UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

UNITED STATES OF AMERICA,	)	**CRIMINAL ACTION NO.**
	)	
Plaintiff,	)	**3:93-CR-330-T**
	)	
v.	)	
	)	
XXXX XXXX,	)	
	)	
Defendant.	)	
	)	

MOTION TO DISMISS INDICTMENT

Defendant XXXX XXXX hereby moves this Court to dismiss Counts 2-8 of the indictment filed against him on October 6, 1993, with prejudice, based upon violations of the Speedy Trial Act. See 18 U.S.C. § 3161(b).

Respectfully submitted,

F. Clinton Broden
Tx. Bar 24001495
Broden & Mickelsen
2715 Guillot
Dallas, Texas 75204
214-720-9552
214-720-9594 (facsimile)

Attorney for Defendant
XXXX XXXX

CERTIFICATE OF SERVICE

I, F. Clinton Broden, certify that on the ___ day of October, 1993, I caused a copy of Defendant XXXX XXXX's Motion to Dismiss Counts 2-8 of the Indictment with Prejudice and Memorandum of Law in Support Thereof to be hand-delivered to Michael Snipes, Assistant United States Attorney, at 1100 Commerce Street, Third Floor, Dallas, Texas.

F. Clinton Broden

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
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UNITED STATES OF AMERICA,	)	**CRIMINAL ACTION NO.**
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	)	
XXXX XXXX,	)	
	)	
Defendant.	)	
	)	

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT XXXX XXXX'S MOTION TO DISMISS COUNTS 2-8 OF THE INDICTMENT WITH PREJUDICE

I. FACTS

On or before September 2, 1993, XXXX XXXX was arrested based upon a criminal complaint charging him with violations of 21 U.S.C. §§ 841(a)(1) and 843(b). See Exhibits A (Commitment to Another District filed September 2, 1993) and B (Criminal Complaint filed August 31, 1993). The Government moved for Mr. XXXX's detention following his arrest. See Exhibit C. Mr. XXXX remained in custody until October 1, 1993 when his parents posted a $25,000 property bond. An indictment was returned against Mr. XXXX by the grand jury on October 6, 1993, thirty-four days following his arrest. Counts 2-8 of the indictment charge Mr. XXXX with violations of 21 U.S.C. § 841(a)(1) and are identical to the charges set forth in the criminal complaint.

II. ARGUMENT

A. Counts 2-8 of the Indictment Must Be Dismissed Against Mr. XXXX.

The Speedy Trial Act (18 U.S.C. § 3161, et. seq.) provides that "[a]ny 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...in connection with such charges." 18 U.S.C. § 3161(b) (emphasis added). The Act further provides that if an indictment is not returned within the mandatory thirty day time limit, "such charge against the individual contained in such

complaint shall be dismissed or otherwise dropped." Id. at § 3162(a)(1) (emphasis added). Indeed, if a violation of the Speedy Trial Act has occurred, dismissal of the indictment is mandatory. United States v. Kingston, 715 F. Supp. 781, 786 (N.D. Tex. 1988), aff'd on other grounds, 875 F.2d 1091 (5th Cir. 1989).

In the instant case, the provisions of the Speedy Trial Act have, without question, been violated. Clearly, Mr. XXXX was indicted more than thirty days following his arrest on a criminal complaint and clearly Counts 2-8 of the indictment are the same charges as set forth in the complaint. Therefore, Counts 2-8 of the indictment must be dismissed as to Mr. XXXX.

B. Counts 2-8 of the Indictment Against Mr. XXXX Should Be Dismissed With Prejudice.

It is within the sound discretion of the trial court whether charges in the indictment dismissed based upon violations of the Speedy Trial Act should be dismissed with or without prejudice. See, e.g. Kingston, 715 F. Supp. at 786. "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." 18 U.S.C. § 3161(a)(1). In the instant case, these three factors set forth in 18 U.S.C. § 3161(a)(1), as well as Fifth Circuit precedent, indicate that Counts 2-8 against Mr. XXXX should be dismissed with prejudice.

As to the first of the factors, Mr. XXXX would concede that the charges against him in Counts 2-8 could be considered serious. However, to determine the true degree of their seriousness, Mr. XXXX would need more information as to the amounts of marijuana allegedly involved since the penalties set forth in 21 U.S.C. § 841 vary greatly depending upon the amounts of drugs involved. Moreover, while the charges appear serious, the Government's evidence, as recognized by Magistrate Judge Boyle at the probable cause hearing held in this matter, is minimal,

and the evidence consists almost exclusively of hearsay statements made by an unrevealed confidential informant.

As to the second of the factors, the reasons for the delay, this factor argues strongly in favor of dismissal with prejudice. In this case, the Government's negligence was the sole reason for the Speedy Trial Act violation. Mr. XXXX did not contribute to the Speedy Trial Act violation in any way whatsoever. See United States v. Cobb, 975 F.2d 152, 158 (5th Cir. 1992). Here, the Government arrested Mr. XXXX then moved for his detention. As a result, Mr. XXXX spent twenty-nine days in pretrial custody, yet the Government could not follow the simple and straight forward dictates of the Speedy Trial Act. As recognized recently by another district court judge in United States v. Rivas, 782 F. Supp. 686, 687 (D. Me.), aff'd, 973 F.2d 36 (1st Cir. 1992), "in a case where the entire responsibility for the violation of the [Speedy Trial] Act's requirements rests with the Prosecution..., the allowance of reprosecution of defendants for the charged offenses would completely negate the beneficent purpose intended to be accomplished by the Act in insuring timely trial of defendants...." Indeed, "[r]eprosecution in this case would send exactly the wrong signal to those responsible for complying with the Act's requirements and would, in all likelihood, foster in future a cavalier disregard, if not a concerted disregard, of those requirements." Id. at 688.

Finally, the United States Court of Appeals for the Fifth Circuit in a case involving exactly the same charges that Mr. XXXX now faces, held that the administration of justice supported a dismissal with prejudice. See United States v. Velasquez, 890 F.2d 717 (5th Cir. 1989). In Velasquez, Mr. Velasquez, like Mr. XXXX, was charged with one count of conspiracy to possess marijuana with intent to distribute. Id. Mr. Velasquez was also charged with one count of possession of marijuana with intent to distribute whereas Mr. XXXX is charged with seven counts of possession of marijuana with intent to distribute. Id. at 719. Mr. Velasquez, like Mr. XXXX, was arrested on a criminal complaint charging him with violation of the substantive possession count, but not the conspiracy count. Id. The Government did not seek an indictment within thirty days of Mr. Velasquez's arrest as required by the Speedy Trial Act. Id. Therefore, the Fifth Circuit in Velasquez ruled that the Speedy Trial Act mandated dismissal of the substantive count contained

in the indictment. Id. The Fifth Circuit further ruled that the administration of justice would "not be disserved by dismissal of the possession count with prejudice." Id. at 720. This was so because under the Sentencing Guidelines, Mr. Velasquez's sentence would be the same whether the possession count was dismissed with or without prejudice. Id. Significantly, the Fifth Circuit did not remand the case to the district court to determine whether the dismissal should have been with or without prejudice, but, in an unusual step, dismissed the count with prejudice on its own accord. Id.

Simply put, Velasquez is absolutely identical to this case, as Mr. XXXX's sentence would also be the same if convicted on Count 1 as if convicted on Counts 1-8. Therefore, this Court is bound by the Fifth Circuit's ruling in Velasquez and should enter an order dismissing Counts 2-8 against Mr. XXXX with prejudice.

III. Unless the Court Enters a Dismissal With Prejudice, the Court Must Hold a Hearing.

The United States Court of Appeals for the Ninth Circuit recently recognized that "a defendant has a liberty interest in being free from reprosecution in violation of the Double Jeopardy Clause, and that a decision whether to dismiss with or without prejudice for a Speedy Trial Act violation impacts this liberty interest." United States v. Delgado-Miranda, 951 F.2d 1063, 1064 (9th Cir. 1991). Accordingly, the Ninth Circuit held that "before a district court can enter a dismissal without prejudice, and thereby prevent the defendant's reprosecution, it must hold a hearing...[and] [t]he defendant must be given adequate notice of the hearing and be afforded an opportunity to be heard." Id. (emphasis added).

Therefore, while the Fifth Circuit's holding in Velasquez would appear to require dismissal of Counts 2-8 with prejudice, in the event the Court is unconvinced, a hearing must be held in order to give Mr. XXXX an opportunity to be heard.

Respectfully submitted,

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XXXX XXXX,	)	
	)	
Defendant.	)	
_____	)	

ORDER

Upon consideration of Defendant's Motion to Dismiss Indictment, said Motion is this _____ day of October, 1993 GRANTED.

Counts 2-8 of the Indictment filed October 6, 1993 against XXXX XXXX are hereby DISMISSED WITH PREJUDICE as to XXXX XXXX only.

ROBERT MALONEY
UNITED STATES DISTRICT JUDGE

CERTIFICATE OF CONFERENCE

Pursuant to Local Rule 5.1 of the Northern District of Texas, I, F. Clinton Broden, certify that a telephone conference on the attached motion was held on October ___, 1993, between the undersigned and Michael Snipes, the Assistant United States Attorney assigned to the case. During the conference, it was determined that:

The Government opposes the Motion.

_____
F. Clinton Broden