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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. RYAN CARROLL and ROBERT LEE, Defendants.	No. CR 13-00566-EMC **UNITED STATES' OPPOSITION TO DEFENDANT'S MOTION TO DISMISS (ECF No. 186)** Date: July 1, 2015 Time: 1:30 PM Court: Courtroom 5 Hon. Edward M. Chen

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INTRODUCTION

Defendant Ryan Carroll's Motion to Dismiss for speedy trial violations is unsupported factually and legally and should be denied accordingly. The defendant claims that he has been prejudiced under the Fifth and Sixth Amendments because testimony from a witness, identified herein as J.C., has been lost and the witness is essentially unavailable for trial because of memory loss due to injuries suffered in a motorcycle accident last year. In fact the witness is listed on the government's witness list, has been subpoenaed to testify at trial by the government, has already spoken with the defense, and indicated to the government just two days ago that he still remembers parts of his interview with investigators from the Humboldt County Sheriff's Office ("HCSO") in early 2013. Rather than suffering from complete memory loss, it appears that J.C. is now simply changing his story and will no longer testify as to certain aspects of the interview that he previously gave which would be favorable to the defense. To support his claims, the defendant now accuses the government of an elaborate conspiracy with the Humboldt County District Attorney to withhold discovery concerning J.C. There is no factual basis for the defendant's accusations. In reality, an FBI report of investigation ("FBI 302") describing J.C.'s potential knowledge of exculpatory information was produced to the defense within weeks of the indictment in September 2013. Although J.C.'s name was redacted, the defense failed to request J.C.'s identity or otherwise follow up. When the government received new evidence from Humboldt County concerning J.C.'s interview with HCSO in March of this year, it produced the material to the defense within days (seven months in advance of the current trial date and two months in advance of the previous trial date).

Further, although the defendant complains at length about purported discovery violations by the Humboldt County DA (before the defendant was indicted federally), the defendant's motion completely fails to make any showing of misconduct or negligence on the part of the federal government. In fact, as described below, Mr. Carroll himself consented to or was the reason for any post-indictment delay, did not assert a speedy trial right for roughly twenty months (until the date of pretrial filings), and has failed to demonstrate any prejudice as a result of the delay. His motion should be denied accordingly.

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ARGUMENT

I. FIFTH AMENDMENT CLAIM

"An indictment is rarely dismissed because delay by the prosecution rises to the level of a Fifth Amendment due process violation." *United States v. Barken*, 412 F.3d 1131, 1134 (9th Cir. 2005). One of the primary reasons for this is the substantial protection provided by the statute of limitations. Statutes of limitation "represent legislative assessments of relative interests of the State and the defendant in administering and receiving justice." *United States v. Marion*, 404 U.S. 307, 322 (1971). "[A]n indictment returned prior to the running of the statute of limitations [is] generally considered a safeguard against the prosecution of stale crimes." *United States v. Griffin*, 464 F.2d 1352, 1354 (9th Cir. 1972); *see also* 1-5 Ninth Circuit Criminal Handbook § 5.04 (noting that "the statute of limitations provides adequate (and nearly exclusive) protection for a defendant's pre-indictment rights."). The indictment in the present case was timely filed within the applicable statutes of limitations.

At the time of the indictment, less than five years had passed since the underlying offenses had occurred. This is within the statutory limit. Even less time had passed – less than two years – since the U.S. Attorney's Office began its investigation. During the intervening years the case had been subject to a separate investigation and prosecution by local authorities in Humboldt County. Importantly, United States Attorneys have broad discretion to enforce the nation's criminal laws and to file charges against those believed to have violated those laws. *United States v. Armstrong*, 517 U.S. 456, 464 (1996). As a result of this discretion, "the presumption of regularity supports their prosecutorial decisions and, in the absence of clear language to the contrary, courts presume that they have properly discharged their official duties." *Id.* (internal quotations omitted). Therefore, because the indictment was filed before the statute of limitations had run on the various charges and because the United States enjoys a presumption that it has properly discharged its prosecutorial duties, the indictment is presumptively proper and should not be dismissed.

A. Legal Standard

Defendant cites the correct two-part test for determining whether a pre-indictment delay amounts to a denial of due process: "(1) the defendant must prove actual, non-speculative prejudice from the delay; and (2) the length of the delay, when balanced against the reason for the delay, must offend those

fundamental conceptions of justice which lie at the base of our civil and political institutions." *United States v. Huntley*, 976 F.2d 1287, 1290 (9th Cir. 1992) (internal quotations omitted). But the burden Defendant must bear is a heavy one, and the remedy of dismissal for pre-indictment delay is truly extraordinary. *See, e.g., United States v. Lovasco*, 431 U.S. 783, 796-97 (1977) ("so few defendants have established that they were prejudiced by delay that neither this Court nor any lower court has had a sustained opportunity to consider the constitutional significance of various reasons for delay"). This is so because the existing statute of limitations is "the primary guarantee against bringing overly stale criminal charges." *United States v. Ewell*, 383 U.S. 116, 122 (1966). In moving for dismissal, Mr. Carroll would have this Court exercise a much laxer standard than any court has previously established for due process claims arising out of pre-indictment delay.

The basis of a due process claim for pre-indictment delay arises from two Supreme Court cases, *United States v. Marion*, 404 U.S. 307 (1971), and *United States v. Lovasco*, 431 U.S. 783 (1977). *Marion* reversed a lower court's dismissal of an indictment on due process grounds, finding that "the Fifth Amendment would require dismissal of the indictment if it were shown at trial that the pre-indictment delay in [the] case caused substantial prejudice to appellees' rights to a fair trial and that the delay was an intentional device to gain tactical advantage over the accused." *Marion*, 404 U.S. at 324. The Court went on to note that a due process inquiry would "necessarily involve a delicate judgment based on the circumstances of each case." *Id.* at 325. Six years later, in *Lovasco*, the Court clarified that "proof of prejudice is generally a necessary but not sufficient element of a due process claim, and that the due process inquiry must consider the reasons for the delay as well as the prejudice to the accused." *Lovasco*, 431 U.S. at 790. After noting that "no one's interests would be served by compelling prosecutors to initiate prosecutions as soon as they are legally entitled to do so," *id*. at 792, the Court delegated the task of applying the principles it had laid out—that a dismissal on due process grounds required both substantial prejudice and intentional delay to gain tactical advantage—in individual cases to lower courts. *Id.* at 797.

The Ninth Circuit applies the *Lovasco* standard stringently, requiring not only the demonstration of "actual prejudice" but a showing of "some culpability on the government's part either in the form of intentional misconduct or negligence." *United States v. Mays*, 549 F.2d 670, 678 (9th Cir. 1977). The

Ninth Circuit in *Huntley* noted that "[t]he task of establishing the requisite prejudice for a possible due process claim is 'so heavy' that [the court] has found only two cases since 1975 in which any circuit has upheld a due process claim." 976 F.2d at 1290 (emphasis added). Defendant here has not met the "heavy" task of establishing actual prejudice. Even if he had, his claim should fail because the defendant has made no showing of either misconduct or negligence on the part of the government.

B. The Defendant has not Shown Actual Prejudice

Under the Ninth Circuit's *Lovasco* standard, a defendant must demonstrate not only that evidence has been lost by the delay, but that such evidence would have helped his defense and that such evidence would not merely be cumulative of other evidence. *See, e.g.*, *Huntley*, 976 F.2d at 1290 (finding that a defendant "must demonstrate by definite and non-speculative evidence how the loss of a witness or evidence is prejudicial to the defendant's case"). This is a "heavy burden" by design. *United States v. Moran*, 759 F.2d 777, 782 (9th Cir. 1985) (noting also that "[o]ur cases reflect this heavy burden, as we have often found actual prejudice lacking in the record."). A defendant attempting to assert a due process claim must not "rely solely on the real possibility of prejudice inherent in any extended delay: that memories dim, witnesses become inaccessible, and evidence be lost," because such concerns are already given force through the applicable statute of limitations. *Marion*, 404 U.S. at 325-26.

Here, the asserted prejudice suffered by the defendant is precisely the type of "inherent" prejudice deemed insufficient by the Supreme Court in *Marion*. *Id.* In the present case, the defendant appears to allege two forms of prejudice. First, that had he been able to interview J.C. sooner, he would have then been able to identify additional witnesses which may have provided helpful testimony. (ECF No.186 ("Mot. to Dismiss") at 9-10). That claim is entirely speculative and should be disregarded. The defendant has made no showing of what testimony such unidentified witnesses would have provided or how such testimony would have been helpful to his case. General allegations of speculative prejudice have long been rejected as an improper basis for a due process claim, and the same reasoning precludes the defendant's claim here. *See, e.g., United States v. Manning*, 56 F.3d 1188, 1194 (9th Cir. 1995) ("Generalized assertions of the loss of memory, witnesses, or evidence are insufficient to establish actual prejudice.").

Second, the defendant appears to claim that J.C.'s testimony has been lost. That claim is inaccurate. J.C. is still available as a witness, is listed on the government's witness list, has been subpoenaed to testify at trial by the government, and has already spoken with the defense. (*See* Declaration of Scott D. Joiner submitted herewith ("Joiner Decl."), Ex. A.) J.C. also appears competent and has expressed a willingness to testify. Based on its motion, the defense would have the Court believe that J.C. is somehow incapable of testifying or remembering anything. That is not the case. As J.C. told the FBI just two days ago, he still remembers the meeting with HCSO, he just does not remember the particulars of what he said. (*Id.*, Ex. B.) This is not surprising given the fact that more than two years have passed since the interview. Notably, J.C. still remembers several facts that he also discussed during the interview. In his HCSO interview, J.C. described how Ryan Floyd had stolen his property, possessed firearms, and had shot at him. (*Id.*, Exs. C, D.)[1] On June 9, 2010, when asked by the FBI if he recalled telling HCSO anything about Ryan Floyd and a firearm, J.C. again said, "Ryan had all kinds of firearms." (*Id.*, Ex. B.) J.C. also said that he observed Floyd speaking to Brown in private, and "overheard bits and pieces" of their conversation, but did not recall any details. (*Id.*) J.C. further stated that his property had been burglarized and that Floyd had shot at him, just as he had previously claimed when interviewed by HCSO. (*Id.*)

Rather than suffering from complete memory loss, it appears that J.C. is now simply changing his story. When asked two days ago if he recalled telling HCSO that he observed Floyd give a firearm to Cody Brown, J.C. said he never saw Floyd give a firearm to Brown. (*Id.*) Although this may not be what the defense would like to hear, the fact that a witness is changing his or her story does not rise to the level of actual, non-speculative prejudice as required to sustain a motion to dismiss.[2]

The only potentially unique aspect of this case is the fact that J.C. was involved in a serious motorcycle accident in July of last year. (*Id.*) Although this may have impacted his memory, it would

[1] Exhibits C and D to the Joiner Declaration are a video recording of the HCSO interview and transcript of the same which will be filed under seal and lodged with the Court.

[2] The defense fails to mention it in their brief, but it appears that J.C. likely told the defense the same thing. (Joiner Decl., Ex. B ("When asked if the defense investigator asked him if he recalled telling HCSO that he observed FLOYD give a firearm to BROWN, [J.C.] said, 'I think so.' When asked what he told the defense investigator, [J.C.] stated he did not recall. When asked if he would have told them that he saw FLOYD give BROWN a firearm, [J.C.] stated he would not.").)

be improper to attribute J.C.'s motorcycle accident to any fault of the United States. Indeed, even if the recorded interview and related investigative report had been in the United States' possession (they were not) and produced in September 2013, J.C. would still have suffered the same injuries in July 2014. Both parties would be facing the same challenges regarding J.C.'s memory and testimony at trial regardless of the timing of discovery.[3]

C. Even Assuming Prejudice, the Defendant has Failed to Show that the Purported Delay Offends Fundamental Conceptions of Justice.

Because Mr. Carroll has not shown actual prejudice, "it is unnecessary to consider the length of or the reason for the delay." *United States v. West*, 607 F.2d 300, 305 (9th Cir. 1979). But even where a defendant has succeeded in showing actual prejudice, "there must be some culpability on the government's part either in the form of intentional misconduct or negligence" to support a dismissal. *Mays*, 549 F.2d at 678. Courts in this circuit "clearly require some showing of governmental culpability to prove a deprivation of due process." *Moran*, 759 F.2d at 783.

In the present case, Mr. Carroll has made no showing of government culpability, either by misconduct or negligence. The sole basis for the defendant's allegation of government culpability is an accusation – with no valid evidentiary support – claiming that: (i) "Humboldt County was instructed to conceal discovery related to J.C." and (ii) that the federal government intentionally concealed and withheld the production of discovery related to J.C. (Mot. to Dismiss at 14.) For support, the defendant cites a vague statement by the Humboldt County prosecutor in an email regarding discovery issues. In the email, dated July 15, 2013, the state prosecutor writes: "They are still engaged in an investigation and they don't want information leaked during their investigation." (Keith Decl. in Support (ECF No. 187, Ex. 8). The FBI's legitimate concern about leaks, as reported second-hand by the county prosecutor, is a far cry from evidence of a conspiracy to withhold discovery. In fact, in the very the same email chain Mr. Carroll's defense counsel makes it clear that the federal government was perfectly

[3] It would be unfair and unprecedented to hold the United States responsible and dismiss the indictment anytime a potential witness suffers an automobile accident or failure of memory during the time it takes to bring a complex case to trial. Such events, and the prejudice to both sides that arises from them, are inherent in any extended delay and a simple fact of life for trial lawyers. *See Marion*, 404 U.S. at 325-26 (defendant may not "rely solely on the real possibility of prejudice inherent in any extended delay: that memories dim, witnesses become inaccessible, and evidence be lost.").

willing to turn over FBI 302 reports of investigation. (*Id.* (noting that defense counsel spoke with the AUSA and "he said that he is willing to provide the FBI 302 reports of investigation, and to do so, the easiest way is for you to request them from him.")). As the foregoing demonstrates, the defendant's conspiracy theory is baseless and should be rejected by the Court.

In reality, the defendant is seeking to somehow transform local discovery disputes – which arose solely in Humboldt County Superior Court with the county district attorney's office – into a constitutional due process violation by the United States. Indeed, the bulk of the defendant's motion is focused on discovery disputes that had nothing to do with the United States government. The majority of the exhibits submitted by the defendant are simply copies of transcripts, meet and confer communications, or pleadings regarding legal proceedings in Humboldt County Superior Court with no connection to the federal case. The absence of any involvement by federal prosecutors in these exhibits is significant and underscores the true nature of the defendant's motion. Because the defendant has no valid due process claims against the federal government, he is now trying to paint the United States as a bad actor by putting forth an elaborate conspiracy theory that would connect the federal prosecution with state prosecutors who allegedly failed to turn over discovery (discovery which, it is important to note, the federal government subsequently obtained from the locals and immediately turned over to the defense).

The defendant's theory is defective. Regardless of the procedural history of the state prosecution, it is undisputed that the United States provided all of the relevant discovery concerning J.C. before the discovery cut-off established by the Court in this case. (Declaration of Benjamin Tolkoff filed herewith (Tolkoff Decl.) ¶¶ 5-11.) The case was indicted on August 22, 2013. On September 18, 2013, this office produced over 800 pages of discovery. Included in that discovery was a 302 summarizing the FBI's telephonic interview of J.C. (*Id.* ¶ 6.) Notably, the 302 included the following information:

- J.C. "observed [RYAN] FLOYD give CODY BROWN a firearm described as having a 'strange stock' and providing instructions for a secret disposal. [J.C.] was unaware .of the specific date or circumstances; however, asserted **the observed exchange was related to the murder in September of 2008**."

- "FLOYD stole property from [J.C.] prior to evicting him from the property prior to harvesting of the marijuana garden. [J.C.] accordingly provided information to and assisted the HCSO with the unsuccessful search for buried "Conex" boxes containing

> firearms on the FLOYD property. [J.C.] indicated the aforementioned Mexican laborer had additional information **regarding the homicide**; however, remained incarcerated within an undisclosed California State Prison (CSP) and was available only for surreptitious questioning by [J.C.] on behalf of FBI interests."
>
> - "[J.C.] was contacted on the phone while watching over his dying mother at ST. JOSEPH HOSPITAL (SJH) in Eureka, CA. [J.C.] was unsatisfied with HCSO efforts to return his stolen belongings and felt they had not looked in the right places for the buried weapons."

(Joiner Decl., Ex. A (emphasis added).)

Although J.C.'s name was redacted, the FBI 302 provided clear notice that J.C. might have information implicating other individuals in the murder. Despite this notice, however, the defense never requested the identity of J.C. or, apparently, did anything to follow-up regarding the two individuals identified in the report.

The defense disingenuously argues that this FBI 302 was misleading because it did not describe additional statements that J.C. made when interviewed by HCSO in February 2013. The FBI 302, however, is not a report of that interview (indeed, the prosecution in this case was not even aware of the details of that interview until it received additional materials from Humboldt County in March of 2015). (Tolkoff Decl. ¶¶1-12.) The FBI 302 instead accurately describes information provided by J.C. in a telephonic interview with the FBI a few weeks later. (Joiner Decl., Ex. A.)

Nor did the government do anything to withhold discovery from the defense. (Tolkoff Decl. ¶¶1-12.) The recorded interview with HCSO and the related investigative report were not in the government's possession until March 2015. (*Id.*) These items were produced within days of being received, before the discovery cutoff, and substantially in advance of trial. (*Id.*) *See also United States v. Gatto*, 763 F.2d 1040, 1048 (9th Cir. 1985) (Rule 16 "triggers the government's disclosure obligation only with respect to documents within the federal government's actual possession, custody or control."); *Weatherford v. Bursey*, 429 U.S. 545 (disclosure need not precede trial); *United States v. O'Hara*, 301 F.3d 563, 569 (7th Cir. 2002) (same); *Lucas v. Regan*, 503 F.2d 1, 3 n.1 (2d Cir. 1974) ("[n]either *Brady* nor any other case we know of requires that disclosures under *Brady* be made before trial."); *United States v. Higgins*, 75 F.3d 332, 335 (7th Cir. 1996) "Brady thus is a disclosure rule, not a discovery rule.").

Further, at no time did the United States ever instruct Humboldt County to conceal or withhold

any discovery concerning J.C. from the defense. (Tolkoff Decl. ¶¶1-12.) The opposite is true. Not only was the defense provided notice of J.C.'s information concerning the murder in September of 2013, just weeks after indictment, but the United States also went back to Humboldt County to ensure that all information had been discovered prior to the discovery cutoff. (*Id.*) The new information the United States received concerning J.C. was provided almost immediately to the defense, along with a number of items that went above and beyond the government's discovery obligations. (*Id.*) Far from concealing J.C. from the defense, the government listed J.C. as a trial witness. If the government intended to hide J.C., as the defendant claims, identifying J.C. as a witness for the government and subpoenaing J.C. to testify at trial would completely defeat the alleged purpose of such concealment.

In addition, the defense has completely failed to explain any tactical advantage that the government gained through the purported concealment of information regarding J.C. There is simply no practical reason why the federal government would engage in such an elaborate scheme with state prosecutors, only to turn around and name J.C. as a witness and then produce the purportedly concealed discovery months (and in the case of the initial FBI 302, years) in advance of trial. Under the defendant's theory, the government would have had to know that J.C. was going to be in a motorcycle accident and have planned to withhold discovery until after the witness' memory loss was exacerbated by the injuries sustained in the wreck. Such a theory is absurd.

Finally, it bears noting that the defendant's Fifth Amendment claim does not actually implicate any improper delay by the federal government in bringing the indictment. Beyond a vague and unsupported accusation that the federal investigation "took six months to get underway, and the government dragged its feet for about four before indicting," there is nothing in the Motion to Dismiss that identifies any improper *pre-indictment* delay. The general allegation that the government "dragged its feet" fails for two reasons. First, there is no evidentiary support for the defendant's claim. *See United States v. Sand*, 541 F.2d 1370, 1374 (9th Cir. 1976) ("The argument that the government deliberately delayed the indictment to gain a tactical advantage is without any support in the record [other than the defendants' own] unsupported conclusory allegations. That is simply insufficient.") Second, as the defense concedes, the federal government was investigating the case while the state prosecution proceeded. A purported delay of ten months while the government investigated and decided

whether to indict is entirely appropriate given the breadth and complexity of the case and the United States Attorney's broad prosecutorial discretion.[4] *See, e.g.*, *Lovasco*, 431 U.S. at 792, 796 (noting that "no one's interests would be served by compelling prosecutors to initiate prosecutions as soon as they are legally entitled to do so" and holding that "investigative delay is fundamentally unlike delay undertaken by the Government solely to gain tactical advantage…. to prosecute a defendant following investigative delay does not deprive him of due process, even if his defense might have been somewhat prejudiced by the lapse of time."); *Huntley*, 976 F.2d at 1291 ("The federal decision not to prosecute during the state proceedings was a policy decision, more properly seen as the explanation of the delay, than as prejudice caused by the delay").

* * *

As described above, the defendant has failed to show actual, non-speculative prejudice. He has also failed to show that the length of any delay, "when balanced against the reason for the delay, [offended] those fundamental conceptions of justice which lie at the base of our civil and political institutions." *Huntley*, 976 F.2d at 1290. The defendant's Fifth Amendment claim for pre-indictment delay should be denied accordingly.

II. SIXTH AMENDMENT CLAIM

The defendant's Sixth Amendment claim for post-indictment delay is similarly defective. An alleged Sixth Amendment violation of the right to a speedy trial must be evaluated under the four-factor test articulated by the Supreme Court in *Barker v. Wingo*, namely: (1) the length of any delay; (2) the reason provided for the delay; (3) the defendant's assertion of the right to a speedy trial; and (4) the actual prejudice that the defendant suffered as a result of this delay. 407 U.S. 514, 521 (1974).

In the present case, the defendant was indicted in August 2013, roughly twenty months before he asserted his right to a speedy trial.[5] Since that time all continuances between his first appearance and the

[4] The complexity of this case is supported by the fact that, before the trial date was moved, the government had identified more than 50 witnesses and 250 exhibits in its pretrial witness and exhibit lists. The parties all anticipate that the trial will last at least a month.

[5] Speedy trial rights for federal charges do not attach upon state arrest even though state and federal officials agree to allow the state to prosecute first. *United States v. Wallace*, 326 F.3d 881 (7th Cir. 2003); *United States v. Tanu*, 589 F.2d 82, 88 (2d Cir. 1978); *United States v. Romero*, 585 F.2d 391, 398 (9th Cir. 1978); *United States v. Burkhalter*, 583 F.2d 389, 392 (8th Cir. 1978).

initial date of the filing of this motion have been initiated at his request or with his consent. These delays were not, as the defendant contends, caused (or even significantly impacted) by the government's alleged failure to provide discovery concerning J.C. (Mot. to Dismiss at 15.) As described above, the initial FBI 302 concerning J.C. was provided within weeks of the indictment, and all discovery was produced prior to the discovery cutoff.

Notably, Mr. Carroll did not assert his right to a speedy trial until a little past midnight on the morning of April 22, 2015. Although the defendant now claims that he was "prevented from asserting his right to a speedy trial" and would not have agreed to exclude time, "[i]f he had been informed of the witness J.C. at the initiation of this prosecution," the defendant has provided no explanation as to how the government "prevented" him from asserting his speedy trial right or why the identification of J.C. would have spurred him to demand a speedy trial any sooner. The defendant's assertion makes little sense given his claim that he has been prejudiced by not being able to interview J.C. and conduct further investigation concerning other potential witnesses. (*E.g.*, Motion to Dismiss at 9-11.) To the contrary, it stands to reason that if the defendant needed to perform additional investigation, he would have been more likely – not less – to seek or agree to continuances and excludable time.

The defendant's claim of prejudice also fails. As described above, Mr. Carroll was on notice that J.C. was interviewed by the FBI within weeks of the indictment (almost two years ago). Although Carroll makes the unfounded claim that the FBI 302 is "misleading," the report of that interview makes it clear that J.C. indicated that he believed Cody Brown and Ryan Floyd were connected to the murder. If Mr. Carroll wanted to interview J.C. he could have done so by following up on the 302 over a year ago. It also bears noting that Ms. Keith was Mr. Carroll's state defense attorney on this matter before Carroll was charged in federal court. Ms. Keith had equal, if not better access to the recording of J.C.'s interview than the government. Ms. Keith claims that the Humboldt County District Attorney would not give her discovery. Assuming for the sake of argument that that is accurate, Ms. Keith should have pursued that issue to conclusion before the Superior Court Judge. The U.S. Attorney's Office is not responsible for the purported refusal or inability of the Humboldt County DA's office to provide discovery. The material was turned over by the U.S. Attorney's Office as soon as the office received it, roughly seven months before the currently scheduled trial (and two months before the previously

scheduled trial date). *See also United States v. Dominguez–Villa*, 954 F.2d 562, 566 (9th Cir.1992) (federal government "is not obligated to review state law enforcement files not within its possession or control.").

More importantly, J.C. continues to be available as a witness and has been subpoenaed to testify at trial (by the government). No witnesses have been "lost." In addition, the tools available to the defense to refresh J.C.'s recollection (including the recording of his prior interview) remain the same as they would for any other witness whose memory may have diminished over the last two years.

Based on the foregoing, it is apparent that Mr. Carroll himself consented to or was the reason for any post-indictment delay, did not assert a speedy trial right until the date of pretrial filings, and has failed to demonstrate any prejudice as a result of the delay. Mr. Carroll's Sixth Amendment claim must therefore fail and his motion should be denied.

III. CONCLUSION

Based on the foregoing, the defendants' Fifth and Sixth Amendment claims and Motion to Dismiss should be denied in their entirety.[6]

Dated: June 11, 2015

Respectfully submitted,

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/s/
SCOTT D. JOINER
Assistant United States Attorney

[6] By filing this response, the United States does not waive or limit its objection to the propriety of the Court considering the defendants' motion to dismiss while two exclusionary rulings in this case are pending appeal in the Ninth Circuit.