Motion to Dismiss for Speedy Trial Violation [2000]

INTRODUCTION

XXXX XXXX hereby requests that the Court dismiss with prejudice the indictment pending against him for violation of the Speedy Trial Act. Almost five months have run on the Speedy Trial clock that were not excluded, and dismissal is therefore required by law. The dismissal should be with prejudice because of the substantial prejudice XXXX has suffered as a result of the lengthy proceedings against him, proceedings that began in state court and have already been underway for over one and a half years. A dismissal with prejudice would also best serve the interests of the administration of the Speedy Trial Act and the interests of justice.

PROCEDURAL BACKGROUND

April10, 1999: Walnut Police Department arrested XXXX XXXX for allegedly committing crimes against a child involving the Internet.

April 14, 1999: XXXX was arraigned on charges of California Penal Code §§ 288.2/664 (attempt to send harmful matter to minor over the Internet) and 288(c)/664 (attempt to commit a lewd act upon a child age 14 or 15). XXXX was not released on bail throughout the pendency of the state proceedings. (See United States' Motion to Revoke Release Order as to Defendant XXXX XXXX, filed July 27, 1999.)

June 4, 1999: Detective Lew Doty of Walnut Creek Police Department contacted FBI Agent Robert Schenke and informed him about the activities of XXXX XXXX, providing all of the information contained in the affidavit in support of the complaint filed in the instant case. (See Affidavit in Support of Complaint, attached as Exhibit A.)

July 14, 1999: The U.S. Attorney's Office for the Northern District of California filed a complaint against XXXX XXXX based upon the same conduct that gave rise to the state charges, and a bench warrant issued. (Docket Sheet, attached as Exhibit B.)

July 16, 1999: The Contra Costa District Attorney's Office dismissed the charges pending against XXXX in favor of federal prosecution. The District Attorney

dismissed the charges before a hearing on XXXX's motion to dismiss the charges as unconstitutional and on the last court day before. (Superior Court Calendar minutes, attached as Exhibit C.)

July 20, 1999: XXXX made his initial appearance in federal court on the instant charges.

July 23, 1999: XXXX was arraigned in federal court on charges of 18 U.S.C. §§ 2422(b), using a computer to entice a minor to engage in prohibited sexual acts, 2252(a)(1), transportation of child pornography in interstate commerce, and 2252(a)(4)(B), possession of child pornography. The magistrate ordered XXXX released, staying the execution of the bond until July 29, 2000 to allow the government time to appeal the release order. (Exhibit B.)

July 27, 1999: The government filed a motion before this Court to revoke XXXX's release.

July 30, 1999: This Court denied the government's motion to revoke XXXX's release.

August 12, 1999: After several hearings regarding XXXX's bail, XXXX was released on bond to home detention. (Exhibit B.)

September 7, 1999: XXXX made his initial appearance before this Court. The Court continued the case until October 5, 1999 for a status hearing, and on September 16, 1999 signed a stipulation and order excluding from Speedy Trial Act calculations the time between September 7, 1999 and October 5, 1999. (Exhibit B.) The exclusion was made in the interests of justice and "to allow defendants continuity of counsel, the reasonable time necessary for effective preparation, taking into account the exercise of due diligence." The parties stipulated and the court ordered that the case also "fits the criteria as a 'complex' case within the meaning of 18 U.S.C. § 3161(H)(8)(B)(ii)." (Exhibit D.)

October 5, 1999: The Court held a status hearing and continued the matter until November 2, 1999.

November 2, 1999: The Court held a further status hearing and continued the matter until November 30, 1999 for motion setting or change of plea. The Court signed a stipulation and

order excluding the time periods from October 5, 1999 to November 2, 1999 and from November 2, 1999 to November 30, 1999 from Speedy Trial Act calculations. The parties stipulated and the Court ordered that time be excluded under 18 U.S.C. §§ 3161(h)(8)(A) and (B)(iv) "to allow defendant continuity of counsel, and to allow the reasonable time necessary for effective preparation, taking into account the exercise of due diligence." The stipulation noted that the defense had had to purchase special computer equipment to view the discovery. The parties also stipulated and the Court ordered that the case "fits the criteria as a 'complex' case within the meaning of 18 U.S.C. Section 3161 (H)(8)(B)(ii)." (Exhibit E.)

November 30, 1999: The Court set March 7, 2000 as the date for hearing on defendant's motions to suppress and ordered that the motions be filed by January 18, 2000.

December 14, 1999: The Court filed a stipulation and order excluding the time from November 30, 1999 to March 7, 2000 from Speedy Trial Act calculations. As before, the parties stipulated and the Court ordered that time be excluded on the grounds of continuity of counsel and to allow reasonable time for preparation pursuant to 18 U.S.C. §§ 3161(h)(8)(A) and (B)(iv). The parties noted that defense counsel intended to file several pretrial trial motions which he asserted could be case-dispositive, and defense counsel was unavailable the month of December. The parties also stipulated and the Court ordered the time be excluded as the case "fits the criteria as a 'complex' case within the meaning of 18 U.S.C. Section 3161(H)(8)(B)(ii)." (Exhibit F.)

January 21, 2000: XXXX filed his motion to suppress.

March 7, 2000: The Court heard argument on XXXX's motion to suppress.

March 14, 2000: The Court issued an order denying XXXX's motion to suppress and setting a status hearing on March 21, 2000.

March 21, 2000: The Court set a motions hearing date of June 13, 2000, with motions to be filed by

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April 18, 2000.

April 18, 2000: XXXX filed his motion to dismiss Count One.

June 6, 2000: The Court ordered the government to file a supplemental brief on the motion to dismiss count one by June 8, 2000 and reset the hearing on the motion to June 27, 2000.

June 30, 2000: The Court continued the June 27, 2000 hearing to July 5, 2000 because the prosecutor was ill. The parties stipulated and the Court ordered that the time between June 27 and July 5, 2000 be excluded to allow for continuity of government counsel pursuant to 18 U.S.C. §§ 3161(h)(1)(F) and (h)(8)(A) and (B)(iv). The parties also stipulated and the Court ordered that time be excluded in the interests of justice and because motions were pending before the Court. (Exhibit G.)

July 5, 2000: The Court heard argument on defendant's motion to dismiss. The Court announced it would issue an order and set the next appearance date.

September 13, 2000: The Court issued an order denying XXXX's motion to dismiss Count One and set a status hearing for September 19, 2000.

October 3, 2000: The Court filed an order in which September 19, 2000 hearing was continued until October 27, 2000. The parties stipulated and the Court ordered that the time between September 19 and October 27, 2000 be excluded from calculation under the Speedy Trial Act "because the interests of justice served by granting a continuance." The stipulation and order provided that "[s]uch continuance is required because government counsel was out of the country when the matter was initially scheduled for September 19, 2000." It further stated that "continuing the matter to October 17, 2000, is in the interests of justice and will allow for continuity of government counsel" pursuant to 18 U.S.C. §§ 3161(h)(8)(A) and (B)(iv). (Exhibit H.)

October 17, 2000: The Court held a status hearing and continued the matter until October 24, 2000,

with time excluded between October 17 and October 24, 2000 in the interests of justice.

ARGUMENT

I. More than 70 Days of Unexcludable Time Have Elapsed Since XXXX XXXX's Arraignment

> The Speedy Trial Act, 18 U.S.C. 3161, provides that
> In any case in which a plea of not guilty is entered, the trial of a defendant charged in an information or indictment with the commission of an offense shall commence within seventy days from the filing date (and making public) of the information or indictment, or from the date the defendant has appeared before a judicial officer of the court in which such charge is pending, whichever date last occurs.

18 U.S.C. § 3161(c)(1). Time may be excluded from the 70-day period between arraignment and trial for specific periods of delay described in 18 U.S.C. § 3161(h).

If there has been a violation of the Speedy Trial Act, dismissal of the indictment is required. As the United States Supreme Court noted in United States v. Taylor, 487 U.S. 326, 332 (1988), "the statute admits no ambiguity in its requirement that when such a violation has been demonstrated, 'the information or indictment shall be dismissed on motion of the defendant.'" (Quoting § 3162(a)(2).) A district court's application of the Speedy Trial Act is reviewed de novo. United States v. Hall, 181 F.3d 1057, 1061 (9th Cir1999).

XXXX XXXX was arraigned in federal court in the above-captioned case on July 23, 1999. As of the date of the filing of this motion, 458 days have passed since the date of XXXX's arraignment. Almost 150 of those days were not excluded under any of the grounds set out in § 3161(h). Therefore, the indictment must be dismissed.

The first periods of delay which were not excluded from the Speedy Trial Act occurred before and after the government appealed the magistrate judge's release order. The three days between July 23, 1999, the date of arraignment, and July 27, 2000, the date the government filed its appeal, were not excluded by the magistrate judge, nor were they excludable by operation of § 3161(h). Similarly, the 38 days between July 30, 1999, the date this Court issued its order denying the government's motion, and September 7, 1999, the date of the first stipulated and Court-ordered exclusion of time, must be credited to the Speedy Trial clock. No court order excluded the 38 days, nor were they automatically excluded

under § 3161(h).

The entire six-month period from September 7, 1999 to March 7, 2000 was excluded by three separate stipulations of the parties and orders of the Court. In each stipulation, the Court ordered that time be excluded based upon, among reasons, the complexity of the case pursuant to 18 U.S.C. § 3161(H)(8)(B)(ii).[1] Each of the Court's findings of complexity set out a specific period that was covered by the finding, as is required under Ninth Circuit law. See United States v. Clymer, 25 F.3d 824, 827 (9th Cir. 1994) (finding of complexity to justify exclusion of time under Speedy Trial Act must be "specifically limited in time"); United States v. Jordan, 915 F.2d 563, 565-66 (9th Cir. 1990) (accord). A finding of complexity only excludes from Speedy Trial Act calculations that time covered by the exclusion; it does not operate to stop the Speedy Trial clock indefinitely or at any time other than that covered by the specific exclusion. See Clymer, 25 F.3d at 829 (Speedy Trial Act "could be seriously distorted if a district court were able to make a single, open-ended 'ends of justice' determination early in a case, which would 'exempt the entire case from the requirements of the Speedy Trial Act altogether.'") (quoting Jordan, 915 F.2d at 565-66).

While the complexity exclusions were limited in time, as required by Ninth Circuit law, they were not accompanied by any justifications for the finding of complexity. The Speedy Trial Act "imposes strict specificity requirements for the 'ends of justice' exception." United States v. Lloyd, 123 F.3d 1263, 1268 (9th Cir. 1997). Any exclusion pursuant to the ends of justice must be "justified [on the record] with reference to the facts as of the time the delay is ordered." United States v. Jordan, 915 F.2d 563, 656-66 (9th Cir. 1990). The court must state the "specific factual circumstances" sufficient to justify the exclusion. United States v. Martin, 742 F.2d 512, 514 (9th Cir.1984). With regard to each of these orders, there was no explanation of why the case was complex; the orders simply asserted that the case was complex.

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[1] Section 3161(H)(8)(B)(ii) provides that one of the factors the court may consider when determining whether to grant a continuance in the interests of justice under § 3161(h)(8)(A) is "[w]hether this case is so unusual or so complex, due to the number of defendants, the nature of the prosecution, or the existence of novel questions of fact or law, that it is unreasonable to expect adequate preparation for pretrial proceedings or for the trial itself within the time limits established by this section."

Because none of these orders provided any specificity regarding the nature of the complexity of the case, the time cannot be excluded on that ground. See Lloyd, 125 F.3d at 1268 (if court does not comply with strict specificity requirements for ends of justice exception, period of time covered by continuance will not constitute excludable delay). Some of the time excluded under these stipulations was supported by specific factual circumstances, including the need for defendant to obtain a computer and defendant's counsel's absence during the month of December. Nonetheless, the entire period from September 7, 1999 to January 21, 2000 cannot be excluded on this ground. It would be necessary to determine at a hearing which of these days were properly excluded. Until that time, defendant reserves argument on how much time should be credited to the Speedy Trial clock during the period covered by the stipulations.

The next period of unexcluded delay occurred between March 14, 2000 when the Court ruled on XXXX's motion to suppress evidence and April 18, 2000 when XXXX filed his motion to dismiss Count One of the indictment. A total of 34 days elapsed which were not excluded by the Court or automatically excluded under § 3161(h). At the March 21, 2000 hearing, the Court set April 18, 2000 as the date for XXXX to file his motion to dismiss. The intervening 34 days cannot be excluded on the ground that defense counsel needed the time to prepare the motion absent a specific exclusion of time for that purpose. See United States v. Hoslett, 998 F.2d 648, 657 (9th Cir.1993) ("Our review of the relevant statutory and legislative materials persuades us that the Speedy Trial Act does not permit the exclusion of all pretrial motion preparation time as a routine matter. Only where there is a specific request for more pretrial motion preparation time than is routinely established by the district court in its standard scheduling order may such preparation time be excluded," and filing deadlines set by district judge do not qualify as "express designations" of excludable pretrial motion preparation time.")

It is arguable that the period of time between June 13, 2000 and June 26, 2000 could also be counted against the Speedy Trial clock. The Court initially set the hearing on defendant's motion to dismiss on June 13, 2000. However, because the government's opposition was unresponsive to the heart of defendant's motion (see September 13, 2000 Order), the Court ordered the government to file a supplemental response and reset the hearing on the motion to June 26, 2000. 18 U.S.C. § 3161(h)(8)(C)

provides that no continuance can be granted in the interests of justice because of "lack of diligent preparation . . . on the part of the attorney for the Government." Since time was otherwise excluded under § 3161(h)(1)(F) for delay resulting from pretrial motions, XXXX leaves to the Court's discretion whether this time should be counted. XXXX does not include these two weeks in his total figure below.

However, an additional 39 days between August 5, 2000 and September 13, 2000 must be counted on the Speedy Trial clock. The Court heard argument on XXXX's motion to dismiss on July 5, 2000 and took the matter under submission. The Court issued its order denying the motion on September 13, 2000. Pursuant to § 3161(h)(1)(J), time is excluded under the Speedy Trial Act for "any period, not to exceed thirty days, during which any proceeding concerning the defendant is actually under advisement by the court." While the Act provides in § 3161 (h)(1)(F) for exclusion of the time between the filing of a motion and "the hearing on, or other prompt disposition of, such motion," the language of subsection (F) does not permit the exclusion of time beyond 30 days of the Court taking the motion under advisement. Once a hearing has been held on a motion and the parties have submitted any post-hearing briefs requested by the Court, § 3161(h)(1)(J) limits the excluded period to thirty days. See Henderson v. United States, 476 U.S. 321, 329 (1986) (noting that district courts cannot use § 3161(h)(1)(F) to bypass the thirty-day limit of § 3161(h)(1)(J), but additional time excludable "during which the court remains unable to rule because it is awaiting the submission by counsel of additional materials."). No briefs were requested by the Court or filed by either party after July 5, 2000. Therefore, the 30 day exclusion for judicial advisement of the motion began to run on July 5, 2000. That exclusion expired on August 5, 2000, and the 39 days until the Court issued its order on September 13, 2000 must be credited to the Speedy Trial clock.

The time from September 13, 2000 when the Court issued its order until September 19, 2000 when the final stipulated exclusion began must also be included under the Speedy Trial Act. Including September 13, this adds six days to the clock.

Finally, the exclusion of time between September 19 and October 17, 2000, a full 28 days, was not justifiable under the Speedy Trial Act. The stipulation and order that excluded the 28 days stated that a continuance was necessary "because government counsel was out of the country when the matter

was originally scheduled for September 19, 2000." (Exhibit H.) There is no explanation in the record why a 28-day continuance was necessary because government counsel was unavailable on September 19, and there was no basis for excluding this time from the Speedy Trial Act. Instructive on this matter is the Ninth Circuit's decision in United States v. Lloyd, 125 F.3d 1263 (9th Cir. 1997). In Lloyd, the district court continued a case based upon a declaration of an attorney that he would be unavailable on a specific date and that other counsel were unavailable at later dates. Id. at 1268. The Ninth Circuit held that findings based upon such a declaration were "woefully inadequate to constitute 'specific factual circumstances' and do not comply with the statutory requirements." Id. at 1269, quoting Jordan, 915 F.2d at 565. The Ninth Circuit in Lloyd found that these findings "could not justify any excludable delay beyond the single day" that counsel was unavailable. Id. at 1269. The district court was required to determine whether there was any way to have the trial sooner rather than to continue the hearing based upon one day of unavailability. Id. The Ninth Circuit also held the district court was required to determine whether continuity of government counsel was a ground for continuance based upon the size of the prosecutor's office, whether another prosecutor was available, how much special knowledge the first prosecutor had developed about the case, how difficult the case was, and how different the case was from others handled by that office. Id.

In the instant case, the hearing that was continued almost a month was a status hearing. In Lloyd, the matter continued was a trial. There has been no showing why the status hearing in this case had to be continued for almost a month because of one day of unavailability by the prosecutor. Therefore, every day but September 19 should count towards the Speedy Trial clock.

In total, there were 148 days between the date of XXXX's arraignment and the most recent exclusion of time that were neither excluded by the Court nor automatically excluded under § 3161(h).

Because the Speedy Trial Act has been violated, the case must be dismissed.

II. The Court Should Dismiss the Charges With Prejudice

> The Speedy Trial Act's remedy provision, § 3162(a)(2) instructs, in relevant part:
> If a defendant is not brought to trial within the time limit required by section 3161(c) as extended by 3161(h), the information or indictment shall be dismissed on motion of the defendant. . . . In determining whether to dismiss the case with or without prejudice, the court shall consider, among others, each of the following factors: the seriousness of the offense; the facts and circumstances of the case which led to the dismissal; and the impact of a reprosecution on the administration of this chapter and on the administration of justice.

The decision to dismiss with or without prejudice is left to the guided discretion of the district court. United States v. Engstrom, 7 F3d 1423, 1427 (9th Cir. 1993). Neither remedy is given priority. Taylor, 487 U.S. at 334. The district court must consider at least the three factors specified in § 3162(a)(2) when exercising its discretion. Id. at 333. The district court's factual findings are reviewed for clear error, including the court's findings in support of a decision to dismiss with or without prejudice. United States v. Montero-Camargo, 177 F.3d 113, 1119 (9th Cir.1999); Taylor, 487 U.S. at 336.

Considering the three factors set out in § 3162(a)(2) and other factors relevant to the case, the Court should dismiss the charges against XXXX XXXX with prejudice. The circumstances of the case which led to dismissal, the seriousness of the delay in getting this case to trial, and the impact of a reprosecution on the administration of justice all militate in favor of dismissal with prejudice.

Regarding the first factor, the seriousness of the offense, XXXX does not dispute that the alleged offense is serious. XXXX does not concede his guilt as to any of the alleged offenses, and it is undisputed that XXXX did not have contact with any actual minor during the commission of the alleged offenses. However, XXXX agrees that society has a compelling interest in protecting minors from sexual advances.

Nevertheless, seriousness of the offense must be considered in light of the other factors contained in § 3162(a)(2). As the Ninth Circuit noted in United States v. Clymer, 25 F.3d 824 (9th Cir. 1994), the seriousness of the offense (in Clymer, conspiracy to distribute and aiding and

abetting the manufacture of methamphetamine) "must be weighed against 'the seriousness of the delay,' as well as the rest of the other two statutory factors." 25 F.3d at 831 (citations omitted). As in Clymer, the concerns regarding the other factors significantly outweigh the seriousness of the offense. See id.

Regarding the second factor, the Court should consider the sheer length of the period involved, a factor that weighs heavily in favor of dismissal with prejudice. XXXX has been under federal indictment for 457 days. Between the state and federal charges, he has been defending himself on this case for over a year and a half. In the federal prosecution, the amount of time not excluded under the Speedy Trial Act is 147 days, just shy of five months, taking a very conservative view of the Speedy Trial clock. As the Ninth Circuit held in Clymer, when faced with a defendant who had been under indictment for nearly a year and a half, roughly five months of which was not excludable under the Act, "'the sheer length of the period involved' weighs heavily in favor of a dismissal with prejudice." 25 F.3d at 831-32, quoting United States v. Stayton, 791 F.2d 17, 21 (2d Cir. 1986). The Ninth Circuit held that "a delay of five months strongly implicates the serious concerns articulated by Justice White in his concurring opinion in Barker v. Wingo, 407 U.S. 514 (1972)" in which Justice White wrote:

> [I]nordinate delay between public charge and trial, . . . wholly aside from possible prejudice to a defense on the merits, may 'seriously interfere with the defendant's liberty, whether he is free on bail or not, and . . . may disrupt his employment, drain his financial resources, curtail his associations, subject him to public obloquy, and create anxiety in him, his family and his friends.'

407 U.S. at 537 (1972) (White, J., concurring) (quoting United States v. Marion, 404 U.S. 307, 320 (1971)). This language was also quoted approvingly by a majority of the Supreme Court in Taylor, 487 U.S. at 340-41.

XXXX has experienced all of these forms of prejudice. XXXX had to defend himself against state charges up to the eve of trial, and then begin the case all over again when federal authorities took over the prosecution. He spent over four months in jail on these charges, and four weeks exclusively because of the federal charges. He then spent over a year in home detention. XXXX has lost his job as a pilot and has lost his license to fly. He spent his life

savings defending himself in the state matter and earlier this year had to declare bankruptcy. His family has now expended substantial funds to support him during the case and to represent him. XXXX has suffered from the substantial stigma that attaches to persons charged with these offenses. He and his family have experienced great anxiety as he has defended himself during these many months. The only benefit that XXXX has received during this time is that he has been in court-ordered therapy for almost a year.

The Supreme Court also noted in Taylor that "[t]he longer the delay, the greater the presumptive or actual prejudice to the defendant, in terms of his ability to prepare for trial or the restrictions on his liberty." Taylor, 487 U.S. at 340. The presumptive prejudice to XXXX is great, because the delays in prosecuting the case would cause XXXX to have to defend himself regarding events that occurred two years ago, should the indictment be dismissed without prejudice and the prosecution refile charges.

The third factor, the impact of reprosecution on the administration of the Speedy Trial Act and on the administration of justice also weighs heavily in favor of dismissal with prejudice. The government bears responsibility for a substantial amount of the delay. First, the government's initial opposition brief in response to XXXX's motion to dismiss did not respond to the heart of defendant's motion, and the Court was required to request additional briefing by the government and continue the hearing. Even after the Court ordered supplemental briefing, the government largely ignored defendant's statutory construction arguments and provided only the tersest of responses to defendant's constitutional challenge. See September 13, 2000 Order at 10, 15. It appears that this Court had to take more than the 30 days provided under § 3161(h)(1)(J) to decide the motion was because the government's briefing was either non-responsive or exceedingly spare. The Court was required to analyze and respond to defendant's arguments with little assistance from the government. As the Court is aware, this was also not the first time in this case that the Court had to respond to difficult defense motions with little assistance from the prosecution. In response to defendant's initial motion to suppress, all the Court received from the government were copies of briefs filed in state proceedings, briefs that

did not address all of the issues raised by defendant and that were unaccompanied by any analysis.

Certainly, Congress did not envision this situation when it allotted only 30 days for the Court to consider a motion. See 18 U.S.C. § 3161(h)(1)(J). An order dismissing this case with prejudice would send a clear signal that the government cannot expect the Court to rule on motions within the Speedy Trial Act's deadlines when the government does not provide the Court with adequate briefing on complex motions. As the Supreme Court noted in Taylor, "[i]t is self-evident that dismissal with prejudice always sends a stronger message than dismissal without prejudice, and is more likely to induce salutary changes in procedures, reducing pretrial delays." 487 U.S. at 342.

Even had the government not directly contributed to the delay, its inaction in prosecuting the case and inattentiveness to the Speedy Trial clock warrant dismissal with prejudice. The purpose of the Speedy Trial Act is not only to protect a defendant's constitutional right to a speedy trial, but also to serve the public interest in bringing prompt criminal proceedings. United States v. Saltzman, 984 F.2d 1087, 1090 (10th Cir.1993) (citing United States v. Noone, 913 F.2d 20, 28 (1st Cir.1990)). Whenever the "government--for whatever reasons--falls short of meeting the Act's requirements, the administration of justice is adversely affected." United States v. Ramirez, 973 F.2d 36, 39 (1st Cir.1992) (quoting United States v. Hastings, 847 F.2d 920, 926 (1st Cir.1988) (finding that the legislative history of the Speedy Trial Act demonstrates its importance in advancing both the public and private interests in fair and expeditious trial of criminal cases)). While not all violations of the Speedy Trial Act warrant a dismissal with prejudice, the purposes of the Act would be thwarted if the government and the courts did not adjust their day-to-day procedures to comply with its requirements. See Clymer, 25 F.3d at 832. Dismissal with prejudice in this case would alert the government to exercise greater vigilance in monitoring the Speedy Trial clock. The government's request to continue the Court's hearing from September 25 to October 17, 2000, when the prosecutor claimed only one day of unavailability and after well over 100 days had run on the Speedy Trial clock, demonstrates its

lack of concern for speedy prosecution of cases.

Finally, the unique history of this case also supports dismissal with prejudice. Before XXXX came to federal court, he had already spent three months defending himself in Contra Costa County Superior Court, up to the eve of trial, for the same alleged criminal conduct. At some point, the Contra Costa County District Attorney's Office concluded that it would turn the case over to federal authorities. It would appear that that occurred in early June, 1999, based upon the communications between the Walnut Creek Police Department and the FBI. See Exhibit A. The federal authorities waited over a month from the time they were aware of all of the facts supporting the complaint to file a complaint in federal court. See id. Obviously, this delay cannot be included as part of the Speedy Trial Act calculations. Nor do the three months of state prosecution or custody count towards the Speedy Trial clock. However, it is proper for the Court to consider this delay when considering the effect of a dismissal on the administration of justice. If federal authorities take over a state proceeding after several months of prosecution in the state, they should be particularly alert to the need for swift prosecution. Where a defendant is forced to begin his case all over again because of the federal government's belated interest in a state prosecution, excessive delays in bringing the case to trial once it moves to federal court are particularly grievous. A dismissal with prejudice in this case would help ensure that no one else is subjected to three months of state proceedings followed by 15 months of federal proceedings and almost five months of unexcludable delay without ever having a trial on the merits of his case.

CONCLUSION

For the foregoing reasons, XXXX XXXX respectfully requests that the Court dismiss the above-captioned indictment with prejudice due to violation of the Speedy Trial Act.