

**UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA**

<b>UNITED STATES OF AMERICA</b>	)	<b>NO. 3:10-CR-338</b>
	)	
<b>v.</b>	)	<b>(J. Caputo)</b>
	)	
<b>RAPHAEL J. MUSTO,</b>	)	<b>(Filed Electronically)</b>
<b>Defendant.</b>	)	

**RESPONSE TO DEFENDANT’S RENEWED AND AMENDED MOTION  
TO CONTINUE THE TRIAL INDEFINITELY**

**I. Procedural History**

On November 23, 2010, a grand jury returned a six-count indictment charging the defendant with honest services wire fraud, in violation of Title 18, United States Code, Sections 1343, 1346; honest services mail fraud, in violation of Title 18, United States Code, Sections 1341, 1346; illegal receipt of gratuities and bribes in violation of Title 18, United States Code, Section 666(a)(1)(B); and false statements in violation of Title 18, United States Code, Section 1001, as well as a notice of forfeiture. (Doc. 1). On December 15, 2010, the defendant entered a plea of not guilty to the offenses. (Doc. 11). On October 17, 2012, the government obtained a Superseding Indictment charging the defendant with the above referenced offenses as well as two additional counts of illegal receipt of gratuities

and bribes in violation of Title 18, United States Code, Section 666(a)(1)(B). (Doc. 81.)

On October 22, 2012, the defendant filed a Motion to Dismiss the Superseding Indictment or in the alternative, to Continue Trial Indefinitely. (Doc. 86.) In the motion, the defense cited to medical issues facing the defendant as grounds for dismissal or indefinite postponement of trial and claimed that proceeding to trial would violate the defendant's Sixth Amendment and Eighth Amendment rights. (Doc. 86.) On October 24, 2012, the court denied the motion. (Doc. 93.)

The defense appealed the court's denial of the motion to dismiss the case to the Third Circuit Court of Appeals, Docket No. 12-4146, and sought a stay of the November 26, 2012, trial date. This court granted the concurred in motion for stay and trial was postponed pending the appeal. (Doc. 102.) On September 30, 2013, the Third Circuit issued an opinion dismissing the appeal for lack of jurisdiction. *United States v. Musto*, --- Fed. Appx. ---, 2013 WL 5422965 (3d Cir. 2013). The Third Circuit held that this court's denial of the motion to dismiss did not conclusively resolve the Sixth Amendment claim because it is also effectively reviewable postjudgment. Following issuance of the mandate on October 22, 2013, the case was remanded to this court for trial. On October 24, 2013, this

court issued a scheduling order directing the filing of pretrial motions on or before November 18, 2013, and requiring responses by December 2, 2013. (Doc. 126).

On November 15, 2013, the defendant filed a Renewed and Amended Motion to Continue the Trial Indefinitely. (Doc. 127). A supporting brief was filed on November 19, 2013. (Doc. 128.)

## II. Discussion

The defense has argued that Musto is physically incompetent to stand trial, and that proceeding to trial would violate his Fifth Amendment Due Process<sup>1</sup> and the Sixth Amendment<sup>2</sup> rights. (Doc. 127.) While the defense claims Musto's physical incompetence has had an impact upon his mental ability to assist in his defense, they have not pursued mental incompetency as a means for relief.<sup>3</sup> (Doc. 127.) Rather, consistent with the direction suggested by the Third Circuit, the defense has based its claim on a due process claim and requested that the court hold a hearing on Musto's health prior to trial. *Musto*, 2013 WL 5422965 at fn. 3.

The requirement that a person be competent to stand trial has constitutional foundations in the Due Process Clause of the Fifth Amendment. *Medina v. California*, 505 U.S. 437, 453 (1992)(prosecution of an mentally incompetent

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<sup>1</sup> "No person shall be ... deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. V.

<sup>2</sup> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense." U.S. CONST. amend. VI.

<sup>3</sup> The procedures for mental competency are governed by 18 U.S.C. §4241.

person violates the Due Process Clause). Sixth Amendment rights are also potentially impacted by a defendant's physical and mental ability to prepare a defense and confront his accusers. *See, Holmes v. South Carolina*, 547 U.S. 319, 324-25 (2006); *United States v. Leggett*, 162 F.3d 237 (3d Cir. 1998). A defendant's physical ability, as opposed to a mental capacity, to withstand the rigors of trial has also been recognized by some courts as grounds for postponement of trial. *United States v. Jones*, 876 F. Supp. 395, 397 (N.D.N.Y. 1995) ("the Second Circuit has long held that the granting or denying of a motion for continuance or severance on the ground that the accused is physically incompetent to stand trial falls within the sound discretion of the trial court"); *United States v. Brown*, 821 F.2d. 986, 988 (4th Cir. 1987).

While the Third Circuit suggested in a footnote that a Due Process right may exist under the circumstances, the process and test for such a determination was not specified. *Musto*, 2013 WL 5422965 at fn. 3. However, the court did cite to *United States v. Knohl*, 379 F.2d 427, 437-38 (2d Cir. 1967) as authority for holding a hearing. In *Knohl*, the Second Circuit noted that a Due Process violation could arise "where there is reasonable ground to believe that physical disability may prevent a proper defense or endanger the life of a defendant." *Id.* at 437. In the context of mental competency, the Supreme Court has provided that the test is

whether the defendant “has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding –and whether he has a rational as well as factual understanding of the proceedings against him.” *Dusky v. United States*, 362 U.S. 402, 402 (1960).

Previously, this court looked to the five factors considered in *United States v. Doran*, 328 F. Supp. 1261, 1263-64 (S.D.N.Y. 1971) to determine whether to indefinitely continue the trial. (Doc. 92.) These factors are: 1) the medical evidence; 2) evidence of the defendant’s activities outside of the courtroom; 3) the availability of measures to minimize the risks to the defendant’s health if subjected to trial; 4) the temporary or permanent character of the physical problem; and 5) the magnitude and seriousness of the case. *Id.* at 1263-64. Multiple courts from a variety of jurisdictions have utilized these factors to analyze a request for continuance of trial where the defendant’s physical health is compromised. *United States v. Passman*, 455 F. Supp. 794, 797 (D.C.D.C. 1978); *United States v. Goldstein*, 633 F. Supp. 424, 426 (S.D. Fla. 1986); *United States v. Jones*, 395, 397 (N.D.N.Y. 1995); *United States v. Hearst*, 412 F. Supp. 858, 861 (N.D. Cal. 1975); *United States v. Gambino*, 828 F. Supp. 191, 192 (S.D.N.Y. 1993); *United States v. Gunter*, Crim. No. 12-394-4, 2013 WL 5942341 (E.D.Pa., 2013).

The first *Doran* factor to be considered is the medical evidence. *Doran*, 328 F. Supp. at 1263. The defense has presented expert reports from a variety of personnel who have treated or examined Musto for physical and mental health. The opinions presented regarding Musto's current physical condition differ substantially from the expert opinion offered by the court's expert. In light of the disparate opinions offered, the defense request for a hearing appears appropriate.

The expert reports uniformly indicate that Senator Musto suffers from cirrhosis of the liver and multiple other complicating co-morbidities. However, their opinions have differed in the past in the timetable and likely impact legal proceedings would have on the defendant's health. The primary defense expert, Cataldo Doria, MD, PhD, FACS, initially postulated – using June 2011 as a starting point – that Senator Musto faced a 50% mortality rate within one year. (Doc. 127, Exhibit A, p. 9.) That mortality rate factored in his liver condition and his episode of ascites, fluid in the abdomen. (Doc. 127, Exhibit A, p. 9.) Dr. Doria postulated that, in addition, Senator Musto had a 32.5% mortality rate due to the abdominal aortic aneurysm. (Doc. 127, Exhibit A, p. 9.)

Despite these postulations, Senator Musto successfully underwent surgery in January 2012, for his abdominal aortic aneurysm. (Doc. 127, Exhibit B, p. 4.) As the defense expert noted, the procedure was “tolerated well in spite of the

numerous negative prognostic factors.” (Doc. 127, Exhibit B, p. 4.) In October 2012, Dr. Doria opined that Senator Musto showed signs of “progressive decline” and that proceeding to trial may “induce life threatening complication” which could be “potentially fatal.” (Doc. 127, Exhibit C, p. 4-5.) However, with respect to his cognitive abilities, the defense expert opined that it is “conceivable” that his cognitive impairment will prevent him from being able to prepare and participate in trial. (Doc. 127, Exhibit C, p. 4-5.)

In June 2012, the court’s expert rendered a substantially different opinion with respect to his physical abilities. He determined that Senator Musto should be capable to drive, attend physicians’ offices for medical appointments, and appear in court. (Doc. 127, Exhibit D, p. 1-2.) In addition, the court’s expert indicated that a person with his clinical presentation would not be able to qualify for disability. (Doc. 127, Exhibit D, p. 1-2.) This opinion was rendered in June 2012, based solely on Senator Musto’s medical records and the defense expert reports then authored.

In August 2012, the government’s expert described his clinical status as “very tenuous.” (Doc. 127, Exhibit E, p. 4.) However, the government’s expert did not render an opinion regarding the likelihood of a life threatening complication that could result from trial preparation and trial itself. Rather, the government’s

expert opinion focused upon Musto's fatigue, stamina, and cognitive abilities, based upon his interview during his examination of Musto. (Doc. 127, Exhibit E, p. 4.) Although the government does not disavow the opinions of its expert, the opinions regarding his cognitive abilities do not appear to be supported by the cognitive evaluations used in mental competency proceedings. Furthermore, he opined that his opinions regarding Musto's ability to assist trial would likely have been the same independent of his liver disease. (Doc. 127, Exhibit E, p. 4.)

Since these opinions were rendered, the defense has offered in support of their current motion additional expert analysis of the defendant's health condition. In a medical opinion dated October 23, 2013, Dr. Doria opined that "it is remarkable that Mr. Musto can still function and interact with the outside world 3 to 4 days a week" and found that he was in steady decline. (Doc. 127, Exhibit G, p. 6.) He noted instances of slurred speech and evidence of cognitive impairment, which he attributed partially to the collateral effects of his liver condition. (Doc. 127, Exhibit G, p. 6.)

His doctors have also found that Musto suffers from dermatitis, a persistent itching of the skin, which has multiple collateral consequences including lack of sleep. (Doc. 127, Exhibit G, p. 5.) Although Dr. Doria identified it as a potential collateral consequence of his liver condition, (Doc. 127, Exhibit G, p. 5) his



dermatologist diagnosed his condition as allergic in nature. (Doc. 127, Exhibit J.) In addition, his dermatologist reported that during his September 5, 2013, exam Musto was “well appearing, alert and oriented to person/place/time, cooperative mood and normal affect.” (Doc. 127, Exhibit J, p. 6.)

The defense has presented an opinion from a psychiatrist regarding his current cognitive abilities. His psychiatrist, Richard E. Fischbein, M.D., has reported that he met with Musto twice, once in October 2012 and on September 7, 2013. (Doc. 127, Exhibit H, p. 1). Dr. Fischbein noted that following his most recent visit, Musto “clearly [understood] the role of his attorneys, the role of the federal prosecutor, the role of the judge, the charges he is facing and the fact that he could serve jail time.” (Doc. 127, Exhibit H, p. 10.) He understood plea bargaining and contesting charges at trial. However, the defense psychiatrist found that he “comes up short ... for being able to aid his attorneys in his defense, in his ability to appreciate and process the court proceedings and determining self-defeating versus self-preservation behaviors.” (Doc. 127, Exhibit H, p. 10.)

The myriad of medical information which the defense presents a minimum demonstrates that a hearing should be held to see whether Musto is physically competent to stand trial. In *Knohl*, the Second Circuit addressed the appropriateness of a hearing in a case where the trial court decided a physical

competency challenge based upon a review of expert reports, even where the parties agreed to the procedure:

We believe it will usually be the better course, where there is reasonable ground to believe that physical disability may prevent a proper defense or endanger the life of a defendant, for the trial court to hold an evidentiary hearing as close to trial as practical. Such a procedure will allow cross-examination of the examining doctors and preserve a full record.

*Knohl*, 379 F.2d at 437.

The second *Doran* factor concerns the defendant's outside activities. The defense has offered in its motion and brief that Musto has had increasingly limited outside activities. Such evidence can be explored and weighed at a hearing.

With respect to the third *Doran* factor, there are a variety of options available to manage the court proceedings in light of the defendant's physical needs. Those options include "shortening court sessions, affording the accused periods of rest and having present such medical and nursing aids and attendants as may be needed." *Knohl*, 379 F.2d. at 437. A primary day-to-day issue is his extended periods of fatigue. An altered or shortened trial schedule, which contemplates the likelihood of this circumstance, can likewise be explored at a hearing.

With respect to the prognosis of declining health, it is clear that all the experts indicate that his health will not improve. As this court properly noted in its

previous ruling, it is a factor which weighs against postponing trial. (Doc. 92.) *See, United States v. Landsman*, 366 F. Supp. 1027, 1029 (D.C.N.Y. 1973) (“because the defendant’s physical condition will progressively worsen, albeit slowly, it is imperative to proceed with trial as soon as possible.”)

Finally, the defendant was a longstanding elected official who has been accused of a breach of the public trust. The court appropriately noted that others similarly situated in the community have been charged and convicted of similar conduct. (Doc. 92.) This factor weighs in favor of denial of the motion.

### **III. Conclusion**

For the foregoing reasons, it is respectfully requested that the court hold a hearing and require the defense to prove that the defendant is physically incompetent to stand trial.

Respectfully submitted,  
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Dated: December 2, 2013

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that he is an employee in the Office of the United States Attorney for the Middle District of Pennsylvania and is a person of such age and discretion to be competent to serve papers.

That this 2<sup>nd</sup> day of December, 2013, he served a copy of the attached

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by electronic mail to the following:

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