

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

UNITED STATES OF AMERICA :

vs.

NOS. [REDACTED]

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DEFENDANT'S MOTION TO DISMISS FOR LACK OF SPEEDY TRIAL

The Defendant, through counsel, moves to dismiss the indictment because he has been denied a speedy trial.¹

I. PROCEDURAL BACKGROUND

The following events in [REDACTED] pertain to this motion:

- MAR 30 - Defendant is arrested pursuant to federal warrant;
- 31 - Initial appearance; criminal complaint alleges offenses on February 8 & 10 and on March 23;
- APR 7 - Preliminary examination; Defendant detained;
- 25 - Indictment returned with additional charge for March 30;
- MAY 5 - Arraignment in District Court; not guilty plea entered;
- JUN 9 - Defense files motion for appointment of new attorney;
- 16 - Court holds hearing on Defendant's motion;
- 24 - Defense files Request For Discovery;
- 27 - Government files response to Request for Discovery;
- JUL 5 - Instant motion to dismiss is filed;
- 11 - Trial is scheduled to begin.

II. Argument

¹The Defendant has specifically requested this motion be filed, as he believes his speedy trial right has been violated. Counsel must inform the Court, however, that there may be no violation of either the 6th Amendment or Speedy Trial Act.

A. The Sixth Amendment

The Sixth Amendment guarantees that in a criminal prosecution, the accused shall enjoy the right to a speedy and public trial. U.S. Const. amend. VI; United States v. Grimmond, 137 F.3d 823, 827 (4th Cir. 1998); Doggett v. United States, 505 U.S. 647 (1992); United States v. MacDonald, 456 U.S. 1, 6 (1982). The Sixth Amendment guarantee is "designed to minimize the possibility of lengthy incarceration prior to trial [...] and to shorten the disruption of life caused by arrest and the presence of unresolved criminal charges." MacDonald, 456 U.S. at 8. The Sixth Amendment protection does not attach before a defendant is either arrested, indicted, or officially accused. Id. at 6.

In Doggett, *supra*, the Supreme Court held that an 8 ½ year delay from indictment to arrest and trial, violated the Sixth Amendment right. The Doggett Court cited the following four part test: "whether delay before trial was uncommonly long, whether the government or the criminal defendant is more to blame for that delay, whether, in due course, the defendant asserted his right to a speedy trial, and whether he suffered prejudice as the delay's result." Id., *citing* Barker v. Wingo, 407 U.S. 514 (1972). Significantly, the first inquiry is a threshold requirement, because "[s]imply to trigger a speedy trial analysis, an accused must allege that the interval between accusation and trial has crossed the threshold dividing ordinary from presumptively prejudicial delay." Doggett, Id. at 651-652. If a defendant makes this threshold showing, he must then demonstrate that the

four factors weigh in his favor. United States v. Woolfolk, 399 F.3d 590, 595 (4th Cir. 2005), *citing*, United States v. Thomas, 55 F.3d 144, (4th Cir.1995).

In the instant case, the Defendant was arrested on March 30th, which starts the Sixth Amendment clock. Assuming this trial begins July 11th, a total of 104 days will have elapsed. The Defendant has been incarcerated in county jails during this entire period, and he has suffered the prejudice of loss of liberty and the opprobrium of this federal indictment.

Counsel must inform the Court that the Fourth Circuit has found no Sixth Amendment violation in cases involving time periods longer than in this case. See United States v. Grimmond, 137 F.3d 823, 827 (4th Cir.1998) (thirty-five months); United States v. Thomas, *supra* at 149-150 (thirty months).

Nevertheless, the Defendant contends that the 104 day delay is a Sixth Amendment violation of his Constitutional rights. The indictment should be dismissed with prejudice.

B. The Speedy Trial Act

The Speedy Trial Act, 18 U.S.C. § 3161 *et seq.*, (henceforth, The Act) has distinct limitations regarding the time that can elapse between arrest to indictment and from indictment to trial. Dismissal of the indictment is mandatory when The Act is violated, and dismissal may be with or without prejudice. United States v. Taylor, 487 U.S. 326, 332 (1988).

Section 3161(b) provides that an indictment must be filed within 30 days of arrest. That requirement appears to be met in

this case.

Secondly, §3161(c)(1) mandates that a defendant be brought to trial within 70 days of either the filing of the indictment or the defendant's first appearance before a judicial officer of the court in which the charge is pending, whichever occurs last. The day of the indictment does not count. United States v. Jurn, 766 F.2d 465, 466 (11th Cir. 1985). The day of arraignment does not count. United States v. Monroe, 833 F.2d 95, 99 (6th Cir.1987). Both indictment and arraignment days are excluded as "delay resulting from other proceedings concerning the defendant...." §3161(h)(1).

Returning to the instant case, the indictment was returned on April 25, so April 26 is day 1 for the 70 day calculation. From April 26 until July 11, there are a total of 77 days. So, unless at least 7 days can be excluded, the Court must dismiss the indictment, with or without prejudice.

The Government, however, is expected to contend that time should not begin with the indictment, but with arraignment before the District Court (Judge Beaty) on May 5. The Government will argue that it gets the later date under §3161(c)(1), because the indictment alleges an additional offense (on March 30) that was not contained in the criminal complaint when the Defendant made his initial appearance. The Government has informed the undersigned of a Tenth Circuit decision in support of its argument. ATTACHMENT 1, United States v. Dosal, 1997 Westlaw 634091, (10th Cir. 1997). The Dosal court held as follows:

The [Speedy Trial Act] unambiguously ties the

relevant appearance before a judicial officer to the particular charge in the controlling information or indictment. Thus where, as here, a defendant has made an appearance related to charges other than those in the indictment at issue, such appearance does not trigger the statutory timetable. Mr. Dosal's February appearance before the Magistrate Judge was related to the conspiracy charge in the original complaint. That complaint was replaced on March 4, 1996 with an indictment containing a different charge Accordingly, the seventy-day clock began ticking on the later of those two dates

Id. at 2. Should this Court follow the Dosal rationale, the 70 day clock would begin the day after arraignment, i.e., on May 6.

The Act states that if either party files a pretrial motion, the time from filing to ruling is excluded. §3161(h)(1)(F); Henderson v. United States, 476 U.S. 321, 330 1986). The Government will argue that the Court should exclude 7 days as a result of Defendant's Motion For Appointment of New Attorney, filed June 9, until the Court held a hearing on June 16.

The Defense also expects the Government to argue that time should be excluded because the Defense filed a request for Brady material. In an unpublished case, the Fourth Circuit has held that such a Brady request is a pretrial motion that triggers an excludable period under §§ 3161(h)(1)(F) & (J). ATTACHMENT 2, United States v. Shelton, 1994WL67650 (4th Cir. 1994). The Defense concedes it filed a "Request For Discovery" on June 24, requesting Brady material. The Defense contends that Shelton is unpublished and is not binding on this Court. It should not be followed.

Finally, the Government will assert that the time from the

filing of the instant motion, until it is resolved by the Court, presumably on July 11, should be excluded under §3161(h)(1)(F).

To recap, the Government is expected to argue that it did not violate the Act, and that the following dates apply:

May 5 - Arraignment;

May 6 - Speedy Trial clock begins (Day 1)

June 9 to 16 - 7 days excluded for Defendant's Motion (Day 35)

July 5 to 11 - 6 days excluded for instant motion (Day 53)

July 11 - Trial (Day 53)

Hence, according to the Government, even without excluding any days for Defendant's Brady request, only 53 countable days under the Act would have passed, and that no violation has occurred.

III. CONCLUSION

The Defendant moves that the Court dismiss the indictment with prejudice.¹

Respectfully submitted, [REDACTED].

[REDACTED]
Federal Public Defender

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¹Counsel must inform the Court that authority seems to support the Government's position.

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CERTIFICATE OF SERVICE

I hereby certify that on [REDACTED], I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following: [REDACTED].

Respectfully submitted, [REDACTED].

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