635 F. Supp. at 252. The United States opposed the motion and sought a Speedy Trial Act  
14 exclusion until after the conclusion of the defendants’ appeals on the counts of conviction.  
15 *Id.* The trial court found “the ends of justice [are] served by stopping the Speedy Trial  
16 clock until the mandate of the Court of Appeals is issued.” *Id.* at 255. The *Levasseur* court  
17 noted that “in processing criminal cases mechanical adherence to time limits would not  
18 serve the interests of defendant, the government, the court, or society.” *Id.* at 254. The  
19 benefits to the parties were clear: “If the convictions are reversed, there will have been no  
20 needless complex and protracted second trial which might also result in a reversal based  
21 on the Second Circuit’s decision.” *Id.*

22 In *Mapp*, after the defendant was convicted of three of 11 counts (with the remaining  
23 eight resulting in a mistrial) the United States moved for an “ends of justice” exclusion of  
24 time from the Speedy Trial clock until the sentencing hearing. 945 F. Supp. at 44. The  
25 United States represented that “it would not dismiss the open counts until the Court  
26 sentenced Mapp and the government had an opportunity to review such sentence.” *Id.* The  
27 *Mapp* court cited *Levasseur* and granted the United States’ motion, finding “it may be a  
28 significant waste of judicial resources to retry the open counts prior to Mapp’s sentencing.”

1 *Id.* at 46.

2 The United States intends to retry Defendant Lacey and the Speedy Trial clock has  
3 been tolled under 18 U.S.C. § 3161(h)(1)(H) and 3161(h)(7)(A).

4 Respectfully submitted this 23rd day of January 2024.

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6 GARY M. RESTAINO  
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7  
8 *s/ Andrew C. Stone*

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15 Trial Attorney

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17 **CERTIFICATE OF SERVICE**

18  
19 I hereby certify that on January 23, 2024, I electronically transmitted the attached  
20 document to the Clerk's Office using the CM/ECF System for filing and transmittal of a  
21 Notice of Electronic Filing to the CM/ECF registrants who have entered their appearance  
22 as counsel of record.

23 *s/ Andrew C. Stone*  
24 U.S. Attorney's Office