IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

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No. 93-1906

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

LLOYD HARMON,

Defendant-Appellant.

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Appeal from the United States District Court
for the Northern District of Texas
(3:91CR 045 T)

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(January 13, 1995)

Before WISDOM, KING, and DUHÉ, Circuit Judges.

PER CURIAM:*

This case is the direct appeal of a criminal conviction. In July of 1992, Lloyd Harmon was added to an indictment charging several individuals with conspiracy to commit mail and wire fraud and with substantive mail and wire fraud offenses. Lloyd Harmon eventually entered into a plea agreement with the government. Although initially the district court conditionally accepted the plea, in April of 1993, after reviewing the presentence report,

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*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

the district court determined that justice would be better served if the plea agreement were rejected and the defendant stood trial. Lloyd Harmon did stand trial in July of 1993, and he was convicted on all counts of a superseding indictment. Lloyd Harmon now appeals his conviction, asserting that the district court erred in denying his motion to dismiss the indictment for violations of the Speedy Trial Act and in rejecting his plea agreement. Because more than seventy non-excludable days passed between the relevant indictment and Harmon's trial, we find that the Speedy Trial Act was violated. Accordingly, we find that we must dismiss the indictment.[1]

## I. BACKGROUND

On April 28, 1992, Lloyd Harmon ("Harmon"), Diane Harmon, Max Barton, and James E. Marshall were charged in a twenty-seven count indictment.[2] The indictment centered around the activities of Diamon International Inc. ("Diamon"), a Texas corporation in which all of the defendants allegedly were officers or employees. According to the indictment, between August 1988 and November

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[1] Because we dismiss the indictment, we do not reach Harmon's claims regarding error in the district court's rejection of his plea agreement.

[2] This April 28, 1992 indictment superseded a February 27, 1991 indictment which named Diane Harmon and O.D. Fought. The indictment was new as to Barton, Marshall, and Lloyd Harmon.

Some of the dates and events regarding the co-defendants are not clear from the record on appeal. Since there seems to be no dispute as to when these events occurred, our decision is based upon the dates provided by the parties.

1990, the defendants, through Diamon, operated a scheme to defraud investors. In sum, the defendants allegedly pretended to be "loan brokers" who, for a fee, would obtain investors and loans for their customers. In order to aid their scheme, the indictment charged that the defendants fraudulently used the mails and wires in violation of the law.

Harmon was arraigned on May 21, 1992, and the next week, the district court set the case for trial on July 6, 1992. The court also set June 1, 1992 as the deadline for filing pretrial motions. On June 1, Harmon filed a motion to enlarge time to file pretrial motions and a supporting brief. Three days later, the district court denied the motion, noting that the "court will not grant a blanket motion for extension of time [to] file pretrial motions. However, if Defendant wishes to file a specific motion, the court will grant leave to do so for good cause shown as to why the motion was not timely filed."

On the first day of July, a superseding indictment adding O.D. Fought as a defendant was filed by the government.[3] On November 11, 1992, Marshall was finally arraigned. Nine days later, Fought filed a motion for continuance, and ten days after that, on November 30, 1992, Marshall filed several motions including his own motion for continuance. The court granted both motions for continuance on December 3, 1992, moving the trial

[3] Fought was not named in the April 1992 indictment.

date of the case to January 11, 1993.[4] Additionally, the court scheduled a pretrial conference for December 17, 1992.

On December 14, Harmon filed a motion to dismiss the indictment with prejudice. Specifically, Harmon argued, inter alia, that in the 207 days since he "appeared before a judicial officer of the Court in which the charges . . . are pending," more than seventy non-excludable days (as defined by the Speedy Trial Act) had passed, and consequently, the Act had been violated and the indictment should be dismissed.

Two days later, the government responded to Harmon's motion. The government noted that Harmon "ha[d] been joined with the other defendants under the same cause number since he was indicted." Moreover, the government contended that "[n]o severance has been granted by the Court, [and] [t]he numerous motions filed by his co-defendants . . . serve to toll the speedy trial clock. Thus, contrary to Harmon's assertions, the Speedy Trial Act does not require dismissal of the indictment."

The district court agreed with the government. In an order dated December 17, 1992, the court noted that:

> [c]ertain periods are excluded from computing the time with which the trial must commence. Excluded periods include delay resulting from the pendency of pretrial motions, and a reasonable period of delay when the defendant is joined for trial with a codefendant as to whom the time for trial has not run, and no motion for severance has been granted.

[4] The order was amended to correct the deadline for filing pretrial motions to December 8, 1992.

(citations omitted). The court reasoned that motions filed by some of Harmon's codefendants were pending and that the pendency of these motions tolled the Speedy Trial clock, and thus, "fewer than seventy days have elapsed since Harmon was indicted until the filing of the present motion." Accordingly, the court denied Harmon's motion. That same day, the court also ruled on all of the defendants' remaining outstanding motions.

On January 5, 1993, Harmon entered into a plea agreement with the government. The agreement provided that in exchange for the government dropping the other charges against him, Harmon would plead guilty to "a one count superseding indictment charging a violation of 18 U.S.C. § 4, that being misprision of a felony." On the same day that Harmon signed the plea agreement, the district court found Harmon guilty and ordered a judgment of guilt entered. The district court also noted, however, that he would not decide whether to accept the plea agreement until after he reviewed the presentence report ("PSR").[5]

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[5] The district court stated:

> Mr. Harmon, I'm going to take the plea agreement under advisement until I have had an opportunity to review a presentence report in the case.
>
> If I find you guilty today I'm going to order that a presentence report be prepared, and once it's been prepared I'll review it and decide whether I'm going to accept the arrangement you have entered into with the government.
>
> If I reject it I will advise of that fact, and if you ask me to do so[,] I'll set aside the finding of guilt and allow you to withdraw your plea of guilty.

A PSR was prepared, and on March 4, 1993, it was adopted by the government. One week later, Harmon filed numerous objections to the PSR, contesting the factual bases of the allegations and the computation of the offense level under the Sentencing Guidelines. On March 30, Harmon objected to the addendum of the PSR on similar grounds. On April 1, the district court advised Harmon's counsel that:

> I have reviewed the presentence report in this case, your objections to the presentence report, the addendum to the presentence report and your objections to the addendum.
>
> After having made such a review I'm of the opinion that justice would be better served in this case if the court rejected the plea agreement and the defendant were to stand trial on the indictment in this case.

Next, on April 28, 1993, the government filed a motion for reciprocal discovery. One month later, on May 28, the district court issued a pretrial order and set the case for trial to begin on July 6, 1993. Five days before trial was to begin, an indictment, superseding the indictment filed one year earlier, was issued. This indictment only named Harmon, and once again, it charged him with conspiracy to commit mail and wire fraud as well as with substantive acts of mail and wire fraud.

On July 5, Harmon filed a motion in limine regarding his prior plea agreement, his former plea of guilty, and his extraneous acts. On July 6, arguing that more than seventy non-excludable days had passed since his indictment, Harmon filed a second motion to dismiss the indictment for violations of the Speedy Trial Act. The government responded the next day, and on

July 8, 1993, the district court issued its ruling on the motion. The district court again noted that "certain periods of delay are excluded from computing the time with which the trial must commence," and after reviewing the proceedings in the case, the court concluded "that fewer than seventy days have elapsed since Harmon was indicted until the filing of the present motion." Accordingly, the district court denied Harmon's second motion to dismiss on speedy trial grounds.

Finally, on July 12, 1993, Harmon's trial began. The next day, the court signed an order memorializing its prior rulings on the pretrial motions. On July 19, 1993, the jury found Harmon guilty of all charges, and on September 30, 1993, after various post-trial motions and orders, the district court entered its judgment. This appeal followed.

## II. STANDARD OF REVIEW

When we examine a Speedy Trial Act ruling, "we review the facts supporting . . . [the] ruling for clear error, but we review the legal conclusions de novo." United States v. Johnson, 29 F.3d 940, 942 (5th Cir. 1994); accord United States v. Holley, 986 F.2d 100, 103 (5th Cir.), cert. denied, 114 S. Ct. 77 (1993).

## III. DISCUSSION

Harmon alleges that his rights under the Speedy Trial Act, 18 U.S.C. §§ 3161-3174, were violated because more than seventy non-excludable days, as defined by the Act, elapsed between his indictment and his trial. Although we reject Harmon's assertions

of when the speedy trial clock ran, we nevertheless conclude that more than seventy non-excludable days passed before his trial. Accordingly, we dismiss the indictment.

The Speedy Trial Act is designed to serve two purposes: "to ensure a federal criminal defendant's [S]ixth [A]mendment right to a speedy trial and to reduce the danger to the public from prolonged periods of the defendant's release on bail." United States v. Gonzales, 897 F.2d 1312, 1315 (5th Cir. 1990), cert. denied, 498 U.S. 1029 (1991); accord Johnson, 29 F.3d at 942; see also H.R. Rep. No. 390, 96th Cong., 1st Sess. 2-3 (1979), reprinted in 1979 U.S.C.C.A.N. 805, 806-07 (noting that the Act "gave effect to a Federal defendant's right to speedy trial under the Sixth Amendment and acknowledged the danger to society represented by accused persons on bail for prolonged periods of time").

In order to serve those purposes, the Act requires that a defendant be tried within seventy days of his indictment or appearance before a judicial officer, whichever is later.[6] 18 U.S.C. § 3161(c)(1); Henderson v. United States, 476 U.S. 321,

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[6] The Act 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 the 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).

322, 326 (1986); Johnson, 29 F.3d at 942; Gonzales, 897 F.2d at 1315. If this requirement is not met, the Act states that "the information or indictment shall be dismissed on motion of the defendant."[7] 18 U.S.C. § 3162(a)(2); see also Johnson 29 F.3d at 942 (discussing the Act); United States v. Williams, 12 F.3d 452, 459 (5th Cir. 1994) (same).

In some circumstances, the Speedy Trial Act clock does not begin to run upon a defendant's indictment or appearance before a judicial officer. Instead, the cases interpreting § 3161(h)(7) of the Act hold that in "multi-defendant cases . . . the seventy-day clock does not start ticking until the last co-defendant has been arraigned."[8] United States v. Baker, No. 94-1304, 1004 WL 617568, at *3 (7th Cir. Nov. 8, 1994); see also Henderson, 476 U.S. at 363 n.2 ("All defendants who are joined for trial generally fall within the speedy trial computation of the latest

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[7] The Act provides:

> If a defendant is not brought to trial within the time limit required by section 3161(c) as extended by 3161(h), the information indictment shall be dismissed on motion of the defendant. The defendant shall have the burden of proof of supporting such motion but the government shall have the burden of going forward with the evidence in connection with any exclusion of time under subparagraph 3161(h).

18 U.S.C. § 3162(a)(2).

[8] Section 3161 of the Act states that the time which is excluded from computing the time within which a trial must commence includes "[a] reasonable period of delay when the defendant is joined for trial with a codefendant as to whom the time for trial has not run and no motion for severance has been granted." 18 U.S.C. § 3161(h)(7).

codefendant."); United States v. Welch, 810 F.2d 485, 488 n.1 (5th Cir. 1987) (same).

Moreover, not every day between the defendant's indictment or appearance before a judicial officer and his trial is included in the Speedy Trial Act's calculation of time; "[c]ertain days are excluded from this calculation if those days fall within the Act's specific definition of `excludable days.'" Johnson, 29 F.3d at 942; Gonzales, 897 F.2d at 1315.

One exclusion, subsection (J), stops the Speedy Trial clock for "delay reasonably attributable to any period, not to exceed thirty days, during which any proceeding concerning the defendant is actually under advisement by the court." 18 U.S.C. § 3161(h)(1)(J). The Supreme Court has interpreted this provision to "allow[] exclusion of up to 30 days while the district court has a motion `under advisement,' i.e., 30 days from the time the court receives all the papers it reasonably expects." Henderson, 476 U.S. at 328-29; accord Johnson, 29 F.3d at 942. Notably, the Speedy Trial clock is reactivated by the passage of time after the last filing, not by the court's ruling on the motion. Therefore, "[a]fter the thirty-day period expires, the Speedy Trial clock begins to tick, regardless of when the trial court ultimately rules on the motion." Johnson, 29 F.3d at 942.

Another exclusion, subsection (F), tolls the Speedy Trial clock during periods of "delay resulting from any pretrial motion, from the filing of the motion through the conclusion on, or other prompt disposition of, such motion." 18 U.S.C. §

3161(h)(1)(F). The Supreme Court has noted that this exclusion applies in two situations. Henderson, 476 U.S. at 329; see also Johnson 29 F.3d at 942-43 (discussing Henderson). First, it applies to pretrial motions requiring a hearing. Id. at 329. In those instances, the Court, after reviewing the language of the Act and its legislative history, concluded that subsection (F) "exclude[s] from the Speedy Trial Act's 70-day limitation all time between the filing of a motion and the conclusion of the hearing on that motion, whether or not a delay in holding that hearing is `reasonably necessary.'" Id. at 330; accord Johnson, 29 F.3d at 943.

In Henderson, the Court also noted that "subsection (F) excludes time after a hearing has been held where a district court awaits additional filings from the parties that are needed for proper disposition of the motion." Henderson, 476 U.S. at 331; accord Johnson, 29 F.3d at 943. Subsection (F), however, does not toll the Speedy Trial clock forever when a motion requiring a hearing is filed. After the hearing, when all of the filings related to the motion are completed, the motion is "under advisement" pursuant to subsection (J) of the Act, and "[t]he trial court has thirty excludable days . . . in which to rule before the Speedy trial clock again begins to tick." Johnson, 29 F.3d at 943.

The second situation to which subsection (F) applies "concerns motions that require no hearing and that result in a `prompt disposition.'" Henderson, 476 U.S. at 329. In those

situations, "`the point at which time will cease to be excluded' is identified by subsection (J), which permits an exclusion of 30 days from the time a motion is actually `under advisement' by the court.'" Id. Moreover, when a motion does not require a hearing, we have held that "as a matter of law, . . . a motion should be considered under advisement for Speedy Trial Act purposes on the day that the last paper concerning the motion at issue was filed with the court." Johnson, 29 F.3d at 944. Thus, when a motion does not require a hearing, the Speedy Trial clock is tolled for thirty days after the last filing regarding that motion.

Applying this framework to the instant case, we find that more than seventy non-excludable days elapsed.[9] Harmon's Speedy Trial clock began to run on November 12, 1992--the first day after the latest codefendant, Marshall, appeared before a judicial officer.[10] Nine days ticked off the Speedy Trial clock

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[9] In calculating days under the Speedy Trial Act calendar, when a motion or other proceeding stops the clock, "all days including the commencement and termination of the proceeding are excluded from the seventy-day count." United Stated v. Kington, 875 F.2d 1091, 1107 (5th Cir. 1989); accord United States v. McCusker, 936 F.2d 781, 783 (5th Cir. 1991).

[10] At this time, the were a variety of pretrial motions pending in the district court. Although the district court ruled on these motions from the bench in the December 17, 1992 meeting, there is no indication that these motions "required a hearing" within the meaning of the Act. If these motions did require a hearing, the time during the pendency of these motions (up to December 17) is excluded from the Speedy Trial Act calculation. On the other hand, if these motions did not require a hearing, the Speedy Trial Act is tolled for up to thirty days after the last filing relating to that motion. It is unclear from the record when the filings for the numerous motions of the many defendants took place. Fortunately, we do not need divine when

until Fought filed a motion for continuance. Time resumed on December 18, 1992, the day after the district court ruled on Fought's and the other defendants' motions.[11] Eighteen additional non-excludable days passed, and on January 5, 1993, the Speedy Trial Act's clock was suspended by Harmon's plea agreement.

The clock stopped until April 2, 1992--the day after the district court rejected Harmon's plea agreement. Twenty-six days ticked off the clock, and once again, on April 28, 1992, the calendar was suspended as the government filed its motion for reciprocal discovery.

Harmon contends that this motion should not toll the Speedy Trial clock because "it is obvious from the record" that the motion was filed only to stop the Speedy Trial clock. In support of his claim, Harmon notes that the "government never urged this motion to the court; there is nothing in the record to show that the court had the motion `under advisement' at any time; and, importantly, there is noting in the record to show that the court ever ruled on the motion!"

As discussed above, the Speedy Trial Act explicitly excludes periods of "delay resulting from any pretrial motion," 18 U.S.C.

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these filings took place, for our conclusions regarding the Speedy Trial calculation remain the same even assuming that the Speedy Trial clock was tolled until the district court ruled on the motions on December 17.

[11] Harmon moved for a dismissal during this time, and this motion would have stopped the Speedy Trial calculation, but time was already tolled by virtue of the pendency of Fought's motion.

§ 3161(h)(1)(F) (emphasis added), and we have held that the tolling mandated by subsection (F) is "all but absolute." United States v. Horton, 705 F.2d 1414, 1416 (5th Cir.), cert. denied, 464 U.S. 997 (1983). Accordingly, we have noted that only a "particularly egregious cases justif[ies] an exception to the Act's command" that time is tolled by the filing of a pretrial motion. United States v. Neal, 27 F.3d 1035, 1042 n.4 (5th Cir.), cert. denied sub nom. Joyce v. United States, 63 U.S.L.W. 3387 (Nov. 14, 1994); accord Horton, 705 F.2d at 1416. This is not such a case. Here, the government simply requested a motion for reciprocal discovery. Although the government did not actively pursue the motion, there is nothing in the record to indicate that its filing was "particularly egregious" and to justify an exception to the rule that the filing of a motion tolls the Speedy Trial clock.

The district court never ruled on the motion for reciprocal discovery, and the Speedy Trial clock was tolled for thirty days after the last filing on the motion. See Johnson, 29 F.3d at 944 n.8 (holding that when there is no hearing on a motion and that motion is not carried for hearing at trial, "the district court ha[s] thirty non-excludable days . . . to rule . . ."). Hence, time began running on May 29, 1993. Time ran unabated for thirty-five days until July 5, 1993--when Harmon filed a motion in limine. This and other motions filed over the next several days tolled the Speedy Trial clock until trial began on July 12. At this time, a total of eighty-eight non-excludable days had

passed between Harmon's indictment and his trial. Because more than seventy non-excludable days had elapsed, § 3162(a)(2) of the Speedy Trial Act mandates that "the indictment . . . be dismissed." 18 U.S.C. § 3162(a)(2).

We must decide whether the indictment should be dismissed with or without prejudice. In making this determination, the Act instructs that "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 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)(2); see also Johnson, 29 F.3d at 945 (discussing this provision).

Although "it is generally true that the trial court is best situated to decide whether to dismiss indictments with or without prejudice in light of a Speedy Trial Act violation," United States v. Blackwell, 12 F.3d 44, 48 (5th Cir. 1994), in some cases this court may resolve the issue. See, e.g., Johnson, 29 F.3d at 945 ("We may determine whether the indictment should be dismissed with or without prejudice . . . ."); Blackwell, 12 F.3d at 48 (deciding whether dismissal should be with or without prejudice); United States v. Velasquez, 890 F.2d 717, 720 (5th Cir. 1989) (same). This is such a case.

It is clear from the record that Harmon was charged with offenses of a serious nature. Cf. United States v. Peeples, 811 F.2d 849, 850-51 (5th Cir. 1987) (discussing serious nature of wire fraud). Harmon's offenses involved defrauding hundreds of

thousands of dollars and are punishable by several years of imprisonment. Both the amount of money involved in the crime and the possible periods of incarceration indicate that the Harmon was charged with serious offenses, militating in favor of dismissal without prejudice and possible reprosecution.

Examining the facts and circumstances surrounding the delay, we find that dismissal without prejudice is warranted. Harmon did raise a motion to dismiss on Speedy Trial Act grounds in December of 1992, and the government should have been aware of the Speedy Trial calendar. On the other hand, this case involved multiple defendants who were added and subtracted from indictments and were removed from the case as they entered into plea bargains. Additionally, Harmon himself entered into a plea agreement that was rejected by the court. In sum, the circumstances surrounding the delay counsel in favor of dismissal without prejudice.

Finally, while we have noted that "dismissal with prejudice is more likely to cause the government and the courts diligently to comply with the Act's requirements," Johnson, 29 F.3d at 946, in this case, the effects of reprosecution on the administration of the Speedy Trial Act and on the administration of justice weigh slightly in favor of dismissal without prejudice. Although Harmon had the cloud of prosecution hanging over him for a considerable period, he was not incarcerated during any period of time. Instead, the record indicated that Harmon had a full-time job and was able to live a relatively normal life. Additionally,

Harmon does not argue that the government regularly or frequently failed to meet the Act's deadlines or delayed the trial maliciously. See United States v. Salgado-Hernandez, 790 F.2d 1265, 1268 (5th Cir.) (discussing the effect of dilatory or malicious actions by the government on the question of dismissal with or without prejudice), cert. denied, 479 U.S. 964 (1986). Further, Harmon does not allege that the delay interfered with his ability to mount a defense. All told, the Act's goals of protecting the public from criminals while on bail and ensuring the constitutional right to speedy trial will not be impinged upon if the government chooses to reprosecute Harmon.

## IV. CONCLUSION

For the foregoing reasons, we REVERSE the judgement of the district court and we REMAND the case with instructions to vacate the conviction and to dismiss the indictment without prejudice.