No. _____

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,

Respondent,

V.

AUSTIN RAY,

Petitioner,

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE TENTH CIRCUIT

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Jason B. Wesoky
Member of the Tenth Circuit's CJA Appellate Panel
Appointed pursuant to 18 U.S.C. § 3006A
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ATTORNEY FOR PETITIONER

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1	2018-8-6 Final Judgment
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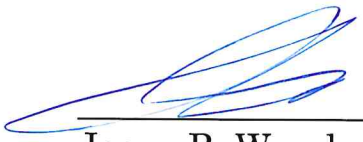
Appendix respectfully submitted this 26th day of November, 2018.



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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

CERTIFICATION OF SERVICE OF APPENDIX TO PETITION FOR WRIT OF CERTIORARI

Pursuant to Supreme Court Rule 29.3, Petitioner, Austin Ray, through his attorney, Jason B. Wesoky, who was appointed under the Criminal Justice Act, 18 U.S.C. § 3006A, respectfully certifies that on November 26, 2018 a true and correct copy of the Petitioner's Appendix to Petition for Writ of Certiorari was placed for delivery with the United States Postal Service, postage prepaid, and addressed as follows:

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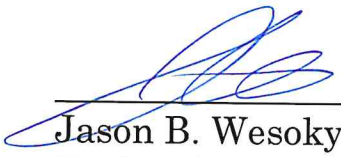

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE TENTH CIRCUIT

APPENDIX – PART 1
10TH CIRCUIT COURT OF APPEALS, CASE 16-1306
FINAL ORDERS

Jason B. Wesoky
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FILED
United States Court of Appeals
Tenth Circuit

August 6, 2018

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

AUSTIN RAY,

Defendant - Appellant.

No. 16-1306
(D.C. No. 1:14-CR-00147-MSK-2)
(D. Colo.)

JUDGMENT

Before **HARTZ**, **McKAY**, and **MORITZ**, Circuit Judges.

This case originated in the District of Colorado and was argued by counsel.

The judgment of that court is affirmed.

If defendant, Austin Ray, was released pending appeal, the court orders that, within 30 days of this court's mandate being filed in District Court, the defendant shall surrender to the United States Marshal for the District of Colorado. The District Court may, however, in its discretion, permit the defendant to surrender directly to a designated Bureau of Prisons institution for service of sentence.

Entered for the Court

ELISABETH A. SHUMAKER, Clerk

FILED
United States Court of Appeals
Tenth Circuit

August 6, 2018

Elisabeth A. Shumaker
Clerk of Court

PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

AUSTIN RAY,

Defendant - Appellant.

No. 16-1306

Appeal from the United States District Court
for the District of Colorado
(D.C. No. 1:14-CR-00147-MSK-2)

Jason B. Wesoky, Darling Milligan Horowitz PC, Denver, Colorado, for Defendant-Appellant.

Hetal J. Doshi, Assistant United States Attorney (Robert C. Troyer, Acting United States Attorney, with her on the brief), Denver, Colorado, for Plaintiff-Appellee.

Before **HARTZ**, **McKAY**, and **MORITZ**, Circuit Judges.

MORITZ, Circuit Judge.

Austin Ray appeals his jury convictions for one count of conspiracy to defraud the United States, five counts of aiding in the preparation of a false tax return, and two counts of submitting a false tax return. In challenging his convictions, Ray first asserts that the government violated the Interstate Agreement on Detainers Act (IAD)

of 1970, 18 U.S.C. app. 2 § 2. But because the government never lodged a detainer against Ray, the IAD didn't apply and the district court didn't err in denying Ray's motion to dismiss on this ground. Next, Ray alleges that the government engaged in vindictive prosecution. Yet Ray establishes neither actual nor presumptive vindictiveness, so this argument also fails. So too does his assertion that the district court violated his rights under the Speedy Trial Act (STA) of 1974, 18 U.S.C. §§ 3161–74; Ray waived the STA argument he advances on appeal by failing to raise it below, and in any event, Ray's STA clock never surpassed 70 days. Ray's next argument—that the government violated his due-process rights by destroying certain evidence—is also flawed. The evidence at issue lacked any exculpatory value. And even if the evidence were potentially useful to Ray's defense, the government didn't destroy it in bad faith. Finally, we reject Ray's assertion that the district court constructively amended the indictment; the district court narrowed, rather than broadened, the charges against Ray. Accordingly, we affirm.

Background

In March 2006, Ray and his wife opened a tax-preparation firm, Cheapertaxes LLC. To expand their business, Ray and his wife relied on word-of-mouth referrals from clients who received large tax refunds. Over the next four years, they greatly exaggerated their clients' itemized deductions, including Schedule A deductions like job expenses and charitable contributions, so that their clients would receive larger tax refunds. Thus, Ray and his wife knowingly prepared and submitted many false tax returns to the Internal Revenue Service (IRS).

In April 2014—while Ray was living in a residential facility and participating in Colorado's community-corrections program as the result of unrelated offenses—the government arrested him on the federal tax-fraud charges central to this appeal. The government also charged Ray's wife with tax fraud. She pleaded guilty, but Ray rejected the government's plea offer. He represented himself at trial, and the jury convicted him on all counts. The district court imposed a 120-month sentence. Ray appeals, raising five issues.

Analysis

I. The Interstate Agreement on Detainers Act

Ray first argues that the government violated the IAD when it twice transported him to and from Colorado before his federal trial concluded. The district court denied Ray's motion to dismiss based on the IAD. It found that the IAD didn't apply because the government never lodged a detainer against Ray with Colorado to begin with, and therefore the government could not have violated it. "We review a decision on a motion to dismiss under the IAD for abuse of discretion. As always, any legal questions implicated by that conclusion are reviewed de novo and any factual findings for clear error." *United States v. Gouse*, 798 F.3d 39, 42 (1st Cir. 2015) (citation omitted).

No one disputes that once a "[r]eceiving [s]tate" lodges a detainer for a prisoner who is in the custody of a "[s]ending [s]tate," the IAD governs the transfer

of that prisoner.[1] § 2, Art. II. Instead, the parties disagree about (1) what constitutes a detainer and (2) whether the government in this case ever lodged a detainer with Colorado.

Generally speaking, a detainer is "a legal order that requires a [s]tate in which an individual is currently imprisoned to hold that individual when he has finished serving his sentence so that he may be tried by a different [s]tate for a different crime." *Alabama v. Bozeman*, 533 U.S. 146, 148 (2001); *see also United States v. Mauro*, 436 U.S. 340, 359 (1978) (describing detainer as "a notification filed with the institution in which a prisoner is serving a sentence, advising that he is wanted to face pending criminal charges in another jurisdiction" (quoting H.R. Rep. No. 91-1018, at 2 (1970); S. Rep. No. 91-1356, at 2 (1970))).

Ray asserts the district court erred in ruling that the federal government never lodged a detainer for him with Colorado. First, he maintains that all arrests constitute detainers under the IAD. In support, Ray points out that (1) the IAD fails to define detainer and (2) an arrest fits within the definitions that other sources, including Black's Law Dictionary, provide for that term.

It's true that the IAD doesn't define detainer. But we need not speculate about whether an arrest can arguably fit within general legal definitions of that term. That's because we are bound by the pronouncements of the Supreme Court, and the

[1] For purposes of the IAD, the receiving state is where a subsequent, untried indictment has been filed against a prisoner. § 2, Art. II(c). And the sending state is where a prisoner is currently serving a sentence. *Id.* at Art. II(b). The federal government constitutes a "[s]tate." *Id.* at Art. II(a).

Supreme Court has defined detainer on multiple occasions to mean something specific in the context of the IAD. *See Bozeman*, 533 U.S. at 148; *Mauro*, 436 U.S. at 359 (defining detainer as "a notification filed with the institution in which a prisoner is serving a sentence" (quoting H.R. Rep. No. 91-1018, at 2 (1970); S. Rep. No. 91-1356, at 2 (1970))). Because an arrest isn't "a notification filed with the institution in which a prisoner is serving a sentence," it doesn't fit within the Supreme Court's binding definition of detainer. *Id.* (quoting H.R. Rep. No. 91-1018, at 2 (1970); S. Rep. No. 91-1356, at 2 (1970)); *see also Bozeman*, 533 U.S. at 148.

Next, Ray appears to broadly suggest that, by the process of elimination, his arrest must necessarily have been a detainer. According to Ray, the government can only obtain custody of a defendant who is serving a sentence in another jurisdiction via (1) a writ of habeas corpus *ad prosequendum*,[2] or (2) a detainer. And because the government indisputably didn't file a writ of habeas corpus *ad prosequendum*, Ray concludes his arrest was necessarily a detainer. Yet Ray fails to develop or provide any authority for his suggestion that one jurisdiction can obtain custody of a defendant who is serving a sentence in another jurisdiction only through (1) a writ of habeas corpus *ad prosequendum* or (2) a detainer. Thus, he's waived this argument. *See* Fed. R. App. P. 28(a)(8)(A) (stating that appellant's opening brief must contain "appellant's contentions and the reasons for them, with citations to the authorities . . . on which the appellant relies"); *Bronson v. Swensen*, 500 F.3d 1099, 1104 (10th Cir.

[2] A writ of habeas corpus *ad prosequendum* is an order issued by a federal district court requiring the state to produce a state prisoner for trial on federal criminal charges. *Mauro*, 436 U.S. at 357–58. It is not a detainer. *See id.* at 361.

2007) (holding that arguments inadequately presented in appellant's opening brief are waived). In any event, as we've discussed, an arrest doesn't fit within the Supreme Court's definition of detainer. *See Bozeman*, 533 U.S. at 148; *Mauro*, 436 U.S. at 359. As such, even if we considered Ray's waived argument, we would reject it.[3]

But our conclusion that Ray's arrest did not constitute a detainer doesn't end our inquiry. Ray alternatively contends that even if his arrest didn't constitute a detainer, the government nevertheless lodged a detainer with Colorado through other means. In support, Ray points to the following facts.

The day after Ray's federal arrest, Gary Pacheco—the parole liaison for Colorado's community-corrections program—completed a form used to explain the reasons an offender is in custody and submitted it to the Colorado Department of Corrections. On that form, Pacheco wrote that the pending federal charges rendered Ray ineligible for Colorado's community-corrections program. Further, Pacheco twice used some iteration of the words "felony detainer." First, under the "[s]pecial [i]nstructions" heading, he wrote that Ray should be "place[d] in [D]enver county jail for r[e]gress to DOC, felony detainer feds." R. vol. 2, 367. Next, he wrote that the "justification" for this action was "felony charges from [f]ederal government detainer, no longer eligible for community[-]corrections, related to tax theft." *Id.*

[3] We note that when the government arrested Ray, he wasn't incarcerated in a Colorado state prison. Instead, he was living in a residential facility and participating in Colorado's community-corrections program. But Ray doesn't argue that this aspect of his arrest has any bearing on whether his arrest constituted a detainer. Accordingly, we decline to consider that possibility. *See United States v. Harrell*, 642 F.3d 907, 912 n.2 (10th Cir. 2011) (treating as waived and declining to consider argument that appellant failed to advance on appeal).

Ray suggests that Pacheco's repeated use of the term detainer indicates that the government must have lodged a detainer with Colorado. We disagree. Pacheco completed this form based on his telephone conversation with IRS agent Arlita Moon. And Pacheco testified that Moon neither uttered the word "detainer" during the call nor instructed him to hold Ray. In fact, Pacheco admitted that using the phrase "felony detainer" on the form "was probably a bad choice of word[s] on [his] part." R. vol. 6, 1306. As such, we reject Ray's contention that the mere appearance of the word "detainer" on the form means that the government in fact lodged a detainer against Ray. *See United States v. Reed*, 620 F.2d 709, 711 (9th Cir. 1980) (finding that district court "properly concluded" that notation "Hold for U.S. Marshals" wasn't detainer because "it was made by a state officer, without the direction of a federal agent or officer").

Relying on *United States v. Trammel*, 813 F.2d 946 (7th Cir. 1987), Ray alternatively suggests that that the phone call between Moon and Pacheco itself constituted a detainer. But *Trammel* supports the opposite conclusion. There, a United States Marshal telephoned a local jail to provide advance notification that federal authorities would appear with a writ to pick up the defendant for an appearance in federal court. *Trammel*, 813 F.2d at 947. The sheriff's deputy who took the call placed a memo in jail records that the marshal would pick up the defendant and would "bring [the] writ along." *Id.* After the defendant was picked up and arraigned, he was returned to the jail. *Id.* But the marshal later mailed a detainer to

the jail to ensure the defendant would be returned to federal custody upon expiration of his sentence. *Id.* at 947–48.

The defendant sought dismissal of the federal charges against him, arguing that the marshal's telephone call to the deputy was a detainer because (1) "it was a 'notification' to a state 'institution' that [the defendant] was 'wanted to face pending criminal charges in another jurisdiction'"; and (2) the deputy's notation in jail records constituted the filing of a detainer. *Id.* at 948. Thus, he contended, authorities violated the IAD when they returned him to state custody without first trying him on federal charges. *Id.*

In rejecting the defendant's argument, the Seventh Circuit in *Trammel* concluded that it couldn't label the telephone call and notation a detainer "without running afoul of the Supreme Court's decision in *Mauro*." *Id.* at 950. Notably, in refusing to classify the phone call as a detainer, the Seventh Circuit reasoned that doing so "would serve only to inhibit informal courtesy notifications of a kind that save time and trouble on both ends, expedite the procedures[,] and contribute in small but meaningful ways to the intergovernmental comity that is among the expressed purposes of the [IAD] itself." *Id.* at 949. Thus, nothing about the Seventh Circuit's holding in *Trammel* supports Ray's assertion that Moon's courtesy phone call mentioning Ray's arrest on federal charges transformed the call into a detainer under the IAD.

In short, we conclude that the district court did not abuse its discretion in denying Ray's motion to dismiss based on the IAD. Because the government never lodged a detainer with Colorado, the IAD didn't apply. And because the IAD didn't

apply, the government could not have violated it when it transported Ray to and from Colorado.

II. Vindictive Prosecution

Ray next argues that the government's decision to add two counts to a superseding indictment—allegedly in retaliation for his refusal to enter a plea—amounts to vindictive prosecution. He argued as much below, but the district court disagreed and concluded that Ray failed to present facts demonstrating prosecutorial vindictiveness. We review this conclusion de novo. *United States v. Wall*, 37 F.3d 1443, 1448 (10th Cir. 1994).

Vindictive prosecution occurs when the government retaliates against a defendant for exercising his or her constitutional or statutory rights, such as the right to file an appeal or the right to present a defense. *See Bordenkircher v. Hayes*, 434 U.S. 357, 362–63 (1978). To succeed on a claim of prosecutorial vindictiveness, the defendant must show either actual or presumptive vindictiveness. *United States v. Creighton*, 853 F.3d 1160, 1162 (10th Cir. 2017). Actual vindictiveness occurs when the government's decision to prosecute "was 'a direct and unjustifiable penalty for the exercise of a procedural right' by the defendant." *United States v. Raymer*, 941 F.2d 1031, 1041 (10th Cir. 1991) (quoting *United States v. Goodwin*, 457 U.S. 368, 384 n.19 (1982)). To establish presumptive vindictiveness, on the other hand, the defendant must show that "as a practical matter, there is a realistic or reasonable likelihood of prosecutorial conduct that would not have occurred but for hostility or

punitive animus towards the defendant because he exercised his specific legal right." *Wall*, 37 F.3d at 1448 (quoting *Raymer*, 941 F.2d at 1042).

Critically, courts tend to find presumptive vindictiveness only in post-trial situations, such as "when a defendant successfully attacks his first conviction and then receives a harsher sentence on retrial, or when 'the "prosecutor clearly has a considerable stake in discouraging convicted misdemeanants from appealing"' by charging a successful appellant with a felony covering the same facts." *Id.* (quoting *United States v. Miller*, 948 F.2d 631, 633 (10th Cir. 1991)). Yet the Supreme Court has declined to credit these presumptions in the pretrial setting. *See id.* Indeed, "neither the Supreme Court nor the Tenth Circuit has ever" found presumptive vindictiveness in a pretrial setting. *Creighton*, 853 F.3d at 1164.

Here, Ray claims prosecutorial vindictiveness in the pretrial setting. Specifically, he argues that after he declined to accept a plea offer, the government retaliated against him by filing a superseding indictment that added two additional counts to the original indictment. Ray doesn't specify whether he contends these circumstances demonstrate actual or presumptive vindictiveness. But because he provides no evidence of actual vindictiveness—and because we have found none—we will assume that Ray alleges presumptive vindictiveness. In support of this allegation, Ray asserts that the government (1) could have included the two new counts in the original indictment but failed to do so, (2) declined to add those counts against his wife who, unlike Ray, agreed to enter a guilty plea, and (3) charged those counts only after Ray filed several pretrial motions and rejected a plea offer.

But these three facts, even taken together, do not establish presumptive vindictiveness. First, as noted above, Ray's allegations arise from a pretrial situation, where we've never before found presumptive vindictiveness. *See Creighton*, 853 F.3d at 1164. Second, the facts that Ray alleges don't convince us that this is the case in which to do so. Adding new counts to an indictment typically falls well within the bounds of prosecutorial discretion, at least where there exists probable cause to support those counts. *See Hayes*, 434 U.S. at 364 ("[S]o long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in [the prosecutor's] discretion.").

This general rule applies where, as here, a prosecutor adds counts after a defendant rejects a plea offer. *See Goodwin*, 457 U.S. at 380 ("An initial indictment—from which the prosecutor embarks on a course of plea negotiation—does not necessarily define the extent of the legitimate interest in prosecution."). And it also applies where, as here, the prosecutor (1) adds counts against a defendant who rejects a plea offer but (2) doesn't add counts against a codefendant who accepts one. *See id.* (noting prosecutor's discretion to "forgo legitimate charges"). Thus, we decline to presume that the prosecutor vindictively added the new counts to retaliate against Ray for refusing to enter a plea. And we likewise decline to presume that the prosecutor vindictively added the new counts to retaliate against him for filing certain pretrial motions. *See id.* at 381 (cautioning that it's "unrealistic to assume that a prosecutor's . . . response to such motions is to seek to penalize and to deter").

Because Ray fails to show a realistic likelihood of vindictiveness that gives rise to a presumption of vindictiveness, the district court did not err in denying Ray's motion to dismiss for vindictive prosecution.

III. The Speedy Trial Act

Next, Ray contends the district court violated his rights under the STA. We generally "review de novo the district court's compliance with the [STA]'s legal requirements" and review its factual findings for clear error. *United States v. Thompson*, 524 F.3d 1126, 1131 (10th Cir. 2008). To the extent Ray's argument turns on his assertion that the district court misinterpreted a statement that Ray made at an evidentiary hearing, we review that portion of Ray's argument for abuse of discretion. *Cf. Barnett v. Hargett*, 174 F.3d 1128, 1133 (10th Cir. 1999) (explaining that "sorting th[r]ough pro se pleadings is difficult at best" and that we typically don't "interfere with the district court's" interpretation of them).

Under the STA, a criminal trial must commence within 70 days from the indictment's filing or the defendant's initial appearance in court, whichever date occurs later. § 3161(c)(1). But several periods of time are excluded from the 70-day requirement. For example, as relevant to Ray's arguments here, any "delay[s] resulting from any pretrial motion" don't count toward the 70 days. § 3161(h)(1)(D). Thus, the 70-day clock is tolled from the day a litigant files a pretrial motion until the day the court resolves it. *Id.* Additionally, if either party requests a continuance and the district court determines that such a continuance would serve "the ends of

justice," then any delay resulting from that continuance doesn't count against the 70 days either. § 3161(h)(7).

Further, and critical to this case, a defendant's pretrial motion to dismiss under the STA must include the specific STA objection that he or she raises on appeal; otherwise that objection is waived. *See United States v. Loughrin*, 710 F.3d 1111, 1120–21 (10th Cir. 2013) (finding that defendant waived specific objection he advanced on appeal by failing to include it in pretrial motion to dismiss based on STA), *aff'd on other grounds*, 134 S. Ct. 2384 (2014); *id.* at 1121 (interpreting § 3162(a)(2) "to mean that we may not conduct any review of [STA] arguments unraised below, not even for plain error").

Here, the crux of Ray's STA claim is that the district court misinterpreted Ray's statements at an October 26, 2015 evidentiary hearing. During the hearing, Ray stated, "[T]here is a lot of stuff, a lot of discovery that was ordered that I just never received." R. vol. 6, 1338. After the hearing, the district court issued a minute order interpreting Ray's comment as an oral motion for discovery. That characterization effectively tolled the speedy-trial clock until the district court disposed of the motion on November 19. *See* § 3161(h)(1)(D).

Yet Ray didn't file an objection to the minute order. Nor did he object when the district court disposed of the oral discovery motion. And in subsequent pretrial motions and hearings, Ray never addressed the minute order. Most critically, in his pretrial motion to dismiss based on the STA, he failed to challenge the district court's characterization of his statement as a discovery motion that tolled the speedy-trial

clock. Nevertheless, Ray now maintains that the district court violated his rights under the STA because it incorrectly interpreted his comment at the October 26 hearing as an oral motion for discovery that tolled the speedy-trial clock. And he argues that in the absence of that allegedly erroneous interpretation, more than 70 days elapsed on his speedy-trial clock.

We conclude that Ray waived this argument by failing to make it in his pretrial motion to dismiss based on the STA. True, he raised this objection in a post-trial motion for relief, which he filed nearly six months after the district court issued the minute order and four months after the trial ended. But that doesn't change the fact that Ray didn't address the minute order in his pretrial motion to dismiss. Thus, we find this argument waived. *See Loughrin*, 710 F.3d at 1120–21.

Alternatively, even if Ray had not waived this this argument, we would reject it on the merits. That's because even if we assume that the district court wrongly characterized Ray's statement as a discovery motion that tolled the speedy-trial clock, Ray's speedy-trial clock never surpassed 70 days.

Initially, in May 2014, five days elapsed on the clock before Ray's pretrial motions and the district court's ends-of-justice continuances began to toll it. *See* § 3161(h)(1)(D), (7). But when the government filed a superseding indictment on December 2, 2014, the speedy-trial clock reset to zero, wiping out those five days.[4]

[4] In a footnote in his opening brief, Ray insists that the superseding indictment didn't reset his speedy-trial clock. But arguments made in a cursory manner, such as in a footnote, are waived. *See United States v. Hardman*, 297 F.3d 1116, 1131 (10th Cir. 2002). And even if we agreed to address this waived argument on the merits, we

Then, again due to pretrial motions and ends-of-justice continuances, no time elapsed on Ray's speedy-trial clock from the date the government filed its superseding indictment until the October 26, 2015 evidentiary hearing. *See id.*

If we accept Ray's waived argument that he did *not* make a discovery motion at that October 26 hearing, then his speedy-trial clock started ticking on October 27. He tolled the clock again eight days later when he filed a pretrial motion for reconsideration. *See id.* On November 19, the district court disposed of Ray's reconsideration motion, so his clock resumed ticking on November 20. *See id.* Ray's trial commenced 60 days later on January 19, 2016. Accordingly, after including the eight days from October 27 to November 4, 2015, a total of 68 days elapsed on Ray's

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would reject it. "As a general rule, new [STA] periods begin to run with respect to an information or indictment adding a new charge not required to be brought in the original indictment." *Andrews*, 790 F.2d at 808. But "when the later charge is merely a part of or only 'gilds' the initial charge, the subsequent charge is subject to the same Speedy Trial Act limitations imposed on the earlier indictment." *Id.* (quoting *United States v. Nixon*, 634 F.2d 306, 309 (5th Cir. 1981)).

Here, the original indictment alleged that Ray conspired to prepare false tax returns *for others* and aided and abetted in the preparation of false tax returns *for others*. The superseding indictment, however, charged Ray with preparing *his own* false tax returns. And fraudulently preparing one's own personal tax returns is legally and factually distinct from preparing fraudulent tax returns for others. *Compare* 18 U.S.C. § 371 (prohibiting conspiracy to defraud United States), *and* 26 U.S.C. § 7206(2) (prohibiting aiding and abetting fraud), *with* § 7206(1) (prohibiting making false declaration under penalties of perjury). Accordingly, the charges brought in the superseding indictment didn't simply "gild[]" the charges in the original indictment; instead, they constituted "new charge[s] not required to be brought in the original indictment." *Andrews*, 790 F.2d at 809 (quoting *Nixon*, 634 F.2d at 309); *see also United States v. Olivo*, 69 F.3d 1057, 1062 (10th Cir. 1995) (ruling that superseding indictment reset speedy-trial clock, in part because "the superseding indictment added an additional conspiracy count"). Under these circumstances, the superseding indictment reset Ray's speedy-trial clock.

speedy-trial clock. Thus, even if we reached Ray's waived argument and accepted its premise, it would nevertheless fail on the merits. The district court did not err in denying Ray's motion to dismiss based on the STA.

IV. Evidence Destruction and Due Process

Ray next argues that the government violated his due-process rights when it destroyed a letter he wrote to the IRS in 2007. He further asserts that the government knew this letter was exculpatory, and that his inability to present the letter to the jury prejudiced his defense. Alternatively, he asserts that even if the letter's exculpatory value wasn't apparent at the time the government destroyed it, the evidence was potentially helpful to his defense, and the government destroyed that evidence in bad faith. The district court held that the letter wasn't exculpatory and that the government didn't destroy the letter in bad faith. We review both of these rulings for clear error. *United States v. Bohl*, 25 F.3d 904, 909 (10th Cir. 1994).

The Due Process Clause of the Fourteenth Amendment requires the government to disclose exculpatory evidence to a criminal defendant. *California v. Trombetta*, 467 U.S. 479, 485 (1984). When the government fails to preserve exculpatory evidence, we will find a due-process violation if the defendant can show that (1) the missing evidence "possess[ed] an exculpatory value that was apparent before the evidence was destroyed," and (2) "the defendant [was] unable to obtain comparable evidence by other reasonably available means." *Id.* at 489. But if the evidence's exculpatory value wasn't apparent at the time the government destroyed it, then the government's conduct violates a criminal defendant's due-process rights

only if (1) the evidence was potentially useful for the defense and (2) the government acted in bad faith in destroying it. *Arizona v. Youngblood*, 488 U.S. 51, 58 (1988).

Here, Ray argues that the government violated his due-process rights when the IRS destroyed a 2007 letter in which Ray challenged the IRS' decision to suspend his ability to electronically file tax returns. Because the IRS destroyed Ray's letter pursuant to its standard destruction policy in 2011, the government was unable to produce it at Ray's 2016 trial. But the government did produce at trial a document that the IRS' Submission Processing Center sent to Ray in response to his letter. In that response, the IRS explained that it suspended Ray's electronic-filing privileges based on his failure to file IRS Form 8453.[5] The IRS eventually reinstated Ray's ability to electronically file returns in 2007.

According to Ray, his 2007 letter advised the IRS that he and his wife had done nothing wrong. Ray contends the letter's exculpatory nature was apparent in 2011 when the IRS destroyed the letter and that he couldn't obtain comparable evidence to present at trial. *See Trombetta*, 467 U.S. at 489. Ray's argument as to the exculpatory nature of the letter is not entirely clear. He contends,

> When a tax[-]return filing service like Cheapertaxes fail[ed] to file [Form 8453] for many, many, returns, it's a red flag for fraud that triggered an investigation and suspension of electronic[-]filing privileges. After investigation of the problem, the IRS concluded that not filing the form was excused, or, perhaps the IRS agreed the returns were true and correct. This is more than speculation that the [letter] was exculpatory.

[5] Form 8453 authorizes the direct deposit of a taxpayer's refund and requires the taxpayer and tax-preparer to attest that they reviewed and confirmed the return's accuracy.

Aplt. Br. 33.

As we read Ray's argument, he appears to suggest that the letter somehow demonstrates that he couldn't have committed tax fraud. But as the government points out, the IRS' response to Ray's letter shows that Ray's letter wasn't exculpatory. That response confirms that Ray's suspension stemmed from his failure to timely file IRS Form 8453—not from the fraud leading to Ray's convictions in this case. *See Trombetta*, 467 U.S. at 489. Thus, the letter and the IRS' reinstatement of Ray's electronic-filing abilities reflect Ray's correction of a record-keeping issue, not vindication that Ray filed truthful tax returns. And because the evidence wasn't exculpatory, we need not address Ray's argument that he lacked access to comparable evidence. *See Trombetta*, 467 U.S. at 489–90.

Alternatively, Ray alleges that even if the letter wasn't exculpatory, the government nevertheless violated his due-process rights because the letter was at least potentially useful to his defense and the government destroyed the letter in bad faith. *See Youngblood*, 488 U.S. at 58. But even if we assume that the letter was potentially useful to his defense, we find no evidence that the government destroyed the letter in bad faith. *See id.*

We consider five factors when determining whether the government destroyed or lost evidence in bad faith: (1) whether the government was on notice of the potentially exculpatory value of the evidence; (2) whether the potential exculpatory value of the evidence was based on more than mere speculation or conjecture; (3) whether the government had possession or the ability to control the disposition of

the evidence at the time it learned of the potential exculpatory value; (4) whether the evidence was central to the government's case; and (5) whether there's an innocent explanation for the government's failure to preserve the evidence. *See Bohl*, 25 F.3d at 911–12. Here, Ray satisfies none of these factors. For the reasons we discuss above, the letter had no potential exculpatory value—speculative or otherwise. Moreover, Ray didn't inform the government about the letter's alleged exculpatory value until three years after the IRS destroyed it pursuant to a standard destruction policy. Finally, the letter played no role in the government's case.

Ray's 2007 letter possessed no exculpatory value when the government destroyed it. *See Trombetta*, 467 U.S at 489. Further, there's no evidence the government destroyed the letter in bad faith. *See Youngblood*, 488 U.S. at 58. Accordingly, the district court didn't clearly err in finding that the government didn't violate Ray's due process rights by destroying the letter.

V. Amendment of the Indictment

Ray's final claim is that the district court violated his Fifth and Sixth Amendment rights when it constructively amended count 1 of the indictment in a manner that—according to Ray—broadened the charges against him. *See United States v. Hien Van Tieu*, 279 F.3d 917, 921 (10th Cir. 2002), *abrogated on other grounds by United States v. Little*, 829 F.3d 1177 (10th Cir. 2016). Our review is de novo. *See United States v. Zar*, 790 F.3d 1036, 1050 (10th Cir. 2015).

A constructive amendment occurs when there's a "possibility that the defendant was convicted of an offense other than that charged in the indictment."

United States v. Apodaca, 843 F.2d 421, 428 (10th Cir. 1988). Ray argues that district court created such a possibility here when it presented a slightly different version of the second superseding indictment to the jury at the opening of the trial. Because Ray's argument focuses on the distinctions between the original second superseding indictment and the slightly altered version the district court presented to the jury, we begin with a detailed description of the former and then explain how it differs from the latter.

The second superseding indictment included 36 criminal counts relevant to this issue. The first count charged Ray and his wife with conspiracy to defraud the United States. Counts 2 through 6 charged Ray individually with aiding and assisting in the preparation of false tax returns. And counts 7 through 36 charged Ray's wife individually with aiding and assisting in the preparation of false tax returns.

Within the first count, paragraphs 12 through 17 listed the overt acts allegedly performed in furtherance of the conspiracy. Paragraph 14 specifically incorporated the acts charged in counts 2 through 6. And paragraph 15 specifically incorporated the acts charged in counts 7 through 36. The acts incorporated in these two paragraphs appeared in a chart format under their respective counts.

At trial, when reading the indictment to the jury, the district court made a few alterations to the second superseding indictment. It replaced the name of Ray's wife with the phrase "another person," or something similar. R. vol. 6, 107. It also replaced the entirety of the text related to counts 7 through 36 (the counts against Ray's wife) with the word "omitted." *Id.* at 112. Then, for the first count, the district

court narrowed the number of overt acts allegedly performed in furtherance of the conspiracy. Specifically, although paragraph 15 in the second superseding indictment incorporated counts 7 through 36 as overt acts, the version of the indictment the district court read to the jury only included nine of those 29 overt acts.[6] In making this change, the district court removed the portion of the chart showing those nine overt acts from its original location in the second superseding indictment—as part of counts 7 through 36—and included it in paragraph 15, which set out the alleged overt acts related to count 1.

Ray argues that the altered indictment effectively alleged new overt acts by (1) excluding the name of his wife, (2) omitting the counts alleged against his wife, and (3) moving a chart illustrating the alleged overt acts to a new location in the amended indictment.

We disagree. It is common practice at trial to omit from an indictment information that's no longer relevant to the offenses—such as counts related to a codefendant who previously pleaded guilty. Thus, the district court didn't amend the indictment by substituting phrases like "another individual," R. vol. 6, 107, for Ray's wife's name, *see United States v. Miller*, 471 U.S. 130, 1356 (1985) ("A part of the indictment unnecessary to and independent of the allegations of the offense proved may normally be treated as 'a useless averment' that 'may be ignored.'" (quoting *Ford v. United States*, 273 U.S. 593, 602 (1927))). And the district court's decision to

[6] The government selected those nine overt acts because it planned on using that subset at trial, rather than all 29 overt acts included in counts 7 through 36.

move part of the chart from counts 7 through 36 to paragraph 15 of count 1 didn't allege any new overt acts against Ray because the district court (1) copied the acts from one section of the indictment and moved them to another and (2) included fewer overt acts than those listed in the second superseding indictments. In fact, the district court actually *narrowed* the scope of the count, leaving no "possibility [Ray] was convicted of an offense other than that charged in the [second superseding] indictment." *Hien Van Tieu*, 279 F.3d at 921. Accordingly, we conclude the district court didn't constructively amend the indictment by reading a revised version of the second superseding indictment to the jury.

Conclusion

Because the government never lodged a detainer with Colorado—thus rendering the IAD inapplicable—the district court did not abuse its discretion in denying Ray's motion to dismiss based on the IAD. The district court also properly rejected Ray's prosecutorial-vindictiveness argument because Ray failed to establish a presumption of vindictiveness. Further, Ray waived the specific STA claim he raises on appeal and, in any event, this claim fails on the merits. Ray's due-process claim also fails because he doesn't show that the destroyed evidence was exculpatory or that the government destroyed that evidence in bad faith. Lastly, the district court didn't constructively amend the indictment by slightly altering it before reading it to the jury. Accordingly, we affirm.

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT
OFFICE OF THE CLERK
Byron White United States Courthouse
1823 Stout Street
Denver, Colorado 80257
(303) 844-3157

Elisabeth A. Shumaker
Clerk of Court

Chris Wolpert
Chief Deputy Clerk

August 06, 2018

Mr. Jason Wesoky
Darling Milligan
1331 17th Street, Suite 800
Denver, CO 80202

RE: 16-1306, United States v. Ray
Dist/Ag docket: 1:14-CR-00147-MSK-2

Dear Counsel:

Attached is a copy of the opinion of the court issued today in this matter. The court has entered judgment on the docket pursuant to Fed. R. App. P. Rule 36.

Pursuant to Fed. R. App. P. Rule 40, any petition for rehearing must be filed within 14 days after entry of judgment. Please note, however, that if the appeal is a civil case in which the United States or its officer or agency is a party, any petition for rehearing must be filed within 45 days after entry of judgment. Parties should consult both the Federal Rules and local rules of this court with regard to applicable standards and requirements. In particular, petitions for rehearing may not exceed 15 pages in length, and no answer is permitted unless the court enters an order requiring a response. If requesting rehearing en banc, the requesting party must file 6 paper copies with the clerk, in addition to satisfying all Electronic Case Filing requirements. *See* Fed. R. App. P. Rules 35 and 40, and 10th Cir. R. 35 and 40 for further information governing petitions for rehearing.

Please contact this office if you have questions.

Sincerely,

Elisabeth A. Shumaker
Clerk of the Court

cc: Hetal Janak Doshi
Anna Kathryn Edgar
Tim Neff
Robert Mark Russel

EAS/at

No. _____

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,

Respondent,

v.

AUSTIN RAY,

Petitioner,

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE TENTH CIRCUIT

APPENDIX – PART 2
UNITED STATES DISTRICT COURT CASE 1:14-CR-147: ORDERS & TRANSCRIPTS

Jason B. Wesoky
Member of the Tenth Circuit's CJA Appellate Panel
Appointed pursuant to 18 U.S.C. § 3006A
DARLING MILLIGAN PC
1331 17th Street, Suite 800
Denver, Colorado 80202
(303) 623-9133

ATTORNEY FOR PETITIONER

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Magistrate Judge Boyd N. Boland

Case No. 14-cr-00147-MSK

UNITED STATES OF AMERICA,

Plaintiff,

v.

AUSTIN RAY,

Defendant.

ORDER OF DETENTION

THIS MATTER came before me for a detention hearing on April 25, 2014. I have reviewed the Pretrial Services report and heard the arguments of counsel.

I find that the evidence establishes that the defendant poses a risk of flight based on the following:

In order to sustain a motion for detention, the government must establish that there is no condition or combination of conditions which could be imposed in connection with pretrial release that would reasonably assure (a) the appearance of the defendant as required or (b) the safety of any other person or the community. 18 U.S.C. § 3142(b). The former element must be established by a preponderance of the evidence, and the latter requires proof by clear and convincing evidence.

The Bail Reform Act establishes the following factors to be considered in determining whether there are conditions of release that will reasonably assure the appearance of the defendant and the safety of the community:

> (1) The nature and circumstances of the offense charged, including whether the offense is a crime of violence or involves a narcotic drug;
>
> (2) the weight of the evidence against the person;
>
> (3) the history and characteristics of the person including–
>
> > (A) the person's character, physical and mental condition, family ties, employment, financial resources, length of residence in the community, community ties, past conduct, history relating to drug and alcohol abuse, criminal history, and record concerning appearance at court proceedings; and
> >
> > (B) whether at the time of the current offense or arrest, the person was on probation, on parole, or on other release pending trial, sentencing, appeal, or completion of sentence for an offense under Federal, State, or local law; and
>
> (4) the nature and seriousness of the danger to any person or the community that would be posed by the person's release.

18 U.S.C. § 3142(g).

Weighing the factors set out in the Bail Reform Act, I find the following:

The defendant has been charged under 18 U.S.C. §371 with conspiracy to defraud the United States; and under 26 U.S.C. § 7206(2) with aiding/assisting in the preparation and presentation of a false and fraudulent return.

I find based on the defendant's history and personal characteristics that no condition or combination of conditions will reasonably assure the appearance of the defendant as required. The defendant is subject to a hold filed by the Colorado Department of Corrections and is not eligible for release. In view of the hold, the defendant did not contest detention at this time.

After considering all appropriate factors, I conclude that the preponderance of the evidence establishes that no condition or combination of conditions of release will reasonably

assure the appearance of the defendant as required.

IT IS ORDERED:

1. The defendant is committed to the custody of the Attorney General or his designated representative for confinement in a corrections facility separate, to the extent practicable, from persons awaiting or serving sentences or being held in custody pending appeal;

2. The defendant is to be afforded a reasonable opportunity to consult confidentially with defense counsel; and

3. On order of this Court or on request of an attorney for the United States, the person in charge of the corrections facility shall deliver defendant to the United States Marshal for the purpose of an appearance in connection with this proceeding.

Dated April 25, 2014.

BY THE COURT:

s/ Boyd N. Boland
United States Magistrate Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Honorable Marcia S. Krieger

Criminal Action No. 14-cr-00147-MSK

UNITED STATES OF AMERICA,

Plaintiff,

v.

AUSTIN RAY,

Defendant.

VERDICT FORM

WE THE JURY render our verdict as to the following Counts:

COUNT 1: Conspiracy to Defraud the United States

As to **Count 1**, we find Mr. Ray:

X **GUILTY** ___ **NOT GUILTY**

COUNTS 2-6: Aiding in the Preparation of a False Tax Return

As to **Count 2**, we find Mr. Ray:

X **GUILTY** ___ **NOT GUILTY**

As to **Count 3**, we find Mr. Ray:

X **GUILTY** ___ **NOT GUILTY**

As to **Count 4**, we find Mr. Ray:

X **GUILTY** ___ **NOT GUILTY**

As to **Count 5**, we find Mr. Ray:

X **GUILTY** ___ **NOT GUILTY**

As to **Count 6**, we find Mr. Ray:

X **GUILTY** ___ **NOT GUILTY**

COUNTS 37 and 38: Subscribing a False Income Tax Return

As to **Count 37,** we find Mr. Ray:

X **GUILTY** ___ **NOT GUILTY**

As to **Count 38**, we find Mr. Ray:

X **GUILTY** ___ **NOT GUILTY**

Proceed to sign the appropriate portion of the Certification section.

CERTIFICATION

By our signatures below, we certify that we have found Mr. Ray **GUILTY** on the Count(s) set forth above, and that this verdict represents the unanimous decision of the jury.

Dominic Piascencia

Dated: January 27, 2015

By our signatures below, we certify that we have found Mr. Ray **NOT GUILTY** on all Counts, and that this verdict represents the unanimous decision of the jury.

Dated: January __, 2015

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Chief Judge Marcia S. Krieger

Criminal Action No. 14-cr-00147-MSK

UNITED STATES OF AMERICA,

Plaintiff,

v.

2. AUSTIN RAY,

Defendant.

OPINION AND ORDER DENYING VARIOUS MOTIONS

THIS MATTER comes before the Court pursuant to certain motions filed by the Defendant, Austin Ray, *pro se*. The docket numbers of the motions and responses are set forth herein.

FACTS

Mr. Ray, along with a co-defendant, is charged in a 38-Count Second Superseding Indictment **(# 92)** of January 6, 2015. Only some of those counts are asserted against Mr. Ray. Specifically, he is charged in Count 1 with Conspiracy to Defraud the United States in violation of 18 USC § 371; in Counts 2-6 with Aiding the Preparation of a False Tax Return in violation of 26 U.S.C. § 7206(2); and in Counts 37 and 38 with Subscribing a False Tax Return in violation of 26 U.S.C. § 7206(1). These events allegedly occurred between 2006 and 2010, in conjunction with Mr. Ray's tax preparation business, Cheapertaxes, which he operated alongside his wife and co-Defendant, Anne Rasamee.

On March 2, 2015, the Court granted **(# 130)** Mr. Ray's request to proceed *pro se*, although the Court appointed his then-assigned counsel to remain in an advisory and standby capacity. On April 2, 2015, the Court granted Mr. Ray until April 9, 2015 to file any pretrial motions he intended to assert. Mr. Ray proceeded to file a variety of motions, and the Government has filed responses to some of those motions.[1]

The Court is mindful of Mr. Ray's *pro se* status and has accordingly construed his filings liberally as required by *Haines v. Kerner*, 404 U.S. 519, 520-21 (1972).

ANALYSIS

A. Motion for Severance and Relief From Prejudicial Joinder (# 147), Government's response **(# 155)**

Mr. Ray's motion appears to seek "severance" of his trial from that of his co-Defendant. He argues that he and Ms. Rasamee would present "antagonistic defenses" if tried together, giving rise to a prejudice that can only be cured by severance.

As the Government's response aptly notes, there is no indication that there will be a joint trial of Mr. Ray and Ms. Rasamee, as Ms. Rasamee has already entered a plea of guilty **(# 113)**. Thus, the trial that will occur will be as against Mr. Ray alone. (The record makes clear that Ms. Rasamee has agreed to cooperate with the Government and is likely to testify against Mr. Ray, but it does not appear that Mr. Ray's motion is challenging the admissibility of Ms. Rasamee's testimony as a cooperating witness.) Because Ms. Rasamee will not be tried jointly with Mr. Ray in any event, his motion to sever is denied as moot.

[1] The Court does not believe that a reply from Mr. Ray will materially aid in the analysis of any of the motions. Thus, the Court exercises its discretion to resolve the motions promptly rather than to await further briefing.

B. Motion for Extension of Time to File Notice of Appeal (# 148), Government's response **(# 161)**

Mr. Ray indicates an intention to "file a Notice of Appeal as it relates to his bond."[2] Mr. Ray was arraigned on April 25, 2014 **(# 10)**. At that time, he did not contest detention, in part because he was "subject to a hold filed by the Colorado Department of Corrections and is not eligible for release." **(# 11)**. Mr. Ray did not initially seek to appeal this ruling.

18 U.S.C. § 3145(c) provides for appellate review of detention orders, but neither that statute nor any of the Federal Rules of Criminal Procedure specify a deadline for taking such an appeal. Fed. R. App. P. 4(b)(1)(A)(i) generally provides for a fourteen-day deadline for a criminal defendant to appeal from an order by the District Court. Rule 4(b)(4) contemplates that the District Court may extend the time for filing such a motion (subject to the defendant showing "excusable neglect or good cause"), but "for a period not to exceed 30 days from the expiration of the time otherwise prescribed by this rule." Thus, Mr. Ray's time to appeal his April 25, 2014 detention order apparently expired in early May 2014, and this Court is prohibited by the Rules of Appellate Procedure from extending that deadline beyond early June 2014. As such, Mr. Ray's motion is nearly a full year too late.

Arguably, Mr. Ray is not seeking appellate review of the original order detaining him. Rather, he may be seeking to appeal this Court's April 2, 2015 order **(# 144)** denying his Motion for Release To Third-Party Custody of the Independence Halfway House **(# 134)**. That motion

[2] Mr. Ray states that his request here is conditional, and that he would withdraw the request to appeal the denial of release on bond if the Court were inclined to grant his motion for a transfer of custody over him to state authorities. The Court denies that motion *infra*.

could arguably be construed to be a motion seeking reconsideration of the April 25, 2014 detention order due to changed circumstances, pursuant to 18 U.S.C. § 3141(f)(2). That statute states that a detention hearing "may be reopened, before or after a determination by the judicial officer, at any time before trial if the judicial officer finds that information exists that was not known to the movant at the time of the hearing and that has a material bearing on the issue." (Emphasis added.)

This Court does not believe that Mr. Ray's March 16, 2015 Motion for Release supported a reopening and reconsideration of the April 25, 2014 detention order under § 3141(f)(2). Mr. Ray's March 2015 motion does not recite any "information . . . that was not known to [him] at the time of the [April 2014] hearing." Rather, the April 2015 motion recites only facts that were known to Mr. Ray as of April 2014 – that he has ties to the community, that he had previously been granted release from state custody to a halfway house, that the Government here had allegedly not sought detention until it learned of the pending state hold on Mr. Ray's release, etc. – but which he elected not to present earlier. Because Mr. Ray's April 2015 motion did not make a facial showing of grounds to reopen the detention hearing under 18 U.S.C. § 3141(f)(2), this Court's denial of that motion on April 2, 2015 was not a new, appealable detention order; rather, it was simply an order denying Mr. Ray's motion seeking to reopen the detention hearing.

Because the Court finds that no new detention order has been issued, Mr. Ray remains subject to the April 2014 detention order that can no longer be timely appealed. Accordingly, his motion for an extension of time to file a Notice of Appeal is denied.[3]

[3] In any event, even if the Court were to find that the April 2, 2015 order constituted a new detention order, Mr. Ray did not file a timely appeal from it. Although he filed the instant motion seeking an extension of time to appeal a mere 6 days (as measured by the prison mailbox

C. Motion for Extension of Time to File Request for Funds . . . (# 149), no response filed by the Government.

Mr. Ray previously sought **(# 138)** authorization under the Criminal Justice Act to retain various services in furtherance of his *pro se* defense. On April 2, 2015, the Court denied **(# 144)** that motion with leave to renew it, subject to the requirement that Mr. Ray make various specific showings as to the identities of the specialists whose services he sought to retain and the amount of time and money that such services were expected to require, among other things. The Court did not formally set a deadline for the filing of a renewed motion, but a reasonable reading of the record warrants the conclusion that the renewed motion was subject to the same global deadline of April 9, 2015 set by the Court with regard to all other motions Mr. Ray wished to file.

In the instant motion, Mr. Ray argues that "the Federal Detention Center does not provide resources that would allow an inmate to research and gather information pertaining to potential investigators or expert witnesses," and that he "is seeking outside legal assistance via mail."[4] He does not offer an estimation of when he will be prepared to file a renewed motion.

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rule) after entry of that order, he did not file a formal Notice of Appeal. Because the 14-day period of Rule 4(b)(1) has now run as to the April 2, 2015 order, this Court would thus require Mr. Ray to show "excusable neglect or good cause" under Rule 4(b)(4) for his failure to timely appeal the April 2, 2015 order. The instant motion is so skeletal as to prevent the Court from making such a finding, and thus, the Court would deny the motion on its merits as well.

[4] Mr. Ray's motion remarks about a statement made by the Court during the April 2, 2015 hearing. Mr. Ray characterizes the statement as instructing his advisory counsel that "his advisory capacity and assistance is limited to the courtroom." To the extent that the Court's statement was unclear or created a misimpression in Mr. Ray or his advisory counsel, the Court takes this opportunity to clarify it.

Mr. Ray is provided with advisory counsel to serve two major purposes. First, advisory counsel remains assigned to Mr. Ray in the event that Mr. Ray decides, at any point, that he no longer wishes to represent himself; in such circumstances, counsel stands by to resume such

The Court is mindful that a trial date of October 19, 2015 has been set in this matter. The Court fully anticipates that, if Mr. Ray receives authorization to retain investigators and other specialists, considerable time will be necessary for those specialists to perform the work required of them (particularly given the communications difficulties that result from Mr. Ray's continued detention). In order to ensure that such work is completed sufficiently in advance of the trial date, it is essential that Mr. Ray identify, locate, and secure authorization for these assistants promptly. Thus, the Court is unwilling to grant a lengthy extension of time to accommodate Mr. Ray that the earliest stages of this process. Although the Court recognizes the difficulties that

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representation with a minimum of delay. *See e.g. Faretta v. California*, 422 U.S. 806, 834-35 n. 46 (1975). (Many courts thus use the label of "standby counsel" to reflect this function.)

Second, Mr. Ray's advisory counsel is present to give legal advice to Mr. Ray, upon his request. This function recognizes Mr. Ray's lack of legal training and knowledge and provides him with an avenue to request information on general legal principles, rules of procedure, and courtroom protocol that are pertinent to the matters to be addressed at trial. *Id.*

It is not advisory counsel's role to assist Mr. Ray in discovering or developing factual evidence that Mr. Ray would like to present (*e.g.* to locate or interview witnesses Mr. Ray might deem important or to prepare summaries of documents at Mr. Ray's request). (Counsel may, of course, conduct whatever factual preparation he deems appropriate in order to be prepared to act as standby counsel. But he is not required or expected to assist Mr. Ray in pursuing lines of factual inquiry that counsel deems irrelevant or unnecessary.) Nor is it advisory counsel's role to assist Mr. Ray in developing a defense strategy (*e.g.* to discuss what witnesses should be called or what motions should be made). These are functions that the Court appointed counsel to perform for Mr. Ray in the course of counsel's representation, assistance which Mr. Ray rejected when he elected to proceed *pro se*. Mr. Ray cannot proceed "partially *pro se*," retaining the ability to dictate strategic decisions while requiring advisory counsel to perform those particular tasks that Mr. Ray finds difficult or unpleasant to do for himself. *See U.S. v. Treff*, 924 F.2d 975, 979 n. 6 (10th Cir. 1991) ("It should be noted that a defendant has no right to hybrid representation"). To hold otherwise would reduce advisory counsel's role to that of a taxpayer-funded paralegal acting at Mr. Ray's command, something neither the Criminal Justice Act nor the Sixth Amendment's guarantee of the assistance of counsel was intended to facilitate. Moreover, doing so would undermine the well-settled proposition that while the defendant retains the right to decide whether to exercise critical constitutional rights (*e.g.* to plead guilty, to waive a jury, to testify in defense, and to appeal), it is generally the job of counsel to develop a strategy for the defense and to make the various tactical decisions necessary to implement that defense. *See generally Florida v. Nixon*, 543 U.S. 175, 187-89 (2004).

Mr. Ray's detention causes when attempting to locate and retain experts, the Court is compelled to remind Mr. Ray of the advisements it gave him at the time he first requested to proceed *pro se* that such difficulties would be likely to arise. The fact that Mr. Ray may now appreciate that advice a bit more is not, of itself, reason to justify a lengthy extension.

Accordingly, the Court will grant Mr. Ray only a brief extension of time to file a properly-supported renewed motion for authorization to retain experts and other services. Mr. Ray shall have until May 21, 2015 to file such a motion, which shall include the specific information required by the Court. Given the need for time for those services to be completed in advance of the trial, no further extensions will be granted for this purpose.

D. Motion for Remand to State Custody (# 150), Government's response **(# 160)**

This motion follows, to some extent, from the prior motions. Mr. Ray explains that his status as a pretrial detainee in federal custody prevents him from having full access to various services that would be available to him as an assigned inmate in state prison – *i.e.* access to law libraries, computerized legal research, free photocopying and legal mail, free phone calls and e-mail access to lawyers and other specialists, etc.[5] He acknowledges that "legal access is a privilege, not a right, in the F.D.C. and accommodations are made on a case by case basis." He states that legal access in the federal detention center is suspended during lockdowns.

The decision regarding where an inmate will be housed during the pendency of a proceeding is largely vested in the discretion of the Executive Branch – here, the U.S. Marshal and U.S. Attorney. Short of a showing that an pretrial detainee's housing conditions violate the

[5] The Government's response points out that Mr. Ray is mistaken in his belief as to the extent to which such services are offered free of charge to inmates in state custody. The Court need not address which party's understanding is correct.

standards set forth in the Fourth and Fifth Amendments to the U.S. Constitution – and no such contention is made here – this Court is reluctant to interfere with that executive function. Here, Mr. Ray's motion concedes (and the Government invokes) at least one reasonable argument in opposition to the relief he requests: once in state custody, his presence at federal proceedings can only be secured by the comparatively-cumbersome process of writs issued to the state facility (followed by coordination between federal and state authorities for the transfer, housing, and return of Mr. Ray at the conclusion of each day of hearing or trial), rather than simply requesting that the Marshal produce Mr. Ray from federal custody.

Courts considering the issue have generally held that the mere fact that an alternative custody arrangement would better facilitate a defendant's self-representation is not a sufficient ground to grant such relief. *see e.g. U.S. v. Stanford*, 722 F.Supp.2d 803, 811 (S.D.Tx. 2010), *citing U.S. v. Petters*, 2009 WL 205188 (D.Minn. Jan. 28, 2009) ("[A]ccepting such an argument would mean that the more complicated the crime, the more likely a defendant should be released prior to trial. This is clearly an absurd result"); *U.S. v. Dupree* , 833 F.Supp.2d 241, 248 (E.D.N.Y. 2011). Here, although Mr. Ray may be correct that state facilities inherently provide more extensive legal access – a proposition this Court doubts but will adopt for purposes of this motion – he has not identified any right to be held in the type of custody that provides him the best legal access. To the contrary, the 10th Circuit has held that "a trial court is under no obligation to provide law library access to a prisoner who voluntarily, knowingly, and intelligently waives the right to counsel in a criminal proceeding." *U.S. v. Stanley*, 385 Fed.Appx. 805, 807-08 (10th Cir. 2010), *citing U.S. v. Taylor*, 184 F.3d 1199, 1205 (10th Cir.

1999). So long as Mr. Ray has access to "other available means" to access legal materials – including the assistance of advisory counsel – his constitutional rights are not implicated. *Id.*

Here, the record demonstrates that Mr. Ray has some access to legal resources at the federal facility, even if that access is less complete than would be available at a state facility as Mr. Ray complains. Indeed, Mr. Ray himself acknowledges that the federal facility offers him access to legal materials, at least when the facility is not in "lockdown" status. As discussed above, Mr. Ray also has the assistance of his advisory counsel for obtaining legal research and authority. As Mr. Ray's motion concedes, access to other materials – computers for review of electronic discovery or investigatory resources – can be arranged on a "case-by-case basis." Mr. Ray has not alleged that his abilities to make such arrangements have been rejected or limited unreasonably, nor disputed the Government's contention that access to electronic discovery is being made available to him. Accordingly, the Court finds no grounds to direct his transfer to state custody.

E. Motion Requesting Trial Court to Allow Furlough To Attend Father's Funeral (# 151), Government's response **(# 156)**

Mr. Ray's Motion, in its entirety, reads "Mr. Ray's Father died on Sunday, April 5, 2015, and he is requesting to be able to attend his funeral." The motion does not identify the date of the funeral, its location, or any other information that would permit the Court to make an informed decision regarding the request. (Nor does the motion address the source of this Court's ability to temporarily furlough Mr. Ray from federal custody without implicating the detainer lodged against him by state authorities.) Because the motion is incomplete, it is denied without prejudice.

F. Motion to Dismiss For Denial of Due Process . . . (# 152), Government's response **(# 159)**

In this motion, Mr. Ray argues that his prosecution violates the 5th Amendment's guarantee of Due Process in various ways. Specifically, he contends: (i) that the IRS "violat[ed] its own observed rules, regulations, and procedural policy in initiating and conducting their criminal investigation against Mr. Ray"; (ii) that the Government has engaged in vindictive and/or selective prosecution of him, either because Mr. Ray refused to sit for an interview with IRS agents on February 23, 2012 or because Mr. Ray succeeded in convincing state prosecutors to drop a "habitual criminal" charge against him in a theft prosecution, resulting in Mr. Ray receiving a much shorter prison sentence on that charge than IRS investigators expected; (iii) that Mr. Ray is being singled out for prosecution because of his race (black); and (iv) that IRS agents "violated C.I.D. policy" by not promptly reporting to supervisors that they had effected Mr. Ray's arrest during execution of a search warrant on April 6, 2010, and further, that such arrest implicated his rights to a speedy trial under the Sixth Amendment, such that his current prosecution violates that right.

Turning first to Mr. Ray's argument that IRS agents violated unspecified "rules [and] regulations" in their investigation of him, Mr. Ray does not elaborate (at least beyond the other arguments enumerated here). Thus, the Court declines to dismiss the charges against Mr. Ray based on this purely conclusory argument.

As to Mr. Ray's arguments that the prosecution against him is "vindictive," such a prosecution would violate the Due Process clause if Mr. Ray can show that the government is punishing him for exercising constitutional or statutory rights in the course of a criminal

proceeding. *U.S. v. Mitchell*, 558 Fed.Appx. 831, 835 (10th Cir. 2014), *citing U.S. v. Raymer*, 941 F.2d 1031, 1040 (10th Cir. 1991). A defendant asserting a claim of vindictive prosecution bears the burden of showing either "actual vindictiveness" or "a realistic or reasonable likelihood that a prosecutor's decision would not have occurred but for hostility or punitive animus toward the defendant because he exercised his specific legal right." *Id.*

Mr. Ray first appears to argue that the Government is pursing this prosecution of him because he refused to participate in an interview with IRS agents on February 23, 2012. Such an argument ignores the admitted fact that the IRS had begun a criminal investigation into Mr. Ray as early as 2010, when it executed a search warrant at his office and seized various records. Moreover, the mere fact that IRS investigators came to speak to Mr. Ray in February 2012 and read him his *Miranda* rights prior to attempting to conduct the interview further demonstrates that the Government already intended to prosecute him, even before he exercised his Fifth Amendment right not to participate in the interview. In such circumstances, it is clear that the Government's intention to prosecute Mr. Ray was formed long before February 23, 2012, such that Mr. Ray has failed to carry his burden of showing a realistic probability that the instant prosecution arises out of vindictiveness based on his refusal to participate in an interview on that date.

Mr. Ray also appears to argue that his prosecution is vindictive insofar as federal authorities are prosecuting him because he successfully avoided the lengthy prison sentence that would have accompanied his conviction as a habitual criminal in state court. He contends that the motions he filed between January 12, 2012 and August 13, 2013 secured that result. For the same reasons discussed above, Mr. Ray's theory fails in light of undisputed evidence that the

Government had already begun investigating him for the crimes charged here as early as 2010. He surmises that federal authorities would have elected not to prosecute him if the habitual criminal designation had resulted in him receiving an expected 48-year sentence, and that federal authorities decided to act only after he was instead sentenced to a sentence that resulted in his release to community corrections after only four months. But speculation is all Mr. Ray offers. He appears to suggest that federal authorities decided to prosecute him merely because he had gotten the better of state authorities, but the 10th Circuit has "rejected the idea that federal prosecution, after state proceedings, constitute vindictive prosecution." *Raymer*, 941 F.2d at 1041, *citing U.S. v. Schoolcraft*, 879 F.2d 64, 68 (3d Cir. 1989) ("the involvement of a separate sovereign tends to negate a vindictive prosecution claim"). Although a claim of vindictiveness might lie where there is evidence that the state prosecution was used as a "stalking horse" for the federal one, Mr. Ray has not identified any facts that would suggest that federal officials coordinated with state officials in the bringing of state charges against him nor otherwise had any stake in those state proceedings. Indeed, when reciting the facts of the February 23, 2012 attempted interview, Mr. Ray merely notes that the IRS investigators remarked upon the potential 48-year sentence he faced as an alleged habitual criminal, but he does not contend that those investigators made statements that linked any putative federal prosecution to whatever state sentence he received or otherwise associated the two proceedings beyond noting their simultaneous existence. In such circumstances, Mr. Ray has not alleged sufficient facts to rise to the "reasonable likelihood of vindictiveness" threshold, and his motion is therefore denied.

As to his argument that he is being prosecuted because of his race, Mr. Ray raises a "selective prosecution" argument. The U.S. Constitution's guarantee of Equal Protection

prohibits the selective enforcement of the law based on considerations such as race. *U.S. v. Alcaraz-Arellano*, 441 F.3d 1252, 1263 (10th Cir. 2006). To succeed on a claim of selective prosecution, Mr. Ray bears the burden of proving that the Government acted against him with a discriminatory purpose – that is, that Mr. Ray's race was a motivating factor in the decision to enforce the law against him – and that it had a discriminatory effect, in that similarly-situated individuals of a different race were not prosecuted. *Id.* at 1264. The burden on Mr. Ray is an "exacting" one. *Id.*

Mr. Ray fails on both accounts. He does not point to any particular evidence that would suggest that the Government was motivated by his race in deciding to charge him with crimes. He does not, for example, point to racially-discriminatory comments allegedly made by IRS investigators or point to other circumstantial evidence that would suggest that the Government took Mr. Ray's race into account when deciding to prosecute. Indeed, beyond stating the (patently false[6]) proposition that he is "the only black person that's been accused of crimes that the IRS is alleging in the counts," Mr. Ray does not explain how the correlation between his race and the charges transforms into a causal connection. Moreover, he offers no evidence of similarly-situated non-black individuals who committed similar crimes and were not prosecuted. At best, he broadly implies that such individuals might exist ("there is no evidence to show through the tax returns seized that anyone of any other race or nationality has been arrested or investigated"). However, in arguing that "there is no evidence to show [that] anyone of any other race" has been prosecuted, Mr. Ray ignores the burden of proof: it is his obligation to

[6] Ms. Rasamee, Mr. Ray's co-Defendant, is also black. Mr. Ray attempts to handwave this fact away by stating that Ms. Rasamee's prosecution is being "staged" by the Government, who "never intended to prosecute her." The Court notes that Ms. Rasamee has already pled guilty to criminal conduct of her own in conjunction with this action and is awaiting sentencing.

identify non-black individuals who could have been, but were not, prosecuted for the same offenses that he is charged with in this action. *U.S. v. Wilson*, 503 Fed.Appx. 598, 602-03 (10th Cir. 2012). Because Mr. Ray has not met the exacting standards applicable to a claim of selective prosecution, his motion is denied.

Finally, Mr. Ray raises an argument sounding in constitutional speedy trial concerns. Mr. Ray raised a similar argument in a prior motion **(# 88)**, which the Court denied in an oral ruling on March 3, 2015 **(# 130)**. Mr. Ray's instant motion places a slightly different gloss on this argument, contending that IRS agents disregarded internal policies requiring them to immediately report arrests to their supervisors (although he does not identify the source or express language of this alleged "policy"), but the remainder of his motion simply repeats the same arguments already considered by the Court. (Indeed, his motion expressly mentions "the Court order [of] March [3], 2014"). Arguably, Mr. Ray may be seeking reconsideration of that ruling, but he has not shown that there has been an intervening change in the law, newly-discovered evidence, or clear error by this Court in rendering the prior ruling. *See U.S. v. Christy*, 739 F.3d 534, 539 (10th Cir. 2014). Rather, he is merely seeking to revisit issues already addressed. *Id.*

Accordingly, Mr. Ray's motion is denied in its entirety.

G. Motion to Suppress All Evidence (# 153), Government's response **(# 158)**.

Notwithstanding its title, this motion seeks to suppress certain categories of evidence. First, Mr. Ray apparently moves to suppress statements he may have given to a Mr. Holmes, an IRS Revenue Agent, on the grounds that Mr. Ray "was never given a *Miranda*-like warning . . . prior to any of the three interviews conducted by Mr. Holmes." Mr. Ray does not describe the

dates or circumstances of any of these interviews, nor does he identify the subject-matter of any of these conversations.

This portion of the motion is facially-deficient. The 5th Amendment's right to remain silent, and the corresponding advisement regarding that right that are the subject of *Miranda* and its progeny, apply in circumstances of custodial interrogation – that is, where the person has either been formally arrested or where his freedom of action has been curtailed to a degree associated with formal arrest. *U.S. v. Cash*, 733 F.3d 1264, 1276-77 (10th Cir. 2013). Thus, before he may invoke *Miranda*, Mr. Ray must show circumstances that demonstrate that his three separate meetings with Mr. Holmes were "custodial" in nature, such that Mr. Ray's freedom was formally curtailed. Moreover, the Government's response reveals that Mr. Holmes is a "tax compliance officer" who was investigating whether Mr. Ray's electronic tax filing privileges with the IRS should be suspended. The record does not indicate whether Mr. Holmes was authorized to arrest Mr. Ray, much less that he did so, much less that he did so on the three separate occasions as suggested by Mr. Ray. Accordingly, this portion of Mr. Ray's motion is denied.[7]

Next, Mr. Ray moves to suppress "co-defendant hearsay statements under [Fed. R. Evid.] 801." The thrust of this brief argument is somewhat unclear; as best the Court can determine, Mr.

[7] It may be that Mr. Ray is not necessarily claiming that his 5th Amendment rights were implicated by non-custodial questioning by Mr. Holmes, but rather, that Mr. Holmes violated internal IRS administrative requirements. Mr. Ray cites to a provision of the IRS Internal Revenue Manual that instructs IRS Special Agents conducting non-custodial interviews to "advise the individual of his/her constitutional rights . . . when the individual is a subject of an investigation." *See* http://www.irs.gov/irm/part9/irm_09-004-005-cont01.html, section 9.4.5.11.3.1. As the Government notes, Mr. Ray has not shown that Mr. Holmes is Special Agent of the IRS. Thus, the Court need not proceed to resolve the question of whether the Internal Revenue Manual is the type of agency regulation that could give rise to a freestanding Due Process right to an advisement before questioning.

Ray is arguing that his co-Defendant, Ms. Rasamee, was a co-signatory to a letter Mr. Ray sent to the IRS in February 2010, seeking reinstatement of Cheapertaxes' electronic filing privileges. Mr. Ray's motion seems to suggest that Ms. Rasamee's current statements to the Government as a cooperating witness against Mr. Ray are contrary to the representations contained in the 2010 letter she signed. Assuming these are the facts, Mr. Ray's appropriate remedy is to seek to impeach Ms. Rasamee at trial based on an alleged prior inconsistent statement. *See generally* Fed. R. Evid. 613. Nothing in the factual scenario described by Mr. Ray implicates the hearsay rules in general or Rule 801 in particular, or justifies suppression. Accordingly, this aspect of the motion is denied.

Mr. Ray's third argument moves to suppress evidence that was allegedly seized from his vehicle during the execution of a search warrant at Cheapertaxes' office in or about 2010. The Court need not explore this argument in detail, as the Government has produced the inventory from the execution of that warrant, and that inventory indicates that no evidence was seized from Mr. Ray's vehicle.[8] Because there appears to be no evidence taken from the vehicle, there is no evidence to suppress regardless of whether Mr. Ray's contentions have merit.[9]

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[8] Mr. Ray asserts that the officers executing the warrant "confiscated numerous boxes of files of client 2010 tax returns that were being transported because of [the deactivation of Cheapertaxes' electronic-filing privileges]." He asserts that "no accurate documentation of what was actually taken [from his vehicle] was ever provided" and that "subsequently, [the] illegally-seized files were comingled with items taken pursuant to the search warrant." Mr. Ray does not provide any evidence or demonstrate a basis for his personal knowledge as to the latter two facts (the failure of officials to inventory any items seized from his vehicle and any subsequent "comingling"), and the Government refutes at least one aspect of the first fact (that hard copies of client 2010 tax returns that could not be electronically-filed by Cheapertaxes were seized), noting that "each tax return identified in the indictment . . . was actually filed with the IRS" and that "numerous of these returns were e-filed." Logically, a hard-copy of a return that was allegedly seized from Mr. Ray's vehicle could not be subsequently have been filed with the IRS, thus calling Mr. Ray's conclusory assertions into question.

Next, Mr. Ray moves "to suppress Counts 37 & 39 in the Superseding Indictment," apparently due to alleged discovery failures by the Government. Mr. Ray states that the Discovery Conference Memorandum **(# 12)** in this action, entered on April 25, 2014, required the Government to provide all relevant discovery by May 9, 2014. Mr. Ray points out that Counts 37 and 38 against him were added in a December 2, 2014 Superseding Indictment **(# 68)** and carried forward in Second Superseding Indictment **(# 92)** filed on January 6, 2015.

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[9] Mr. Ray has repeatedly raised objections to the conduct of the law enforcement officers executing the warrant, and thus, the Court pauses here to advise Mr. Ray of certain legal principles that may be unfamiliar to him, and indeed may be causing him to labor under a misapprehension about the scope of his legal rights.

Law enforcement officers executing a search warrant are granted a limited right to detain persons found inside or immediately outside the premises of the search. *See Bailey v. U.S.*, 133 S.Ct. 1031, 1037-38 (2013), *citing Michigan v. Summers*, 452 U.S. 692 (1981). This right serves several purposes: it protects the officers from harm while executing the warrant, it facilitates the officers' ability to execute the warrant without disruption, and, in some circumstances, it prevents the flight of an individual who may be subject to arrest as a result of the search. *Id.* at 1038. The right to detain individuals found in the immediate vicinity of the location being searched is a function attendant to the issuance of the search warrant itself, and it is not necessary that the person detained be specifically-identified in the warrant or be suspected of criminal wrongdoing; the individual's mere presence in or near the premises to be searched is enough to permit detention. *Id.*; *Muehler v. Mena*, 544 U.S. 93, 99 n. 2 (2005). Such detention may, in appropriate circumstances, include placing the individual in handcuffs, subjecting the individual to basic questioning about their identity, and requesting consent to search their personal property. *Muehler*, 544 U.S. at 101. The detention may last as long as is reasonably necessary for police to complete the tasks incident to the search, such that a detention for a period of 2-3 hours is not necessarily unreasonable. *Id.* at 100. Indeed, the Supreme Court has commented on "the far-reaching authority the police have when the detention is made at the scene of the search." *Bailey*, 133 S.Ct. at 1039.

Here, Mr. Ray has asserted that he and his minor children arrived at the Cheapertaxes office while the premises were being searched pursuant to the warrant. He has alleged that he and his children were handcuffed, detained an extended period of time, and that law enforcement agents also searched his vehicle despite the warrant authorizing only a search of the office. Although Mr. Ray may ultimately be able to argue that certain aspects of the detention were unreasonable – and the Court offers no finding as to that point – the mere fact that Mr. Ray and his children were detained by officers executing the warrant does not, of itself, appear to be a 4th Amendment violation.

Observing that the filing dates of those superseding indictments are after the deadline in the Discovery Conference Memorandum had passed, Mr. Ray appears to be arguing that the Government's failed to comply with the discovery deadline with regard to charges that were not yet asserted. This portion of the motion is denied.

Finally, Mr. Ray moves to suppress the evidence seized as a result of the execution of the search warrant, asserting that the application for that warrant failed to disclose that the allegations in that application were "mostly based on two undercover operations conducted in violation of IRS procedural policy. Without these undercover operations, the search warrant was granted without probable cause." Mr. Ray does not elaborate on what "undercover operations" were conducted or how they were "in violation of IRS procedural policy."

In *Franks v. Delaware*, 438 U.S. 154, 155-56 (1978), the Supreme Court held that, in limited circumstances, a defendant is entitled to an evidentiary hearing to determine whether a search warrant was issued in reliance upon a deliberately or recklessly false affidavit. To be entitled to such a hearing, a defendant must make a "substantial showing" that the warrant affiant made a false statement or omitted material information from the affidavit, and that the misrepresentation or omission was made knowingly or with reckless disregard for the truth. *U.S. v. Zarif*, 192 Fed.Appx. 784, 789 (10th Cir. 2006). Here, Mr. Ray has offered only ambiguous and conclusory allegations that the "undercover operation" was conducted "in violation of IRS procedural policy." (Indeed, he does not even supply the Court with a copy of the warrant application affidavit.) The lack of elaboration prevents these bare allegations from rising to the "substantial showing" necessary to warrant a further *Franks* inquiry by the Court.

Accordingly, Mr. Ray's Motion to Suppress is denied in its entirety.

H. "Motion to Order the Government To Produce Additional Discovery . . . ." (# 154), Government's response **(# 164)**

Mr. Ray states that "in order . . . to prepare [an] entrapment defense, he is requesting [that] the court order the government and IRS to produce all records that relate to the initiation and termination of the IRS' criminal investigation." Specifically, he requests: (i) documentation authorizing the 20-month delay between IRS termination of investigation and actual presentation of their criminal investigation to the U.S. Attorney"; (ii) "statements made by co-defendant in appeal filed Feb. 15, 2010 [the electronic-filing appeal letter] as Mr. Ray believes statements are impeaching and discoverable under *Brady*"; (iii) a "Bill of Particulars as to each count in the Indictment"; (iv) "all documentation related to any interviews conducted by all revenue agents pursuant to any civil/criminal investigations, to enable Mr. Ray to prepare a mistake of law defense"; (v) "all documentation related to authorizing all areas of investigation, including but not limited [to] assignment of revenue agent monitoring, undercover operation, electronic monitoring, etc."; and (vi) "all plea agreements and minutes as to any hearings had on the matters as they pertain to co-Defendant."

As to the last request, the Government states that it has supplied Mr. Ray with Ms. Rasamee's plea agreement and the courtroom minutes relating to her change of plea hearing. This request has been satisfied.

As to the request for the February 2010 letter from Mr. Ray (and Ms. Rasamee) to the IRS appealing the termination of Cheapertaxes' electronic filing authorization, the Government states that it has searched its records and has not been able to locate that document. Because the

Court cannot compel the Government to disclose records it does not possess, this request is denied.

Two of Mr. Ray's requests – for "documentation authorizing [the] delay" between the investigation into his conduct and his prosecution and the request for "documentation relating to . . . all areas of investigation" – are foreclosed by Fed. R. Crim. P. 16(a)(2). That rule states that "this rule does not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by an attorney for the government or other government agent in connection with the investigating or prosecuting the case." By all appearances, Mr. Ray's request for "documents" demonstrating the "investigation" of the case against him fall squarely within this rule. Accordingly, these requests are denied.

Mr. Ray's request for a Bill of Particulars is also denied. A Bill of Particulars is intended to inform the Defendant of the charge against him with sufficient precision to allow him to prepare his defense. *U.S. v. Ivy*, 83 F.3d 1266, 1281 (10th Cir. 1996). Where the indictment sets forth the elements of the offense charged and sufficiently apprises the defendant of the charges so as to allow him to prepare for trial. A Bill of Particulars is unnecessary. *Id.* A Bill of Particulars is "not a discovery device." *U.S. v Dunn*, 841 F.2d 1026, 1029 (10th Cir. 1988). Here, the Second Superseding Indictment sufficiently recites the elements of each charge against Mr. Ray and specifies the particular tax returns underlying each of the individual counts. It also fully describes the operation of the conspiracy alleged in Count 1. The Court finds that this is sufficient to permit Mr. Ray to understand the charges against him and to mount a defense. Thus, his request for a Bill of Particulars is denied.

Finally, Mr. Ray's request for "documentation" of "interviews" conducted by the IRS, so as to assist Mr. Ray in preparing a "mistake of law" defense, is somewhat unclear. As best the Court can determine, Mr. Ray is referring to interviews that IRS agents may have conducted with clients of Cheapertaxes, such that evidence from these witnesses that would suggest that Mr. Ray was himself confused about the operation or application of tax laws would support a defense by Mr. Ray that the false tax returns he prepared or subscribed were false due to his own mistaken understanding of tax law, rather than being knowingly false. Mr. Ray's entitlement to records relating to interviews conducted with potential witnesses are circumscribed by the *Jencks* Act, 18 U.S.C. § 3500; and the various disclosure obligations created by *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny, which typically require the production to the defendant of "exculpatory" evidence. The obligation to provide discovery under the *Jencks* Act is technically triggered only after the witness has testified at trial, 18 U.S.C. § 3500(a),[10] leaving only *Brady* as the basis for Mr. Ray to obtain the requested information. Mr. Ray has not provided his own assumptions about which particular clients he believes might have given statements that would be likely to exculpate him on a *mens rea* element, thus leaving it to the Government to review the records and spontaneously disclose any material it believes is of *Brady* character. The Government represents that it has diligently done so to date and will continue to do so in the future. In the absence of a more specific request by Mr. Ray, this is the most that the Court can require.

Accordingly, Mr. Ray's motion is denied in its entirety.

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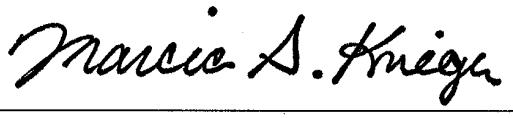
[10] For practical reasons and to avoid unnecessary disruption of the trial itself, it is the general practice in this District that *Jencks* Act material relating to witnesses the Government intends to call at trial is disclosed by the Government to the defendant a few weeks prior to the start of trial.

CONCLUSION

For the foregoing reasons, Mr. Ray's Motion for Severance **(# 147)**, Motion for Extension of Time to File a Notice of Appeal **(# 148)**, Motion for Remand to State Custody **(# 150)**, Motion Requesting . . . Furlough **(# 151)**, Motion to Dismiss **(# 152)**, Motion to Suppress **(# 153)**, and Motion for Discovery **(# 154)** are each **DENIED** in their entirety. Mr. Ray's Motion For Extension of Time to File Request for Funds **(# 149)** is **GRANTED IN PART**, insofar as Mr. Ray shall file a renewed motion consistent with the Court's prior instructions on or before **May 21, 2015**. No further extensions of this deadline will be granted.

Dated this 7th day of May, 2015.

BY THE COURT:



Marcia S. Krieger
Chief United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Criminal Action No. 14-CR-00147-MSK-02

UNITED STATES OF AMERICA,

Plaintiff,

vs.

AUSTIN RAY,

Defendant.

REPORTER'S TRANSCRIPT
MOTION HEARING

Proceedings before the HONORABLE MARCIA S. KRIEGER, Judge, United States District Court for the District of Colorado, commencing at 11:05 a.m., on the 2nd day of April, 2015, in Courtroom A901, United States Courthouse, Denver, Colorado.

THERESE LINDBLOM, Official Reporter
901 19th Street, Denver, Colorado 80294
Proceedings Reported by Mechanical Stenography
Transcription Produced via Computer

COURTROOM DEPUTY: Actually, I'm not seeing it on our calendar for the 27th at all. That was my initial question here, but I'm going to go look at the docket here.

THE COURT: Counsel, do you remember?

MS. EDGAR: We set it for two weeks of four days.

THE COURT: Okay. We'll set it for two weeks of four days each.

COURTROOM DEPUTY: Okay.

THE COURT: All right.

Let's go to Docket No. 134, Mr. Ray's motion for release pending trial. The Government filed a response at Docket No. 137. I've had an opportunity to review both the motion and the response. I.

S there anything further, Mr. Ray, that you want to add?

MR. RAY: Yes.

Okay. In light of the Government's position, I have a document first to address -- as part of my response. Let me just -- bear with me.

Okay. First of all, at this particular day, today, I received from the case manager, whom the U.S. attorney is familiar with, Mr. Waldo. He confirmed yesterday with the United States Marshal that there is no formal detainers are lodged against me, okay, as she addresses in here. So I'm -- I'm just at a pause to that as to why that would be stated.

And this was -- I was just informed, I'm pretty sure it could be reevaluated at this time.

The next issue I would have is -- it's on page 2, where the U.S. government believes that I was released on recognizance bonds. I was not released on any recognizance bonds in my Jefferson County case or my Arapahoe County case. When I was arrested on May 31, I believe, 2007, I posted a $10,000 cash bond the day I was arrested, and I was released. A month later Jefferson County picked me up, and I posted $100,000 bond, with my house, cars, whatever. So there was never a recognizance bond as to relate -- I was just released on free spirit. I -- I had to pay a substantial amount to get released.

Now, during my Jefferson County case, I never missed one court date, all the way up to sentencing. I was sentenced, I was taken into custody, and I was allowed to -- after being taken into custody, to apply for an appeal bond. I didn't run from the fact that I was convicted. I did not run from the fact that I was going to be sentenced a month later after being convicted. I showed up and got convicted, taken into custody. I requested -- I asked the Court if I could apply for one. They said you can. And I was placed into custody, I applied for a bond, and it was granted.

They refer to -- United States refers to an April 20 failure to appear after sentencing in the Jefferson County

case. I'd like the Court to know that during -- pending both cases, which were arrested within a month, there is only one -- over the three-year, four-year period I was fighting these cases, I never missed any court dates except for this. I made every single court date. I even flew in from California to make the court date to fly back to go to work back in California where I was working in the off season. So I made every attempt to never miss a court date as an intentional running from the law, as they would want the Court to believe.

But to refer to the April 20, 2009, they say that I failed to appear in the Arapahoe case, and a few days later I self-surrendered. Your Honor, I have here, I believe -- I'm sorry, I believe that the -- this was in discovery. This is part of the discovery, the registry of action, and it says, "Defendant is not present. It is the consensus of counsel that defendant may have thought that the hearing was scheduled for 1:30." On that particular day, I was at a doctor's appointment with my son. And the slip that I received from counsel at the time reflected 1:30, erroneously, through the copy, whatever, was going through. That's what -- that was a mix-up. That wasn't intentional objective of me to flee on bond. Same day, "Defendant called and can be here on Monday." So it wasn't a few days later. I had no choice but to wait until Monday because of -- they're not open on the weekends. I tried to make myself available, I called them, told them of the

situation, and corrected it as soon as possible, and cure that with any additional bond that they would have, and I took responsibility for the mistake. But I wasn't running, as they would want the Court to believe in that -- in that particular incident.

Also states that -- in the government's motion, that they issued a search warrant on April 6 that related to this case at hand. And then on September 2010, defendant failed to appear at his Jefferson County case. And they would want the Court to believe that I didn't show up because I was fleeing, as she states in here, I was fleeing the investigation of the search warrant.

THE COURT: Did you show up?

MR. RAY: Okay. I would like to -- I'm --

THE COURT: Did you show up?

MR. RAY: No. I have a reason for not showing up, Your Honor.

THE COURT: Okay.

MR. RAY: May I continue?

THE COURT: Please.

MR. RAY: Okay. So I was under appeal on the Jefferson County case. Okay. Now, when I was arrested on April 6, I was released on one of the conditions that I was getting an attorney. I retained Joseph Thibodeau two days later, after that search warrant. After a month of his

retained services, of finding out whether the government was going to prosecute or whatever they were going to do, they informed Mr. Thibodeau that, we're not seeking an Indictment, and we're not prosecuting at this time.

Okay. Since that was happening -- and I wasn't under any obligation at that time to be in the state of Colorado, based on another -- another point I want to make is that I had permission from both Jefferson County and Arapahoe County to leave -- to travel to California based on the fact that -- based on the fact that I had joint custody with my daughter, and that would always happen after-tax season. So I leave around August, and I would be there.

I have here in my registry of actions that "Court allows bond to continue. Court allows defendant to travel to California while on bond to go pick up his daughter for a brief period of time." All of that was done during that. I rented a house and stayed there the whole time during the time of the joint venture -- joint custody issue.

I did not know on September 29 -- I mean, on September 2 that I actually had to be in court, because I hadn't had to be at any other hearings based on the appeal.

While that was my reason for leaving, and I didn't know until the actual court date 'til the lawyer called and said, you're supposed to be at a hearing. But the information I was provided with was just that it was a hearing, and I'm on

appeal. From my understanding, and -- from my understanding at that time, appeals are -- were written. You don't -- the appeals court. So it was based on another misunderstanding.

But that was one misunderstanding from the total times that I've never missed a court date in the Jeffco case. And this was based on a hearing based on ineffective assistance of counsel, which I might add, after three years of being incarcerated, I finally got that remanded for ineffective assistance of counsel as it stands right now. So that conviction was returned back to the district court in March.

THE COURT: Mr. Ray --

MR. RAY: I'm just saying -- she's referring to it in a negative manner. I want to refer to it in a positive sense.

THE COURT: I'm only interested in the facts. I'm not interested in the aspersions.

MR. RAY: That's fine. May I continue?

Okay. It says on page 3, "According to information Co-defendant Rasamee provided to the Government, her and Mr. Ray fled to California and hid from the law. Okay. I think this -- any information from the co-defendant is self-serving based on any type of --

THE COURT: Mr. Ray, I don't want to hear your aspersions about the co-defendant.

MR. RAY: Okay.

THE COURT: Did you flee to California?

MR. RAY: No, I did not.

THE COURT: Did you assume different identities while you were in California?

MR. RAY: No, I did not.

THE COURT: Did you stay in hotels under different names?

MR. RAY: No, I did not.

THE COURT: Okay. Did you stay in California for eight months?

MR. RAY: For eight months?

THE COURT: Uh-huh.

MR. RAY: Part of incarceration, yes. Included in the incarceration for the extradition back, yes. Most of that was the incarceration.

THE COURT: Where did you stay in California?

MR. RAY: At my house where I was arrested.

THE COURT: Thank you.

MR. RAY: Okay.

THE COURT: Let me hear from the Government.

MS. EDGAR: With respect to the state hold, initially, there is a detainer lodged by the state. It appears that for some reason it didn't get into the marshal system, which I was made aware of just yesterday when I spoke with Mr. Waldo, the case manager for Mr. Ray at FCI Englewood. Mr. Waldo said he had been talking to the marshals at Mr. Ray's request, and that

the marshals said they didn't have anything in the system. At that point I got in touch with pretrial services and the marshal's office to figure out what was going on. The state hold does still exist. I was provided a copy by pretrial services.

THE COURT: Have you provided a copy to Mr. Ray?

MS. EDGAR: I believe they provided a copy to Mr. Ray, but I have an extra copy if you would like one. Or if the Court would like a copy, I have an extra as well.

THE COURT: All right.

MS. EDGAR: So in fact, there is a state hold, which I think renders the issue moot.

If the Court is going -- would like to address release nevertheless, I would mostly rely on my pleadings. But I would only point out that with respect to -- the search warrant was executed April 6, 2010 in this case. Prior to that time, Mr. Ray had been making regular appearances in his state court cases and did have hefty bonds on his appearance. Nevertheless, after execution of the search warrant, those bonds were not sufficient to keep him here. He did flee, and he was not arrested on the fugitive warrant until May 23, 2011. So April 6, 2010, a search warrant was executed; May 23, 2011, he was arrested on the fugitive warrant in California; and then in July 2011 he was remanded to serve his Jeffco County case, that's when he also, then, wrapped up his Arapahoe County case.

I would point out that after the search warrant execution, he disregarded his obligations in the state case, based on timing, one would appear based on his intent to avoid prosecution in the federal case.

The next failure to appear in the Jeffco case was September 2. That was the next opportunity he had a failure to appear, so there was a delay between April and September. The next hearing wasn't set until December 2, 2010, in the Jeffco case, and the next one was November 29, 2010, in the Arapahoe County case.

During that time he was in California. Whether or not he had permission to travel to California is really irrelevant to the fact that he failed to return. Mr. Ray just admitted as well that he was informed by his defense counsel that he did fail to appear, and he nevertheless made no effort to correct that issue.

His absence from two cases where significant bonds were placed on his need to appear indicates that there is no set of conditions that is going to assure his presence in this case. And so regardless of the state hold, which I believe nevertheless moots the issue, detention is appropriate.

THE COURT: Thank you.

Anything further, Mr. Ray?

MR. RAY: Yes. I'm just reviewing the state hold, okay. And to rebut, Ms. -- I mean, the U.S. attorney stated

that under her legal analysis, page 2, "Because of the state hold, the question of release is moot. If defendant is released from federal custody, he'll be turned over to the state, from which the United States would then be required to writ him for purposes of this case." That meaning, as far as I know -- and I'm asking and stating this as an issue, is that if I was returned to the state under this particular sentence and you would have to writ me, because I was serving a sentence, why haven't I been provided with a writ in this case based on how they got me in the first place? Because I'm not here on a writ. I'm not here on an IAD. I was taken from state custody while serving a sentence. The government cannot circumvent a federal law to bring me into this court.

So at this point, based on her admission, this court doesn't have or lacks subject matter jurisdiction of the person, because I should have been obligated due process based on the fact that I was in a facility serving a sentence and the due process requirement based on that, because I had a liberty interest in that situation. So that's a denial of due process, *Harper v. Young*, 64 F.3d 563. And if that is true, this court only has the authority to dismiss the case.

That's what I have to say.

THE COURT: Thank you.

Is there anything the Government would like to respond?

MS. EDGAR: Your Honor, I'm sorry. I'm not sure I'm understanding Mr. Ray's argument, and I'm not familiar with case law. I don't believe there is anything improper.

THE COURT: Mr. Ray doesn't understand why he is present here under federal detention when he had previously been serving a state sentence and why that is different from a situation where he is remanded to the state court at this point and you writ him back for every hearing.

MS. EDGAR: Right. So -- well, Your Honor, upon his arrest, Mr. Ray elected not to contest detention because of the state hold. If we writ him over -- if we -- we wouldn't -- I mean, I'm not sure we would be sending him back and forth. I think we would maintain custody of him, but I may be wrong.

THE COURT: What I understand your position to be is, at the original time that these charges were brought against him, he was taken into federal custody from the state court and given an opportunity to object at that point, and he waived objection. Is that correct?

MS. EDGAR: Right, Your Honor.

THE COURT: Thank you.

MS. EDGAR: Thank you.

MR. RAY: Could you explain that to me, Your Honor, because I didn't understand what you just said.

THE COURT: When you were taken into custody for this federal proceeding --

MR. RAY: Right.

THE COURT: -- you were given an opportunity to object, and you chose not to.

MR. RAY: Object to what?

THE COURT: Being moved from the custody of the state court to the federal court.

MR. RAY: On arraignment day? The day I was --

THE COURT: I don't know what day it was. What she said was, you were given an opportunity to object and you didn't.

MR. RAY: I wasn't given an opportunity --

THE COURT: Mr. Ray, I'm not going to argue with you.

MR. RAY: I understand. I'm trying to figure out, where did I object to that on the record?

THE COURT: Mr. Ray --

MR. RAY: Yes.

THE COURT: -- it's not my obligation to tell you what your rights are and to tell you how to assert them or to tell you what has happened in the past.

MR. RAY: I understand.

THE COURT: Actually, I can by reference to the court record, which is Docket No. 11, it was on April 25, 2014.

MR. RAY: Okay. And I did what?

THE COURT: You waived your right to be writted back to the state court.

MR. RAY: Okay --

THE COURT: I'm sorry to the state facility. It was Docket No. 10.

MR. RAY: Counsel did, not me.

THE COURT: Counsel acts on your behalf, and you're bound by what your counsel does.

MR. RAY: Okay. I'm still not understanding -- I'm still -- I think you have a misunderstanding of what my position was. Do you mind?

THE COURT: I do, because I'm going to rule on this motion.

MR. RAY: I understand, so --

THE COURT: Before me is Mr. Ray's motion for release pending trial. We've gotten kind of outside the scope of this motion because Mr. Ray doesn't understand how he is here as compared to in state custody. And that really isn't pertinent to the motion for release pending trial, but we've taken that digression in order to clarify what his concern is.

Essentially, this is a motion for reconsideration of the magistrate judge's April 25, 2014 decision at Docket No. 11 to detain Mr. Ray pending trial. The magistrate judge found that Mr. Ray posed a flight risk and further found that Mr. Ray was nevertheless subject to a detainer filed by state authorities such that he would be held in custody in any event. Mr. Ray argues that he has extensive ties to the community, he

is requesting release to the custody of the halfway house, and he would submit to electronic monitoring and any other conditions imposed by the court.

The motion for release is opposed by the Government. And the applicable law is set forth in 18 U.S.C. Section 3142(e). It provides that a defendant facing charges may be detained pending trial upon a finding that "no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community."

The magistrate judge's finding that Mr. Ray posed a flight risk was based on the fact that Mr. Ray failed to appear at several proceedings before state courts. The bond report reflects eleven instances of failing to appear which resulted in the issuance of warrants and that Mr. Ray's bond was revoked in Denver County Court Case X232133. It also reflects a failure to appear on September 20, 2010 with regard to a Jefferson County matter. And Mr. Ray admits he did not appear as required. He has reasons he thinks justify that, but he did not appear. And a failure to appear on November 29, 2010 with regard to an Arapahoe County court matter. There is no dispute by Mr. Ray that he did not appear on that date either.

Now, taking what Mr. Ray says to be true, that he was in California with Anne Rasamee and that the assumption of different entities is misinformation supplied to this court, I

disregard it. I nevertheless find that the repeated failure to appear in multiple different actions makes it impossible for this court to assure that Mr. Ray will appear in this matter for the pretrial hearings and the trial short of detaining him.

I secondarily find that there is no dispute that there is a state court detainer at this time. And although it was not in the marshal's system when Mr. Ray asked about it, there does not appear to be any dispute that it exists. And in any event, Mr. Ray would be detained in -- for one court or for another.

Any need for clarification or further explanation?

MS. EDGAR: No, thank you, Your Honor.

THE COURT: Okay. So Mr. Ray, you're going to stay where you are.

MR. RAY: Okay. I have a question.

THE COURT: Okay.

MR. RAY: Is there a possibility based on --

THE COURT: Would you like to stand, please.

MR. RAY: Is there a possibility that based on the limited access -- I understand your position, which is too bad -- but the limited access I have to legal at this jail, the prison system, which I would have to go back to if I was remanded to a prison system has all of the adequate law libraries, legal mail access, and the access to real -- real -- how do I say, real ability to prepare for trial, as opposed to

MS. EDGAR: Thank you very much.

THE COURT: All right.

(Government counsel excused from courtroom. Remainder of hearing not transcribed herein.)

REPORTER'S CERTIFICATE

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

Dated at Denver, Colorado, this 18th day of May, 2015.

s/Therese Lindblom

Therese Lindblom,CSR,RMR,CRR

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Chief Judge Marcia S. Krieger

Criminal Action No. 14-cr-00147-MSK

UNITED STATES OF AMERICA,

Plaintiff,

v.

2. AUSTIN RAY,

Defendant.

SECOND OPINION AND ORDER ADDRESSING VARIOUS MOTIONS

THIS MATTER comes before the Court pursuant to certain motions filed by the Defendant, Austin Ray, *pro se* and by the Government. The docket numbers of the motions and responses are set forth herein.

FACTS

Mr. Ray, along with a co-defendant, is charged in a 38-Count Second Superseding Indictment **(# 92)** of January 6, 2015. Only some counts are asserted against Mr. Ray. He is charged in Count 1 with Conspiracy to Defraud the United States in violation of 18 USC § 371; in Counts 2-6 with Aiding the Preparation of a False Tax Return in violation of 26 U.S.C. § 7206(2); and in Counts 37 and 38 with Subscribing a False Tax Return in violation of 26 U.S.C. § 7206(1). The underlying events allegedly occurred between 2006 and 2010 in conjunction with operation of Mr. Ray's tax preparation business, Cheapertaxes. He operated Cheapertaxes with his wife and co-Defendant, Anne Rasamee.

On March 2, 2015, the Court granted **(# 130)** Mr. Ray's request to proceed *pro se*,

although the Court also appointed his then-assigned counsel to act in an advisory and standby capacity. The Court set a deadline of April 9, 2015 for Mr. Ray to file all pretrial motions, but he has continued to file a steady stream of motions well past that date. The Court has, to date, entertained those motions. However, Mr. Ray is advised that the Court will not entertain any further pretrial motions (other than motions in limine) absent his showing as to why such motion could not have been filed previously.

The Court is mindful of Mr. Ray's *pro se* status and has accordingly construed his filings liberally as required by *Haines v. Kerner*, 404 U.S. 519, 520-21 (1972).

ANALYSIS

A. Motion to Dismiss For Denial of Due Process, Lack of Jurisdiction, Violation of Interstate Agreement on Detainers, and Outrageous Government Conduct (# 170, 213), Government's response **(# 174)**, Mr. Ray's reply **(# 178, 215)**.

Mr. Ray moves to dismiss the Indictment against him, invoking a number of disparate arguments. First, he contends that he was denied Due Process because he was terminated from a state "pre-parole" program without notice or a hearing. Mr. Ray states that this termination occurred on April 22, 2014, when federal agents arrested him and took him into federal custody. That arrest occurred pursuant to the filing of the Indictment in this case against Mr. Ray on April 10, 2014. The fact that Mr. Ray's arrest and detention on federal charges may have deprived him of the freedom resulting from some form of parole on an existing state sentence is of no consequence; it is axiomatic that federal authorities may arrest and detain a person currently charged with federal crimes. That such an arrest might have some effect on Mr. Ray's participation in a state parole program is irrelevant for Due Process purposes relating to the instant prosecution.

Second, Mr. Ray argues that this Court lacks "personal jurisdiction" over him. He states that, at the time of his arrest, he was already serving an undischarged state criminal sentence. He argues that "under the rule of comity, the second sovereign must postpone its exercise of jurisdiction until the first sovereign is done with [the] prisoner." *Citing Weekes v. Fleming*, 301 F.3d 1175, 1180-81 (10th Cir. 2002). In *Weekes*, the plaintiff was in state custody, awaiting a probation revocation hearing, when he was arrested and taken into federal custody on federal charges. He was temporarily returned to state custody on a writ, at which time the state sentenced him to imprisonment on the probation violation, that sentence to run concurrently with an anticipated sentence on the federal charges. He was then returned to federal custody, where he was sentenced to a lengthy term of federal imprisonment. He began serving his federal sentence in a federal facility when Bureau of Prisons personnel learned of his undischarged state sentence. Deeming the federal sentence to run consecutively to the state sentence, the Bureau of Prisons returned him to state custody to complete the state sentence. Upon completing that sentence, he was returned to federal custody, where he requested that he be granted credit against his federal sentence for the time he served on his state sentence. The Bureau of Prisons refused and Mr. Weekes filed a *habeas* petition seeking such credit. The 10th Circuit held that federal credit was required. It explained that although the state authorities, as the sovereign first asserting jurisdiction over Mr. Weekes, could have elected to grant only temporary custody over Mr. Weekes to federal authorities for purposes of trial (such as by honoring a federal detainer or writ), state authorities instead surrendered full custody of Mr. Weekes to federal officials. In such circumstances, "the United States was relieved of its duty to return Mr. Weekes to Idaho to complete his state sentence before commencing his federal sentence." *Id.* at 1181. Thus, when

federal authorities returned Mr. Weekes to the state to serve his state sentence, they were required to credit that time against his federal sentence, which he had already begun serving.

It is difficult to see how *Weekes* – a case involving the issue of credit as between a state and federal sentence – has any relevance to Mr. Ray and his yet-to-be-resolved charges here. However, to the extent this case is at all analogous to *Weekes*, Colorado appears to have implicitly consented to surrender its right to control Mr. Ray, despite being the sovereign who first asserted jurisdiction over him.[1] *Id.* ("Idaho allowed the United States to take exclusive physical custody of Mr. Weekes without presenting either a written request for temporary custody or a writ of habeas corpus ad prosequendum"). This would suggest that, if Mr. Ray is convicted and sentenced in this Court, "the United States [would be] relieved of its duty to return [him] to [Colorado] to complete his state sentence before commencing his federal sentence." *Id.* However, nothing in *Weekes* requires dismissal of the unadjudicated charges against Mr. Ray.

Third, Mr. Ray makes a vague argument that his continued detention is in violation of the Interstate Agreement on Detainers ("the Agreement"), 18 U.S.C. Appx. II. The key provisions of the Agreement are found in Articles III and IV. Article III provides that an inmate who is subject to a detainer lodged against him by another jurisdiction due to untried criminal charges in that jurisdiction may demand that he be sent to that jurisdiction and promptly tried on those charges; such a demand allows an inmate to attempt to quickly clear any pending detainers that might otherwise affect service of his existing sentence. *See generally U.S. v. Mauro*, 436 U.S. 340, 351 (1978). Article IV provides that a prosecutor in a jurisdiction having untried criminal charges against a person incarcerated in another state may contact the incarcerating state and request that the person be delivered to the requesting jurisdiction for purposes of trying the

[1] At the very least, the current position of the State of Colorado regarding Mr. Ray is not clear from Mr. Ray's motion.

charges. *Id.* Article IV further requires that the requesting jurisdiction complete its trial of the person before returning him to the original state of incarceration; otherwise, any untried charges in the requesting jurisdiction must be dismissed upon the inmate's return to the original place of incarceration. *Id.*, Art. IV(e).

As the Government points out here, although Mr. Ray was serving an undischarged state sentence at the time he was arrested on federal charges, his arrest and detention in federal custody were not accomplished by means of filing a detainer with the State of Colorado. Rather, he was simply arrested in person at the community corrections facility where he was residing and taken into federal custody. Because federal authorities never filed a detainer with the state concerning Mr. Ray, the Agreement's terms were never implicated. *Mauro*, 436 U.S. at 361. Thus, it is unclear to this Court how Mr. Ray believes that the Agreement compels dismissal of the charges against him.

Accordingly, Mr. Ray's Motion to Dismiss is denied in its entirety.

B. Motion to Dismiss Counts 2 Through 38 of the Superseding Indictment for Multiplicity (# 173), Government's response **(# 176)**, Mr. Ray's reply **(# 180)**.

Mr. Ray's motion recites a generally-accepted principle: "charging a single [instance of criminal behavior] in more than one count is multiplicitous" and prohibited. *See e.g. U.S. v. Johnson*, 130 F.3d 1420, 1424 (10th Cir. 1997). To determine whether counts are mutliplicitous, the Court examines whether each crime requires proof of a fact that the other does not. *U.S. v. Berres*, 777 F.3d 1083, 1090 (10th Cir. 2015).

Mr. Ray does not offer any meaningful explanation as to why Counts 2 through 38 of the Second Superseding Indictment **(# 92)** are allegedly multiplicitous. (Notably, Mr. Ray is charged only in Counts 2-6, 37, and 38 of that Indictment.) It is evident that each of Counts 2-6 allege separate instances in which Mr. Ray assisted in the filing of false tax returns, as the

Second Superseding Indictment specifically identifies the different taxpayers whose returns are the subject of each count. Thus, each of Counts 2-6 allege a different instance of criminal conduct committed by Mr. Ray and thus, are not multiplicitous. Similarly, Counts 37 and 38 are distinct allegations of two separate instance of Mr. Ray subscribing false tax returns of his own, as Count 37 relates to a false 2008 return while Count 38 relates to a false 2009 return.

Accordingly, Mr. Ray's motion is denied.

C. Motions Requesting the Withdrawal of Advisory Counsel (# 183, 192, 217)

Mr. Ray, who continues to proceed *pro se* of his own accord, requests in two similar motions that the Court direct the "withdrawal" of his current standby and advisory counsel, Mr. Viorst, and that the Court appoint new standby and advisory counsel. Mr. Ray recites a litany of grievances against Mr. Viorst, accusing him of refusing to assist Mr. Ray, of lacking knowledge on many areas Mr. Ray wishes to pursue, of discouraging Mr. Ray from pursuing certain strategies, of "refus[ing] to act on issues surrounding the destruction of evidence," and of violating attorney-client privilege.

It is unusual for a *pro se* litigant to request the withdrawal of standby or advisory counsel because there is no obligation for that litigant to consult with counsel in the first place. Mr. Ray, having elected to represent himself, need not have any conversations with Mr. Viorst of any kind, particularly if Mr. Ray believes that Mr. Viorst is unhelpful or actively harmful. Nor is Mr. Ray necessarily entitled to Mr. Viorst's assistance to "act on issues" of missing evidence or to assist Mr. Ray in crafting a strategy to address various issues Mr. Ray would like to address (such as those presented in the instant motion).

The Court has previously addressed the particular role Mr. Viorst plays as advisory counsel in detail, and offers this additional clarification: Mr. Viorst's function as advisory

counsel exists to assist Mr. Ray by allowing Mr. Ray to request an explanation of basic principles of law, such as the steps of the criminal process, the purpose of charging documents, the function of processes such as *voir dire* and jury instruction, the elements of the offenses that Mr. Ray is charged with, and the general nature of Mr. Ray's constitutional rights. Mr. Ray can also request Mr. Viorst to obtain specific legal resources for him, such as copies of statutes or particular cases, or specific treatises on particular areas of law. Mr. Viorst is not required to supply Mr. Ray with comprehensive explanations of various areas of the law (such as Mr. Ray's apparent request for education on matters of tax law), to conduct independent research for Mr. Ray on issues or defenses Mr. Ray would like to raise, or to assist Mr. Ray in exploring or developing strategies. In short, advisory counsel does not exist to serve as Mr. Ray's investigator, paralegal, or research assistant. Although Mr. Viorst (or his staff) would perform these types of tasks were he actually representing Mr. Ray (at least to the extent he felt such tasks were necessary for effective representation), Mr. Ray's election to proceed *pro se* results in Mr. Ray having to perform these tasks for himself, without the expectation of Mr. Viorst's assistance.

The Court sees no reason to remove Mr. Viorst as standby or advisory counsel because Mr. Ray is not entitled to demand that Mr. Viorst perform the tasks that Mr. Ray is demanding of him, nor is Mr. Ray required to avail himself of the services that Mr. Viorst stands by to provide. Moreover, even if the Court were to remove Mr. Viorst from his role as advisory counsel as Mr. Ray requests, the Court would not be inclined to appoint new standby or advisory counsel. There is no inherent conflict of interest preventing Mr. Viorst from carrying out his role as standby and advisory counsel, and thus, no basis for the Court to provide Mr. Ray with a counsel more to his liking. Accordingly, Mr. Ray's motion is denied.

D. Motion to Exclude Evidence of Prior Felony Convictions (# 193), Government's response **(# 206)**

Mr. Ray seeks to preclude the Government from eliciting at trial that Mr. Ray has previously been convicted of several felonies. In its response, the Government expresses an intention to introduce: (i) Mr. Ray's conviction for motor vehicle theft and fraud by check in 2013; (ii) seven theft convictions and a conviction for fraud by check in 2008; and (iii) convictions for presenting a false insurance claim and destroying insured property in 2011. The Government seeks to offer this evidence pursuant to Fed. R. Evid. 609(a)(2), arguing that each conviction involved dishonesty. Mr. Ray responds that he is willing to enter into an *Old Chief* stipulation to his status as a felon, but that admission of the particular nature of each conviction is unduly prejudicial under Fed. R. Evid. 403 and, perhaps, Rule 404(b).

Fed. R. Evid. 609(a)(2) provides that, if Mr. Ray elects to testify, the Government may attack his character for truthfulness by adducing evidence that he has been convicted of a crime whose elements required proof of "a dishonest act or false statement." The Government has come forward with evidence that each of the convictions above required proof of a false statement by Mr. Ray, and Mr. Ray has not rebutted that showing. Notably, Rule 609(a)(2) is stated in mandatory terms: "the evidence must be admitted . . ." if the requisite criteria are demonstrated. Thus, evidence that is properly offered under Rule 609(a)(2) is not subject to further balancing against its prejudicial value under Rule 403. *See e.g. U.S. v. Guardia*, 135 F.3d 1326, 1329 (10th Cir. 1998); *see also U.S. v. Estrada*, 430 F.3d 606, 615-16 (2d Cir. 2005). Thus, the Government has made a *prima facie* showing that the evidence of the prior convictions is admissible if Mr. Ray chooses to testify.

Mr. Ray proposes to stipulate to the fact of his prior convictions, but not to the nature or details of those convictions, pursuant to *Old Chief v. U.S.*, 519 U.S. 172, 191 (1997). In *Old*

Chief, the Supreme Court concluded that such a stipulation was sufficient to preclude the Government from offering evidence of a prior conviction in circumstances where the Government was required to prove, as an element of the offense, that a defendant had the status of a felon – *e.g.* where the defendant was charged with an offense that was criminal because the defendant was already a felon (such as possession of a firearm by a prior felon, 18 U.S.C. § 922(g)). 519 U.S. at 190. Allowing the defendant to stipulate to that status deprived the Government of the ability to present that evidence in some other form, but *Old Chief* concluded that "the fact of the qualifying conviction is all that matters." *Id.*

Notably, *Old Chief* distinguished that situation from others where "there [is] a justification for receiving evidence of the nature of prior acts on some issue other than status." *Id.* It is obvious that admission of convictions under Rule 609(a)(2) is precisely intended to serve an "issue other than status" – it is clearly intended to supply evidence that the witness testifying has previously been found to have been untruthful. Because such evidence is offered to impeach, not simply to establish the defendant's status, a defendant may not preclude its admission simply by offering an *Old Chief* stipulation. *U.S. v. Smith*, 131 F.3d 685, 687-88 (7th Cir. 1997). Accordingly, Mr. Ray's motion is denied.

E. Motion to Direct Matthew Belcher, Federal Public Defender, to Produce ... (# 194), Government's response **(# 195)**, Mr. Ray's reply **(# 218)**

Mr. Ray complains that a hard drive, seized from his business, was produced to and examined by his former counsel. He states that his counsel "has repeatedly refused to disclose to Mr. Ray the whereabouts of this terabyte drive since his withdrawal" and has refused to "identify who the technician is who worked on the terabyte drive." Mr. Ray requests that the Court "order [his former counsel] to turn over the exact terabyte drive given to him along with all the service records regarding the work the technician has done."

The Government responds that it produced a copy of the electronic data it had seized from Mr. Ray upon the request of Mr. Ray's former counsel, copying that data onto a hard drive that Mr. Ray's former counsel provided. Mr. Ray's former counsel has informed the Government that, following his withdrawal, he deleted that data. Thus, there appears to be no "drive" to now produce to Mr. Ray, nor any reason to produce "service records" relating to that drive (whatever those records may be).

Moreover, the Court has previously addressed the issue of Mr. Ray's access to the electronic data seized by the Government. The matter was addressed in detail at a hearing on April 2, 2015 **(# 144)**, including a protocol by which the Government would produce detailed information about that data to Mr. Ray. The Government subsequently produced such a report **(# 162)**, and there is no indication that Mr. Ray has sought further information or production based on that disclosure. Because the electronic data has been and remains available to Mr. Ray to examine, his request that the Court compel his prior counsel to produce material that no longer exists is denied.

F. Motion For Docket Sheet (# 195)

Mr. Ray requests a copy of the current docket sheet in this case. The Court grants this motion and will direct the Clerk to produce a copy of that docket sheet contemporaneously with this Order.

G. Motion to Dismiss For Violation of Anti-Shuttling Provision (# 196), Government's response **(# 202)**, Mr. Ray's reply **(# 219)**

Mr. Ray seeks dismissal of the Indictment against him on the grounds that the Government has violated the "anti-shuttling" provisions of the Interstate Agreement on Detainers. As noted above, Article IV of the Agreement provides that, when a jurisdiction obtains custody of a defendant ("the requesting jurisdiction") by means of a detainer lodged with

the jurisdiction in which he is currently bound ("the sending jurisdiction"), the requesting jurisdiction must complete its trial of the person before returning him to the sending jurisdiction; otherwise, any untried charges in the requesting jurisdiction must be dismissed upon the inmate's return to the sending jurisdiction. 18 U.S.C. Appx. II, Art. IV(e). Mr. Ray contends that the federal government obtained custody of him pursuant to a detainer, as he was serving a sentence in state custody at the time of his arrest by federal authorities. He further states that on two occasions, federal authorities turned him over to state authorities for proceedings in state cases, taking him back into federal custody thereafter. Thus, because federal authorities allowed him to be transferred to state custody before trial of his federal charges were complete, he contends that he is entitled to dismissal of the federal charges against him.

The Government responds that Mr. Ray's argument contains a fatal factual flaw: that his presence in federal custody is not pursuant to any detainer lodged with the State of Colorado. Rather, the Government points out, it obtained custody of Mr. Ray simply by executing an arrest warrant and taking him into federal custody. The Agreement specifically recites the process by which detainers are lodged and processed: an officer in the receiving jurisdiction must "present[ ] a written request for temporary custody" to the sending jurisdiction, the sending jurisdiction then responds with "a certificate stating the term of commitment under which the prisoner is being held" along with other pertinent data, the sending state then "shall offer to deliver temporary custody of such prisoner to the appropriate authority" in the receiving state. *Id.*, Art. IV(a), (b), Art. V(a). (Note that the Governor of the sending state may also intercede and refuse to permit a transfer. *Id.*, Art. IV(a).) Although Mr. Ray offers the conclusory and unsupported assertion that federal authorities obtained custody of him pursuant to a detainer, he does not allege that each of these steps occurred. Indeed, it is clear from the record that they did not: Mr. Ray was,

by his own admission, taken into custody by federal officials pursuant to an arrest warrant, not delivered to federal authorities by an official of the State of Colorado.

Accordingly, the Court (again) finds that Mr. Ray has not established that federal custody over him was obtained pursuant to a detainer, and thus, the provisions of Art. IV of the Agreement do not apply to him. His motion to dismiss is denied.

H. Motion for Relief From Judgment (# 198), Government's response **(# 207)**

Mr. Ray apparently takes issue with the Court's Opinion and Order dated May 7, 2015 **(# 165)**. Although it is somewhat unclear from this brief motion, Mr. Ray appears to object to the fact that the Court elected to resolve the issues prior to Mr. Ray having had an opportunity to file a reply brief in support of any of his motions. He states that the Government's responses include "false statement[s] of fact," although he does not elaborate, nor does he otherwise explain how arguments he could muster in reply would have changed the Court's analysis of the motions.

It is axiomatic that a Court possesses the discretion to decide a motion at any point in time, without awaiting further briefing from the parties. *See generally* D.C. Colo. L. Civ. R. 7.1(d) ("Nothing in this rule precludes a judicial officer from ruling on a motion at any time after it is filed.") In any event, because Mr. Ray has not identified the facts he contends the Government misrepresented or the arguments he would have put forth if permitted to reply, this motion fails to articulate good cause for setting aside the prior Order. Accordingly, the motion is denied.

I. Motion to Amend Second Superseding Indictment (# 201)

The Government moves to correct two typographical errors in the Second Superseding Indictment, one that mistakenly refers to the wrong year when identifying the tax return at issue

in Count 37, and one that mistakenly identifies the statutory subsection at issue in Counts 37 and 38. The Government contends that the change in date for Count 37 is a matter of form, not substance. *Citing Russell v. U.S.*, 369 U.S. 749, 770 (1962). It further contends that the properly-amended count would fall within the statute of limitations (as measured from the date of the Second Superseding Indictment), and that Mr. Ray would not be prejudiced by such an amendment. It argues that correction of the mis-cited statutory section is permitted by Fed. R. Crim. P. 7(c)(2), insofar as the error does not prejudice Mr. Ray. Mr. Ray did not file a response to the motion or otherwise assert any prejudice he believed granting the corrections would cause.

The Court agrees with the Government that the date error is merely a matter of form and that no prejudice will result to Mr. Ray from allowing the amendment. As initially stated, Count 37 alleged that "on or about January 15, 2008 . . . [Mr. Ray] did willfully make and subscribe a U.S. Individual Income Tax Return, for the calendar year 2008. . . ." The count goes on to identify the specific income and refund amounts Mr. Ray claimed in that return. The Government wishes to amend the Indictment to reflect that Mr. Ray submitted the return for calendar year 2008 on January 15, 2009, rather than 2008. Mr. Ray cannot be prejudiced by such an amendment: it would be impossible for a person to file a tax return for calendar year 2008 on January 15 of that same year. Thus, it would be clear to any reader that one of the date references in that count was mistaken – in other words, either the January 15, 2008 date should have been 2009, or the tax year in question should have been 2007, not 2008. Any ambiguity on this point could be resolved by examining the appropriate tax returns and ascertaining which one contained the specific figures cited in the Indictment. Review of the returns filed by Mr. Ray would have readily revealed that the tax return in question was for tax year 2008, filed in January

2009. Thus, because the Court sees no basis on which Mr. Ray could claim prejudice based on the amending of Count 37 to reflect the correct filing date, the Government's motion is granted.

Similarly, the Government is correct that Rule 7(c)(2) implicitly suggests that a prompt correction of a mistaken citation is appropriate. Accordingly, the Government's motion is granted. For purposes of clarity, the Government shall file a Corrected Second Superseding Indictment as a stand-alone docket entry within 7 days of this Order.

J. Motion for Subpoenas (# 209), Government's response **(# 210)**

Mr. Ray requests issuance of subpoenas to the I.R.S., compelling it to produce several categories of information: (i) "a copy of the Internal Revenue Manual," as Mr. Ray believes that I.R.S. agents "intentionally violated his constitutional rights . . . prior to, during, and preceding their internal investigations," but that he "cannot inform the court of the actual violations without being able to review what the criminal investigation procedures consist of and the actual . . . sections of the I.R.M. that they have violated"; (ii) a copy of the I.R.S. "Handbook for Special Agents Planning and Conduction Investigation"; (iii) "all documentation relating to the 'Firm Indication of Fraud Rule,' I.R.M. 4565.21, as it relates to this case and when the I.R.S. concluded that there was a firm indication of fraud as it relates to Mr. Ray's charges"; (iv) "all documentation as it relates to undercover monitoring operation"; and (v) "all documentation relating to I.R.S. referral of the case to the Dept. of Justice." Mr. Ray also requests additional subpoenas to be issued to various individuals, including: (i) his former counsel, directing production of the "terabyte drive" and related materials as discussed previously; (ii) that two representatives of the Colorado Department of Corrections "turn over to Mr. ray all documents and or records pertaining to his custody . . . as it relates to his removal from state custody"; and

(iii) that a representative of the Colorado Department of Corrections "turn over all documents material to Mr. Ray's removal from state custody."

The Government responds that Mr. Ray's requests are either an impermissible "fishing expedition" under Fed. R. Crim. P. 17, seek internal deliberative material relating to the prosecution that is not discoverable by operation of Rule 16(a)(2), or requests material that is irrelevant to the charges against him. The Court agrees with the Government in all respects.

Although Rule 17 allows a defendant to obtain information and documents via subpoenas, a party seeking such subpoenas must show: (i) that the information is evidentiary and relevant; (ii) that it is not otherwise procurable in advance through the exercise of due diligence; (iii) that the party seeking production cannot properly prepare for trial, post-trial motions, or sentencing without it; and (iv) that the application is made in good faith and is not simply intended as a general 'fishing expedition." *U.S. v. Winner*, 641 F.2d 825, 833 (10th Cir. 1981). By Mr. Ray's own admission, he cannot articulate a basis for his belief that I.R.S. agents violated his rights in the investigation of this case, and thus, by definition, his request for various I.R.S. materials is a "fishing expedition" through which Mr. Ray hopes to identify and develop additional bases for challenging that conduct.

Mr. Ray's request for various memoranda and records relating to the referral of his case for prosecution are precisely the kinds of records – "reports, memoranda, or other internal government documents made by [a] government agent in connection with investigating or prosecuting the case" – that Rule 16(a)(2) exempts from disclosure. A Rule 17 subpoena can sometimes be used to obtain records that might be subject to Rule 16(a)(2), but once again, such a request must meet the four-part showing discussed above. *See U.S. v. Hardy*, 224 F.3d 752, 755 (8th Cir. 2000). Mr. Ray's request for documents reflecting the investigation and referral of

this case for prosecution do not identify any specific, identifiable, good-faith theory of defense that Mr. Ray is pursuing. Rather, it again appears that Mr. Ray seeks the documents simply in the hopes that, somewhere within them, he can find additional material that might reveal inconsistencies or new avenues to challenge the charges against him. Such fishing expeditions are not grounds for a Rule 17 subpoena.

Finally, as to the materials in the hands of his former counsel or the Colorado Department of Corrections, such information is irrelevant to the charges against him, and thus, not subject to production under Rule 17. Accordingly, Mr. Ray's request for subpoenas is denied without prejudice.

K. Government's Motion to Set a Trial Preparation Conference (# 211)

The Government notes that trial in this matter is set to commence on October 19, 2015, but that no Pretrial Conference has yet been set. The Court schedules a Pretrial Conference for **4:00 p.m.** on **Tuesday, Sept. 29, 2015**. Counsel and Mr. Ray shall be prepared to tender proposed jury instructions and proposed *voir dire* questions at that time, and the Government shall be prepared to tender a witness and exhibit list.

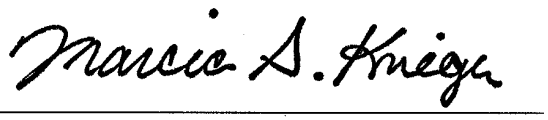
CONCLUSION

For the foregoing reasons, Mr. Ray's Motion to Dismiss for Denial of Due Process, [etc.] **(# 170)**, Motion to Dismiss . . . For Multiplicity **(# 173)**, and Motion Requesting the Withdrawal of Advisory Counsel **(# 183)**, Motion to Exclude Evidence of Prior Felony Convictions **(# 193)**, Motion to Direct Matthew Belcher, Federal Public Defender, to Produce ... **(# 194)**, Motion to Dismiss For Violation of Anti-Shuttling Provision **(# 196)**, Motion for Relief From Judgment **(# 198)**, and Motion for Subpoenas **(# 209)** are **DENIED**. Mr. Ray's Motion **for Docket Sheet (# 195)** is **GRANTED**, and the Court provides a copy of the Docket Sheet in this case along with

this Order. The Government's Motion to Amend Second Superseding Indictment **(# 201)** is **GRANTED**, and the Government shall file a Corrected Second Superseding Indictment within 7 days. The Government's Motion to Set a Trial Preparation Conference **(# 211)** is **GRANTED**, and the Court sets a Pretrial Conference for **4:00 p.m.** on **Tuesday, Sept. 29, 2015.**

Dated this 9th day of September, 2015.

BY THE COURT:



Marcia S. Krieger
Chief United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Criminal Action No. 14-CR-00147-MSK

UNITED STATES OF AMERICA,

Plaintiff,

vs.

AUSTIN RAY,

Defendant.

REPORTER'S TRANSCRIPT
Hearing on Motions

Proceedings before the HONORABLE MARCIA S. KRIEGER, Judge, United States District Court for the District of Colorado, commencing at 3:35 p.m., on the 6th day of October, 2015, in Courtroom A901, United States Courthouse, Denver, Colorado.

Proceeding Recorded by Mechanical Stenography, Transcription Produced via Computer by Janet M. Coppock, 901 19th Street, Room A-257, Denver, Colorado, 80294, (303) 893-2835

APPEARANCES

Timothy Neff and Anna Edgar, Assistant U.S. Attorneys, 1225 17th Street, Suite 700, Denver, CO, 80202, appearing for the plaintiff.

Mr. Austin Verland Ray, Register Number: 40401-013, FCI Englewood, Federal Correctional Institution, 9595 West Quincy Avenue, Littleton, CO 80123, appearing pro se; and

Anthony Jacob Viorst of The Viorst Law Offices, P.C., 950 South Cherry Street, Suite #300, Denver, CO 80246, appearing as advisory counsel.

PROCEEDINGS

THE COURT: We are convened this afternoon in Case No. 14-CR-147, encaptioned United States of America versus Austin Ray. This is the final pretrial conference in advance of a trial set to begin on October 26, 2015.

Could I have entries of appearance, please.

MS. EDGAR: Good afternoon, Your Honor. Anna Edgar for the United States.

MR. NEFF: And Tim Neff on behalf of the government.

THE COURT: Good afternoon and welcome.

MR. RAY: Austin Ray, pro se.

THE COURT: Good afternoon and welcome.

MR. VIORST: Anthony Viorst, advisory counsel.

THE COURT: Thank you. Good afternoon and welcome to

you, too.

Okay. We have a number of pending motions, and I am going to just out of hand deny a series of motions by the government: Docket Nos. 226, 233 and 239. They all seek to strike motions by Mr. Ray as untimely. I also deny Mr. Ray's motion to strike at Docket No. 260, a reply by the government in support or opposition to one of these motions.

I did set a deadline for Mr. Ray to file motions, but out of an abundance of caution and in order to minimize disputes later on, I think we will proceed to hearing these motions, the remaining motions on the merits.

So we will start with Docket No. 213. This is Mr. Ray's Motion to Dismiss for Denial of Due Process, Lack of Personal Jurisdiction, Violation of Interstate Agreement Detainers and Outrageous Government Conduct.

Is there any further argument with regard to this? Please know I have reviewed and considered everything that you filed.

THE DEFENDANT: Yes.

THE COURT: Okay.

THE DEFENDANT: In looking at -- now, if I am not mistaken, I am trying to see -- what docket number are we referring to?

THE COURT: 213.

THE DEFENDANT: Is that a replica of 178 because I saw

that in the docket. It's like -- 178 was like the same as 213. Is that what I am understanding? Or 170 is 213 and 178 is 215?

THE COURT: This is identical to the motion of Docket No. 170.

THE DEFENDANT: Okay. Then I want to say thanks, then. I was just confused. As it relates to 170 --

THE COURT: Well, I am not going back to 170.

THE DEFENDANT: I understand you are going to 213.

THE COURT: Yes.

THE DEFENDANT: All right. That's fine.

All right. I believe that the government's argument is based on the fact that they feel that they never filed a detainer. The document that was used on April 25th, the document that was used on April 25th to substantiate that I had a hold placed on me by the state government for being incarcerated here was not actually -- that document was not actually a state hold for me. It was actually -- this document that I received from the court on April 2nd of 2015 is an acknowledgment by the Colorado Department of Corrections that they are acknowledging the government's detainer. That's what this document was. It wasn't a hold on me as a detainer here.

Now, one has been filed as of April 22nd, 2015, the only detainer by the State that's ever been filed. This document she used then on April 22nd when I was arrested in 2014 was just a confirmation that they received notification of

the federal government detainer. So there is a detainer in this case which she has been claiming for the last 18 months that there is not.

One thing is that -- now, in relation to this particular allegation that was lodged against me by this government here, it states that a detainer under the IAD may be lodged against a prisoner on the initiative of a prosecutor or a law enforcement officer, *U.S. v. Mauro*, 436 at 340.

I have talked with Susan Jungclaus, who is the parole -- the CDOC parole supervisor for adult parole community corrections. I have talked with her and she says she was there when the IRS lodged that particular detainer on the 10th, okay?

Now, this particular detainer that was -- that the government filed and this document that they were using was actually a notification that they were about to exhaust their remedy against me regressing me back to DOC so I could finish my sentence before turning me over to this government here.

So based on this document, and it says the IAD, it says at a minimum -- it says in *U.S. v. Weaver*, 882 F.2d 1128, it says to show that a detainer was filed, at a minimum, there must be proof that authorities from the charging jurisdiction notified the authorities where the prisoner is being held that the prisoner is wanted to face charges. Now, I believe this document satisfies the requirement of whether or not a detainer was filed.

My next issue would be -- is that the government is claiming that I paroled on February 6, 2014, which allowed them to not have to file a writ or detainer because I was on parole. That's what they are claiming. But however, under the IAD, a person serving a term of imprisonment activates the IAD and she is required to do certain things under 18 U.S.C. 3161(j) where she is supposed to -- where she knows a prisoner is incarcerated, she is supposed to either seek that person via detainer or use the writ of habeas corpus.

Now, they could have used a writ of habeas corpus without a detainer and just sought to get me, which couldn't be like denied, but they chose to notify the government instead. I mean -- well, sorry. I just lost my train of thought. I am going to go back.

Okay. Now, under 3161(j) the prosecutor, once they know that a prisoner is incarcerated, is supposed to promptly undertake to obtain the defendant's presence in the appropriate jurisdiction for trial on the pending charge or cause a detainer to be filed with the person having custody of the prisoner and request them to -- so advise the prisoner of his right or -- right to demand trial. The options set out in the statutes are alternatives. The prosecutor must therefore file a detainer or secure defendant's presence by filing of a writ of habeas corpus.

Okay. So she had those -- that statute states the

process in which I am supposed to be taken as a person serving a term of imprisonment.

Now, I do have a mittimus from the State. This is a current mittimus that was filed with the marshal's office on April 22nd, 2015. My sentence is being carried out at the Community Corrections Center. I am not on parole. I am serving a sentence. So she was required to honor the rule of comity in respect to what the rules are concerning the rule of comity.

And I would just like to add that under -- she also states that -- the government also states that my situation, my particular situation based on -- well, I won't even go into that. I am just going to -- I am going to wait for that.

All right. It says in *Ponzi v. Fessenden*, 285 U.S. 254, since two sovereigns exist, each with its own jurisdiction, definite rules fixing the powers of the courts in cases of jurisdiction over the same persons and things in actual litigation must be established. In the spirit of reciprocal comity, the mutual assistance to promote due and orderly procedure must be observed.

The chief rule which preserves the courts from conflict of jurisdiction is that the court which first takes the subject matter of jurisdiction when the person or property must be permitted to exhaust his remedy before other court may have jurisdiction for its purpose.

By way of this document that the prosecutor got on April 25th, 2014, this is what it says. It says whole -- this is an interagency document. I was told by Susan Jungclaus, the supervisor at CODOC, she said this was an interagency departmental memo to the -- it was just a Department of Corrections document that said hold Mr. Ray. Placed in Denver County Jail for regress to DOC. Felony detainer feds. For community corrections violation, 17-27-104(6). Under that it also states that it's a felony case, the case number, which is supposed to say this is felony charges from Federal Government detainer, no longer eligible for community corrections.

This was their notice to the government here that we are taking the appropriate measures based on a detainer filed against someone in our community corrections facility. So that's my argument is that the U.S. Attorney didn't acquire me in the manner required by law and that's my argument.

THE COURT: Mr. Ray, you have been referring to various pieces of paper. Have you filed these?

THE DEFENDANT: Okay.

THE COURT: Have you filed them?

THE DEFENDANT: Yes, I did.

THE COURT: Okay. So they are already part of the record?

THE DEFENDANT: Yes. I filed them just recently. Yes, I filed this in the motion. Well, I filed this in the

motion challenging subject matter jurisdiction. It's in --

MS. EDGAR: Your Honor, I believe it's Document 275 that he is referring to.

THE COURT: I need his statement. Thank you.

MR. RAY: Yes, I have.

THE COURT: Are they attached to Docket No. 275?

MR. RAY: Yes, they are.

THE COURT: Were you planning on calling any witnesses today?

MR. RAY: Any witnesses? No.

THE COURT: Okay. Thank you.

Response?

MS. EDGAR: Thank you. To the extent we are still talking about Document No. 213, I believe that was a filing of a part of his appeal in Appeal No. 15-1284 which has been dismissed.

THE COURT: I understand that.

MS. EDGAR: It's otherwise a copy of 170 which we responded to in Document 174 and the Court ruled upon.

THE COURT: I understand that.

MS. EDGAR: To the extent we are talking about Document 275, the government has not yet filed its response which I believe is due Thursday. However, I have researched in some detail the attachments that Mr. Ray has filed and that he references today and in his motion.

There is a document that at the top says State of Colorado Department of Corrections, Adult Parole, Community Corrections, and Youthful Offender System. I spoke with Parole Officer Gary Pacheco, who was the individual who created this document. He explained that his use of the language "felony detainer feds" was, if you will, just a sloppy use of language. He did not intend to indicate that there was any sort of detainer filed and he informed me there wasn't one.

THE COURT: All right. I am going to stop at this moment because you are referring to statements that are made outside this courtroom. Were you planning on calling any witnesses?

MS. EDGAR: Your Honor, I didn't understand this today to be an evidentiary hearing on this motion. If Your Honor would like an evidentiary hearing, I could be prepared and we would respectfully request time --

THE COURT: It's not a question of what I like, but in essence you have suggested that I disregard and I will disregard out-of-court statements that are relied upon by Mr. Ray. I similarly have to disregard out-of-court statements that you make. So if you want an evidentiary hearing, I am happy to schedule an evidentiary hearing or I am happy to treat this as the evidentiary hearing. What's your pleasure?

MS. EDGAR: Your Honor, I believe I may be able to resolve everything without an evidentiary hearing if I am

permitted additional time. I have spoken with a records custodian who should be able to provide me a certified copy of a record with respect to an absence of a detainer in the State of Colorado's records for Mr. Ray. And if I could file that with Your Honor, I believe that would resolve this motion.

THE COURT: All right. What I am hearing is that you would like to file a written response and you would like to file documentation that will give Mr. Ray an opportunity to file a reply. Is that what you would like?

MS. EDGAR: Your Honor, I believe that makes sense. And if at that time an evidentiary hearing nevertheless remains appropriate, at that time I would submit that we could determine that then.

THE COURT: All right. So you want to postpone the trial in order to accommodate this?

MS. EDGAR: Your Honor, I don't. I believe that we should be able to accomplish it before trial. And I apologize if I have missed anything. I didn't understand today to be a hearing on this motion which was just filed last Thursday. I have been in touch with the people at the State of Colorado and have had some difficulty getting people to get back to me, but I am prepared to get the information necessary as quickly as I can.

THE COURT: Well, I am not sure that I am going to have time for an evidentiary hearing between now and the time

of trial. And these detainer-related motions have been filed numerous times, as we can see, multiple times in the docket. This is the first time there have been documents attached to them, and I have denied the previous motions because there was nothing attached to support Mr. Ray's theory. But we are right on the eve of trial now, so what's your pleasure? I can't guarantee you are going to have an evidentiary hearing before trial.

MS. EDGAR: Well, Your Honor, I as an initial matter then would request that the motion be denied on the basis that he has already raised this issue multiple times and the Court has ruled upon it. He hasn't submitted information that is any different than information he had before. I believe this information has been in his possession for some time.

THE COURT: Response?

MR. RAY: Yes. Your Honor, this document came into my possession on April 2nd, okay. And I took it at face value as the court's proof that the prosecutor was stating that this was a document as to the State's detainer. I took it on good faith that she was telling me the truth. But as a result of the responses and your motions denying my -- I looked at it again and I got a better understanding of it, so I haven't had it a long time. She has had this document 18 months.

And if I might say, 2004 U.S. District Lexis 16253, *U.S. v. Patino*, "The invited error doctrine prevents a party

from inducing action by a court and later seeking reversal on the ground that the requested action was in error."

She can't come in and use this for a full 18 months and say this is about a document and then go outside her bounds to try to discredit it by the person who made it. It was great for 18 months when she was saying it was a detainer, so it should be great right now.

THE COURT: Mr. Ray, do I understand that you have had these documents that were just submitted for six months?

MR. RAY: Yeah. I didn't know what it was.

THE COURT: I am sorry, I didn't hear you.

MR. RAY: I didn't know what it was.

THE COURT: I am sorry, I didn't hear you.

MR. RAY: I am sorry. The Court gave me this document on 4/2/2015, and in reference to it being -- this is a copy of a detainer from the State of Colorado and gave it to me and I put it up because I believed you guys were telling me the truth. You were just giving me a copy of the detainer. You felt I needed a copy so I would stop talking about the issue, but it's not a detainer in the sense that she brought it up in come to find out.

THE COURT: Mr. Ray, do you want to have an evidentiary hearing?

THE DEFENDANT: Yes, I do. I mean, yes, I do.

THE COURT: All right. And when will you be prepared

for hearing?

THE DEFENDANT: I don't know because in light of what's her comments, I have to further -- I've got to write more letters to the Department of Corrections to verify what I just verified from Susan Jungclaus, Mr. Pacheco's supervisor, because obviously now they are in conflict, so I need to see if I can get some witnesses too.

THE COURT: Okay.

MR. RAY: About as fair as it's going to be, I think.

THE COURT: Sounds like to me that both sides have had documents for quite a while. Both sides have had interpretations with regard to the documents for quite a while. But now their interpretations have changed, and as a consequence, each side would like to bring other evidence before the Court. It's unfortunate that these documents were not identified prior to this time. We might have been able to deal with this in its entirety and indeed I was prepared to rule on that today. But in light of the fact that the government wants to submit documentation, Mr. Ray thinks there is other information that is pertinent and the parties believe there is a factual issue that needs to be determined, I believe an evidentiary hearing is appropriate.

I cannot facilitate an evidentiary hearing and give the appropriate time for briefing before the currently scheduled trial. And as a consequence, I am going to vacate

the trial. I will reset it after we've had an opportunity to address this issue.

Now, there are some other motions we can address. I can address Docket No. 213. It folds into 225. And I deny it and will consider Document 225 as the operative motion. I deny 213 on the same grounds that I previously denied these motions and will focus on 225.

We then have Docket No. 214, Mr. Ray's Motion to Suppress for Denial of Post-Deprivation Hearing. Is there any further argument on that? That's Docket No. 214.

MR. RAY: Yes. Your Honor, I don't have a copy of that with me since I didn't know that we were having a hearing on that. I would have brought it. I don't believe I have that document with me. Your Honor, I don't have a copy of that document with me. I am just going to stand on the motion as presented.

THE COURT: All right. Any further argument by the government?

MS. EDGAR: I have no further argument on the paper. I wonder if I could just make one suggestion with respect to the potential evidentiary hearing.

THE COURT: Not right now. Let's get through the rest of these motions.

MS. EDGAR: Thank you, Your Honor.

THE COURT: If you want to raise something at the end

of the hearing, please feel free to do so.

MS. EDGAR: Thank you, Your Honor. I have no further argument with respect to the motion.

THE COURT: Then with regard to Docket No. 214, this is Mr. Ray's Motion to Suppress for Denial of Post-Deprivation Hearing, he seeks to suppress unspecified fruits of an April 6, 2010 search and seizure of the Cheapertaxes office by IRS agent pursuant to a search warrant. He contends that he was not afforded a "post-deprivation hearing" following the search and that the seizure of computers and records from Cheapertaxes prevented him from "correcting any erroneous deductions within the three-year statute of limitations for filing amended returns." In other words, the seizure of his computers and records prevented him from correcting the false returns at issue here.

In certain circumstances when the government takes private property, it is obligated to provide the owner either pre-deprivation notice and an opportunity to be heard or a post-deprivation hearing or a common law tort remedy to protect the property owner against the risk of erroneous deprivation.

And one of the cases that reflects those rights is *Zinermon v. Burch* found at 494 U.S. 113, a 1990 Supreme Court decision. But Mr. Ray mistakenly applies this rule to property that is seized pursuant to a search warrant and retained by the government as evidence of a crime. It is axiomatic that the

government is entitled to retain such evidence until the trial is completed. And that's recognized in the 10th Circuit in *U.S. v. Christie* at 717 F.3d 1156, a 10th Circuit, 2013 decision that states "The general rule is that lawfully seized property bearing evidence relevant to trial should be returned to its rightful owner once the criminal proceedings have been terminated, not before."

Arguably, Mr. Ray might be entitled to demand the return of any property seized during the execution of the warrant that will not be used as evidence against him in accordance with Rule 41(g), but because Mr. Ray brings the instant motion as one seeking suppression of evidence at trial, that is not an issue the Court need address and it is a tautology to suggest that the property the government is not going to use as evidence at trial should be suppressed so that it may not be used as evidence at trial. Accordingly, the motion is denied.

We will turn to Docket No. 231, Mr. Ray's Motion to Dismiss Superseding and Second Superseding Indictment for Selective and Vindictive Prosecution. The government responded at Docket No. 239.

Any further argument with regard to that?

MR. RAY: Yes. I don't have those documents. I don't have that motion in front of me either, but as it relates to -- I believe that the government's argument was that the

superseding indictment was based on information uncovered in a proffer November 3rd and November 12th when they interviewed the co-defendant, okay?

This information they said they had no knowledge of prior to interviewing the co-defendant. But my tax returns they did have knowledge of because they -- they were seized in 2010. On April 21st of 2014 the records of vital statistics sent Arleta Moon a letter stating that this is the information that you requested concerning the death of Austina Ray and her death certificate. So they had this information prior to the first discovery order that was supposed to be complied with by May 7th of 2014.

They waited until an opportunity and held it in abeyance. As far as I am concerned, it's retaliation based on my statements made in my -- since I don't have it in front of me, I can't go urging what my argument is, but that was held back as a source for retaliation because they knew that information existed and should have -- and if they intended on prosecuting me on it, they were supposed to provide it. That's what the Rule 16 says, if you intend to prosecute a person on these, on whatever you are prosecuting them on, have this information discovery to them by May 7 or whatever that order was.

THE COURT: Mr. Ray, this isn't the argument made in this motion.

MR. RAY: That's not the argument?

THE COURT: Nope.

MR. RAY: In the superseding indictment? Well, that's the -- this is additional argument, then. This is the "do you have anything else to say" part of it, then. That's the part I am adding to that. Thank you.

THE COURT: Thank you.

Response?

MS. EDGAR: Just briefly, Your Honor. I would just point out that Counts 37 and 38 of the superseding indictment, second superseding indictment now indicate more than just the death of -- the unfortunate death of Mr. Ray's daughter, Austina Ray. It includes that his income on the tax return was $19,530. He was entitled to a certain refund. And those allegations are true with respect to both counts. The information used for purposes of adding counts to the indictment was learned after a proffer with the defendant's former wife.

THE COURT: Well, this motion concerns selective or vindictive prosecution. And the argument is retaliation against Mr. Ray for successfully seeking the withdrawal of his prior counsel; that the government filed the superseding indictment in December 2014 to retaliate for refusing a plea offer; and that Mr. Ray is being subjected to selective prosecution because of his race. Those are the arguments that

I am dealing with right now.

MS. EDGAR: Right, Your Honor. In that respect, then, we would stand on our papers which I believe have fully responded to those allegations.

THE COURT: Thank you. Anything else?

MR. RAY: Yes. And I just remembered --

THE COURT: Those are the arguments I am dealing with.

MR. RAY: I understand. I understand.

Okay. The selective part of that argument, and it not being right in front of me, I believe I was establishing that I was the only black person being prosecuted. And then to substantiate that other black people were being prosecuted, the prosecutor wanted to incorporate Africans into the situation calling them black, okay?

Africans, anyone that can be deported are not black people. She knows the difference between Africans and black people. To use an African because that's all there was, especially for the counts I am charged with, these are all Africans or nationals from another country, okay? These are not black people. We know what black people are. And to try and use an African to cover up the fact that I am the only black person and say just because they are the same color, they are black, to try to justify and make that an answer for me saying it's selective was -- I think that shows the bias right there.

THE COURT: Thank you.

This motion which is Docket No. 231 raises three separate allegations of selective or vindictive prosecution: First, that the government filed the superseding indictment at Docket 68 in December 14 to retaliate against Mr. Ray for successfully seeking the withdrawal of his prior counsel on November 6, 2014, Docket No. 57; second, that the government filed the superseding indictment in December of 2014 to retaliate against him for refusing a plea offer that was made about that time; and third, that Mr. Ray is being subjected to selective prosecution because of his race.

The Court has previously addressed the standard for obtaining relief under a vindictive prosecution theory. The government may not punish a defendant for exercising constitutional or statutory rights in the course of a criminal proceeding. That's in accordance with *U.S. v. Raymer*, 941 F.2d 1031, a 10th Circuit 1991 decision.

The burden is initially on the defendant to show evidence of either "actual vindictiveness," that is, evidence of a prosecutor expressly coupling a decision to file charges with a defendant's invocation of constitutional rights or, "a realistic likelihood of vindictiveness which will give rise to a presumption of vindictiveness."If, and only if, the defendant meets this burdens does the burden shift to the government to present legitimate, articulable, objective reasons for the

decision.

Mr. Ray has not met his burden on any of the arguments as to the contention that the government brought additional charges against him because he rejected a plea offer. *Raymer* explains that no presumption of vindictiveness arises "when a prosecutor offers a defendant a chance to plead guilty or face more serious charges, providing the prosecutor has probable cause on the more serious charges and the defendant is free to accept or reject the offer."

The record suggests that probable cause supports the additional charges contained in the superseding indictment and Mr. Ray was free to accept or reject the offer.

Moreover, the Court finds that Mr. Ray has not presented facts from which one might find a realistic likelihood of vindictiveness in bringing additional charges against him based on his efforts in securing the withdrawal of his prior counsel. Mr. Ray offers no particular explanation as to why the government would care whether Mr. Ray was represented by one counsel over another.

And the third ground, selective prosecution based on race, was previously asserted by Mr. Ray in a prior motion, Docket No. 152, which this Court denied in a May 7, 2015 order, Docket No. 165. The instant motion adds no additional material support for the argument, and thus it is denied for the same reason.

Any need for clarification or further explanation?

MR. RAY: Yes.

THE COURT: I am sorry, I can't hear you.

MR. RAY: Yes. You said in your order. Was that 160 you referred to?

THE COURT: 165.

MR. RAY: In that same order, Your Honor, and this is for clarification at 13 -- it says that in this particular motion you stated that I use my wife as a -- one second. Let me get this straight.

THE COURT: Mr. Ray, I'm sorry, I'm not going to entertain more argument with regard to an order that was issued in May. The time for reconsideration of that has passed.

MR. RAY: Okay. So no clarification?

THE COURT: Thank you.

MR. RAY: I am not saying I don't want clarification. I am asking, so I can't get clarification?

THE COURT: You can get clarification as to what I just said, but I am not going to go back and try and clarify an order that was issued in May.

MR. RAY: I understand. Okay. That's not what I was trying to do. I wasn't trying to clarify an order. You know what? I will save it. It's probably best if I do. Thank you.

THE COURT: Okay. The next motion is Docket No. 227. That's Mr. Ray's Motion to Dismiss the Indictment for Grand

Jury Misconduct. The government responded at Docket No. 233. Is there further argument?

MR. RAY: No.

MS. EDGAR: No, thank you, Your Honor.

THE COURT: Thank you.

In this motion Mr. Ray seeks dismissal of the indictment arguing that an IRS agent fabricated evidence that was presented to the Grand Jury. Specifically, Mr. Ray argues that the agent showed the Grand Jury a screen shot of a warning message that the tax preparation software used by Mr. Ray gave when submitting certain information, warning the user that, "entries made in this section are under penalty of perjury."

Mr. Ray contends that, "the software does not have a warning of this nature for the years in question." And he specifically alleges that the Assistant United States Attorney prosecuting this action was complicit in the agent's fabrication, although he offers no more than a conclusory assertion as to that fact.

The government's response is that it, "cannot locate the specific testimony of which Mr. Ray complains." Arguably, the government's knowing presentation of fabricated evidence to the Grand Jury, assuming that that evidence is material to the Grand Jury's decision to indict, could constitute a constitutional deprivation that would warrant dismissal of charges. And that was recently recognized in the Second

Circuit in *Morse v. Fusto* found at Westlaw 2015 5294862.

Had Mr. Ray raised this issue promptly, say at the time the original motions deadline in April of 2015, perhaps we could have had an evidentiary hearing to determine whether the evidence was actually presented to the Grand Jury and whether Mr. Ray can establish that the evidence was fabricated. But by raising the issue so close to trial, it's impossible for the Court to schedule a hearing prior to the trial date. And accordingly, I am going to deny the motion without prejudice at this time allowing Mr. Ray to raise it at the conclusion of trial should the jury convict him of any counts to which that evidence may be relevant.

Any need for clarification or further explanation?

MR. RAY: No.

THE COURT: Ms. Edgar?

MS. EDGAR: No, thank you, Your Honor.

THE COURT: Let's go to 235. This is Mr. Ray's Motion to Dismiss for Violation of Speedy Trial Act. The response was filed at Docket No. 246. Any further argument with regard to these issues?

MR. RAY: I withdraw that motion.

THE COURT: Okay. It's deemed withdrawn.

Docket No. 242 is Mr. Ray's Motion to Dismiss for Prosecutorial Misconduct. The government's response is at 245. Any further argument?

MR. RAY: I don't have that in front of me. I don't have any of the motions that we are actually doing in front of me. I would just request -- move to revisit this motion in conjunction with any evidentiary hearing we have on the other issue of jurisdiction.

THE COURT: Response?

MS. EDGAR: Your Honor, I don't believe that's necessary. I don't believe he has met his burden with respect to anything he has raised in his motion; and therefore, I would request that it be denied.

THE COURT: I agree. This motion raises 16 separate grounds in which Mr. Ray argues that the charges against him should be dismissed due to prosecutorial misconduct. The listing is merely a recapitulation of the many grounds he has previously urged on the Court in various motions, each of which the Court has denied on their merits. At best I can determine the motion raises no new grounds in which Mr. Ray has not previously sought relief unsuccessfully; and to the extent the motion raises some new argument, it does so in so cursory a fashion as to prevent the Court from meaningfully being advised of Mr. Ray's argument. I am denying the motion.

Docket No. 275, Mr. Ray's Motion to Dismiss for Lack of Subject Matter Jurisdiction is the motion that will require an evidentiary hearing. And as I think about it, I thought I was going to rule on it today, but as I think about it, it

could be bundled with the motion to dismiss the indictment for Grand Jury misconduct if we are going to have an evidentiary hearing.

So let me find out when you all will be ready for that evidentiary hearing on those two motions so that we can set it, and I also need to know how much time you are going to need.

We will start with Ms. Edgar.

MS. EDGAR: Your Honor, a bit of clarification, if I may. Are you proposing that we bundle them for hearing after trial or before?

THE COURT: Before trial.

MS. EDGAR: May I request that we do them after trial as you suggested with respect to 227? Could we not treat the motion with respect to the detainer in the same way?

THE COURT: Why would we do that?

MS. EDGAR: Your Honor, I don't -- I apologize that I am not more prepared on this particular issue. I don't believe -- if I can mention a few things, first of all. I don't believe Mr. Ray has met his burden with respect to Document 227; and therefore, I believe the Court could deny it on that ground alone.

Secondly, to the extent there is any evidentiary issue, which I am not sure Mr. Ray has sufficiently raised, the reason for the late raising is entirely Mr. Ray's fault. I mean, he has had this document for some time. It is not the

Federal Government's document. It is the State of Colorado's document. And for him to be able to create a factual issue that will derail the trial that has now been scheduled for some months at this time seems particularly unfair, mostly to the people of the United States, Your Honor.

The Speedy Trial Act protects not just the defendant's interests, but the people as well, Your Honor. And the defendant has more than -- has had more than adequate time to prepare his motions and his arguments.

THE COURT: There is a problem with 275. It raises the issue of subject matter jurisdiction.

MS. EDGAR: Your Honor, I began to research that issue right before I came here. I believe that the 10th Circuit has ruled that an IAD objection may not be raised in a 2255 petition suggesting that it is not jurisdictional. If I could have more time to brief that and research it, I would like to do so if there is any way for me to be able to preserve our trial date. I could, you know, accomplish that briefing as soon as possible so that I could get some more information to the Court on which you could make the decision.

We are still three weeks out, approximately three weeks out from trial, and I believe that -- if there is any way to preserve our trial date, Your Honor, I would certainly like to do that and would do anything that I can to do that.

Additionally, with respect to the issue itself, I

think the only issue that is raised is whether or not -- that is properly raised in this motion is whether or not the government filed a federal detainer. I can tell you as an officer of the Court that I did not file one. The only other person who would have filed one was a federal law enforcement agency and no federal law enforcement agency did that at my direction or otherwise.

If that would resolve the issue, I do have our special agent, Arleta Moon, who is the officer here who could testify that she did not file one or ask anyone else at the IRS to file one. Separate and apart from that, Your Honor, I could also obtain, as I have been attempting to do all week from the State of Colorado, documentation which would be certified pursuant to Federal Rule of Evidence 902(11) and admissible under the hearsay exceptions under 803(7) to get an absence of business record proving that the State of Colorado does not have on record any federal detainer from the Federal Government with respect to Mr. Ray.

THE COURT: Response?

MR. RAY: Your Honor, Document 234 was an order issued by you. I have appealed this order interlocutorily based upon the jurisdictional issue in appeals court. I don't think her argument is going to have any effect on appeal based on the fact that now all of the sudden this is an error. She induced this document to the Court to believe it was substantive. She

had plenty opportunity -- like everybody is blaming me for. She has way more power than I do.

I am locked in the jail, locked in the unit. I am in jail. Pick up the phone call, give Mr. Ray parole. No. Pick up the phone call. Is this a document you sent me because I am about to use it in court and I am about to file other documents on it asserting this is a true document. She has been filing documents that say that I paroled and that no detainer was filed and she had this in her possession, the document in her possession, all right?

The fact that she doesn't validate whether this document is true before she files it, that's her fault. But to induce the Court to believe it's an actual true document and the Court rules on that document and orders based on the assumption that she is telling the truth, that this document is what it is, well, the document is what it is. The fact that she mistook it for something else is of no consequence. It says a detainer. Not only did Pacheco sign it, managers, three different managers. So you know, once --

THE COURT: Mr. Ray, I am not dealing with the substance here. The question, what has just been asked by Ms. Edgar is to delay the hearing until after the trial. That's what I need your opinion on, not the merits of the motion.

MR. RAY: Okay. That's fine. Understandable. Okay.

This is a rule of comity issue. The first sovereign has been and this is the subject matter jurisdiction issue. If she didn't give me according to subject matter, if she didn't give me according to the rules of law, there is always going to be a subject matter issue.

She violated the law. She didn't get a writ. Don't even think about the detainer. You have still got to have a writ. That's the jurisdictional tool. So her argument is just the IAD. Well, explain away the writ because you definitely supposed to have that. And she hasn't given no argument as to why she hasn't provided a writ if I am serving a term of imprisonment in the state of Colorado.

And I think that's why this should be -- because the Court has to establish this jurisdiction. And it's not -- the burden of proof has been put on me and it's actually supposed to be on the prosecution they asserted to prove how I got here. I have been proving everything. It's not even my job.

THE COURT: Thank you.

I understand the government's frustration in wanting to preserve a trial date. Unfortunately, the IAD deems the indictment to be a nullity if the anti-shuttling provisions are violated. And as a consequence, we cannot proceed to trial until that issue is resolved.

Now, the old motions that were filed were not accompanied by evidence, and that is why I denied Mr. Ray's

motions repetitively. But apparently the evidence that you all think is important in determining whether there was a federal detainer or not has been in your possession for some time. And as a consequence, although I have some degree of sympathy with regard to the continuance of the trial, not too much because this issue was a threshold issue that should have been fully firmed up and fully addressed before now. I have no option but to determine this issue before we go to trial, and I can assure you there is no time between now and the current trial date to have an evidentiary hearing.

So despite my sensitivity to your desire to preserve that trial date, I deny the motion and again ask you when will you be ready for a hearing on this motion and on the Grand Jury motion and how much time will you need?

MS. EDGAR: Your Honor, we are pretty open I think because we have been preparing for trial, so we could be ready as soon as possible. Not to beat the proverbial dead horse, but if I could ask for one clarification. Would it be at all possible for Your Honor to rule on the paper based on evidence --

THE COURT: No.

MS. EDGAR: -- that's independently admissible?

THE COURT: No. You both have been referring to statements that are made by people outside this court. And we all know that those statements if offered for the truth of the

matter asserted are excludable hearsay. We need to have those people come in and testify as to whatever it is you want them to say.

So we can certainly schedule a hearing during the time that we anticipated having the trial, so we could schedule a hearing on Monday, October 26 of 2015, in order to have this hearing. Will you be ready by that time?

MS. EDGAR: We will be ready, Your Honor.

THE COURT: Okay. And how about you, Mr. Ray?

MR. RAY: I will be ready.

THE COURT: All right. Then we will have the evidentiary hearing for this particular issue on the 26th of October at -- we will make it 9:00 o'clock a.m. And if I can rule orally, I will do so, and we will reschedule the trial promptly. If it requires a written ruling, then we will reschedule the trial once we have that ruling issued.

Is there anything else we can take care of today?

MR. RAY: I have a question, Your Honor. May I have a copy -- since this is so voluminous, can I have a copy of the minute order?

THE COURT: It's usually sent to you, Mr. Ray. Do you not get it?

MR. RAY: Like weeks, eight or nine days from now. Everything is always late.

THE COURT: Well, I don't know whether Ms. Glover will

have it finished by the time you are transported. She may or may not. And if she does not, we will have to mail it.

THE COURT DEPUTY: You mean today's minutes? I won't have them done, but I can assure you that -- I will probably mail those to you tomorrow morning. When I finish this, I will get them out to you and mail them. I personally do the envelope and put them in the mail to you.

MR. RAY: I appreciate it. Thank you, Your Honor.

THE COURT: Thank you.

Anything from the government?

MS. EDGAR: Your Honor, due to the nature of our witnesses' schedules, I wonder if it's possible to set the trial date now. People have been scheduling off work and I know it really affects their ability to come and attend. I want to tell them they can go to work, go ahead and get them back on their schedules. I am trying to do the best thing I can for my witnesses as far as scheduling out the trial date and giving them as much notice as possible.

THE COURT: I am having a little bit of difficulty. Do you know all their schedules?

MS. EDGAR: Your Honor, I have been meeting with them only -- I don't mean to schedule around their availability, but I know that, you know, many of them are shift-type workers, so they request a couple weeks in advance of their time off. And I am trying to accommodate that by giving them as much notice

as possible for the trial date.

THE COURT: What's you're speedy trial calculation?

MS. EDGAR: Your Honor, based on the continuances the Court has previously granted, I believe speedy trial was continued through the date of the trial.

THE COURT: That's right. But how much time is left on speedy trial?

MS. EDGAR: Because we filed a superseding indictment which added new counts, I believe that restarted the clock. A few days after that filing the Court ruled on a pending motion to continue the trial which set it out for a first trial date in April. A subsequent hearing reset it out for the date in October. So I don't think that any time has elapsed under speedy trial based on those calculations.

I did the calculations based on the pendency of the defendant's motions as well, and under that calculation I think if you simply were to disregard the Court's findings with respect to the time necessary to get ready for trial, then some 50 days I think had elapsed just based on the pendency of motions and when things were outstanding.

THE COURT: I don't think I can set the trial today because I cannot tell what is happening with regard to several weeks, and we have the holidays in November and December coming up. You still want eight days for trial, so that means two weeks, correct?

MS. EDGAR: Well, the way Your Honor had rescheduled it, we had set it for a five-day trial week and we were very hopeful we would be able to accomplish it then. So we are still very hopeful it takes only eight days, whether Your Honor prefers to schedule that in two weeks or one longer week with a hope that we finish then. Obviously part of it depends on how long Mr. Ray's case takes. The government should be able to get its case in within the week.

THE COURT: All right. Well, I will have a better view of what the calendar looks like and you will have a better idea what speedy looks like once we have the hearing on our evidentiary hearing. It may be that there is some holes that open up shortly thereafter.

MR. VIORST: Your Honor, if I may, I know I am just advisory counsel, but if -- obviously, the Court I think wants me to be here and Mr. Ray would like me to be here for all these hearings, and I am CJA appointed, so I would ask if the Court would consider -- my first question is even though I am advisory counsel, I would still retain subpoena power in this case. Mr. Ray has asked me to subpoena some witnesses. I guess he could go through the court, but I would assume that I would still retain subpoena power for a witness, the witness he referenced in regard to that evidentiary hearing. I guess I could subpoena that witness in my role as advisory counsel; is that correct, Your Honor?

THE COURT: I don't know.

MR. VIORST: Okay. Well, I am going to try, see what happens, I guess.

Second question is would Your Honor be willing to consider any other time for the evidentiary hearing? I could do the afternoon of the 26th or any other day that week. There is in state court they have Monday morning dockets and there have been a number of clients who have asked me to represent them that morning, which I put them on hold not knowing this case was going to go forward or not. And if I could have the opportunity to represent those individuals, I would surely appreciate it, as would they.

THE COURT: Is there any objection to holding the hearing in the afternoon?

MS. EDGAR: No objection, Your Honor.

THE COURT: Okay. Then we will hear the matter at 1:30 p.m. Please be prepared at that time to give me good speedy trial calculations so that we can set trial. And I know that you're going to want to continue the sentencing of Ms. Rasamee. Would you please just file a written motion.

MS. ESKESEN: I will, Your Honor, thank you.

THE COURT: Anything else we can do today?

MR. RAY: No, thank you, Your Honor. No, Your Honor, I don't have anything else.

THE COURT: All right. Thank you very much. We will

stand in recess.

(Recess at 4:36 p.m.)

REPORTER'S CERTIFICATE

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter. Dated at Denver, Colorado, this 20th day of October, 2015.

S/Janet M. Coppock

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Criminal Action No. 14-CR-00147-MSK

UNITED STATES OF AMERICA,

Plaintiff,

vs.

AUSTIN RAY,

Defendant.

REPORTER'S TRANSCRIPT
MOTION HEARING

Proceedings before the HONORABLE MARCIA S. KRIEGER, Judge, United States District Court for the District of Colorado, commencing at 1:41 p.m., on the 26th day of October, 2015, in Courtroom A901, United States Courthouse, Denver, Colorado.

APPEARANCES

ANNA EDGAR and TIM NEFF, Assistant U.S. Attorneys, 1225 17th Street, Suite 700, Denver, Colorado, 80202, appearing for the Government.

AUSTIN RAY, Pro Se

ANTHONY VIORST, Attorney at Law, 950 South Cherry Street, Suite 300, Denver, Colorado 80246, appearing for the Defendant.

THERESE LINDBLOM, Official Reporter
901 19th Street, Denver, Colorado 80294
Proceedings Reported by Mechanical Stenography
Transcription Produced via Computer

P R O C E E D I N G S

THE COURT: Court is convened this afternoon in Case No. 14-cr-147. This is encaptioned the United States of America v. Austin Ray, and we're convened for an evidentiary hearing on two motions.

Could I have entries of appearance, please.

MS. EDGAR: Good afternoon, Your Honor. Anna Edgar for the United States.

THE COURT: Good afternoon and welcome.

MR. NEFF: Good afternoon, Your Honor. Tim Neff on behalf of the Government. With us at counsel table is Special Agent Arlita Moon with the IRS.

THE COURT: Good afternoon and welcome.

MR. RAY: Austin Ray, *pro se*.

THE COURT: Good afternoon and welcome.

And I see that Mr. Viorst is seated with you at counsel table. Welcome to you as well.

MR. VIORST: Thank you, Your Honor.

THE COURT: All right.

Is there any request for sequestration?

MR. RAY: Yes, Your Honor.

THE COURT: All right. Who are you seeking to sequester?

MR. RAY: Witnesses --

THE COURT: Would you stand up, please.

MR. RAY: The witnesses that I've subpoenaed.

THE COURT: Sequestration is an exclusion of witnesses. Who is it you are trying to exclude from the courtroom?

MR. RAY: Any witness called to testify that's in here.

THE COURT: Any objection?

MS. EDGAR: No objection, Your Honor.

THE COURT: All right. Then all of those who are present in the courtroom who have been called or anticipate testifying in this hearing shall now leave the courtroom. You may be seated outside the courtroom. There is a little conference room where you can be comfortable, but you cannot discuss your testimony or the testimony of any other witness with another witness.

Ms. Glover, could you please post the sequestration order.

MS. EDGAR: Can I just mention that while I don't anticipate that Special Agent Moon might testify, on the off chance she does, she is here in her advisory witness capacity, and ask she remain.

THE COURT: She may remain.

MS. EDGAR: Thank you.

THE COURT: Any other matters we need to take up before presentation of evidence?

MS. EDGAR: None from the Government, Your Honor.

MR. RAY: No, Your Honor.

THE COURT: Okay. We have two motions to address. Docket No. 277, which is Mr. Ray's motion to dismiss the Indictment against him for grand jury misconduct, and Docket No. 275, which is Mr. Ray's motion to dismiss the charges against him for being lack of subject matter jurisdiction.

Which motion do you intend to proceed with first?

MR. RAY: I'd like to proceed with the motion for subject matter jurisdiction first.

THE COURT: I'm sorry, I can't --

MR. RAY: The motion challenging subject matter jurisdiction.

THE COURT: Okay. We'll start with that motion.

You may proceed.

MR. RAY: Your Honor, I have received the U.S. attorney's response to my motion challenging subject matter jurisdiction. And, firstly, it doesn't --

THE COURT: Mr. Ray --

MR. RAY: Yes.

THE COURT: This is not a time for argument.

MR. RAY: Okay.

THE COURT: You wanted to have an evidentiary hearing, you wanted to be able to present the evidence that you have.

MR. RAY: Okay.

THE COURT: Please do so.

MR. RAY: I would call my first witness, Mark Yurky.

COURTROOM DEPUTY: Mr. Neff, I can retrieve witnesses. Who is your witness?

MR. RAY: Mark Yurky.

THE COURT: Mr. Ray, you need to proceed to the lectern.

Please step up and be sworn.

COURTROOM DEPUTY: Please raise your right hand.

(**MARK YURKY, DEFENDANT'S WITNESS, SWORN**)

COURTROOM DEPUTY: Please be seated.

Please state your name and spell your first and last name for the record.

THE WITNESS: My name is Mark Yurky, the last name is Y-U-R-K-Y.

THE COURT: You may proceed.

DIRECT EXAMINATION

BY MR. RAY:

Q. How are you doing this morning -- good afternoon. How are you doing?

A. I'm doing fine, sorry.

Q. I'm going to be handing you a document --

THE COURT: Mr. Ray, you're going to have to pull that microphone toward you and speak loudly into the microphone because you have a soft voice, and we cannot hear you unless

you speak loudly.

BY MR. RAY:

Q. Mr. Yurky, I'm going to be handing you a document I want you to look at.

Oh, you have?

There is a document in front of you labeled Defendant's Exhibit 1.

A. Okay. I see it.

Q. Do you recognize that document?

A. I do. It's an arrest form that the adult parole division uses to hold people in custody.

Q. Let's back up a second. Could you describe your profession and your occupation, place of employment.

A. Yeah, I can. I was a supervisor at the Lincoln Parole Office from January of 2010 until the end of July, 2014. I supervised my team, supervised offenders that were residing in community corrections, so I supervised the officers and supervised the halfway houses in the Denver Metro area.

Q. Thank you. Back to the document in front of you, Defendant's Exhibit 1. So you do recognize this document?

MS. EDGAR: Objection, leading.

THE COURT: It is. I'll allow the witness to answer.

THE WITNESS: Yeah, it's a hold form.

BY MR. RAY:

Q. Thank you. Is this your signature -- is that your

signature at the bottom of this document -- did you sign this document?

A. I did not sign it. It's an electronic signature of mine -- my signature, yes.

Q. Did you approve this document when it was created? I mean -- excuse me a second. Let me just rephrase this. Did you authorize this document?

A. The -- I did not authorize this. The supervising officer, Gary Pacheco, I believe, completed this form. All supervisors and -- for the parole department, their name and signature is a selection in the drop-down box.

Q. Okay. Prior to your name being electronically -- your signature being electronically printed on this document, did you have an opportunity to review this document before your signature was placed on here, whether it was yours or electronically?

A. I did not. The process is that the arrest hold form is completed; and once it's completed, that I would get an e-mail that says "arrest hold." And then there is an attachment in the e-mail, and that can come soon, or it can come hours later.

Q. Okay. Thank you.

And this particular document, could you explain to the Court what it entails.

A. The document is kind of notification to a jail that -- essentially, that -- why this offender is in custody and

notifying them of such and preventing them from posting bond until a determination is made on the status of their community supervision in this case.

Q. Okay. Thank you.

There is -- I think -- is that the entirety of your explanation as far as what is entailed?

A. Yeah.

Q. Okay. I want to point to another issue inside this document under "special instructions." Can you explain the special instructions portion of this document.

A. Well, the special instructions are instructions that are typed by the initiator or author of this document, the supervising officer.

Q. Could you read for the Court the special instructions.

A. On Exhibit 1?

Q. Yes.

A. Place in Denver County Jail for regress to DOC, felony detainer, feds.

Q. Felony detainer, feds, is that what you said?

A. That's correct.

Q. Okay. Now, the violation under which -- it says C.R.S. 17-27-104, are you familiar with that particular violation?

A. It's a community corrections violation for offenders that are placed in residential community corrections program.

Q. Okay. Special instruction says -- says place in Denver

County Jail. Is this a normal routine procedure for felony detainer that's filed or felony detainer, what it says there, is that the normal procedure?

MS. EDGAR: Objection, foundation.

THE COURT: Sustained.

BY MR. RAY:

Q. Okay. Under special instructions, can you explain why there is a hold placed and instructions to place myself in -- well, to place prisoner in jail for regress to DOC?

MS. EDGAR: Same objection.

THE COURT: Overruled.

The question call for a yes or no answer. Can you explain this or not?

THE WITNESS: I did not complete this document. But if a residential community corrections offender would be in a Denver program and was to be taken into custody, that's where the person would be placed.

BY MR. RAY:

Q. Okay. I'm going to come back to special instructions.

I would like to move down to the justification, right above your name, where your name is printed and that electronic signature is. Could you read the justification portion of this document.

A. Felony charges from federal government detainer, no longer eligible for community corrections, related to tax theft.

Q. Okay. So is this justification -- is the reason on this justification -- just a second -- give me a second.

Okay. Is the reasoning -- is the justification the reason for the special instructions?

A. I think the justification is why the -- a person is placed in custody.

Q. And that is why -- from this document, why is he being placed -- why is the defendant being placed in custody, from the justification?

A. Well, he's placed in custody for a hold. Again, I didn't complete the form, so --

Q. I understand. I understand, sir. But --

A. But --

Q. -- for the justification, why is he being moved from the community corrections system?

MS. EDGAR: Objection, foundation. To the extent he was to read --

THE COURT: I can't hear you, counsel. You need to pull that microphone toward you.

MS. EDGAR: I apologize. Just object to foundation.

THE COURT: Thank you. I sustain.

BY MR. RAY:

Q. Was this document ever transmitted to you after it was created?

A. It was.

Q. When was that?
A. I don't really know. As I mentioned, after the person completes the form, it's -- I get a message that one is completed and get it via the e-mail hit with the attachment and the form? I can't really tell you when that document or when that e-mail came.
Q. Do you believe it was one month after or --
A. No, it would have been with -- I would probably say within hours, or could have been sooner.
Q. All right.
A. The same day it was generated.
Q. Thank you. And at the time when you received this document, did you verify any of the information that was on it?
A. I did not.
Q. Did you take the information to be true as it was transmitted to you?

MS. EDGAR: Objection, foundation.

THE COURT: Overruled.

MS. EDGAR: It's not clear he ever read the form.

THE COURT: Overruled.

THE WITNESS: I would assume that the information in the form is accurate.

BY MR. RAY:

Q. Thank you. Is there a verification process when a person is about to be removed from the community correction facility

in this particular matter? I mean, at this point your name could just be attached to any document without you knowing it. So is there a verification process that this goes through before it's even transmitted to verify the information is correct before you get it?

A. Again, the officer completes the form, and it's transmitted. So I -- I do not verify any information before I get it. It's on the document before it gets sent to me.

Q. Is Mr. Pacheco's signature anywhere on this document, verifying this information, or signing off on it?

A. His signature is not there. His name is printed up on the -- under the officer.

Q. Is this a reference to the person who created the document or a reference to a -- just an officer liaison of the community corrections facility, person to contact?

A. Usually it would be the supervising officer. In this case it would be -- it was Mr. Pacheco that supervised that facility.

Q. Next question is, how often do you oversee documents like this that come to you, I mean, within a -- like, in a period of a month, how many times do you see regress for federal detainer?

A. It's fairly rare.

Q. Rare in the sense of -- I mean, like just never happens, this is the first time it happened, or --

A. Well, rare that the federal detainer, the person most likely wouldn't be in community corrections.

Q. All right. Under justification portion of this document, in your opinion, is this a notification of pending charges?

MS. EDGAR: Objection, Your Honor, relevance, foundation.

THE COURT: Response.

MR. RAY: I'm just asking him to verify that this is notification of a detainer -- of charges pending against Mr. Ray, myself.

THE COURT: Why does that matter?

MR. RAY: Because it goes to -- because it matters, because it goes to the provisions of the detainer, i.e., the situation.

THE COURT: How does it affect whether this is a detainer or evidence of a detainer?

MR. RAY: Because detainer is just a word. Now, it describes the action that takes place, okay. And the action that took place was that the Department of Corrections was notified of pending charges, okay. So notification of pending charges in a different jurisdiction is also called a detainer.

So my question is to Mr. Yurky -- this is his field, this is where he's at, so he can determine whether or not this is a notification.

THE COURT: I sustain the objection.

MR. RAY: Okay.

BY MR. RAY:

Q. Okay. Mr. Yurky, would you say that the justification portion of this document, as described in this document, is an accurate description of why Mr. Ray has been removed from ComCor and was supposed to be regressed back to DOC to serve the remainder of his sentence?

MS. EDGAR: Objection, foundation.

THE COURT: I'm sorry?

MS. EDGAR: Objection, foundation. I apologize, Your Honor.

THE COURT: Overruled.

THE WITNESS: I think that the justification as far as felony charges, no longer eligible for community corrections, is accurate. That any offender in a community corrections program that is -- has a new felony charge, arrest, or if a detainer is filed, would be ineligible for community corrections.

BY MR. RAY:

Q. Thank you. When you first reviewed this document and you -- when you received it and you -- and you received it, do you report any accuracies that you would -- would you report any inaccuracies that you saw?

MS. EDGAR: Object to the form of the question. I believe it also assumes facts not in evidence.

THE COURT: Overruled.

You can answer the question, sir.

THE WITNESS: I -- I'm not sure that I even opened the attachment of the e-mail. But to answer that question, the -- that I would if there was something glaring on that form.

BY MR. RAY:

Q. Has your -- has your name and signature ever been used by anyone in the department of CDOC, has it ever been used to produce a false document?

A. I don't know of any.

MR. RAY: Thank you, Mr. Yurky. I have no further questions.

THE COURT: Thank you.

Cross-examination.

You may be seated, Mr. Ray.

MS. EDGAR: Thank you, Your Honor.

CROSS-EXAMINATION

BY MS. EDGAR:

Q. Good afternoon, Mr. Yurky. With respect to Defendant's Exhibit 1, have you ever read this -- at the time this form was created, did you read it?

A. I can't recall looking at whether I clicked open and looked at this document or not.

Q. Do you have a specific recollection as to whether or not you even received it?

A. I'm pretty sure that it came in an e-mail, because that's the way the system is set up.
Q. Do you specifically remember, however, actually looking at this form in April of 2014?
A. I do not.
Q. Are you responsible for creating any of the content on this form that is marked as Defendant's Exhibit 1?
A. I am not.
Q. Do you have any personal knowledge of any of the contents of the form?
A. I do not.
Q. Are you familiar with this type of form generally?
A. Yes, I am.
Q. How is the form predominantly populated?
A. It's in the CY system. You click on the selected offender, and then the form would come up, date and time are fill-in blanks, you have a drop-down box for which jail, you have a -- either a hold or release selection, and it's either for whatever program the offender is in, either parole, community corrections, YOS, ISP, so whatever program the offender is participating in --
Q. I can stop you there. So is it -- in case -- this is in fact an electronic form, correct?
A. It is.
Q. It's predominantly drop-down boxes, correct?

A. Or -- yes.
Q. Or auto-populated field?
A. Or click a selection, yeah.
Q. And that includes your name?
A. It does.
Q. And your signature, even though it looks like a signature?
A. Yes, it's selection under supervisor.
Q. Okay. And you said this form is directed to a jail. To whom is this form directed?
A. It goes to the jail as far as the offender is placed, is being placed in. And it also goes to the supervisor whose name is selected, the managers, and the -- I believe it goes to the officer who created it, too.
Q. It is an internal state form, correct?
A. Correct.
Q. Did you -- do you know what a federal government detainer is?
A. It would be --

MR. RAY: I object, Your Honor.

THE COURT: One, you need to stand.

MR. RAY: I object, Your Honor.

THE COURT: And what is the basis of your objection?

MR. RAY: Is that I -- she hasn't said foundation for that particular question.

THE COURT: This is a foundational question. I

overrule your objection.

You may answer the question.

THE WITNESS: Okay. In the Department of Corrections, a federal detainer would be some sort of legal documentation submitted to our detainer operations unit that's based in Colorado Springs.

BY MS. EDGAR:

Q. What is the detainer operations unit responsible for?

A. They handle information as far as -- they're kind of a contact person for other agencies, other states, those type of things, wanting to place a detainer because of some sort of interest they have in the offender. So they process that paperwork.

Q. If you are -- if you in your responsibility and supervising community corrections are ever informed of a detainer, where do you get that notification from?

A. I would get the information from somebody in detainer operations or our headquarters stating that in fact a detainer was lodged against this offender, and then we would need to ensure that this person is taken into custody.

Q. And then, briefly, you mentioned before that you can't reside in community corrections if you have felony charges pending; is that correct?

A. That's correct.

Q. And that's correct whether or not there is a detainer.

It's simply the fact of outstanding charges that prevent you from being in community corrections; is that correct?

A. That's correct.

MS. EDGAR: No further questions. Thank you.

THE COURT: Thank you.

Redirect.

MR. RAY: First, Your Honor, these -- I would like these documents -- these exhibits admitted into evidence.

THE COURT: Well, you've only referenced --

MR. RAY: 1.

THE COURT: -- Exhibit 1 right now. Is that all you're offering?

MR. RAY: Yeah, I'm offering at this time.

THE COURT: All right.

Any objection?

MS. EDGAR: No objection.

THE COURT: 1 is received.

(Exhibit 1 admitted.)

REDIRECT EXAMINATION

BY MR. RAY:

Q. Back to the same document. Is this document a detainer filed against me?

A. This --

Q. No, let me finish my question before you answer this. Sorry about that.

Is this a detainer filed by the Department of Corrections against me with the federal government?

MS. EDGAR: Objection, relevance.

THE COURT: Overruled.

THE WITNESS: It's -- it's an arrest hold. It's not -- I wouldn't see it as a detainer. Again, I don't see any supporting documentation and -- other than a case number, so this is just an arrest hold.

BY MR. RAY:

Q. Okay. So it's not -- what you're saying is it's not a detainer, it's to hold me filed with the federal government once I was in their custody?

A. This is a hold for the state offense.

Q. Okay. The next question. Was this document transmitted to the government as a detainer, to the federal government as a detainer?

MS. EDGAR: Objection, foundation, relevance.

THE COURT: As to relevance, I overrule. As to foundation, the witness can answer if he has any knowledge.

THE WITNESS: I don't know any that this -- by the government, you mean, the federal government?

BY MR. RAY:

Q. I'll rephrase the question. My question is, is the document in front of you the type of document that would be used to file a detainer against me while I'm in the federal

government's custody from the state?

A. I don't really know that this document would meet the criteria of some sort of legal documentation in order to file a detainer. I don't think that it would.

Q. You stated on cross-examination that you never actually viewed this document, even though it was an e-mail transmission; is that correct?

A. Yes, I did say that.

Q. Okay. Do you know where any of this information came from?

A. Again, I don't know where the information came from. Again, I would -- supervising officer completed the form, so . . .

Q. So you don't know if the detainer operations had anything to do with this transmission or not?

A. I do not.

Q. So this could have been transmitted from them to you with this information in it; is that correct?

A. This is a form that is an internal electronic thing. I don't believe detainer operations over -- it's just for people that have access to it, and I don't think detainer operations has access to this system.

Q. Okay. Who is -- when a violation of this sort or a regress of this sort happens, whose job is it to notify the department -- the detainer operations?

MS. EDGAR: Objection, foundation.

THE COURT: The witness can answer if he knows.

THE WITNESS: It would not be -- if there was a detainer -- again, I would assume that whoever the originating organization or agency would be would file whatever documentation they need to detainer operations.

BY MR. RAY:

Q. Okay. Thank you.

Okay. In light of extreme measures taken, based on this -- the description, based on the allegations described in this document, who actually authorizes the removal?

A. It would be a process where a determination would be made, and it would be a joint thing between the community corrections program that -- if it was a new charge, it's kind of standard practice that the person would be removed from community corrections.

Q. A joint effort with who?

A. It would be with community corrections program.

Q. And --

A. If it was for, like, technical violations and that sort of stuff.

Q. Right. So I ask you again, on its face -- this document on its face and the procedures that are described that this document says it's taking, are they consistent with a detainer being lodged against someone who is serving a sentence in a community corrections facility?

A. I don't know that it would be consistent. Again, it could be a possibility, or -- but, again, unless paperwork is submitted with detainer operations.

Q. Thank you. Are there any other violations that require this particular sanction?

A. As far as?

Q. Removal.

A. Removal from community corrections?

Q. Yeah.

A. There is a number of them.

Q. Well, let me -- well, pursuant -- are there any other violations that -- give me a second.

Are you saying that the special instructions that are given here are not consistent with the justification?

A. I'm not saying that at all. Again, I didn't complete the form, so I can't really tell you --

Q. Okay --

A. -- what the person put in special instructions or justification.

Q. Okay. You are familiar with the procedure for -- well, you actually explained already the procedure for someone with pending charges, that they can't reside, and there is a state statute.

Okay. So if you already know that there is a state statute for people with pending charges not to remain in the

facility, my question is, again, are there special instructions consistent with the justification?

A. Again, I would say, yes, that persons that are being placed in custody and regressed based on charges and not eligible for community corrections.

MR. RAY: Thank you, Mr. Yurky. No further questions.

THE COURT: Thank you.

Can this witness step down and be excused?

MR. RAY: Yes. Sorry.

THE COURT: Thank you.

MS. EDGAR: No further questions, Your Honor. Thank you.

THE COURT: Thank you, sir. You may step down. You are excused.

Mr. Ray, please call your next witness.

MR. RAY: Yes, I'm going to call Louis Zorn. Sorry, apologize.

Call Louis Zorn.

THE COURT: Thank you.

Please step up and be sworn.

(**LOUIS ZORN, DEFENDANT'S WITNESS, SWORN**)

COURTROOM DEPUTY: Please be seated.

Please state your name and spell your first and last name for the record.

THE WITNESS: Louis Zorn, L-O-U-I-S, Z-O-R-N.

THE COURT: You may proceed.

DIRECT EXAMINATION

BY MR. RAY:

Q. Good afternoon, Mr. Zorn.

A. Hi.

Q. Could you describe your position and employment.

A. I'm currently a community parole manager with the Colorado Department of Corrections. I basically supervise officers and team leaders that are assigned to my team.

Q. Thank you. Do you have an exhibit in front of you labeled Exhibit 1? I'll give you time to look at it.

A. Yeah, it's a regular hold slip.

Q. Are you familiar with this document?

A. I'm -- not this one in particular; but I'm familiar with the form itself, yeah.

Q. All right. The format?

A. Yeah.

Q. Okay. Thank you. And I'm going to give you a chance to read over this. My question is, the special instructions, are they consistent with the justification at the bottom of this document, to authorize the removal of a person housed at that community corrections facility?

MS. EDGAR: Object to the foundation, Your Honor.

MR. RAY: I'll withdraw the question.

THE COURT: Thank you.

MR. RAY: I'll withdraw the question.

BY MR. RAY:

Q. And ask you another question. Do you know what a detainer is?

A. It's, basically, something to hold another body that somebody has interest in.

Q. Okay. All right. Does this document reflect that a detainer -- in your opinion that a detainer has been lodged against a person and the actions being taken as a result of that?

MS. EDGAR: Object, Your Honor. His opinion is not relevant.

THE COURT: I sustain that.

MS. EDGAR: Okay.

BY MR. RAY:

Q. Have you ever -- your signature -- is this your signature at the bottom of this form?

A. It's an electronic version. We signed these back in -- probably about nine years ago.

Q. Okay.

A. So, basically, the officer, when they do a hold, it's automatically in the chain of command. Our names automatically go on the hold.

Q. Okay. Are the special instructions consistent with the justification?

A. Repeat that, again.
Q. Are the special instructions, place in Denver County Jail for regress to DOC, felony detainer, feds, community corrections violation, is this -- are these special instructions consistent with the justification, felony charges from federal government detainer, no longer eligible for community corrections? Do they attach that?
Okay. I'll rephrase the question. Is the instructions --
A. That are on the top?
Q. Right. The instructions on the top, are they -- are these actions taken based on the justification?
A. I'm not the one that wrote it, so I'm not really sure what the intent was from the special instructions and justifications, because I'm not the one that typed it in.
Q. Okay. On its face, does this document appear to be accurate and -- in its form and description as it describes the -- as it describes the information involved?
MS. EDGAR: Objection to the foundation.
THE COURT: Sustained. I understand that objection not to be generally foundation, but that this witness has no personal knowledge of the contents or the drafting of this document; is that right?
MS. EDGAR: That's correct, Your Honor.
THE COURT: Okay. I sustain it.

MR. RAY: Okay.

BY MR. RAY:

Q. Mr. Zorn, can you explain the special instructions.

A. Can I explain what the officer wrote on this?

Q. Yes. Can you explain.

A. Looks like he's typed in the code for Denver County Jail for regress back to the Department of Corrections. It says, felony detainer, feds. I can't explain what he wrote or why he wrote. I know the purposes of the hold are to hold somebody in a local county jail in Colorado for the Department of Corrections.

Q. Okay. Can you explain the justification portion?

A. I can't explain it, but I can read it to you.

Q. That's not necessary. Is this the first time your name has ever appeared on a document of this sort?

A. No, they happen all the time. Like I said, if an officer puts a hold in a Denver County -- in a Colorado county jail to hold the body for the purposes of either parole hearing or community corrections hearing, once the officer clicks on a drop-down box that has their name, automatically, whoever is in their chain of command, their names automatically populate for that, to show that someone above them -- that they have a chain of command. But me, myself, when I get these, 99 percent of these are in my e-mail because they really have no bearing on what I do every day. It's the officer's responsibility.

The only time I really get involved is if there is an issue as far as payment to the county jail. Me, as the manager, authorize payment to the county jail. That's the only time I really get involved with holds.

Q. At the time -- this document was created April 23, 2014, you were an actual manager?

A. Yes, I've been a manager for probably seven years, somewhere around there.

Q. And Mr. Yurky was your immediate supervisor?

A. I'm his supervisor.

Q. Okay.

A. So it goes, officer, team leader, supervisor, manager.

Q. Okay. Thank you.

No further questions.

A. Okay.

THE COURT: Cross-examination.

CROSS-EXAMINATION

BY MS. EDGAR:

Q. Mr. Zorn, to your knowledge, did the Department of Corrections have a process for dealing with federal detainers received from the federal government?

A. Department of Corrections as a whole?

Q. Or any office that you've worked with.

A. If we receive -- if an offender, if they're on parole or community corrections, if we have information that someone has

a vested interest in the body, whether that's warrant or detainer, if it's an active warrant out there under our supervision or office, we would place them in custody. We would place them in the local county jail based on that federal warrant. If they're already in custody, vis-a-vis, inmate status in a halfway house, if they're out on a pass, we would call them back from pass, back to the halfway house, we would place them in custody once they returned to the halfway house.

If we didn't think they were going to show up at halfway house, we would go to their employment, place them in custody, and put them in the local county jail.

Q. And that is any time that you learn there is a felony charge pending, correct?

A. If it's community corrections, it's any charge, even if it's a misdemeanor.

Q. But no matter how you would learn of that, you would do that because they're not eligible for community corrections if they have pending charges.

A. Whether it's municipal, county, state, federal, under our guidelines and our policies and procedures, they cannot be in a halfway house if they have pending charges from somewhere else. So it's not that they violated anything, but they cannot be in community corrections with pending charges.

Q. That's regardless of whether or not a federal detainer as a legal notice has been received?

A. Right. If we just know that there is a warrant of any kind, we're going to put them in custody.

Q. You do it of your own volition?

A. Absolutely.

Q. Have you ever interacted with detainer operations at headquarters?

A. No, not --

Q. You don't --

A. Other than, they'll call us. We'll have somebody in a halfway house or that just paroled, and they'll say, hey, this offender just got out, what type of offender he is, whether inmate or parolee, and they've located a warrant that wasn't processed before he was moved. And they would say, put him in custody. And we would just go get them and put them in the local county jail.

MS. EDGAR: Okay.

THE COURT: Redirect?

MR. RAY: Yes.

REDIRECT EXAMINATION

BY MR. RAY:

Q. Could you tell me, Mr. Zorn, how are those notifications received, any notification, like you said --

A. In general, if the Department of Corrections gets it, they usually get in their department. And that will usually be an e-mail. If we haven't seen the e-mail or if we're in training,

one was created, then phone calls start coming in, like, hey, Mr. Zorn, whoever is in charge, we've discovered there is a warrant for this body to be arrested, whether it's an inmate, an parolee. If it's an inmate, we talk to the residential liaison, like Gary Pacheco at that time was a residential officer. We contact the officer, say, someone is in your halfway house, they have a warrant for their arrest that was discovered, put them in custody as soon as possible. If it's an ISP-status prisoner, someone at home on an ankle bracelet, we would contact that division. If it's a parolee, then we would contact the parole officer.

So depending on what facet, as far as caseload, that officer or that team would be contacted, be it their supervisor or myself, those being the field officer for those in custody. Once they were in custody, they would put a parole hold on them so they can't bond out.

Q. Okay. So, basically, no matter how you're notified of pending charges, these actions take place, no matter how the notification occurs?

A. Well, there is variables to everything, depending on, was an officer there, was there someone else, were we the ones who arrested them, did someone else arrest them? They may have a warrant for their arrest, but let's say they're in a Denver halfway house and the warrant is out of Denver, so we didn't see it, it's a Denver charge only, Denver PD may be the ones

that actually arrest him. We're notified after the fact that he's in custody and we'll put our hold on. So if a local jurisdiction arrests somebody before we're -- before we place them in custody, all we do is place the hold.

Q. Right.

Does this document, Defendant's Exhibit 1, is it -- is this -- can this also -- is this a detainer filed by Department of Corrections?

A. No, this is a hold. This says, hold the body for us.

Q. Okay.

A. There is some vested interest in this person. And then you sort out why they're on hold, if they need to be released.

Q. And this is intercommunicating within the Department of Corrections only. This doesn't go out to anyone claiming that this is the detainer to hold Mr. Ray?

A. This strictly goes between us and the county jail that they're holding him. So it's -- in this scenario, it's Denver County Jail. So whenever the body gets to Denver County Jail, this tells Denver, don't let this person bond out. We have a vested interest in them.

Q. Right. Okay. Would this document ever be used once I'm in federal custody as a detainer to hold me here?

MS. EDGAR: Objection, relevance, Your Honor.

THE COURT: Sustained.

BY MR. RAY:

Q. Like you said, this is a hold, this is not a Department of Corrections detainer?

A. This is a hold slip, depending on what box is checked. In this scenario, if it's a parolee, we check the parolee box. If it's an inmate, we check the community corrections box. If it's YOS, we check the YOS box. Basically, just tells the jail, hey, he's coming into your custody or they're already in your custody, hold him, we have a vested interest, until we decide what to do with them. In this scenario, since it was from a halfway house, we say, hold them in custody until that person was regressed or get back in the Department of Corrections.

Q. Thank you. I would like you to look at Defendant's Exhibit 2.

If you could flip that first page, and it will show a mittimus. Are you familiar with that document?

A. I don't think it's a mittimus. I think it's a printout of a computer screen, but --

Q. What's the top line say?

A. CJIS query, view archive mittimus, dat, for date, it says 4/22/15, page 1.

Q. If a person who has not been paroled and they're serving a sentence in community corrections, are they serving a term of imprisonment?

A. If a person has not been paroled --

Q. But has been allowed to --

A. -- go to community corrections?

Q. Yes. Is he -- is he still serving --

A. The --

Q. -- a term of imprisonment under DOC?

A. Yeah, they'd still be on DOC time, DOC inmate instead of in Department of Corrections, doing their time in a halfway house.

MR. RAY: Thank you. That's all my questions.

THE COURT: Any cross-examination?

MS. EDGAR: I have one question, Your Honor.

RECROSS-EXAMINATION

BY MS. EDGAR:

Q. Just to clarify, you stated that this form, which is Defendant's Exhibit 1, can be created after someone is taken into custody by another authority.

A. Yeah, it's either -- we sent --

Q. Yes or no?

A. Yes.

MS. EDGAR: Thank you.

THE COURT: Can this witness step down and be excused?

MR. RAY: Yes.

MS. EDGAR: Yes, thank you.

THE COURT: Thank you, sir. You may step down. You are excused.

Would you please call your next witness.

MR. RAY: I'd like to call Pamela Dash.

THE COURT: Please step up and be sworn.

(**PAMELA DASH, DEFENDANT'S WITNESS, SWORN**)

COURTROOM DEPUTY: Please be seated.

Please state your name and spell your first and last name for the record.?

THE WITNESS: Pamela J. Dash, P-A-M-E-L-A, Dash, D-A-S-H.

THE COURT: You may proceed.

DIRECT EXAMINATION

BY MR. RAY:

Q. Good afternoon, Ms. Dash.

A. Hi.

Q. Could you state your occupation and place of employment.

A. I work for the Colorado Department of Corrections, and I am the court services detainer operations supervisor.

Q. Thank you. In front of you is Defendant's Exhibit 2. It might be stapled together, but if you have a separate copy, I would like you to pick that up. Have you got it?

A. Yes.

Q. Are you familiar with this particular document?

A. I'm familiar with three pages of it.

Q. Okay. And what pages are those?

A. The second page, third, and fourth.

Q. And that is your cover letter and a copy of the mittimus?

A. Correct.

Q. Thank you. This document states on April 22, 2014, that you lodged a detainer with the federal government.

A. Correct.

Q. Is this your first -- is this -- how many detainers have you filed besides this one?

A. Gee, I can -- I really cannot count how many.

Q. I was --

A. Myself or, you mean, in general --

Q. On yourself.

A. I --

THE COURT: Wait a minute, folks. We cannot have two people talking at the same time. And that's not because we don't want to hear from you, it's because we do want to hear from you. And our court reporter cannot transcribe two people at the same time. Would you please wait until the other person has finished talking before you speak.

Mr. Ray.

BY MR. RAY:

Q. Okay. I was referring to myself.

A. Oh, no, this was the first detainer I placed on you.

Q. Okay. Could you explain to the Court the requirements for removing a person for -- a prisoner serving a sentence, what the requirements before they can be removed, by another jurisdiction.

A. Well, in what context? Are you meaning from a prison or community corrections?

Q. Okay. Do you remember on April 23 I contacted you via my federal detention counselor?

A. I do not.

Q. Don't remember that?

A. I receive many calls a day.

Q. Okay. Then I'm going to ask you a question in a different way.

When a person is serving a sentence, term of imprisonment, with DOC, and they have pending charges, and someone wants to remove them from any facility while they're serving a term of imprisonment, is a writ of *habeas corpus ad prosequendum* needed or required to removal?

MS. EDGAR: Objection, Your Honor. The witness is not an attorney, and he hasn't laid a foundation with respect to personal knowledge to answer this question.

THE COURT: Thank you. I sustain the objection. This witness has to have personal knowledge of the area in which you're inquiring.

Please direct a question to her that asks her personal knowledge.

BY MR. RAY:

Q. Do you have personal knowledge of what documents are required before a person can be removed from Department of

Corrections?

A. From a prison, it would be a writ.

Q. Okay. And from community corrections?

A. I am not community corrections. I handle the processes in DOC facilities. So, meaning, if you were incarcerated in one of our prisons, then that's where I handle that process. And within that process, it would be a writ of *habeas corpus*.

Q. Okay. Is there a writ on file?

A. I do not have one, no.

Q. For me?

A. I do not have a writ.

Q. Does this mittimus in front of you show that I'm still serving a term of imprisonment -- let me rephrase the question. Does this mittimus show that I was serving a term of imprisonment the day I was taken? On April 22, 2014, was I an active -- was I actively serving a term of imprisonment?

A. Yes.

MR. RAY: Thank you. No further questions.

THE COURT: Thank you.

Cross-examination.

CROSS-EXAMINATION

BY MS. EDGAR:

Q. Ms. Dash, how were you employed in April of 2014?

A. How was I employed?

Q. Yes.

A. I am the court services detainer operations supervisor at the time.

Q. What were your responsibilities with respect to detainer operations in April of it 2014?

A. The placement of detainers that are received from law enforcement agencies.

Q. Okay. Would any detainer that is received by the state of Colorado from the federal government come to you?

A. Yes.

Q. And are you responsible for maintaining all records of any detainers that do come to you?

A. Yes.

Q. Tell me, once a detainer is received by your office -- walk me through what you would do with a federal detainer that is received on an untried charge?

A. First, I would, obviously, look over the documents that were sent to me, which consist of a cover letter, stating -- from the local law enforcement agency, as well as usually a copy of a warrant or complaint and charges. I also verify a name, a date of birth, case number, and charges. Once those -- that's the information I need.

Q. Okay. And what do you do with that information?

A. From there, I look over the documentation, I make sure that it -- it is one of our offenders within our system, meaning, according to name and DOC number, date of birth. I look at the

paperwork to determine if it is a tried charge or untried charge in order to place the detainer correctly.

Q. Okay. Do you enter any of this information into a system?

A. Yes.

Q. What system do you use?

A. It is called our DCIS program. It's a main program within Department of Corrections.

Q. Is that a system that you use on a regular basis?

A. Yes, daily.

Q. It's maintained by the Department of Corrections?

A. Yes.

Q. You said you would associate the detainer with an individual. Do you look them up by name, how do you look them up?

A. By name and date of birth.

Q. What information do you enter into the system?

A. Their last name, first name, and D.O.B.

Q. Do you record any information to indicate that a detainer has been received?

A. Yes.

Q. And then once that information is entered, is there a subsequent process that you complete under the -- the Interstate Agreement on Detainers Act?

A. Yes. In determining if it's a case that has not been tried, then -- if it's an untried case, then that allows us to

enter the detainer as untried, and then from there, we are able to generate the IAD forms, which are then given to the offender to be notified and be given information to request final disposition.

Q. Is there a query that you can run in the DCIS system to determine whether there is a detainer for an offender?

A. Yes.

Q. What is that query?

A. It's our query detainer screen, which lists detainers -- lists all detainers on the offender.

Q. Did you run a query of the defendant, Austin Ray?

A. Yes.

Q. How did you run it?

A. By his name.

Q. Okay.

A. Yes, by his name.

Q. And is there -- how many Austin Rays were returned from that query?

A. One.

Q. And does that query show any federal detainers filed against Austin Ray?

A. It does not.

Q. In addition to the DCIS system, is there anywhere else within your office that a record of a detainer received would be kept?

A. No.

Q. Do you keep any hard copy files of the paperwork that you receive?

A. I do, yes.

Q. Okay. So you mentioned before, like, the cover letter, the paperwork, the arrest warrant, you keep copies of those things?

A. We do, yes.

Q. Are those kept in your office?

A. Yes.

Q. How are those files organized?

A. By alphabetical order, by last name.

Q. Do you maintain those files in the regular course of your business?

A. I do, yes.

Q. Did you check those files to see if you had any detainer paperwork for Austin Ray?

A. Yes.

Q. Is there any?

A. There is not.

Q. Is there anywhere in your records any paperwork that was completed under the IADA that you mentioned, such as the notice to the offender of their rights under that act?

A. No.

MS. EDGAR: No further questions.

THE COURT: Thank you.

Redirect.

REDIRECT EXAMINATION

BY MR. RAY:

Q. I'd like you to look at Defendant's Exhibit 1.

Now, are you the one that actually files detainers -- you actually filed the detainer that you filed on April 22, 2014, that detainer was filed by you?

A. Yes.

Q. Okay. This Exhibit 1, is this another form of detainer that -- or is this a detainer that would be filed by you also?

A. No.

Q. Your office, is that -- does this document -- have you ever seen this document prior to today?

A. No.

Q. So is this -- have you ever seen a document like this?

A. I have not.

Q. Does this document -- in reading -- I want you to read this document and just go over the special instructions and justification. Let me know when you're done.

A. I'm done.

Q. Okay. During your course of employment, has every single notification for pending charges, has every single one came through your office?

A. No.

Q. So they can come from all sorts of different avenues?

A. It needs to come from a law enforcement agency.
Q. Thank you. So it doesn't necessarily have to come from that law enforcement agency straight to your department?
A. It does. The law enforcement agency needs to have -- directs the paperwork directly to my office.
Q. I understand. Are they required to notify -- this is another -- I mean, in reading this document, does it reflect a detainer has been filed?
A. No.
Q. Under "justification," can you read that out loud.
A. "Felony charges from federal government detainer, no longer eligible for community corrections related to tax theft."
Q. Okay. This is not the normal routine -- routine way that a notification is filed?
A. Notification or detainer, because this would not --
Q. I'm talking about a notification.
A. Not to me, no.
Q. Okay. Is there a difference to you between a detainer and a notification?
A. Yes.
Q. Could you tell us that difference.
A. A notification is strictly, an agency wants to be notified. A detainer is an actual hold in place, with the correct documentation, in my office.
Q. So a detainer has to be filed with you --

A. Yes, it does.

Q. But a notification -- law enforcement can notify anyone in Department of Corrections of pending charges?

A. Uh-huh.

Q. Okay. They don't necessarily have to go through you unless there is a detainer?

A. If they want to place a detainer, yes.

Q. They have to go through you?

A. Yes. And submit the correct documentation.

Q. Okay. As you said before, this is not a detainer filed by you.

A. No.

Q. And the one you filed on April 22, 2014 was the first time you ever filed a detainer for me?

A. For you, yes.

MR. RAY: Thank you very much. No further questions.

THE COURT: Thank you. Can the witness step down and be excused?

MS. EDGAR: Yes, Your Honor.

THE COURT: Thank you, ma'am. You may step down. You are excused.

We'll take a brief recess, ten-minutes. The court clock is showing five minutes before 3:00. Please be ready to convene at five minutes after the hour.

We'll stand in recess until then.

(Recess at 2:55 p.m.)

(In open court at 3:07 p.m.)

Please call your next witness.

MR. RAY: Gary Pacheco.

THE COURT: Would you stand, please.

MR. RAY: Gary Pacheco.

THE COURT: Thank you.

(**GARY PACHECO, DEFENDANT'S WITNESS, SWORN**)

COURTROOM DEPUTY: Please be seated.

Please state your name and spell your first and last name for the record.

THE WITNESS: Gary Pacheco, first name G-A-R-Y, last name P-A-C-H-E-C-O.

THE COURT: You may proceed.

DIRECT EXAMINATION

BY MR. RAY:

Q. Good afternoon, Mr. Pacheco.

A. Hello.

Q. Could you state your occupation and place of employment, please.

A. Yes. I'm a parole officer for the Department of Corrections.

Q. Okay. Are you also -- are you still parole liaison for community corrections?

A. I am.

Q. In fact, are you still parole liaison for the Dahlia, CMI Dahlia, or just overall?
A. Not any longer. I have a regular parole caseload now.
Q. Okay. Thank you.
I would like you to look at Defendant's Exhibit 1, right there to your left. Are you familiar with this document?
A. I am.
Q. Did you create this document?
A. I wouldn't say I created it. It's already in our computer system. The only thing that I did was get access to it and fill it out.
Q. Okay. What portions of this document did you fill out?
A. I filled out the arrest date and where it says, sheriff, Denver.
Q. Right.
A. I filled that out, Denver County Jail, and then that is a dropbox, Denver County Jail, under the special instructions, I put that in there, and --
Q. Did you type that in there, or was that a dropbox input type situation?
A. It's a type in.
Q. So you typed this information in?
A. Yeah.
Q. Could you read what you typed for the Court, please.
A. Place in Denver County Jail for regressed DOC felony

detainer, feds, community corrections residential violations.

Q. When were you notified of the pending charges for this felony detainer?

A. Well, I wasn't notified of the felony detainer. I was notified of pending felony charges.

Q. Thank you. Who -- who did you talk to?

A. I believe the lady's name was Arlita Moon.

Q. You just talked to her?

A. Yes, over the telephone.

Q. She informed you that there was pending felony charges?

A. She said that there was going to be pending felony charges, uh-huh.

Q. Thank you. Let's move down the document. Anything else you inputted?

A. The names on the bottom, I did that. And then where it says felony, I put that case, because that's what the case number was, the 14-cr-00147.

Q. Okay. Who gave you that case number?

A. I can't honestly say. I've talked to Arlita Moon. She's mostly the person I did talk to.

Q. Have you ever met her?

A. I never have.

Q. Okay. So -- but the case number was given to you by someone from -- you talked to someone to get that particular information, the case number?

A. Yes.
Q. Thank you. I see there is a -- well, you can continue. I'll let you continue on the inputs that you input.
A. Then down at the bottom, where it is a dropbox, I input Mark Yurky, and the same thing with Lou Zorn. Where it says justification --
Q. Right.
A. That is a free type also.
Q. Under justification, you typed that information in?
A. I did type that in.
Q. Could you read that for the Court, please.
A. It says "felony charges from the federal government," and then "detainer, no longer eligible for community corrections related to tax theft."
Q. And based on all of this information that you included in this document, this required me to be moved from community corrections based on a detainer being lodged?
A. No --
Q. Or notification?
A. No, not on the detainer. Based on the felony -- new felony charges.
Q. Okay.
A. It makes you no longer eligible for community corrections.
Q. Okay. And these felony charges, you just stated you were informed by an Arlita Moon via telephone concerning these

pending charges?
A. Yeah, that that would be what the pending charges were, yes, or that was the case number.
Q. Okay. Do you see any mistakes that you might have made on this document in reference to the information you received from Arlita Moon?
A. No, but I do see a mistake that I did make. It states here, date of arrest, towards the top.
Q. Right.
A. 4/25/14. Actually, the date of arrest was the date that I generated -- did this document, on 4/23 of '14.
Q. Thank you very much, sir. Noted.
After this document was created, were you ever contacted by anyone from the federal government concerning the accuracy of this document prior to October 5, when you talked to the U.S. attorney?
A. No.
Q. So for the last 18 months, basically, no one has had a problem with this document, as far as you know?
A. As far as I know, yes.
Q. At the time you created this document, did you believe the information that you put in here was true?
A. I believed that there was new felony charges, that's what I believed to be true. That's the only thing that I knew about --

Q. Right.
A. -- I wouldn't know about anything else.
Q. I understand. Thank you.
Couple more questions. I did ask you a question -- you don't know the exact date you talked to Arlita Moon?
A. No, I don't. That was probably two or three different times that we talked, maybe.
Q. All right.
A. At the most.
Q. Was -- okay. All right. That's fine. I'm not going to -- it's been a long time, it's been about 18 months, so I'm not going to push you for an exact date at this time.
You created this document. Can this document also be considered as a detainer?
A. No.
Q. In any way?
A. No.
Q. Thank you.
And I see on this document under special instructions, you say that it's a felony detainer, feds. Then below under justification, federal government detainer. So you were pretty sure about what you heard that day?
A. Well, no, I put -- when they told me they were -- that you would be arrested on new criminal charges and I knew the agency that it was coming out of, I just put, place in Denver County

Jail for regress to DOC, felony charges. I did see where I put felony detainer, but I would have no knowledge that there was a detainer. That was probably wrong use of words on my part, because I wouldn't have any idea about that. I knew there were new felony charges, and that was all.

Q. Okay. Prior -- okay. Thank you. Did you ever review this document before submitting it for the removal of myself? Did you ever review it for any mistakes? Did you review it --

A. I --

Q. -- and note these mistakes that you're noting now? Did you note those mistakes prior to submitting this document for processing?

A. I didn't.

Q. Okay. I understand. Thank you.

So at the time you submitted the documents, you were fine with what it represented?

A. Well, what it represents is just keeping you in custody in whichever facility or whatever jurisdiction you're in, be it Denver County Jail or wherever, keep you in custody until they're through with their process, and then we would get you back. It allows you not to be released into -- back to society.

Q. Okay.

No further questions.

THE COURT: Thank you.

Cross-examination.

MS. EDGAR: Thank you.

CROSS-EXAMINATION

BY MS. EDGAR:

Q. Sir, you created this form on April 23, 2014, correct?

A. That's correct.

Q. And Mr. Ray was arrested on April 22, 2014, correct?

A. Yes. I believe to the best of my knowledge, yes.

Q. So this was created the day after he was arrested?

A. Yes.

Q. Okay. And you created the information in the special instructions box, correct?

A. That is correct.

Q. Did the words "felony detainer" ever come out of Arlita Moon's mouth?

A. No, that didn't. Again, that was probably a bad choice of word on my part.

Q. Did any federal agent ever tell you what to do with Mr. Ray?

A. No.

Q. Did, in fact, Arlita Moon inform you that she was going to arrest Mr. Ray?

A. They said that they were going to take him into custody, yes.

Q. The purpose of this form, so that -- when he does come

back, for example, to the Denver County Sheriff's Department, he's not allowed to go to community corrections because he's not permitted to be there because he has felony charges pending?

A. That was correct.

Q. If you're in community corrections, you're not permitted to have any type of charges pending, be they felony or misdemeanor, correct?

A. That's correct.

Q. And that doesn't matter whether or not a federal detainer has been filed, correct?

A. That's correct.

Q. And the -- the citation to the C.R.S. 17-27-1046, does that indicate that having felony charges pending is in fact a separate violation of Mr. Ray's rules for being in community corrections?

A. It is. It's a statute that covers corrections violations that we have.

Q. Is that the basis for holding him under here, he's being held for community corrections residential violations pursuant to 17-27-1046?

A. Yes, and the violation would be for a new felony. That's -- that would be the only thing that it's for. I might -- could you rephrase that again, please? I don't know if I --

Q. That's fine. I think you answered the question. Did anyone ever provide you a copy of the Indictment in this case?

A. No.

Q. Did you ever receive a copy of the arrest warrant?

A. No.

MS. EDGAR: No further questions.

THE COURT: Redirect.

REDIRECT EXAMINATION

BY MR. RAY:

Q. Taking you back to the phone call that you -- that you testified that you received from Arlita Moon. You say that she didn't say federal detainer. You didn't -- is that what you said, that she did not say federal detainer?

A. She did not say federal detainer. She said new felony charges.

Q. New felony charges or new felony pending charges?

A. Pending charges, yeah.

Q. Pending charges, so -- okay. So she did notify you of felony pending charges?

A. Well, I think felony pending charges and felony charges --

Q. It's the same thing?

A. I would think it's kind of the same thing.

Q. Okay. I just want to clarify. I'd like you to clarify. You said earlier that it was felony pending charges. If that's what you said earlier, then I have no problem with you

repeating what you said earlier. I'm just getting some clarification.

So the phone call that you received from Arlita Moon, did she notify you in that phone call of felony pending charges?

A. Yes, she did say that there were new charges coming, and that's why they wanted to take you into custody. And that made you ineligible for community corrections.

MR. RAY: Thank you very much.

THE WITNESS: So I did my process.

MR. RAY: Thank you.

No further questions, Your Honor, on that.

THE COURT: Thank you. Can this witness step down and be excused?

MR. RAY: I said I was done. Yes.

THE COURT: All right.

Can the witness step down and be excused?

MS. EDGAR: Yes, thank you.

THE COURT: Thank you, sir. You may step down, and you are excused.

Mr. Ray, your next witness.

MR. RAY: I have no further witnesses, Your Honor.

THE COURT: Thank you.

Did you want to offer any exhibit other than Exhibit 1?

MR. RAY: Yes. I wanted to offer Exhibit -- I wanted to offer Exhibit 2, and I forgot.

THE COURT: Any objection?

MS. EDGAR: Your Honor, it's irrelevant.

THE COURT: I'll receive it.

(Exhibit 2 admitted.)

For the Government.

MS. EDGAR: Your Honor, we have one witness, Special Agent Mike Quiegert.

THE COURT: Please step up and be sworn.

(**MICHAEL QUIEGERT, GOVERNMENT'S WITNESS, SWORN**)

COURTROOM DEPUTY: Please be seated.

Please state your name and spell your first and last name for the record.

THE WITNESS: First name is Michael, M-I-C-H-A-E-L, last name Quiegert, Q-U-I-E-G-E-R-T.

THE COURT: You may proceed.

MS. EDGAR: Thank you.

DIRECT EXAMINATION

BY MS. EDGAR:

Q. Sir, how are you employed?

A. I'm a special agent with IRS criminal investigation here in Denver.

Q. Were you so employed in April of 2014?

A. I was.

Q. Are part of your duties as a special agent with the IRS to arrest individuals?

A. Yes.

Q. Have you encountered an individual, the defendant in this case, Austin Ray, before?

A. I have.

Q. Under what circumstances?

A. I arrested him.

Q. On what date did you arrest him?

A. I believe it was April 22, 2014.

Q. What authority did you use to arrest him?

A. There was a federal arrest warrant.

Q. Could you take a look at Government Exhibit 1. It should be in front of you in the binder.

A. Yes.

Q. Do you recognize that document?

A. I do.

Q. What is it?

A. This is the federal arrest warrant that I arrested him on.

MS. EDGAR: Move to admit Government Exhibit 1.

THE COURT: Any objection?

MR. RAY: No objection, Your Honor.

THE COURT: Exhibit 1 is received.

(Exhibit 1 admitted.)

BY MR. RAY:

Q. Sir, did you file a detainer against Mr. Ray?

A. I did not.

Q. Have you ever filed a detainer before?

A. I have not.

MS. EDGAR: No further questions.

THE COURT: Thank you.

Cross-examination.

MR. RAY: Yes.

CROSS-EXAMINATION

BY MR. RAY:

Q. Could you repeat your name. I --

A. First name is Michael, last name is Quiegert.

Q. How are you doing, sir?

A. Good.

Q. Okay. Have you had a chance to look at the arrest warrant?

A. I have, yes.

Q. And did you call the facility prior to coming to the facility to arrest me?

A. I'm not certain whether I did or not, or whether the information that you were at the facility was communicated to me beforehand.

Q. Okay. Did you have the arrest warrant with you?

A. I did.

Q. Was this arrest warrant presented to anyone at the facility -- at the facility like -- I'm going to back up one

second. Did you present this document, the arrest warrant, to any supervisor or anyone that was managing or managing director of that facility prior to actually taking me into custody?

A. Not that I recall, no.

Q. Okay. I take you back to April 22, all right, 2014. I was there -- sorry, no pun intended. I saw, I don't know, six to eight of you guys walk all the way back to the -- and follow me all the way back to the director's office. And then the facility was locked down, all inmates were sent to their living quarters, and then --

MS. EDGAR: Objection, Your Honor. Is this a question?

MR. RAY: Well, I'm trying to -- go ahead. I'm sorry.

THE COURT: You need to ask a question. You can't tell a story.

MR. RAY: Okay.

BY MR. RAY:

Q. Who was this document presented to prior to arresting me?

A. Nobody.

Q. So are you saying you just walked into the facility and effectuated an arrest without any cooperation of anyone in the facility?

A. I didn't say there wasn't cooperation. I said I didn't speak to anybody that I recall.

Q. Okay. Who had possession of the arrest warrant at the

time?

A. I had a copy of it.

Q. Okay. You didn't show it to anyone?

A. Not that I recall, no.

Q. Okay. Did you have a writ of *habeas corpus* with you?

A. No.

Q. At the time. Do you know what a writ of *habeas corpus* is?

A. No.

Q. That's fine.

MR. RAY: That's all my questions. Thank you.

I'm done.

THE COURT: Thank you.

Redirect?

MS. EDGAR: No, thank you.

THE COURT: Okay.

Can this witness step down, be excused?

MS. EDGAR: Yes, from the Government.

MR. RAY: No, Your Honor. I have one more question, if I may.

THE COURT: Any objection?

MS. EDGAR: No.

THE COURT: Okay.

BY MR. RAY:

Q. This -- back to the arrest warrant. Was this document ever faxed to anyone or -- prior to you coming to the facility, what

notification did you give the facility before you showed up?

A. Well, again, I don't know whether I communicated with the facility, I just don't recall, or if they had already been communicated with prior to my arrival there. They had been communicated with, I just don't recall whether it was myself or another special agent.

Q. Prior to the arrest?

A. Yes.

Q. Communicated with as to this arrest warrant?

A. Yes.

Q. And looking at this arrest warrant, does this state the charges?

A. It does.

Q. Does it have a case number on there?

A. It does.

Q. Does it have my name on there?

A. It says Austin Ray.

Q. So, basically, you actually notified -- they were actually notified before you arrived?

A. They knew I was coming. I don't recall, again, whether that was myself that notified them or another special agent.

Q. They knew you were coming, okay. Did you tell them you were bringing an arrest warrant -- did anybody warn that an arrest warrant was to follow?

A. I don't know.

MR. RAY: Thank you very much.

No further questions. Your Honor.

THE COURT: Do you care to follow up?

REDIRECT EXAMINATION

BY MS. EDGAR:

Q. When you arrested Mr. Ray, where did you take him?

A. To the U.S. marshals.

MS. EDGAR: Thank you.

THE COURT: Any further questions, anyone?

Thank you, sir. You may step down, and you are excused.

Any further evidence by the Government?

MS. EDGAR: No, thank you, Your Honor.

THE COURT: Thank you.

Any rebuttal evidence by Mr. Ray?

MR. RAY: Yes, I would like to --

THE COURT: Mr. Ray, please stand up.

MR. RAY: Yes. I do have rebuttal evidence. I would like to admit -- I would like to admit the arrest report -- I'm sorry.

I would like to admit the arrest warrant and the arrest report. I guess it would be --

THE COURT: Exhibit 1 has been received.

MR. RAY: Okay.

THE COURT: You would like to have Exhibit --

Government Exhibit 2 admitted as well?

MR. RAY: Yes.

THE COURT: Any objection?

MS. EDGAR: Your Honor, I do. I don't know why he's using it. The witness has been excused.

THE COURT: Well, that's not a basis for an objection, that you don't know why he's offering.

MS. EDGAR: Sure. I guess there is no foundation for the document, Your Honor.

THE COURT: Do you contest its authenticity?

MS. EDGAR: I don't.

THE COURT: All right. Then I'm going to receive Exhibit 2, thank you.

MS. EDGAR: All right, Your Honor.

MR. RAY: Thank you, Your Honor.

(Exhibit 2 admitted.)

THE COURT: Okay.

Mr. Ray, this is your chance now to make your argument. All the evidence has been received.

MR. RAY: Okay, I'm ready.

THE COURT: Please proceed.

MR. RAY: In looking at the -- in light of the evidence presented, firstly, I believe that I have shown -- I've met the requirement under the IAD and have shown that notification was actually given via phone call to the

Department of Corrections, initially -- activating the provisions of the IAD.

Under the IAD, we've heard testimony that -- firstly, to show that a detainer was filed, at minimum, there must be proof that authorities from charging jurisdiction notified authorities where prisoner was being held that prisoner is wanted to face charges. *U.S. v. Weaver*, 882 F.2d 1128.

THE COURT: So are you contending that notice is a substitute for the written demand for custody under Article IV?

MR. RAY: Under Article IV. I'm contesting -- am I what?

THE COURT: Are you contending that notice that there are charges pending is a substitute for the requirement of a written demand for custody under Article IV.

THE WITNESS: Well, yes, under *Morrow* -- okay. Sorry.

Under *Morrow*, the agreement itself contains no definition of the word "detainer." The House and Senate reports, however, explain that detainer is a notification with an institution in which a prisoner is serving a sentence, advising that he is wanted to face pending criminal charges in another jurisdiction. So it's notification --

THE COURT: Well, that's the problem. That's not what the agreement says. The agreement says in part IV(a) that the appropriate officer of the jurisdiction in which an untried indictment, Information, or complaint is pending shall be

entitled to have a prisoner against whom he has lodged a detainer and who is serving a term of imprisonment in any party's state made available in accordance with Article V upon presentation of a written request for temporary custody.

MR. RAY: I understand. The written -- the temporary written request for custody is the writ of *habeas corpus ad prosequendum*. That's the writ that they're referring to, and not the detainer itself. The detainer is the notification that puts them on notice that a person is wanted for pending charges. But the actual temporary request for custody is the actual writ of *habeas corpus* that was never filed in this case. They didn't do that part. That's the written request, is the writ.

THE COURT: All right. Do you have case law for the proposition that an oral notice is sufficient --

MR. RAY: Yes.

THE COURT: -- to constitute a detainer --

MR. RAY: Yes.

THE COURT: -- under this agreement?

MR. RAY: Yes.

Bear with me, Your Honor. I have it. I just --

Telephone calls by federal agent advising that defendant will be picked up and notation by official constituted filing of a detainer, *U.S. v. Trammel*, 813 F.2d 946.

THE COURT: All right. I understand your argument.

MR. RAY: Okay. Want me to proceed?

THE COURT: Sure.

MR. RAY: Further, it appears that the U.S. attorney knew the requirements all along. But on her mistaken belief in her document filed 137, page 4, on February -- this -- I'm quoting her document that she filed. "On February 6, 2014, defendant was released on parole." Under her mistaken belief that I was released on parole is what actually constituted the arrest. He's on parole, go get him.

I have case law that I -- I believe she's standing on to -- I guess -- to substantiate that. If you're on parole -- if you're on parole, you're not covered under the IAD. You have to be serving a term of imprisonment, okay.

Her belief was that I paroled; and, therefore, filing of the writ and/or her mistaken belief that a detainer wasn't filed wasn't even necessary because she thought I paroled. Obviously, I didn't parole. So, therefore, her argument -- her argument is kind of flawed.

THE COURT: Well, let's stop here.

Ms. Edgar, is there any factual dispute that Mr. Ray was not on parole?

MS. EDGAR: No.

THE COURT: All right.

MR. RAY: Is there any factual dispute that I

wasn't --

THE COURT: She doesn't believe you were on parole. She's not going to argue that you were on parole.

MR. RAY: Okay. Thank you. I appreciate that. All right.

That being said, Document 160, I believe, that's response to a remand to state custody, she states, "At each court appearance, defendant would appear on a writ requiring the U.S. Marshal Service to bring him to court and return him to state custody." She knows the requirement of the writ when you're serving a term of imprisonment. So the fact that she didn't file a writ, she never --

THE COURT: Mr. Ray, this is not about Ms. Edgar.

MS. EDGAR: I'm saying the government, then. I mean the Government.

THE COURT: It's not about what was used when you came to hearings.

MR. RAY: Okay.

THE COURT: It is about how you came into federal custody.

MR. RAY: Okay. Thank you.

So -- I believe I have established that under the IAD and the meaning of -- as the detainer and the meaning of the detainer in the IAD, I believe that I've established that the state of Colorado community corrections was notified, which

activated the provisions of the IAD, because I was serving a term of imprisonment. Okay.

I was taken prior to -- I was taken prior to the state being allowed to exhaust its remedy. They were in the process -- based on testimony already presented and evidence by Defendant's Exhibit 1, that they were in the process of regressing me back to DOC for the purposes of continuing my sentence because I was no longer qualified to be in community corrections. That was intervened on, and they have -- under the rule -- let me stop there.

Under the rule of comity, it requires that the second sovereign must postpone its exercise of jurisdiction until the first sovereign is through with the defendant or until the first sovereign agrees to temporarily or permanently relinquish custody. 214 U.S. 97242, D. Williams v. Garcia, a Tenth Circuit case.

There hasn't been any evidence presented in the form of a writ or in the form of an agreement that would show that they had temporarily got permission, which is what the writ is designed to do, show that there is an agreement. A writ is like an unquestioned agreement. And the fact that the Department of Corrections had to file the detainer against me on April 22, 2014 shows that there wasn't an agreement. Because if an agreement was already in place, based upon the writ, then they already had an understanding that I would be

returned. But since there was no writ, the first that -- the first sovereign's authority to exhaust their remedy was ascerbated [ph], you know, they just didn't allow them to do whatever they needed to do. They just -- excessive jurisdiction, they just took power over the situation and did what they wanted to do.

Also it says that -- this is a Supreme Court case. It says two sovereigns -- since two sovereigns exist, each with its own jurisdiction, definite rules fixing powers of courts in case of jurisdiction over same persons and things in actual litigation must be established. And spirit of reciprocal comity and mutual assistance to promote due and orderly procedure must be observed. Chief rule for serving courts for competent jurisdiction is that the Court first taking subject matter jurisdiction or the personal property must be permitted to exhaust this remedy before other court may have jurisdiction for its purpose.

Okay. Department of Corrections, just based on Exhibit 1 that was presented, was in the process of exhausting their remedy.

At the time -- at the time when I was taken, the officer has testified that he presented nothing. They just basically walked in and took me without incident. And then after questioning more, he actually admitted that, well, you know what, we did notify them prior. It wasn't him, but he did

admit that they were notified of the pending charges prior to coming to get him. And based on that notification, they activated the provisions of the IAD.

Now, whether he knew what a writ was or what it contained, ignorance of the law is no excuse at this point. They were under directions of the government, however -- however they sought to proceed.

I have something additional, I just --

So I believe without the writ and the actual notification, I think those are two -- two -- not filing of the writ is one, and I believe that the notification activating the provisions of the IAD are two burdens of proof that the Government has not obtained at this point. Thank you.

THE COURT: Thank you.

For the Government.

MS. EDGAR: Thank you.

Your Honor, it appears that the defendant believes that an oral notification is sufficient to activate the IADA. He has offered no legal support in support of that point, nor has the Government found any.

I think the closest he comes is the Seventh Circuit case he cites in his brief, which is *United States v. Weaver*. That case is actually closer to the factual situation we have here, where, in fact, the Court found there was no detainer because the defendant failed to meet his burden of proof in

showing that there was one when he just testified that he was taken out of the general prison population and told by prison officials that it was at the behest of postal inspectors when he had pending charges for a postal offense, forging or altering money orders.

In that case, the Court explicitly refused to decide the contours of the, quote, unquote, notification requirement of the IADA. That case was also seven years before *Alabama v. Bozeman* and 18 years before *United States v. Pursley*, a Tenth Circuit case, 474 F.3d 757, both of which quoted the Tenth Circuit quoting *Bozeman*, stating that a detainer is a legal order that requires a state in which an individual is currently imprisoned to hold that individual so that he may be tried by a different state for a different crime.

As the Your Honor also pointed out, there is a written requirement to obtain custody of him, and the Government has established with the evidence here that he was detained pursuant to an arrest and an arrest warrant. The IADA doesn't apply, because there was neither a detainer nor a written request for his custody. Instead, he was simply arrested. That is not impermissible -- the defendant hasn't pointed to anything that says that's not allowed.

He talks a lot about comity, which this Court has already ruled on in previous motions so I won't belabor the point, other than to say that the rule of comity infers no

rights on a defendant. It's a relationship between state, and two sovereigns can agree how they obtain custody.

So, Your Honor, that said, unless you have any other questions.

THE COURT: Is there a stipulation between the parties as to Mr. Ray being returned to state custody, as to when that occurred?

MS. EDGAR: Yes, Your Honor. He did go back to the state on May 20, 2015 and June 8, 2015. I would note that as the defendant stated in his motion, he went for the purpose of a court hearing.

THE COURT: Purpose isn't relevant. I just want to know what date.

MS. EDGAR: Yes.

THE COURT: Thank you.

So those were the only times he went back to state custody after having been arrested in April of 2014; is that correct?

MS. EDGAR: That's correct.

THE COURT: Okay.

Thank you.

Anything further, Mr. Ray?

MR. RAY: Yes.

I would just like to note that under -- sorry -- pursuant to 18 U.S.C. 3161(j), if a prosecutor knows that a

defendant who has been charged with a federal crime is incarcerated, the prosecutor must promptly undertake to obtain defendant's presence in the appropriate jurisdiction for trial on the pending charge or cause a detainer to be filed for the person they have in custody, request him to so advise of his or her right to trial. The prosecution can therefore file a detainer or secure defendant's presence by filing of a writ of *habeas corpus ad prosequendum*.

So either way, when you activate the proceedings of the IAD and you lodge a detainer, you still have to file for temporary written custody, which is the writ. And even if she didn't go the route -- or even if the Government didn't go the route of the detainer and sought to just have him removed for whatever means immediately, a writ would still have to be provided. It is the jurisdictional tool by which all prisoners serving a term of imprisonment are allowed to be taken from one sovereign to another. Thank you.

THE COURT: Thank you.

Thank you, Mr. Ray, thank you, Ms. Edgar, for the presentation of evidence and argument with regard to this motion. I am prepared to issue an oral ruling. I do not intend to issue a written ruling. You can order a transcript if you would like.

This is Mr. Ray's motion at Docket No. 275, seeking dismissal of the charges against him in the Indictment in this

case on the grounds that this court lacks jurisdiction under the anti-shuttling provisions of the interstate agreement on detainers, found at 18 U.S.C. App. II. The Government opposes the motion.

Before I go to factual findings, let me make an observation. I think the Government correctly notes that violations of this agreement are not jurisdictional in nature. That was addressed by the Tenth Circuit in 1994 in *Knox v. Wyoming Department of Corrections*, at 34 F.3d 964. The import of the anti-shuttling agreement, which everyone refers to as -- by its acronyms, and I am not going to refer to it by an acronym. I will simply call it the anti-shuffling agreement, is that when the agreement's terms are violated, charges that are untried must be dismissed.

The agreement's sanction is stringent. And that's what we're concerned about, is not subject matter jurisdiction, it is, instead, whether these charges should be dismissed.

Now, the evidence before the Court establishes that Mr. Ray was serving a sentence in a state community corrections facility on a state conviction on April 22, 2014. On that date he was arrested by a federal agent, Agent Quiegert, who is a special agent of the Internal Revenue Service. He was arrested pursuant to a warrant issued out of this court in Case No. 14-cr-147, which is this case. No written detainer was sought or filed with Colorado authorities pursuant to the

anti-shuttling agreement.

After his arrest, the community corrections facility staff prepared a document, Defendant's Exhibit 1, which was sent to the Denver County Sheriff's Department, directing the department to hold Mr. Ray for a community corrections residential violation under Colorado statute C.R.S. 17-27-104(6). That statute made it a violation of Mr. Ray's right to be in community corrections if he was charged with additional criminal charges, regardless of what type of criminal charges those were. And in this case, the criminal charges that gave rise to that residential violation were the federal criminal charges in this case.

The document at Defendant's Exhibit 1 was sent to the Denver County Sheriff's Department for the purpose of telling them that should they retain custody or obtain custody over Mr. Ray, that they should regress to the Department of Corrections. In other words, don't release him and don't send him back to community corrections.

Unfortunately, this document contains of several references to detainer in conjunction with the federal charges. That reference is found in special instructions, and it's also found in the justification. But the author of this document, Officer Pacheco, testified unequivocally that that was a mistake. He never was told that there was a detainer, he never saw a detainer, he's not sure why he put that language in this

document, but it was not based upon the existence of a federal detainer.

Mr. Ray has been in federal custody during the course of this case since his arrest with the exception of his return to the state on writ on May 20, 2015 and June 8, 2015. His contention in this motion, as the Court understands it, is that the terms of the anti-shuttling agreement, the interstate agreement on detainers, have been violated. And as a consequence, the charges against him should be dismissed.

The key provision of the interstate agreement on detainers, or the anti-shuttling agreement, is found in Section 2, Article IV, which provides that a prosecutor in a jurisdiction having untried criminal charges against a person incarcerated in another state may contact the incarcerating state and request that that person be delivered to the requesting jurisdiction for the purposes of trying the charges.

Article IV also contains the anti-shuttling provision, which requires that the requesting jurisdiction fully complete its trial of the person before returning him to the original state of incarceration; otherwise, any untried charges in the requesting jurisdiction must be dismissed upon the inmate's return to the original place of incarceration.

So let me start with the question of whether this particular agreement, the interstate agreement on detainers, is applicable under these circumstances.

The agreement never formally defines the term "detainer," even though that word is contained in the title of the agreement; but it does set out a process by which detainers are lodged and prepared. First, the officer in the receiving jurisdiction must present a written request for temporary custody and send it to the sending jurisdiction. We have no evidence of a written request that was prepared by the federal government and sent to the state of Colorado.

Upon receipt of this request, the sending jurisdiction has 30 days to decide whether to grant it, and the governor of the sending jurisdiction may decide to decline it. There is no evidence that the sending jurisdiction, here, Colorado, understood that it had an opportunity to consider a request or to decline it. In fact, the evidence is to the contrary; colorado had no record of a written request.

Third, the sending jurisdiction, deciding to honor the request, responds with a certificate stating the term of commitment under which the prisoner is being held and other data about the defendant's release date. There is no document that constitutes that certificate that has been admitted into evidence either.

And, finally, the sending state shall offer to deliver temporary custody of such prisoner to the appropriate authority in the receiving state. That is a formal statement that temporary custody is transmitted from Colorado to the federal

government. Again, we have no evidence that that occurred. Thus, the record does not show that any of the four requirements necessary to invoke this agreement were satisfied.

Instead, we know that this agreement on detainers is not the exclusive means by which one jurisdiction can obtain custody over another serving a sentence in another jurisdiction.

The Eighth Circuit recognized that in 1978 in *Bailey v. Shepard*, noting that custody may be obtained in a number of ways, including a writ of *habeas corpus ad prosequendum*, without activating the interstate agreement on detainers. And it is well settled that the agreement's provisions, including the anti-shuttling provision, apply only when the jurisdiction has obtained custody of the defendant through a detainer filed according to the agreement's terms.

In situations where the jurisdiction obtains custody of the defendant through a means other than these formal requirements, the agreement's provisions do not apply.

Now, Mr. Ray has argued that oral notice given by the agent who effected the arrest, that the arrest was to occur, constitutes a detainer. I've had an opportunity to review his citation for that proposition, and that case is *United States v. Trammel* at 813 F.3d 946, a Seventh Circuit 1987 decision.

Unfortunately, that's not what the case stands for, and it's exactly the opposite of what the Court held. In that

case, there was a writ for *habeas corpus ad prosequendum* issued by the federal court on untried federal charges. The defendant was in state custody. A marshal called the state house of detention and stated he was coming to take the defendant and would bring a writ. The Court expressly found that the telephone call was not a detainer and it was not sufficient to create a detainer under the interstate agreement on detainers.

The reason that the Court explained for that conclusion is that a detainer must issue from an act prior to and separate from the issuance from the writ of *habeas corpus ad prosequendum*, and that follows from the Supreme Court's holding in *U.S. v. Morrow*. And to hold that the telephone call constituted a detainer would work a disadvantage to the cooperation between law enforcement agencies to facilitate the transfer of a defendant.

I therefore find, based on the evidence that has been presented, that in this case, the interstate agreement on detainers does not apply, that Mr. Ray has not established that the process required by the interstate agreement on detainers was satisfied. And although there might be some dispute as to what is meant by the word "detainer," what occurred in this case is inconsistent with the process set forth in the agreement.

As a consequence, the motion to dismiss is denied.

Any need for clarification or further explanation?

MS. EDGAR: No, thank you.

MR. RAY: No.

THE COURT: Okay.

Let's go on to the next one, then. The next motion is a motion to dismiss brought by Mr. Ray as well.

Mr. Ray, want to call your first witness.

MR. RAY: Your Honor, I'm withdrawing that motion.

THE COURT: I'm sorry?

MR. RAY: I withdrew that motion -- I'm withdrawing the motion.

THE COURT: Okay.

Did you hear what he said?

MS. EDGAR: I did, thank you.

THE COURT: All right. That motion is withdrawn by the defendant.

That means we need to set this matter down for trial. I believe there are no other pending motions.

How much time do we have left on speedy?

MS. EDGAR: Seventy days, Your Honor.

THE COURT: I'm sorry?

MS. EDGAR: Seventy days, Your Honor.

THE COURT: Do you agree, Mr. Ray?

MR. RAY: Yeah, at this time I agree.

THE COURT: Mr. Ray, you need to stand up. I can't hear you if you don't stand up.

MR. RAY: At this time I don't have anything to refute as to those statements.

THE COURT: Okay. When will you be ready to go to trial?

MR. RAY: I haven't even gotten the discovery that was supposed to be given to me since --

THE COURT: Wait a minute. We've been over the discovery issues.

MR. RAY: Okay.

THE COURT: What is it now that you think you don't have?

MR. RAY: Whatever was ruled on -- what was ruled on in April, I've never received.

THE COURT: Well, what is it that you need?

MR. RAY: I need everything -- I need everything that was ordered, because I don't know what I need, because I haven't reviewed everything -- I haven't reviewed anything, actually.

THE COURT: I can't help on the review side, but it's your burden to specify what it is that you were entitled to receive and you have not received.

MR. RAY: I don't have that document in front of me that was for what was ordered.

THE COURT: Okay. Then we're going to proceed to set the trial.

My recollection is we had this set -- we thought there were going to be -- I think it was 15 days -- 18 days, but you hoped you could get it done in 15; is that right?

MS. EDGAR: Your Honor, we set it for two weeks or eight day. I think it was 15 back when we had the co-defendant. Now that she's pled, two weeks. After today, I'm still hopeful things would move quickly, but I'm not as optimistic.

THE COURT: Well, they always take a little longer when we have a defendant who is representing himself because he's not as familiar with the procedures in the courtroom, so we're going to have to at least set aside two weeks.

When is the Government going to be ready for trial?

MS. EDGAR: Your Honor, I believe we need two to three weeks just to gather up all of our witnesses again. We're otherwise prepared to proceed.

THE COURT: What does it mean, two to three weeks to gather up all of your witnesses?

MS. EDGAR: Well, Your Honor, we've had them under subpoena a few times now. I need to reach back out to them, let them all know when trial will be, make sure they're still around in town, not traveling, if it happens to be over the holidays, et cetera. So I would request three weeks for the purpose of recontacting our witnesses. At the appropriate time, I would submit a motion to continue the trial subpoenas

from the previous trial date so it makes that process a little more efficient.

THE COURT: Will you be ready to go to trial on November 9 or 16th?

Oh, I can't do it on the 16th, I'm sorry. 9th or 18th.

MS. EDGAR: Your Honor, we can be free the 18th.

THE COURT: We would need to take a break for the Thanksgiving holiday. Beginning the 18th, 19th, 20th, then the 23rd, 24th, 25th and into the week of November 30.

Will that work for you?

MS. EDGAR: That works for the Government, Your Honor.

THE COURT: There is a conflict with another criminal case on -- for trial on November 30, 2015, it's Case No. 10-cr-327. I don't know whether that matter will resolve itself, but you may want to check in your office and see.

MS. EDGAR: Is that Michele Korver's case?

THE COURT: I don't know, but I can find out.

MR. RAY: Your Honor --

THE COURT: In a minute.

Yes, it is.

Yes, sir.

MR. RAY: I don't think I'm going to be ready for trial. I was wondering if we could move it after the holidays.

THE COURT: If we move it after the holidays, you're looking at February.

MR. RAY: That's fine.

THE COURT: What's the position of the Government?

MS. EDGAR: Your Honor, I don't believe he's stated a basis under the Speedy Trial Act.

THE COURT: That's not what I asked. I asked for your position.

MS. EDGAR: We would like to get to trial as soon as we can. We would definitely prefer sooner rather than later.

THE COURT: All right.

Mr. Ray, it's not sufficient for you to say "more time to prepare."

MR. RAY: I understand. I was waiting for that --

THE COURT: All right. Would you please stand.

MR. RAY: Right here is fine?

THE COURT: Whatever.

MR. RAY: Okay. I believe that the access -- I don't have the access and the time frame to be ready at this facility by next week or in the two weeks.

I believe that I would be fully prepared -- there is a lot of stuff, a lot of discovery that was ordered that I just never received.

I don't know how to be more clear than the order was, and I never received anything from my counselor as to anything

being provided to them. Every time I've asked, they don't have it. And now the counselor that was there has been moved to a new facility. Now there is a new counselor there who has no idea. And I'm being told to contact a previous counselor for the different -- so, you know, I haven't been given anything, period, as part of the order.

THE COURT: The order that I issued told the Government to supply what it had, so the fact that you haven't received something does not mean that the Government has not complied with the order.

Without you being able to say what it is that you are missing, I cannot ask the Government whether they have supplied everything that they have.

MR. RAY: I don't know what I'm missing because I haven't even seen what they've got. I can't review it to be, like, they're misting these other documents, how come this is not here? Without being able to review anything, I don't know how am I supposed to know what -- what is supposed to be there, if I can't look at anything.

THE COURT: All right. Then let me inquire. Ms. Edgar, has the Government complied with all of the discovery obligations that have been imposed, including every order that I have issued?

MS. EDGAR: I believe I have complied, Your Honor. I believe I've complied with every order.

THE COURT: And you turned over everything you have, consistent with those orders?

MS. EDGAR: Consistent with those orders. With respect to the terabyte drive that was the subject of some conversation, I complied with the Court's order that I file the statement regarding what was available and what could be processed or not processed; and there was never a response to that document by the defendant. Everything in our possession has been produced over time via certified mail, so we know it is being received at the prison with the case manager. And that if he hasn't been able to get it for some reason, this is the first time we're hearing of it.

THE COURT: Mr. Ray, this might be something you want to talk about with Mr. Viorst., because there is nothing I can do to assist you at this point. Without knowing what you should have gotten and did not receive, I cannot assist you.

MR. RAY: Your Honor, so the complexity of the case, the tax returns are numerous, voluminous tax returns involved, all the issues of deductions that go along with that and other issues of deductions and all the witness testimony that is going to be presented, I won't be ready in three weeks to have all -- I won't be ready in three weeks to review all of the tax returns and all -- and have anticipated question, you know, as far as, like -- have an expert witness testimony. There is a lot of information, people involved, that I can't even get in

contact with.

THE COURT: Well, Mr. Ray, we previously had this set for trial.

MR. RAY: Okay.

THE COURT: You were ready for trial. And now we're going to be setting this, and you're not ready for trial.

If I set this, I have to do so within 70 days based on what you have told me, that would be speedy trial.

MR. RAY: Okay.

THE COURT: And that takes us to January 4.

So looking at the available time for trial, we have two options: One is to do this in November, and one is to do it in December.

MR. RAY: What if I waive speedy?

THE COURT: There is no waiver of speedy trial.

MR. RAY: There isn't?

THE COURT: I have to make independent findings in accordance with the statute in order to set a trial outside of speedy.

MR. RAY: I understand that.

THE COURT: So what I can do is set this in November -- as I said, we have the one conflict with Ms. Korver's trial, and that's set to begin on Monday the 30th.

Do you know whether that's going to go?

MS. EDGAR: I spoke with her the other day. I think

it is going to go. She was discussing the fact that she has motions pending and she wasn't sure whether the Court was going to rule on those prior to the trial date. I believe there is a 702 motion pending for an expert in that case that she mentioned. She said that was the only thing that made her uncertain about the trial date. Otherwise, based on what I know from her, there is no disposition.

THE COURT: If we try this in December, we are looking at December 14, and that conflicts with another criminal trial from your office, 15-cr-30.

MR. VIORST: Your Honor, I'm sorry, I can't do the 14th. I've got long-standing plans for leaving on Friday, for the holidays, I apologize.

THE COURT: So you're out of town through Christmas?

MR. VIORST: From the 17th through Christmas, yes, Your Honor.

THE COURT: All right. Then I think what we will do is this: I can play with this calendar a little bit, but I have limited flexibility. And so I am going to direct that, Mr. Viorst, you and Ms. Edgar contact chambers tomorrow morning before noon in order to obtain a new trial date. By then, we can better figure out what is going on. I'd like to have Mr. Ray connected as well; but if he can't be connected, then, Mr. Viorst, you'll have to obtain a trial date subject to his approval.

MR. VIORST: Yes, Your Honor.

Monday, Your Honor -- is Monday the 4th an option, 4th of January?

THE COURT: I begin a four-week jury trial on the 4th of January.

MR. VIORST: Understood.

MS. EDGAR: Is that a criminal trial, Your Honor?

THE COURT: No.

MS. EDGAR: Okay.

THE COURT: If need be, I can bump that trial; but I would prefer not to, with a four-week trial.

MS. EDGAR: Sure.

THE COURT: So that's where we will leave it. And you know when the 70 days runs. I would like to be able to get this matter set for trial. I'm willing to work around holidays, but you all know the schedules that you have. And maybe you can find out from your witnesses what is going to work best for them.

Is there anything else we can do today?

MR. VIORST: No, Your Honor.

MR. RAY: No.

MS. EDGAR: Your Honor, once we do have a trial date, if I may, I'll submit a motion to continue subpoenas.

THE COURT: That's fine.

MS. EDGAR: Thank you.

THE COURT: All right. Then I think that will conclude what we can finish up today, and we'll get the trial set tomorrow.

Thank you all, and thank you to our marshal staff and our court staff as well.

Mr. Ray will be remanded to the care and custody of the United States Marshal Service, and that will conclude our hearing. We'll stand in recess.

(Recess at 4:30 p.m.)

I N D E X

DEFENDANT'S EXHIBITS

Exhibit	Offered	Received	Refused	Reserved	Withdrawn
1		20			
2		59			
2		66			

GOVERNMENT'S EXHIBITS

Exhibit	Offered	Received	Refused	Reserved	Withdrawn
1		60			

REPORTER'S CERTIFICATE

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

Dated at Denver, Colorado, this 24th day of December, 2016.

Therese Lindblom,CSR,RMR,CRR

AO 245B (Rev. 11/14 D/CO) Judgment in a Criminal Case
Sheet 1

UNITED STATES DISTRICT COURT

District of COLORADO

UNITED STATES OF AMERICA
V.

AUSTIN RAY

JUDGMENT IN A CRIMINAL CASE

Case Number: 14-cr-00147-MSK-02

USM Number: 40401-013

Pro Se and Anthony J. Viorst
Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to Count(s) _____

☐ pleaded nolo contendere to Count(s) _____ which was accepted by the Court.

☒ was found guilty on Counts 1, 2 through 6, 37 and 38 of the Second Superseding Indictment after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	**Nature of Offense**	**Offense Ended**	**Count**
18 U.S.C. § 371	Conspiracy to Defraud the United States	04/2010	1

The defendant is sentenced as provided in pages 2 through 7 of this judgment in accordance with the findings and conclusions made in open court, a transcript of which is attached hereto and incorporated herein by this reference. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on Count(s) _____

☐ Count(s) _____ ☐ is ☐ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

July 19, 2016
Date of Imposition of Judgment

Marcia S. Krieger
Signature of Judge

Marcia S. Krieger, Chief U.S. District Judge
Name and Title of Judge

July 26, 2016
Date

AO 245B (Rev. 11/14 D/CO) Criminal Judgment
Sheet 1A

DEFENDANT: AUSTIN RAY
CASE NUMBER: 14-cr-00147-MSK-02

ADDITIONAL COUNTS OF CONVICTION

Title & Section	Nature of Offense	Offense Ended	Count
26 U.S.C. § 7206(2)	Aiding and Abetting in the Preparation and Presentation of a False and Fraudulent Return	01/29/09	2
26 U.S.C. § 7206(2)	Aiding and Abetting in the Preparation and Presentation of a False and Fraudulent Return	01/30/09	3
26 U.S.C. § 7206(2)	Aiding and Abetting in the Preparation and Presentation of a False and Fraudulent Return	01/29/09	4
26 U.S.C. § 7206(2)	Aiding and Abetting in the Preparation and Presentation of a False and Fraudulent Return	02/05/09	5
26 U.S.C. § 7206(2)	Aiding and Abetting in the Preparation and Presentation of a False and Fraudulent Return	01/30/10	6
26 U.S.C. § 7206(1)	Subscribing a False Income Tax Return	01/15/08	37
26 U.S.C. § 7206(1)	Subscribing a False Income Tax Return	01/15/10	38

AO 245B (Rev. 11/14 D/CO) Judgment in Criminal Case
Sheet 2 — Imprisonment

DEFENDANT: AUSTIN RAY
CASE NUMBER: 14-cr-00147-MSK-02

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of: sixty (60) months as to Count 1; thirty-six (36) months as to Count 2; twenty-four (24) months as to Count 3. Counts 1, 2, 3, all consecutive to each other. Thirty-six (36) months for each of Counts 4, 5, 6, 37 and 38, all concurrent to each other and concurrent with Counts 1, 2, and 3. This results in a total imprisonment sentence of one hundred twenty (120) months.

☐ The court makes the following recommendations to the Bureau of Prisons:

☒ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____ .

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 12 p.m. on _____ .

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

at _____ , with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

AO 245B (Rev. 11/14 D/CO) Judgment in a Criminal Case
Sheet 3 — Supervised Release

DEFENDANT: AUSTIN RAY
CASE NUMBER: 14-cr-00147-MSK-02

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of: three (3) years as to Count 1, and one (1) year each Count as to Counts 2-6, 37 and 38, all to run concurrently.

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

☐ The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)

☒ The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. (Check, if applicable.)

☒ The defendant shall cooperate in the collection of DNA as directed by the probation officer. (Check, if applicable.)

☐ The defendant shall register with the state sex offender registration agency in the state where the defendant resides, works, or is a student, as directed by the probation officer. (Check, if applicable.)

☐ The defendant shall participate in an approved program for domestic violence. (Check, if applicable.)

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
2) the defendant shall report to the probation officer in a manner and frequency directed by the court or probation officer;
3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4) the defendant shall support his or her dependents and meet other family responsibilities;
5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;
6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;
7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician. Except as authorized by court order, the defendant shall not possess, use or sell marijuana or any marijuana derivative (including THC) in any form (including edibles) or for any purpose (including medical purposes). Without the prior permission of the probation officer, the defendant shall not enter any marijuana dispensary or grow facility;
8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;
10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;
13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement; and
14) the defendant shall provide access to any requested financial information.

AO 245B (Rev. 11/14 D/CO) Judgment in a Criminal Case
Sheet 3C — Supervised Release

DEFENDANT: AUSTIN RAY
CASE NUMBER: 14-cr-00147-MSK-02

SPECIAL CONDITIONS OF SUPERVISION

1. Pursuant to 18 U.S.C. § 3563(b)(2), it is ordered that the defendant make restitution to the victim, Internal Revenue Service, in the amount of $303,774.32.

2. The defendant shall not incur new credit charges or open additional lines of credit without the approval of the probation officer, unless the defendant is in compliance with the periodic payment obligations imposed pursuant to the Court's judgment and sentence.

3. As directed by the probation officer, the defendant shall apply any monies received from income tax refunds, lottery winnings, inheritances, judgments, and any anticipated or unexpected financial gains to the outstanding court-ordered financial obligation in this case.

4. The defendant shall make payment on the restitution obligation that remains unpaid at the commencement of supervised release. Within 60 days of release from confinement, the defendant shall meet with the probation officer to develop a plan for the payment of restitution. This plan will be based upon the defendant's income and expenses. The plan will be forwarded to the Court for review and approval.

5. The defendant shall work with the probation officer in development of a monthly budget that shall be reviewed with the probation officer quarterly.

6. If the defendant has an outstanding financial obligation, the probation office may share any financial or employment documentation relevant to the defendant with the Asset Recovery Division of the United States Attorney's Office to assist in the collection of the obligation.

7. The defendant shall document all income and compensation generated or received from any source and shall provide such information to the probation officer as requested.

8. The defendant shall not cause or induce anyone to conduct any financial transaction on his behalf or maintain funds on his behalf.

9. All employment for the defendant shall be approved in advance by the supervising probation officer and the defendant shall not engage in any business activity unless approved by the probation officer.

10. The defendant shall comply with all legal obligations associated with the Colorado Department of Revenue and the Internal Revenue Service regarding federal and state income taxes. This includes resolution of any tax arrearages as well as continued compliance with federal and state laws regarding the filing of taxes.

11. The defendant shall participate in and successfully complete a program of testing and/or treatment for substance abuse, as approved by the probation officer, until such time as the defendant is released from the program by the probation officer. The defendant shall abstain from the use of alcohol or other intoxicants during the course of treatment and shall pay the cost of treatment as directed by the probation officer.

DEFENDANT: AUSTIN RAY
CASE NUMBER: 14-cr-00147-MSK-02

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Fine	Restitution
TOTALS	**$** 800.00	**$** 0.00	**$** 303,774.32

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case* (AO 245C) will be entered after such determination.

☒ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss*	Restitution Ordered	Priority or Percentage
Internal Revenue Service Attn: Mail Stop 6261, Restitution 333 West Pershing Avenue Kansas City, Missouri 64108	$303,774.32	$303,774.32	
See Attachment for Audited Clients			
TOTALS	$ 303,774.32	$ 303,774.32	

☐ Restitution amount ordered pursuant to plea agreement $ _____

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☒ The Court determined that the defendant does not have the ability to pay interest and it is ordered that:

☒ the interest requirement is waived for the ☐ fine ☒ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

AO 245B (Rev. 11/14 D/CO) Judgment in a Criminal Case
Sheet 6 — Schedule of Payments

DEFENDANT: AUSTIN RAY
CASE NUMBER: 14-cr-00147-MSK-02

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows:

A ☐ Lump sum payment of $ _____ due immediately, balance due

☐ not later than _____, or
☐ in accordance ☐ C, ☐ D, ☐ E, or ☐ F below; or

B ☒ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☒ F below); or

C ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of $ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or

D ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of $ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after release from imprisonment. The Court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☒ Special instructions regarding the payment of criminal monetary penalties:

The defendant shall pay a special assessment of $800, due and payable immediately. The Court finds that the defendant does not have the ability to pay a fine, so the Court will waive the fine in this case.

The defendant shall make payment on the restitution obligation that remains unpaid at the commencement of supervised release. Within 60 days of commencement of supervision, the defendant shall meet with the probation officer to develop a plan for the payment of restitution. This plan will be based upon the defendant's income and expenses. The plan will be forwarded to the Court for review and approval.

The defendant's restitution shall be joint and several as to the shared identified loss owed to IRS for the same taxpayer accounts also ordered against co-defendant Anne Rasamee, as identified in the attached chart. Once full payment is made on a taxpayer account to the victim, whether through restitution payment or continued payments from a taxpayer, no additional money is accepted from either Defendant or the individual taxpayer. This defendant is solely responsible for $183,592.20 owed to the IRS as a result of Count 37.

Unless the Court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the Court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☒ Joint and Several

Anne Rasamee, Docket No. 14-cr-00147-MSK-01, $120,182.12.

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following Court cost(s):

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and Court costs.

No. _____

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,

Respondent,

v.

AUSTIN RAY,

Petitioner,

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE TENTH CIRCUIT

APPENDIX – PART 3
10TH CIRCUIT COURT OF APPEALS, CASE 16-1306:
ORDER DENYING PETITION FOR REHEARING

Jason B. Wesoky
Member of the Tenth Circuit's CJA Appellate Panel
Appointed pursuant to 18 U.S.C. § 3006A
DARLING MILLIGAN PC
1331 17th Street, Suite 800
Denver, Colorado 80202
(303) 623-9133

ATTORNEY FOR PETITIONER

FILED
United States Court of Appeals
Tenth Circuit

August 31, 2018

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

AUSTIN RAY,

Defendant - Appellant.

No. 16-1306

ORDER

Before **HARTZ**, **McKAY**, and **MORITZ**, Circuit Judges.

Appellant's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court

ELISABETH A. SHUMAKER, Clerk

No. _____

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,

Respondent,

v.

AUSTIN RAY,

Petitioner,

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE TENTH CIRCUIT

APPENDIX – PART 4
MATERIAL REQUIRED BY SUPREME COURT RULE 14(1)(F): INTERSTATE AGREEMENT ON DETAINERS

Jason B. Wesoky
Member of the Tenth Circuit's CJA Appellate Panel
Appointed pursuant to 18 U.S.C. § 3006A
DARLING MILLIGAN PC
1331 17th Street, Suite 800
Denver, Colorado 80202
(303) 623-9133

ATTORNEY FOR PETITIONER

INTERSTATE AGREEMENT ON DETAINERS

Pub. L. 91–538, Dec. 9, 1970, 84 Stat. 1397, as amended by Pub. L. 100–690, title VII, §7059, Nov. 18, 1988, 102 Stat. 4403

§1. Short title

This Act may be cited as the ''Interstate Agreement on Detainers Act''.

(Pub. L. 91–538, §1, Dec. 9, 1970, 84 Stat. 1397.)

§2. Enactment into law of Interstate Agreement on Detainers

The Interstate Agreement on Detainers is hereby enacted into law and entered into by the United States on its own behalf and on behalf of the District of Columbia with all jurisdictions legally joining in substantially the following form:

''The contracting States solemnly agree that:

''ARTICLE I

''The party States find that charges outstanding against a prisoner, detainers based on untried indictments, informations, or complaints and difficulties in securing speedy trial of persons already incarcerated in other jurisdictions, produce uncertainties which obstruct programs of prisoner treatment and rehabilitation. Accordingly, it is the policy of the party States and the purpose of this agreement to encourage the expeditious and orderly disposition of such charges and determination of the proper status of any and all detainers based on untried indictments, informations, or complaints. The party States also find that proceedings with reference to such charges and detainers, when emanating from another jurisdiction, cannot properly be had in the absence of cooperative procedures. It is the further purpose of this agreement to provide such cooperative procedures.

''ARTICLE II

''As used in this agreement:

''(a) 'State' shall mean a State of the United States; the United States of America; a territory or possession of the United States; the District of Columbia; the Commonwealth of Puerto Rico.

''(b) 'Sending State' shall mean a State in which a prisoner is incarcerated at the time that he initiates a request for final disposition pursuant to article III hereof or at the time that a request for custody or availability is initiated pursuant to article IV hereof.

''(c) 'Receiving State' shall mean the State in which trial is to be had on an indictment, information, or complaint pursuant to article III or article IV hereof.

''ARTICLE III

''(a) Whenever a person has entered upon a term of imprisonment in a penal or correctional institution of a party State, and whenever during the continuance of the term of imprisonment there is pending in any other party State any untried indictment, information, or complaint on the basis of which a detainer has been lodged against the prisoner, he shall be brought to trial within one hundred and eighty days after he shall have caused to be delivered to the prosecuting officer and the appropriate court of the prosecuting officer's jurisdiction written notice of the place of his imprisonment and his request for a final disposition to be made of the indictment, information, or complaint: *Provided*, That, for good cause shown in open court, the prisoner or his counsel being present, the court having jurisdiction of the matter may grant any necessary or reasonable continuance. The request of the prisoner shall be accompanied by a certificate of the appropriate official having custody of the prisoner, stating the term of commitment under which the prisoner is being held, the time already served, the time remaining to be served on the sentence, the amount of good time earned, the time of parole eligibility of the prisoner, and any decision of the State parole agency relating to the prisoner.

''(b) The written notice and request for final disposition referred to in paragraph (a) hereof shall be given or sent by the prisoner to the warden, commissioner of corrections, or other official having custody of him, who shall promptly forward it together with the certificate to the appropriate prosecuting official and court by registered or certified mail, return receipt requested.

''(c) The warden, commissioner of corrections, or other official having custody of the prisoner shall promptly inform him of the source and contents of any detainer lodged against him and shall also inform him of his right to make a request for final disposition of the indictment, information, or complaint on which the detainer is based.

''(d) Any request for final disposition made by a prisoner pursuant to paragraph (a) hereof shall operate as a request for final disposition of all untried indictments, informations, or complaints on the basis of which detainers have been lodged against the prisoner from the State to whose prosecuting official the request for final disposition is specifically directed. The warden, commissioner of corrections, or other official having custody of the prisoner shall

forthwith notify all appropriate prosecuting officers and courts in the several jurisdictions within the State to which the prisoner's request for final disposition is being sent of the proceeding being initiated by the prisoner. Any notification sent pursuant to this paragraph shall be accompanied by copies of the prisoner's written notice, request, and the certificate. If trial is not had on any indictment, information, or complaint contemplated hereby prior to the return of the prisoner to the original place of imprisonment, such indictment, information, or complaint shall not be of any further force or effect, and the court shall enter an order dismissing the same with prejudice.

''(e) Any request for final disposition made by a prisoner pursuant to paragraph (a) hereof shall also be deemed to be a waiver of extradition with respect to any charge or proceeding contemplated thereby or included therein by reason of paragraph (d) hereof, and a waiver of extradition to the receiving State to serve any sentence there imposed upon him, after completion of his term of imprisonment in the sending State. The request for final disposition shall also constitute a consent by the prisoner to the production of his body in any court where his presence may be required in order to effectuate the purposes of this agreement and a further consent voluntarily to be returned to the original place of imprisonment in accordance with the provisions of this agreement. Nothing in this paragraph shall prevent the imposition of a concurrent sentence if otherwise permitted by law.

''(f) Escape from custody by the prisoner subsequent to his execution of the request for final disposition referred to in paragraph (a) hereof shall void the request.

''ARTICLE IV

''(a) The appropriate officer of the jurisdiction in which an untried indictment, information, or complaint is pending shall be entitled to have a prisoner against whom he has lodged a detainer and who is serving a term of imprisonment in any party State made available in accordance with article V(a) hereof upon presentation of a written request for temporary custody or availability to the appropriate authorities of the State in which the prisoner is incarcerated: *Provided*, That the court having jurisdiction of such indictment, information, or complaint shall have duly approved, recorded, and transmitted the request: *And provided further*, That there shall be a period of thirty days after receipt by the appropriate authorities before the request be honored, within which period the Governor of the sending State may disapprove the request for temporary custody or availability, either upon his own motion or upon motion of the prisoner.

''(b) Upon request of the officer's written request as provided in paragraph (a) hereof, the appropriate authorities having the prisoner in custody shall furnish the officer with a certificate stating the term of commitment under which the prisoner is being held, the time already served, the time remaining to be served on the sentence, the amount of good time earned, the time of parole eligibility of the prisoner, and any decisions of the State parole agency relating to the prisoner. Said authorities simultaneously shall furnish all other officers and appropriate courts in the receiving State who has lodged detainers against the prisoner with similar certificates and with notices informing them of the request for custody or availability and of the reasons therefor.

''(c) In respect of any proceeding made possible by this article, trial shall be commenced within one hundred and twenty days of the arrival of the prisoner in the receiving State, but for good cause shown in open court, the prisoner or his counsel being present, the court having jurisdiction of the matter may grant any necessary or reasonable continuance.

''(d) Nothing contained in this article shall be construed to deprive any prisoner of any right which he may have to contest the legality of his delivery as provided in paragraph (a) hereof, but such delivery may not be opposed or denied on the ground that the executive authority of the sending State has not affirmatively consented to or ordered such delivery.

''(e) If trial is not had on any indictment, information, or complaint contemplated hereby prior to the prisoner's being returned to the original place of imprisonment pursuant to article V(e) hereof, such indictment, information, or complaint shall not be of any further force or effect, and the court shall enter an order dismissing the same with prejudice.

''ARTICLE V

''(a) In response to a request made under article III or article IV hereof, the appropriate authority in a sending State shall offer to deliver temporary custody of such prisoner to the appropriate authority in the State where such indictment, information, or complaint is pending against such person in order that speedy and efficient prosecution may be had. If the request for final disposition is made by the prisoner, the offer of temporary custody shall accompany the written notice provided for in article III of this agreement. In the case of a Federal prisoner, the appropriate authority in the receiving State shall be entitled to temporary custody as provided by this agreement or to the prisoner's presence in Federal custody at the place of trial, whichever custodial arrangement may be approved by the custodian.

''(b) The officer or other representative of a State accepting an offer of temporary custody shall present the following upon demand:

''(1) Proper identification and evidence of his authority to act for the State into whose temporary custody this prisoner is to be given.

''(2) A duly certified copy of the indictment, information, or complaint on the basis of which the detainer has been lodged and on the basis of which the request for temporary custody of the prisoner has been made.

''(c) If the appropriate authority shall refuse or fail to accept temporary custody of said person, or in the event that an action on the indictment, information, or complaint on the basis of which the detainer has been lodged is not brought to trial within the period provided in article III or article IV hereof, the appropriate court of the jurisdiction where the indictment, information, or complaint has been pending

shall enter an order dismissing the same with prejudice, and any detainer based thereon shall cease to be of any force or effect.

''(d) The temporary custody referred to in this agreement shall be only for the purpose of permitting prosecution on the charge or charges contained in one or more untried indictments, informations, or complaints which form the basis of the detainer or detainers or for prosecution on any other charge or charges arising out of the same transaction. Except for his attendance at court and while being transported to or from any place at which his presence may be required, the prisoner shall be held in a suitable jail or other facility regularly used for persons awaiting prosecution.

''(e) At the earliest practicable time consonant with the purposes of this agreement, the prisoner shall be returned to the sending State.

''(f) During the continuance of temporary custody or while the prisoner is otherwise being made available for trial as required by this agreement, time being served on the sentence shall continue to run but good time shall be earned by the prisoner only if, and to the extent that, the law and practice of the jurisdiction which imposed the sentence may allow.

''(g) For all purposes other than that for which temporary custody as provided in this agreement is exercised, the prisoner shall be deemed to remain in the custody of and subject to the jurisdiction of the sending State and any escape from temporary custody may be dealt with in the same manner as an escape from the original place of imprisonment or in any other manner permitted by law.

''(h) From the time that a party State receives custody of a prisoner pursuant to this agreement until such prisoner is returned to the territory and custody of the sending State, the State in which the one or more untried indictments, informations, or complaints are pending or in which trial is being had shall be responsible for the prisoner and shall also pay all costs of transporting, caring for, keeping, and returning the prisoner. The provisions of this paragraph shall govern unless the States concerned shall have entered into a supplementary agreement providing for a different allocation of costs and responsibilities as between or among themselves. Nothing herein contained shall be construed to alter or affect any internal relationship among the departments, agencies, and officers of and in the government of a party State, or between a party State and its subdivisions, as to the payment of costs, or responsibilities therefor.

''ARTICLE VI

''(a) In determining the duration and expiration dates of the time periods provided in articles III and IV of this agreement, the running of said time periods shall be tolled whenever and for as long as the prisoner is unable to stand trial, as determined by the court having jurisdiction of the matter.

''(b) No provision of this agreement, and no remedy made available by this agreement shall apply to any person who is adjudged to be mentally ill.

''ARTICLE VII

''Each State party to this agreement shall designate an officer who, acting jointly with like officers of other party States, shall promulgate rules and regulations to carry out more effectively the terms and provisions of this agreement, and who shall provide, within and without the State, information necessary to the effective operation of this agreement.

''ARTICLE VIII

''This agreement shall enter into full force and effect as to a party State when such State has enacted the same into law. A State party to this agreement may withdraw herefrom by enacting a statute repealing the same. However, the withdrawal of any State shall not affect the status of any proceedings already initiated by inmates or by State officers at the time such withdrawal takes effect, nor shall it affect their rights in respect thereof.

''ARTICLE IX

''This agreement shall be liberally construed so as to effectuate its purposes. The provisions of this agreement shall be severable and if any phrase, clause, sentence, or provision of this agreement is declared to be contrary to the constitution of any party State or of the United States or the applicability thereof to any government, agency, person, or circumstance is held invalid, the validity of the remainder of this agreement and the applicability thereof to any government, agency, person, or circumstance shall not be affected thereby. If this agreement shall be held contrary to the constitution of any State party hereto, the agreement shall remain in full force and effect as to the remaining States and in full force and effect as to the State affected as to all severable matters.''

(Pub. L. 91–538, § 2, Dec. 9, 1970, 84 Stat. 1397.)

§ 3. Definition of term "Governor" for purposes of United States and District of Columbia

The term ''Governor'' as used in the agreement on detainers shall mean with respect to the United States, the Attorney General, and with respect to the District of Columbia, the Mayor of the District of Columbia.

(Pub. L. 91–538, § 3, Dec. 9, 1970, 84 Stat. 1402.)

TRANSFER OF FUNCTIONS

''Mayor of the District of Columbia'' substituted in text for ''Commissioner of the District of Columbia'' pursuant to section 421 of Pub. L. 93–198. Office of Commissioner of District of Columbia, as established by Reorg. Plan No. 3, of 1967, abolished as of noon Jan. 2, 1975, by Pub. L. 93–198, title VII, § 711, Dec. 24, 1973, 87 Stat. 818, and replaced by Office of Mayor of District of Columbia by section 421 of Pub. L. 93–198.

§ 4. Definition of term "appropriate court"

The term ''appropriate court'' as used in the agreement on detainers shall mean with respect to the United States, the courts of the United States, and with respect to the District of Columbia, the courts of the District of Columbia, in which indictments, informations, or com-

plaints, for which disposition is sought, are pending.

(Pub. L. 91–538, § 4, Dec. 9, 1970, 84 Stat. 1402.)

§ 5. Enforcement and cooperation by courts, departments, agencies, officers, and employees of United States and District of Columbia

All courts, departments, agencies, officers, and employees of the United States and of the District of Columbia are hereby directed to enforce the agreement on detainers and to cooperate with one another and with all party States in enforcing the agreement and effectuating its purpose.

(Pub. L. 91–538, § 5, Dec. 9, 1970, 84 Stat. 1402.)

§ 6. Regulations, forms, and instructions

For the United States, the Attorney General, and for the District of Columbia, the Mayor of the District of Columbia, shall establish such regulations, prescribe such forms, issue such instructions, and perform such other acts as he deems necessary for carrying out the provisions of this Act.

(Pub. L. 91–538, § 6, Dec. 9, 1970, 84 Stat. 1403.)

TRANSFER OF FUNCTIONS

''Mayor of the District of Columbia'' substituted in text for ''Commissioner of the District of Columbia'' pursuant to section 421 of Pub. L. 93–198. Office of Commissioner of District of Columbia, as established by Reorg. Plan No. 3 of 1967, abolished as of noon Jan. 2, 1975, by Pub. L. 93–198, title VII, § 711, Dec. 24, 1973, 87 Stat. 818, and replaced by Office of Mayor of District of Columbia by section 421 of Pub. L. 93–198.

§ 7. Reservation of right to alter, amend, or repeal

The right to alter, amend, or repeal this Act is expressly reserved.

(Pub. L. 91–538, § 7, Dec. 9, 1970, 84 Stat. 1403.)

§ 8. Effective Date

This Act shall take effect on the ninetieth day after the date of its enactment.

(Pub. L. 91–538, § 8, Dec. 9, 1970, 84 Stat. 1403.)

REFERENCES IN TEXT

The date of its enactment, referred to in text, means Dec. 9, 1970.

§ 9. Special Provisions when United States is a Receiving State

Notwithstanding any provision of the agreement on detainers to the contrary, in a case in which the United States is a receiving State—

(1) any order of a court dismissing any indictment, information, or complaint may be with or without prejudice. 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 the agreement on detainers and on the administration of justice; and

(2) it shall not be a violation of the agreement on detainers if prior to trial the prisoner is returned to the custody of the sending State pursuant to an order of the appropriate court issued after reasonable notice to the prisoner and the United States and an opportunity for a hearing.

(Pub. L. 91–538, § 9, as added Pub. L. 100–690, title VII, § 7059, Nov. 18, 1988, 102 Stat. 4403.)

CLASSIFIED INFORMATION PROCEDURES ACT

Pub. L. 96–456, Oct. 15, 1980, 94 Stat. 2025, as amended by Pub. L. 100–690, title VII, §7020(g), Nov. 18, 1988, 102 Stat. 4396; Pub. L. 106–567, title VI, §607, Dec. 27, 2000, 114 Stat. 2855; Pub. L. 107–306, title VIII, §811(b)(3), Nov. 27, 2002, 116 Stat. 2423; Pub. L. 108–458, title I, §1071(f), Dec. 17, 2004, 118 Stat. 3691; Pub. L. 109–177, title V, §506(a)(8), Mar. 9, 2006, 120 Stat. 248; Pub. L. 111–16, §4, May 7, 2009, 123 Stat. 1608

§ 1. Definitions

(a) ''Classified information'', as used in this Act, means any information or material that has been determined by the United States Government pursuant to an Executive order, statute, or regulation, to require protection against unauthorized disclosure for reasons of national security and any restricted data, as defined in paragraph r. of section 11 of the Atomic Energy Act of 1954 (42 U.S.C. 2014(y)).

(b) ''National security'', as used in this Act, means the national defense and foreign relations of the United States.

(Pub. L. 96–456, §1, Oct. 15, 1980, 94 Stat. 2025.)

§ 2. Pretrial conference

At any time after the filing of the indictment or information, any party may move for a pretrial conference to consider matters relating to classified information that may arise in connection with the prosecution. Following such motion, or on its own motion, the court shall promptly hold a pretrial conference to establish the timing of requests for discovery, the provision of notice required by section 5 of this Act, and the initiation of the procedure established by section 6 of this Act. In addition, at the pretrial conference the court may consider any matters which relate to classified information or which may promote a fair and expeditious trial. No admission made by the defendant or by any attorney for the defendant at such a conference may be used against the defendant unless the admission is in writing and is signed by the defendant and by the attorney for the defendant.

(Pub. L. 96–456, §2, Oct. 15, 1980, 94 Stat. 2025.)

§ 3. Protective orders

Upon motion of the United States, the court shall issue an order to protect against the disclosure of any classified information disclosed by the United States to any defendant in any criminal case in a district court of the United States.

(Pub. L. 96–456, §3, Oct. 15, 1980, 94 Stat. 2025.)

§ 4. Discovery of classified information by defendants

The court, upon a sufficient showing, may authorize the United States to delete specified items of classified information from documents to be made available to the defendant through discovery under the Federal Rules of Criminal Procedure, to substitute a summary of the information for such classified documents, or to substitute a statement admitting relevant facts that the classified information would tend to prove. The court may permit the United States to make a request for such authorization in the form of a written statement to be inspected by the court alone. If the court enters an order granting relief following such an ex parte showing, the entire text of the statement of the United States shall be sealed and preserved in the records of the court to be made available to the appellate court in the event of an appeal.

(Pub. L. 96–456, §4, Oct. 15, 1980, 94 Stat. 2025.)

§ 5. Notice of defendant's intention to disclose classified information

(a) NOTICE BY DEFENDANT.—If a defendant reasonably expects to disclose or to cause the disclosure of classified information in any manner in connection with any trial or pretrial proceeding involving the criminal prosecution of such defendant, the defendant shall, within the time specified by the court or, where no time is specified, within thirty days prior to trial, notify the attorney for the United States and the court in writing. Such notice shall include a brief description of the classified information. Whenever a defendant learns of additional classified information he reasonably expects to disclose at any such proceeding, he shall notify the attorney for the United States and the court in writing as soon as possible thereafter and shall include a brief description of the classified information. No defendant shall disclose any information known or believed to be classified in connection with a trial or pretrial proceeding until notice has been given under this subsection and until the United States has been afforded a reasonable opportunity to seek a determination pursuant to the procedure set forth in section 6 of this Act, and until the time for the United States to appeal such determination under section 7 has expired or any appeal under section 7 by the United States is decided.

(b) FAILURE TO COMPLY.—If the defendant fails to comply with the requirements of subsection (a) the court may preclude disclosure of any classified information not made the subject of notification and may prohibit the examination