

IN THE CIRCUIT COURT OF FAULKNER COUNTY, ARKANSAS
THIRD DIVISION

STATE OF ARKANSAS

PLAINTIFF

VS.

CASE NO.: CR-11-1028

RICHARD RALPH CONTE

DEFENDANT

REPLY TO STATE'S MOTION FOR CONTINUANCE OF TRIAL SETTING
AND TOLLING OF TIME

The Defendant, Dr. Richard Conte, by and through his attorney, Jack T. Lassiter, states in support of his reply, that:

1. The defendant asked the Court for release on his own recognizance under Rule 28.1(a), in that nine months have passed since his waiver of extradition on September 28, 2011, excluding the time period resulting from the Court's order for mental evaluation. The State does not dispute that September 28, 2011 is the correct beginning date for the calculation.
2. The State's motion asserts that "necessary and essential counsel has been unable to prepare for trial within nine months due to the complexity of the case, after due diligence by the State. The state has been unable to proceed without the presence of Mr. Braswell." For the reasons that follow, the nature of the case and solitary assignment to Mr. Braswell do not form the basis for an excluded period.
3. Mr. Braswell's unavailability due to his illness should not be considered an excluded period in the nine-month calculation, as there are other prosecutors available for assignment to the case and special prosecutors available outside of that office. The choice as to whether to assign the case solely to Mr. Braswell and not another attorney in the office is one over which Dr. Conte had no control.

4. The burden is on the courts and the state to ensure that the defendant receives a speedy trial. *Novak v. State*, 294 Ark. 120, 741 S.W.2d 243 (1987). In *Novak*, the presiding judge fell ill and was hospitalized for an extended period resulting in a delay of three and one half months. In determining whether the delay due to the judge's illness constituted an excluded period, the court considered the test set forth in *Barker v. Wingo*, 407 U.S. 514 (1972), and the weight of authority in other jurisdictions, which supported the view that the judge's incapacity did not justify a delay in bringing the accused to trial. *Novak* at 124. The court noted that no efforts were made to get another judge. The court reversed and dismissed rejecting the state's argument that the judge's illness constituted an excluded period. In *Norton v. State*, 273 Ark. 289, 618 S.W.3d 164 (1981), (overruled on other grounds by *Richards v. State*, 338 Ark. 801, 2 S.W.3d 766 (1999)) the court refused to hold excludable the period between recusal of a prosecutor and the appointment of a replacement. For the same reasons, the period of Mr. Braswell's unavailability should not constitute an excluded period. Other prosecutors were available in his office to take over the case. There is no case law to support the State's position that Mr. Braswell's unavailability should trigger an excludable period. As in *Novak*, there was no effort to replace the official to whom the case was assigned with someone else. Further, the State's motion does not reflect any effort to proceed with trial preparation in his absence. The prosecutor's office made a choice over which Dr. Conte had no control and time should not be tolled as a result of that choice.
5. The verified affidavit sets forth the problems that the State is experiencing and

asserts that it renders the litigation exceptionally complex. Most of these problems are caused by the ten-year delay in charging the case. As set forth above, the burden is on the courts and the state to make sure the defendant receives a speedy trial. Although the issue of prosecutorial delay addressed in an earlier motion and speedy trial are different, decisions made by earlier prosecutors on behalf of the State appear to have created this situation. Lost or destroyed evidence , lost recollection, and inability to locate witnesses appear to all result directly from the delay. However, those factors are not complex. Evidence is lost or located. Witnesses remember or forget. Witnesses can or cannot be located. None of these factors alone or together rise to the level of exceptional complexity. And these are trial problems that could have been addressed by law enforcement officers and the staff of the prosecutors office in the seven months that passed between the filing of the information and the inception of Mr. Braswell's illness, as well as during the period of his illness.

WHEREFORE, for the reasons stated herein, the defendant asks that the Court deny the states motion and release Dr. Conte on his own recognizance.

Respectfully submitted,

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Attorney for Defendant

CERTIFICATE OF SERVICE

I hereby certify that I mailed a true and correct copy of the above and foregoing Motion by placing a copy of same in the United States Mail with sufficient postage thereon to ensure delivery on this 25th day of October, 2012 to:

Deputy Prosecuting Attorney
Troy Braswell
801 Locust St.
Conway, AR 72033

Jack T. Lassiter