SpeedyTrial[2012]

I.

THE INDICTMENT SHOULD BE DISMISSED BECAUSE IT VIOLATES THE SPEEDY TRIAL ACT

A. The Indictment Was Filed XX Days After CLIENTNAME's Arrest And Therefore Must Be Dismissed.

"Any information or indictment charging an individual with the commission of an offense shall be filed within thirty days from the date on which such individual was arrested or served with a summons in connection with such charges." 18 U.S.C. § 3161(b).

The Speedy Trial Act, 18 U.S.C. § 3161 *et seq.*, was in part a result of Congress's desire to provide greater protection against improper delay in criminal trials than afforded under the Sixth Amendment. *See United States v. Mehrmanesh*, 652 F.2d 766, 769 (9th Cir. 1981); *accord United States v. Nance*, 666 F.2d 353, 360 (9th Cir. 1982). It therefore provides specific timetables and remedies to ensure that criminal cases do not languish due to ordinary docket congestion or similar causes. *See Nance*, 666 F.2d at 355-56. The Act moreover "put teeth into the speedy trial guarantee" by mandating dismissal when its parameters were exceeded, without any showing of prejudice. *Mehrmanesh*, 652 F.2d at 769. If the time limits in the statute are exceeded, the district court must dismiss upon motion of the defendant. *See* § 3162(a)(1) & (2); *United States v. Taylor*, 487 U.S. 326, 332 (1988). The trial court's only discretion is whether to dismiss with or without prejudice. *See United States v. Engstrom*, 7 F.3d 1423, 1427 (9th Cir. 1993).

CLIENTNAME was arrested on DATE, but was not arraigned on the Indictment until DATE, XX days after his arrest. Section 3162(a)(1) provides that if "no indictment or information is filed within the [thirty-day time limit], such charge against that individual contained

in such complaint shall be dismissed or otherwise dropped." After the charges are dropped, "the government may indict on new charges, or it may abandon the original charges upon which the defendant is held, but it may not indict on the same charge for which the defendant was arrested." *United States v. Lopez-Osuna*, 242 F.3d 1191, 1197 (9th Cir. 2000).

Here, a one-count Complaint was filed, charging CLIENTNAME with CHARGE. On DATE, thirty-one days after his arrest, a two-count Indictment was filed against CLIENTNAME charging him with CHARGES. Clearly, the Government's first charge in the Indictment is the same as that of the original Complaint. *See United States v. Alvarez-Perez*, 629 F.3d 1053, 1058 (9th Cir. 2010) (filing of indictment with same charge as complaint or information does not restart clock). Furthermore, the Government not only relied on the same information it had following CLIENTNAME's arrest to prosecute the second count of the Indictment, but also failed to file the Indictment within thirty days of CLIENTNAME's arrest.

Finally, none of the thirty-one days that elapsed after his arrest is excludable under 18 U.S.C. § 3161(h). In fact, the Government used an administrative agency, Immigrations and Customs Enforcement (ICE), to circumvent the requirements of the Speedy Trial Act (hereinafter "STA"). This abuse of power should not be tolerated or permitted by this Court. Because the Indictment was returned more than thirty days after CLIENTNAME's arrest, it must be dismissed. *See* § 3162(a)(1).

B. <u>Count 2 of the Indictment Must Be Dismissed, Because the Government Had All Relevant Information Regarding Any Violation of CHARGE at the Time of CLIENTNAME's Arrest.</u>

The STA requires any indictment be filed within thirty days from the date of arrest under § 3161(b). 18 U.S.C. § 3161(b); *United States v. Pollock*, 726 F.2d 1456, 1462 (9th Cir. 1984). When a charge is dismissed and another indictment is filed charging a defendant with the same

offense or an offense based on the same conduct or arising out of the same episode, § 3161(b) applies with respect to the subsequent indictment. 18 U.S.C. § 3161(d)(1). Section 3161(b) requires any charge be dismissed where the indictment has not been filed in conformance with the time requirements of § 3161(b).

The test for determining whether a charge should have been alleged in the original indictment is whether the offenses to be dismissed are apparent on the face of the complaint or original indictment. *Id.* If the charges in any subsequent indictment arise under the same statute as the charges in the original indictment, they must still comply with the thirty-day time limit of 3161(b). *See United States v. Palomba*, 31 F.3d 1456, 1463 (9th Cir. 1994).

In this case, the Government initially charged CLIENTNAME with only CHARGE, not both CHARGES. The Indictment filed on DATE included counts for both CHARGES, but because the facts upon which the Indictment is predicated were present at the time of CLIENTNAME's arrest, the time calculation for purposes of the STA began on DATE for both the CHARGE in the complaint *and* the CHARGE count in the Indictment.

When this Court inquired into the status of discovery material on DATE, counsel for the Government informed the Court that discovery material had already been provided to CLIENTNAME's attorney. However, that discovery material was provided on DATE, before the initial complaint was dismissed and before indictment. Counsel for CLIENTNAME requested discovery again because of the additional CHARGE count in the Indictment, expecting additional material in light of the new charge. On DATE, the Government sent the identical thirty-five pages of discovery previously delivered on December 6, 2000. This demonstrates that the new charge in the Indictment is based on the same information in the Government's possession when it filed the complaint, and the Government did not file the Indictment because of any newly-obtained

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information.

All facts relied upon for the CHARGE count of the Indictment were present at arrest. Thus, the Court should calculate time under the STA beginning at the arrest date on DATE for *both* counts, and find the Government violated the STA due to the Indictment being filed more than thirty days after arrest.

C. <u>Although "Excludable Time" May Allow for Prolonging the Initiation of an Indictment Proceeding, There Was No Excludable Time Between CLIENTNAME's Arrest And the Indictment Thirty-One Days Later.</u>

Although the running of time can be tolled by specific, qualifying events, there is no proper basis here for excluding the time between CLIENTNAME's arrest and the filing of the Indictment past the STA deadline. Time may be excluded under the STA § 3161(h)(1) computations for "other proceedings," such as in the case of a defendant who waives indictment. *See Lopez-Osuna*, 242 F.3d at 1195. However, in this case, CLIENTNAME did not waive indictment. In fact, counsel for CLIENTNAME specifically informed the Government as early as DATE that CLIENTNAME would not waive indictment, thereby putting the Government on notice that an Indictment proceeding would be required.

Additionally, time is not excludable because the parties were involved in plea negotiations, as this is not a factor supporting excluding time. *United States v. Ramirez-Cortez*, 213 F.3d 1149, 1155 (9th Cir. 2000) ("Negotiation of a plea bargain is not one of the factors supporting exclusion.") (quoting *United States v. Perez- Reveles*, 715 F.2d 1348, 1352 (9th Cir. 1983)). Any other time exclusion must be supported by a specific finding, on the record, by this Court that the delay serves the interests of justice. *See Bloate v. United States*, 130 S.Ct. 1345 (2010).

The Government may argue that time spent by CLIENTNAME in ICE custody should be excludable as a civil detention because "[t]his circuit has repeatedly declined to apply the Speedy

Trial Act in situations where the defendant's detention is not pursuant to federal criminal charges, even though federal criminal authorities may be aware of and even involved with that detention." *United States v. Cepeda-Luna*, 989 F.2d 353, 356 (9th Cir. 1993). This argument would be misguided, however, because Ninth Circuit case law on this issue applies to circumstances where a defendant is initially in ICE or state custody and an Indictment is not filed within thirty days of that agency's arrest of the defendant. *See, e.g., United States v. Benitez*, 34 F.3d 1489 (9th Cir. 1994); *United States v. Orbino*, 981 F.2d 1035 (9th Cir. 1992). In other words, civil detention does not trigger the STA. *Cepeda-Luna*, 989 F.2d at 354.

Here, however, CLIENTNAME's detention did not commence during custody by another sovereign or another agency, but, as is covered by the STA, when he was arrested for a federal offense on DATE. The Ninth Circuit has held that:

> [a]lthough we determine the Speedy Trial Act does not apply to civil deportation arrests, this rule is not absolute. The requirements of the Act would lose all meaning if federal criminal authorities could collude with civil or state officials to have those authorities detain a defendant pending federal criminal charges solely for the purpose of bypassing the requirements of the Speedy Trial Act.

Cepeda-Luna, 989 F.2d at 357. Therefore, even under circumstances where an individual's custody commences with ICE, courts are to look at the specific circumstances to ensure compliance with the intent of the STA. Here, it is clear that CLIENTNAME was transferred to ICE custody following dismissal of his case even though there was never any intention to have him deported or removed. Indeed, while in ICE custody, CLIENTNAME called his attorney to inform him that he was not being allowed to return to Mexico but instead, being transferred back to federal custody. Under these uncontroverted facts, it is apparent that the sole purpose of CLIENTNAME's transfer was to allow the Government to circumvent the STA by creating extra time to file an Indictment. Because this was an abuse of process, no period of time between

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CLIENTNAME's arrest and Indictment is excludable for purposes of the STA.

Finally, with regard to STA cases, a court:

> need not inquire whether the delay in [the defendant's] case resulted from mere inadvertence or bad faith on the part of the government. The triggering of the sanction is unambiguous: if the indictment is not filed within 30 days of arrest, the charge contained in the complaint shall be dismissed.

Pollock, 726 F.2d at 1462 (emphasis added) (citation omitted). In other words, regardless of whether an impermissible delay in returning the indictment resulted from mere inadvertence or bad faith on the part of the Government, the sanction of dismissal is required. *See id.* In any case, there is even more justification here to dismiss the Indictment as the Government deliberately acted in bad faith.

D. Not Only Should the Court Dismiss the Indictment, It Should Dismiss with Prejudice.

Because the Court must dismiss the indictment, the issue of prejudice remains:

> [i]n 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.

18 U.S.C. § 3162(a)(1). In this case, the factors weigh in favor of dismissal with prejudice.

First, the Ninth Circuit has expressly classified the charge of attempted reentry after deportation as only a "moderately serious offense." *United States v. Pena-Carrillo*, 46 F.3d 879, 882 (9th Cir. 1995). Thus, the first factor weighs in favor of dismissal with prejudice in the case at hand.

Second, the facts and circumstances of the case weigh heavily in favor of dismissal. Clearly, the Government could have, and should have, indicted CLIENTNAME within the thirty-

day time period mandated by § 3161(b). Because counsel for CLIENTNAME informed the Government on DATE that CLIENTNAME neither accepted its plea offer nor waived indictment, the Government had XX days to obtain and file an indictment. The fact that the Government failed to do so under these circumstances weighs in favor of dismissal with prejudice.

Third, re-prosecution would distort the effective administration of both the STA and of justice. The prejudice against CLIENTNAME is obvious: a charge under 8 U.S.C. § 1326 carries a twenty-year maximum sentence. Moreover, failure to dismiss the indictment with prejudice will serve to condone and perpetuate prosecutorial misconduct and delay by the Government. The Government was aware of all of the facts justifying an indictment for § 1326 and § CHARGE when it filed the original complaint. Furthermore, the Government had sufficient time to obtain an indictment and file it in compliance with 18 U.S.C. § 3161(b). Dismissal without prejudice unfairly rewards the Government by allowing it to benefit from an error of its own making, deflecting any adverse consequences for its obvious failure to comply with the simple, bright-line rule of the STA.

Thus, failure to dismiss with prejudice guarantees constant repetition of cases such as the present case — a highly probable circumstance in this district, which frequently prosecutes § 1326 violations. Furthermore, it seriously undermines the administration of justice, eliminating the protections the STA provides to the accused and condoning the Government's failure to comply with even the simplest of statutory rules. For these reasons, the Court should dismiss this case with prejudice.