PETITIONER'S APPENDIX A

Opinion of the Eleventh Circuit Court of Appeals

909 F.3d 1292
United States Court of
Appeals, Eleventh Circuit.

UNITED STATES of
America, Plaintiff–Appellee,
v.
David Lazaro OLIVA, a.k.a.
Davisito, Defendant–Appellant.
United States of America,
Plaintiff–Appellee,
v.
Rafael Gomez **Uranga**,
Defendant–Appellant.

No. 17-12091, No. 17-11497
|
(November 30, 2018)

Synopsis

Background: Defendants were indicted in connection with two large-scale warehouse burglaries and charged with conspiracy to commit interstate transportation of stolen property and aiding and abetting the interstate transportation of stolen property. The United States District Court for the Northern District of Georgia, Leigh Martin May, J., 2016 WL 6525151, adopted findings and recommendation of Linda T. Walker, United States Magistrate Judge, 2016 WL 8732322, denying defendants' motion to dismiss the indictment based on a Sixth Amendment speedy trial rights violation. Subsequently, defendants pled guilty to the conspiracy charge, retaining the right to appeal the District Court's denial of their motions to dismiss. Defendants appealed.

Holdings: The Court of Appeals held that:

[1] Government's conduct was not purposefully dilatory and thus did not require Court of Appeals to find that Government's actions weighed heavily in favor of finding speedy trial violation;

[2] Court of Appeals would not factor two-year pre-indictment delay into determination of whether defendants' speedy trial rights were violated; and

[3] length of and reason for delay factors did not weigh heavily against government.

Affirmed.

West Headnotes (20)

[1] Criminal Law
Nature and scope of remedy
Criminal Law
Time for trial or hearing; continuance

In light of the unique policies underlying the Sixth Amendment speedy trial right, courts must set aside any judgment of conviction, vacate any sentence imposed, and dismiss the indictment if the right is violated. U.S. Const. Amend. 6.

Cases that cite this headnote

[2] Criminal Law

In general;balancing test

Courts assess claims for violation of Sixth Amendment right to speedy trial under the *Barker* four-factor test, weighing: (1) the length of the delay; (2) the reason for the delay; (3) the defendant's assertion of his speedy trial right; and (4) actual prejudice to the defendant. U.S. Const. Amend. 6.

Cases that cite this headnote

[3] Criminal Law

Length of Delay

In determining whether defendant's Sixth Amendment right to speedy trial has been violated, length of the delay factor serves a triggering function and must first be satisfied for the court to analyze the other factors of four-factor *Barker* test. U.S. Const. Amend. 6.

Cases that cite this headnote

[4] Criminal Law

Subsequent to accusation

Post-indictment delay exceeding one year is generally sufficient to trigger analysis of whether defendant's Sixth Amendment right to speedy trial has been violated. U.S. Const. Amend. 6.

1 Cases that cite this headnote

[5] Criminal Law

In general;balancing test

Criminal Law

Prejudice or absence of prejudice

If first three factors of *Barker* test for determining whether defendant's Sixth Amendment right to speedy trial were violated weigh heavily against the Government, the defendant need not show actual prejudice to establish violation of the right. U.S. Const. Amend. 6.

Cases that cite this headnote

[6] Criminal Law

Length of Delay

If a defendant alleging violation of Sixth Amendment right to speedy trial proves the length of the delay factor is sufficient to trigger the *Barker* analysis, that does not necessarily mean that factor weighs heavily against the Government; the two inquiries are separate. U.S. Const. Amend. 6.

1 Cases that cite this headnote

[7] Criminal Law

Questions of Law or of Fact

Whether the Government violated a defendant's Sixth Amendment right to a speedy trial is a mixed question of law and fact. U.S. Const. Amend. 6.

Cases that cite this headnote

[8] **Criminal Law**
Review De Novo
Criminal Law
Questions of Fact and Findings

Court of Appeals reviews a district court's legal conclusions de novo and its factual findings for clear error.

Cases that cite this headnote

[9] **Criminal Law**
Deliberate governmental conduct

An intentional attempt to delay trial in order to hinder the defense is weighted heavily against the government in determining whether a defendant's Sixth Amendment right to speedy trial has been violated. U.S. Const. Amend. 6.

Cases that cite this headnote

[10] **Criminal Law**
Absence of witness

A valid excuse, such as a missing witness, justifies reasonable delay for purposes of determining whether a defendant's Sixth Amendment right to speedy trial has been violated. U.S. Const. Amend. 6.

Cases that cite this headnote

[11] **Criminal Law**
Duty of prosecution to proceed to trial
Criminal Law
Delay Attributable to Prosecution

For purposes of determining how much weight to accord reason for delay, in determining whether defendant's Sixth Amendment right to speedy trial has been violated, government's negligence as reason for delay falls between two extremes of intentional attempt to delay trial in order to hinder the defense and valid excuse such as a missing witness, but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government rather than the defendant. U.S. Const. Amend. 6.

Cases that cite this headnote

[12] **Criminal Law**
Delay Attributable to Prosecution

For purposes of determining whether a defendant's Sixth Amendment right to speedy trial has been violated, government negligence falls on the wrong side of the divide between acceptable and unacceptable reasons for delaying a criminal prosecution

once it has begun. U.S. Const. Amend. 6.

Cases that cite this headnote

[13] Criminal Law
Delay Attributable to Prosecution
Criminal Law
Length of Delay

For purposes of determining whether a defendant's Sixth Amendment right to speedy trial has been violated, the length of the delay impacts a court's determination of whether the Government's negligence weighs heavily against it. U.S. Const. Amend. 6.

Cases that cite this headnote

[14] Criminal Law
Deliberate governmental conduct

Government actions which are tangential, frivolous, dilatory, or taken in bad faith weigh heavily in favor of a finding that a Sixth Amendment speedy trial violation occurred. U.S. Const. Amend. 6.

Cases that cite this headnote

[15] Indictment and Information
Motion to Dismiss

Dismissing an indictment is an extraordinary remedy.

Cases that cite this headnote

[16] Criminal Law
Deliberate governmental conduct

For government action to be dilatory, such that reason for delay factor will weigh heavily in favor of a finding that a Sixth Amendment speedy trial violation occurred, government action requires intent; negligence does not suffice. U.S. Const. Amend. 6.

Cases that cite this headnote

[17] Criminal Law
Deliberate governmental conduct

Government did not purposefully cause delay or otherwise act in bad faith in causing delay between indictment and arrest of burglary defendant, and thus government's conduct was not purposefully dilatory and thus did not require Court of Appeals to find that reason for delay factor weighed heavily in favor of finding that a Sixth Amendment speedy trial violation occurred; government was merely grossly negligent in causing delay. U.S. Const. Amend. 6.

Cases that cite this headnote

[18] Indictment and Information

Term of court or time of finding

Two-year pre-indictment delay was not inordinate, and thus court would not factor pre-indictment delay into its analysis of whether burglary defendants' Sixth Amendment right to speedy trial were violated; defendants were convicted of conspiracy for actions involving two separate large-scale burglaries carried out by a number of participants, investigation conducted by police officer serving as Federal Bureau of Investigation (FBI) task force officer included 25 witnesses located throughout numerous states, nine suspects, and several arrest warrants, and officer was still collecting pertinent evidence until fewer than six months before defendants' indictment. U.S. Const. Amend. 6.

Cases that cite this headnote

[19] Indictment and Information

Term of court or time of finding

Pre-indictment delay is accounted for in determining whether defendant's Sixth Amendment speedy trial right has been violated if it is inordinate. U.S. Const. Amend. 6.

1 Cases that cite this headnote

[20] Criminal Law

Delay Attributable to Prosecution

Criminal Law

Subsequent to accusation

Criminal Law

Prejudice or absence of prejudice

Neither length of, nor reason for 23 month post-indictment delay in burglary prosecution weighed heavily against Government for purposes of determining whether defendants' Sixth Amendment rights to speedy trial were violated, and thus defendants were required to establish actual prejudice to be entitled to relief; delay was result of government negligence in that delay was caused by convergence of several factors including federal crime being investigated by a state law enforcement officer who was unfamiliar with federal indictment and arrest procedure and who was serving as solo investigator for first time in case where the prosecutor who secured the indictment left the United States Attorney's Office and was not replaced on the case for more than a year, and officer made good faith attempts to arrest defendants in that he was under impression that he was not responsible for arrests, and, eventually, once he realized his mistake, he quickly effectuated defendants' arrests. U.S. Const. Amend. 6.

Cases that cite this headnote

Attorneys and Law Firms

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Appeals from the United States District Court for the Northern District of Georgia, D.C. Docket No. 1:13-cr-00463-LMM-LTW-2, 1:13-cr-00463-LMM-LTW-1

Before WILSON and NEWSOM, Circuit Judges, and VINSON, * District Judge.

Opinion

PER CURIAM:

This case begins with two large-scale warehouse burglaries in October and November of 2011. After a lengthy investigation, David Lazaro Oliva and Rafael Gomez **Uranga** were indicted in November 2013 in connection with those burglaries and charged with conspiracy to commit interstate transportation of stolen property, in violation of 18 U.S.C. § 371, and aiding ***1296** and abetting the interstate transportation of stolen property, in violation of 18 U.S.C. §§ 2314 and 2. They were arrested on these charges nearly twenty-three months later, in October 2015. While in the District Court, Oliva and **Uranga** moved to dismiss the indictment based on a Sixth Amendment speedy trial violation. The motions were referred to a Magistrate Judge, who held an evidentiary hearing and entered a report and recommendation. The Magistrate Judge found that the delay between indictment and arrest was the result of the Government's gross negligence, but she ultimately recommended that the motions be denied. The District Court agreed with the Magistrate Judge's recommendation. Subsequently, Oliva and **Uranga** pled guilty to the conspiracy charge, retaining the right to appeal the District Court's denial of their motions to dismiss. They do so in this consolidated appeal.

Although the lengthy delay between the indictment and arrest was the result of the Government's negligence, we hold that the delay did not amount to a Sixth Amendment violation. Accordingly, we affirm.

I.

On October 23, 2011, a group of men burglarized a SouthernLinc warehouse in Gwinnett County, Georgia. They escaped with a truckload of cellphones valued at $1,789,980. Another group of men attempted a similar burglary of a Max Group warehouse, also located in Gwinnett County, on November 28, 2011. [1] This group, however, tripped the warehouse's burglary alarm, causing the police to arrive at the site. **Uranga** was arrested in his SUV near the Max Group location. [2]

The FBI opened an investigation into the burglaries on November 21, 2011.[3] On or about March 27, 2012, Michael Donnelly, a Gwinnett County Police Department officer serving as an FBI Task Force Officer, was assigned as the sole investigator in the case. This was Donnelly's first time serving as a solo investigator. His expansive investigation involved, *inter alia*, twenty-five witnesses located across various states, nine suspects, nearly 100 exhibits, shoe-tread analysis, and numerous search warrants. Donnelly's investigation continued until at least June 2013.

Oliva and **Uranga** were indicted by a federal grand jury on November 25, 2013, about two years after the attempted Max Group warehouse burglary. Donnelly was responsible for locating and arresting the Appellants, but he mistakenly believed that this was the United States Marshals Service's ("USMS") responsibility.[4] In or ***1297** around January 2014, Donnelly realized that nothing was happening with the case and conferred with Josh Thompson, another FBI Task Force Officer who had recently worked with the USMS. Donnelly gave Thompson copies of the arrest warrants and possible locations of the Appellants, and asked Thompson to communicate with the USMS about locating them.

According to Thompson's testimony during the evidentiary hearing before the Magistrate Judge, he called someone from the USMS within a month after conferring with Donnelly and learned that Marshals are not responsible for executing arrest warrants when the FBI controls the case. Then, not more than a month later, in or around February or March 2014, Thompson met with Donnelly to return the warrants, and the two discussed some information. Neither could recall at the evidentiary hearing exactly what was discussed when Thompson returned the warrants. Thompson testified, however, that he did *not* inform Donnelly that the FBI handles its own arrests, and that Donnelly did *not* ask about FBI procedure or whether the USMS would begin locating the Appellants. Donnelly testified at the same evidentiary hearing that, after this second meeting with Thompson, he was not under the impression that he was responsible for arresting the Appellants. Donnelly never followed up with the USMS about the matter. There was also no communication between Donnelly and the U.S. Attorney's Office concerning the arrests. The Assistant U.S. Attorney who secured the indictment, Karlyn Hunter, left the U.S. Attorney's Office in September 2014 (almost a year after the indictment), and a new prosecutor was not assigned to the case until October 2015 (more than a year thereafter). Donnelly had no contact with the U.S. Attorney's Office during this two-year period.

Donnelly took no further action on the case until late September or early October of 2015, when his supervisor informed him that he, not the USMS, was responsible for locating and arresting the Appellants. Donnelly began searching for them within twenty-four hours after receiving this information. Notably, counsel for the Appellants conceded at oral argument that there was no evidence of bad faith in

this case and that the speed with which Donnelly acted after he learned that he was responsible for making the arrests suggested the delay "probably was an honest mistake." [5] ***1298** **Uranga** was ultimately arrested in the Southern District of Florida on October 9, 2015, [6] and Oliva was arrested in the Southern District of New York four days later.

On December 11, 2015, **Uranga** moved to dismiss the indictment for lack of a speedy trial. Oliva did the same about three months later.

II.

[1] The Sixth Amendment to the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy ... trial[.]" In light of the "unique policies" underlying the speedy trial right, courts must "set aside any judgment of conviction, vacate any sentence imposed, and dismiss the indictment" if the right is violated. *United States v. Villarreal*, 613 F.3d 1344, 1349 (11th Cir. 2010).

[2] [3] [4] [5] [6] This Circuit assesses speedy trial claims under the four-factor test derived from *Barker v. Wingo*, weighing (1) the length of the delay, (2) the reason for the delay, (3) the defendant's assertion of his speedy trial right, and (4) actual prejudice to the defendant. 407 U.S. 514, 530, 92 S.Ct. 2182, 2192, 33 L.Ed.2d 101 (1972); *see also Villarreal*, 613 F.3d at 1350. The first factor, length of the delay, serves a triggering function: it must first be satisfied for the court to analyze the other factors. *Villarreal*, 613 F.3d at 1350; *see also United States v. Dunn*, 345 F.3d 1285, 1296 (11th Cir. 2003). A post-indictment delay exceeding one year is generally sufficient to trigger the analysis. *United States v. Ingram*, 446 F.3d 1332, 1336 (11th Cir. 2006); *United States v. Clark*, 83 F.3d 1350, 1352 (11th Cir. 1996). Importantly, if the first three factors "weigh heavily against" the Government, the defendant need not show actual prejudice, the fourth factor. *Ingram*, 446 F.3d at 1336. If a defendant proves the length of the delay is sufficient to trigger the *Barker* analysis, however, that does not necessarily mean that factor weighs heavily against the Government; the two inquiries are separate. *See Doggett v. United States*, 505 U.S. 647, 651–52, 112 S.Ct. 2686, 2690–91, 120 L.Ed.2d 520 (1992); *Villarreal*, 613 F.3d at 1350.

A.

As earlier noted, Oliva and **Uranga**'s motions to dismiss were referred to a Magistrate Judge who, in a report and recommendation, recommended that the motions be denied. The Magistrate Judge performed a three-step inquiry: first, she analyzed whether the first three *Barker* factors weighed against the Government; next, she separately analyzed whether those factors "weighed *heavily*" against the Government; finally, after concluding that the first three factors did not weigh heavily against the Government, she assessed whether the Appellants could prove actual prejudice, the fourth factor.

In her first step, the Magistrate Judge noted that the Government conceded that the first and third factors, length of the delay and assertion of the right, weighed against it.[7] The Magistrate Judge then ***1299** found that the Government was "grossly negligent" in failing to procure the Appellants' arrests, and accordingly held that the second factor—reason for the delay—also weighed against the Government.

After determining that the first three factors weighed against the Government, the Magistrate Judge next analyzed whether they did so heavily. Drawing upon the two most relevant Eleventh Circuit cases—*Ingram*, 446 F.3d at 1332, and *Clark*, 83 F.3d at 1350—the Magistrate Judge concluded that the length of the delay, though sufficient to trigger the *Barker* analysis, did not weigh heavily against the Government. In reaching this conclusion, the Magistrate Judge factored in only the post-indictment delay period. Although "inordinate pre-indictment delay" can also weigh heavily against the Government, *see Ingram*, 446 F.3d at 1339, the Magistrate Judge concluded that the two-year pre-indictment delay here was not "inordinate" given the complexity of Donnelly's investigation.

Finally, since the first three factors did not each weigh heavily against the Government, the Magistrate Judge assessed whether the Appellants could prove actual prejudice. She found that they could not, and she recommended that their motions be denied.

The Appellants objected to the report and recommendation. Oliva contended that the Magistrate Judge should have factored pre-indictment delay into her determination. He also argued, more generally, that the length of the delay weighed heavily against the Government in light of its gross negligence. **Uranga**, apparently believing that the Magistrate Judge concluded that the *reason for*—not the *length of*—the delay did not weigh heavily against the Government, asserted that the Magistrate Judge erred in reaching that conclusion.[8]

The Government responded, devoting the majority of its brief to supporting the Magistrate Judge's conclusion that the length of the delay did not weigh heavily against it. Unlike **Uranga**, the Government believed that the Magistrate Judge had concluded that the *reason for* the delay *did* weigh heavily against it. Importantly, the Government did not argue against that purported conclusion, but simply acknowledged:

> In evaluating the reason for delay, the Magistrate Judge found that the Government was "grossly negligent" in failing to procure the Defendants' arrests and, without stating so explicitly, concluded that this factor weighed heavily against the Government by stating: "[T]he Government's negligence in this case is every bit as culpable as that of the ATF special agent in *Ingram*."

B.

The District Court adopted the Magistrate Judge's report and recommendation. But, like **Uranga**, it operated under the assumption that the Magistrate Judge recommended that the motions be denied because the *reason for*, not *length of*, the delay did not weigh heavily against the Government.[9] The District Court held that ***1300** because the Appellants did not produce evidence of bad faith by the Government—the delay between indictment and arrest was proven only to result from gross negligence—the reason for the delay did not weigh heavily against the Government.

To support this conclusion, the District Court looked to *United States v. Bibb*, 194 F. App'x 619 (11th Cir. 2006), which states that " '[g]overnment actions [which] are tangential, frivolous, dilatory, or taken in bad faith weigh heavily in favor of a finding that a speedy trial violation occurred.' " *Id.* at 622 (quoting *United States v. Schlei*, 122 F.3d 944, 987 (11th Cir. 1997)). Although the Government caused the delay, the District Court held that its conduct could not be characterized as "dilatory," as the Appellants argued, because in context dilatory requires intent. Here, the Government caused only unintentional delay through its negligence; there was no bad faith. The District Court also refused to factor the pre-indictment delay period into its decision, agreeing with the Magistrate Judge that the complexity of Donnelly's investigation justified the delay.

Thus, the District Court held that the first three *Barker* factors did not each weigh heavily against the Government, and that the Appellants had failed to prove actual prejudice, the fourth factor. The District Court accordingly denied their motions to dismiss.

Oliva and **Uranga** appealed. On appeal, they do not challenge the District Court's holding that they failed to prove actual prejudice.[10] Rather, they argue that the District Court had found that the first and third *Barker* factors weighed heavily against the Government, and that it erred in holding that the reason for the delay, the second *Barker* factor, did not weigh heavily against the Government, rendering actual prejudice irrelevant.

First, the Appellants contend that this Circuit's speedy trial right jurisprudence does not require intentional delay or bad faith by the Government. Instead, they maintain that the term "dilatory," as used *Schlei* (and as later quoted in *Bibb*) refers both to unintentional and intentional delay. Therefore, they argue that the Government's gross negligence—Donnelly's near-complete inaction, Thompson failing to relay that the USMS was not assigned arrest responsibility, and the U.S. Attorney's Office failing to check on the Appellants' arrest status—weighs heavily against it. The Appellants add that the pre-indictment delay should also have been factored into the Court's analysis, providing more weight to the Government's negligence. *See Clark*, 83 F.3d at 1353 ("[Our] toleration of negligence varies inversely with the length of the delay caused by that negligence.").

Next and alternatively, the Appellants argue that the Government's attempt to arrest them was so minimal that it cannot be characterized as "diligent" or performed "in good faith," requiring that the second *Barker* factor weigh heavily against ***1301** the Government. *See United States v. Bagga*, 782 F.2d 1541, 1543 (11th Cir. 1986) (noting the Government's " 'constitutional duty to make a diligent, good-faith effort' to locate and apprehend a defendant and bring the defendant to trial") (quoting *Smith v. Hooey*, 393 U.S. 374, 383, 89 S.Ct. 575, 579, 21 L.Ed.2d 607 (1969)). The Appellants maintain that they did not have to prove actual prejudice because, under either theory, the reason for the delay weighs heavily against the Government and the Government conceded that the other two factors, length of the delay and assertion of the right, did so too. Their motions to dismiss, the Appellants argue, should have therefore been granted.

The Government asserts that the delay in the Appellants' arrests was due only to negligence, not bad faith. The District Court thus properly denied the motions, as intent or bad faith is required for the second *Barker* factor to be weighed heavily against the Government. The Government also contends that it never conceded that the length of the delay weighs heavily against it. Although it did concede that the length of the delay was sufficient to trigger the *Barker* analysis, it did not also concede that the delay's length was so great as to be weighed heavily against it.

III.

A.

[7] **[8]** Whether the Government violated a defendant's Sixth Amendment right to a speedy trial is a mixed question of law and fact. *Villarreal*, 613 F.3d at 1349. We review a district court's legal conclusions *de novo* and its factual findings for clear error. *Id.*

Here, we are tasked with reviewing the District Court's application of the *Barker* factors. As noted, the Appellants do not challenge the District Court's finding of no actual prejudice, the fourth factor. And, the Government concedes the third factor, assertion of the right. [11] The Government, however, did not concede that the length of the delay weighed heavily against it. [12] Thus we address the first two factors, length of the delay and the reason for it. As discussed below, these factors overlap to an extent, so we address them together.

[9] **[10]** **[11]** **[12]** **[13]** Different reasons for delay are accorded different weights. *Barker*, 407 U.S. at 531, 92 S.Ct. at 2192. An intentional attempt to delay trial in order to hinder the defense is "weighted heavily against the government." *Id.* In contrast, a valid excuse, such as a missing witness, justifies reasonable delay. *Id.* Negligence falls between these two extremes. It is "more neutral" and "should be weighted less heavily" than bad-faith acts. *Id.* But negligence "nevertheless should be considered since the ultimate responsibility

for such circumstances must rest with the government rather than with the defendant." *Id.* ***1302** Indeed, "it still falls on the wrong side of the divide between acceptable and unacceptable reasons for delaying a criminal prosecution once it has begun." *Doggett*, 505 U.S. at 657, 112 S.Ct. at 2693. Our "toleration of negligence varies inversely with the length of the delay" that the negligence causes. *Clark*, 83 F.3d at 1353. Analyzing the second factor, therefore, overlaps some with the first: the length of the delay impacts our determination of whether the Government's negligence weighs heavily against it.

Two Eleventh Circuit cases involving negligent governmental delay set the parameters of our analysis. In the first case, *United States v. Clark,* 83 F.3d at 1350, the defendant, Clark, was charged with six counts related to controlled-substance violations and one count of carrying a firearm during a drug-trafficking crime. *Id.* at 1351. There was a seventeen-month delay between Clark's indictment and arrest, during which he continually resided in the apartment listed on the arrest warrant. *Id.* at 1352. A city police officer attempted to locate Clark by visiting his apartment a single time, but no one answered the door. *Id.* The police department then suspended its efforts to locate Clark, mistakenly believing that the USMS was taking over. *Id.* Clark was finally arrested while sitting in a college class. *Id.*

The District Court dismissed the indictment after finding that the first three *Barker* factors weighed heavily against the Government. *See id.* at 1354. This Court reversed, reasoning that although the Government was negligent, it did not deliberately cause the delay. *Id.* at 1353-54. We further reasoned that the seventeen months of negligent Government delay was significantly less than the eight and a half years of such delay found intolerable by the Supreme Court in *Doggett v. United States*, 505 U.S. at 651–53, 112 S.Ct. at 2690–91, and was close to the fourteen and a half months of negligent Government delay found acceptable by the Fifth Circuit in *Robinson v. Whitley*, 2 F.3d 562, 568–70 (5th Cir. 1993). [13] *Id.*

The second case, *United States v. Ingram*, 446 F.3d at 1332, went the other way. In that case, the defendant, Ingram, claimed he was not a convicted felon when applying to purchase a firearm on February 28, 2000. *Id.* at 1334. The seller submitted Ingram's application to the National Instant Criminal Background Check System, and the application came up "denied." *Id.* In March of 2000, a special agent with the Bureau of Alcohol, Tobacco, and Firearms began investigating the transaction. *Id.* In July of that same year, the agent interviewed Ingram at his workplace, where Ingram admitted he was a convicted felon, but inaccurately claimed that his civil rights had been restored. *Id.* at 1335. During the interview, Ingram gave the agent his home address and phone numbers and told the agent his brother was a police officer. *Id.* The agent turned in his report and heard nothing for over two years. *Id.* When the agent checked in with the U.S. Attorney's

Office in 2002, he was told Ingram's case had been "misplaced." *Id.*

Ingram was eventually indicted in October of 2002—more than two and a half years after his attempted firearm purchase—for making false statements to a firearms dealer in connection with an attempted acquisition of a firearm. *Id.* The indictment was sealed the same day it was ***1303** entered and a warrant was issued for Ingram's arrest. *Id.* The agent made a minimal effort to arrest Ingram. He left some voicemails for Ingram between 2002 and 2004. *Id.* Ingram returned at least one call in December of 2002 and left his cellphone number and workplace address for the agent to contact him. *Id.* The agent also drove by Ingram's residence and workplace on several occasions, but did not exit his car. *Id.* Finally, in July of 2004, the agent called Ingram's workplace and a coworker gave the agent another number at which to reach Ingram. *Id.* The agent left a message at this new number and Ingram returned his call the next day. *Id.* Ingram surrendered in court on August 3, 2004. *Id.*

Ingram moved to dismiss the indictment on speedy trial grounds. The District Court denied the motion, but this Court reversed. We noted that "inordinate pre-indictment delay" influences "how heavily post-indictment delay weighs against the Government," and held that the pre-indictment delay in Ingram's case qualified as "inordinate." *See id.* at 1339. Thus, the nearly two years of post-indictment delay weighed more heavily against the Government in light of the two and a half years of inordinate pre-indictment delay. *Id.* We also noted that the agent in *Ingram*, unlike the one in *Clark*, knew he was the only law enforcement agent responsible for Ingram's arrest; the Government's negligence, we concluded, was overall more egregious than it was in *Clark*. *Id.* So, considering the length of the pre- and post-indictment delays, the degree of Government negligence, the simplicity of the crime for which Ingram was indicted, the state of the proof against him when the indictment was entered, and the Government's knowledge of Ingram's whereabouts, this Court determined that the length of and the reason for the delay weighed heavily against the Government. *Id.* at 1340. We then remanded the case to the District Court with instructions to dismiss the indictment. *Id.*

B.

Before comparing this case to *Clark* and *Ingram*, we address the Appellants' argument that the Government's negligent conduct was "dilatory" and therefore *must* be weighed heavily against it.

[14] **[15]** **[16]** As quoted in *Bibb, supra*, the precedential language relevant to the Appellants' argument provides that "Government actions which are tangential, frivolous, dilatory, or taken in bad faith weigh heavily in favor of a finding that a speedy trial violation occurred." *Schlei*, 122 F.3d at 987 (citing *United States v. Loud Hawk*, 474 U.S. 302, 315–17, 106 S.Ct. 648, 656–57, 88 L.Ed.2d 640 (1986)). They contend that the term "dilatory"

does not require intent, and so it covers the Government's negligence. We disagree. The Supreme Court's *Loud Hawk* case cited by *Schlei* (which was in turn cited by *Bibb*) for the above proposition used the word "dilatory" to describe purposeful action. *See* 474 U.S. at 316, 106 S.Ct. at 656 (noting that there was "no showing of bad faith or dilatory *purpose* on the Government's part") (emphasis added). Further, dismissing an indictment is an "extraordinary remedy." *Villarreal*, 613 F.3d at 1349. It is not one to be given to defendants each time the Government's conduct unintentionally causes delay, as the Appellants' interpretation suggests. Finally, *Clark* and *Ingram* contemplate that negligence alone *can* be, but not *must* be, weighed heavily against the Government depending upon the circumstances. *See Ingram*, 446 F.3d at 1339; *Clark*, 83 F.3d at 1353–54.

[17] The District Court found that the Government was grossly negligent, but not that it purposefully caused delay or otherwise acted in bad faith. Nothing in the ***1304** record indicates that this conclusion—one we view with "considerable deference," *Doggett*, 505 U.S. at 652, 112 S.Ct. at 2691—was clearly erroneous. [14] The Government's conduct was therefore not purposefully dilatory as the term is used in the pertinent case law. We thus turn to whether the Government's negligence, in light of the length of the delay, was so great as to weigh heavily against it, and we hold that it wasn't.

[18] **[19]** The relevant length of delay in this case is twenty-three months, the length of the post-indictment delay. [15] The two-year pre-indictment delay is not factored into our analysis of whether the first two *Barker* factors weigh heavily against the Government. Pre-indictment delay is accounted for if it is "inordinate." *Ingram*, 446 F.3d at 1339. The two and a half years of pre-indictment delay in *Ingram*, for example, was inordinate given the simplicity of Ingram's crime and of the investigation. *See id.*; *see also Barker*, 407 U.S. at 531, 92 S.Ct. at 2192 ("[T]he delay that can be tolerated for an ordinary street crime is ***1305** considerably less than for a serious, complex conspiracy charge."). In *Ingram*, the defendant committed a simple crime and the investigation appeared complete more than two years before the indictment. Here, by contrast, the Appellants were convicted of conspiracy for actions involving two separate large-scale burglaries carried out by a number of participants. Further, Donnelly's investigation included twenty-five witnesses located throughout numerous states, nine suspects, almost 100 exhibits, several search warrants, shoe-tread analysis, and more. Donnelly was still collecting pertinent evidence until at least June of 2013, fewer than six months before the Appellants' November 2013 indictments.

Thus, unlike in *Ingram*, the pre-indictment delay here is not inordinate. [16] With the relevant period of delay at twenty-three months, this case is much closer to *Clark*'s seventeen-month delay than to *Ingram*'s combined delay of four and a half years. Moreover, courts outside this Circuit have

consistently rejected defendants' arguments that similar delays excuse them from proving actual prejudice. [17]

The Government's negligence in the case before us is also more akin to its negligence in *Clark* than in *Ingram*. Like the investigator in *Clark*, Donnelly believed that the USMS was responsible for arresting the Appellants. Donnelly made at least a minimal attempt to follow up on the Appellants' arrest by conferring with Thompson, and he remained under the impression that he was not responsible for the arrests. Eventually, once Donnelly realized his mistake, he quickly effectuated the Appellants' arrests. The lack of effort exemplified by the investigator in *Ingram* was more egregious, as that investigator knew he was solely responsible for Ingram's arrest.

[20] Ultimately, the delay in this case was the result of a convergence of several factors, including: (a) a federal crime being investigated by a state law enforcement officer (albeit a federally-deputized one); (b) who was unfamiliar with federal indictment and arrest procedure; (c) and who was serving as a solo investigator for the very first time; (d) in a case where the prosecutor who secured the indictment left the U.S. Attorney's Office and was not replaced on the case for more than a year. Nevertheless, the Government's negligence here is worrisome. Despite his inexperience, Donnelly could have followed up with the USMS, contacted someone in the U.S. Attorney's Office, or reached out to a supervisor during the long period between the time that he conferred with Thompson and later learned that he was responsible for arresting the Appellants. But because the negligence in this case is weaker than ***1306** that in *Ingram*—though perhaps only slightly—and because the relevant length of delay is less than half of *Ingram*'s, we conclude that neither the length of the delay, nor the reason for it, weigh heavily against the Government. The Government's good-faith attempt to arrest the Appellants was diligent enough to avoid warranting the "extraordinary remedy" of dismissing their indictments. *See Villarreal*, 613 F.3d at 1349.

IV.

In sum, two of the first three *Barker* factors do not weigh heavily against the Government. The Appellants therefore must prove actual prejudice, which they did not do below and do not attempt to do here. Accordingly, we affirm the District Court's denial of their motions to dismiss.

AFFIRMED.

All Citations

909 F.3d 1292, 27 Fla. L. Weekly Fed. C 1541

Footnotes

* Honorable C. Roger Vinson, United States District Judge for the Northern District of Florida, sitting by designation.

1 The extent to which the personnel overlapped between the two burglaries is not clear from the record.

2 Four other men were in **Uranga**'s SUV, and they escaped on foot. The record does not specify whether Oliva was one of these men. The record indicates only that Oliva rented a U-Haul truck shortly before both burglaries and that the person who attempted to sell the stolen phones identified Oliva as "part of a robbery crew." **Uranga**, on the other hand, was linked to the Max Group burglary by video, shoe prints, and proximity; and he was linked to the SouthernLinc burglary by a similar *modus operandi* and cellphone location data and records.

3 The parties' briefing, the Magistrate Judge's report and recommendation, and the District Court order at issue all state that the FBI opened the investigation into "both" burglaries on November 21, 2011, before the Max Group burglary was attempted. The District Court noted that "presumably the investigation began with the first burglary only but then incorporated the second burglary once it was committed." We, too, assume this to be the case.

4 Donnelly believed this because in Gwinnett County, the investigating officer is not responsible for locating and arresting defendants—that task falls to the Sheriff's Department—and he just assumed that it worked the same way in the federal system with respect to the USMS.

5 In her report and recommendation, the Magistrate Judge stated that it was "inexplicabl[e]" and "defie[d] logic" that Donnelly and Thompson did not discuss the FBI's responsibility for handling its own arrests at the time that Thompson returned the warrants in February or March 2014. The Appellants argued in their briefs on appeal that this language constitutes a finding by the Magistrate Judge—the only judge to hear the testimony—that Donnelly's claim of lack of knowledge of the FBI's responsibility for making the arrests was not credible. We have two things to say about that. First, as the District Court rightly noted, the Magistrate Judge did not say that their testimony was not credible. Rather, the language that she used ("inexplicabl[e]" and "defie[d] logic") merely acknowledged that their actions were puzzling and not logical. Second, the Appellants' argument in their briefs on this point is difficult to reconcile with the position that they took at oral argument. As just noted in the text above, counsel for the Appellants conceded at oral argument that there was no evidence of bad faith and that the delay "probably was an honest mistake." If, however, Thompson told Donnelly in February or March 2014 that the FBI was responsible for making the arrests (which is essentially what the Appellants are arguing when they suggest that Donnelly and Thompson did not testify truthfully at the evidentiary hearing), then that would indicate there *was* bad faith and that the subsequent delay was *not* the result of an honest mistake. After reviewing the record, we agree with the position that defense counsel took at oral argument and not the one that the Appellants argued in their briefs: there is no evidence of bad faith or anything other than an honest mistake here.

6 When **Uranga** was first arrested after the Max Group burglary, the arresting officers took **Uranga**'s wallet, which contained a driver's license listing the address where he resided throughout this case. It was at this address that he was arrested by the FBI.

7 The Government conceded that the length of the delay was sufficient to trigger the rest of *Barker*'s analysis, but not that it was so long as to be weighed heavily against it. Put another way, the concession pertained to the first part of the Magistrate Judge's analysis, not the second. *See Doggett*, 505 U.S. at 651–52, 112 S.Ct. at 2690–91; *Villarreal*, 613 F.3d at 1350.

8 **Uranga**, like Oliva, also objected to the Magistrate Judge excluding pre-indictment delay time from her *Barker* analysis.

9 The District Court stated, "The Magistrate Judge found, and both parties agreed, that the length of the delay was presumptively prejudicial, triggering the other three *Barker* factors. The Magistrate Judge did *not* find that the reason for the delay weighed heavily against the Government, as Oliva suggests." The Court further stated in a footnote that because the Government conceded the "length of delay" and "assertion of the right" factors, it assumed *arguendo* that those factors weighed heavily against the Government. Thus, the Court added, if it were to find that the reason for the delay weighed heavily against the Government, all three factors would weigh heavily against the Government and the Appellants would not have to show actual prejudice.

Contrary to the District Court's belief, the Government conceded only that the length of the delay was sufficient to trigger analysis of the rest of the *Barker* factors, not that the delay weighed heavily against it. *See supra* note 7. Given this limited concession, the length of the delay factor was still at issue.

10 In fact, the Appellants expressly conceded at oral argument that they cannot show actual prejudice.

11 Although the Government concedes that the Appellants timely asserted their speedy trial rights and, thus, it stipulates that the third factor weighs against the Government, it does not say whether that factor weighs *heavily* against the Government. This Court has previously determined that the third *Barker* factor weighed "heavily" against the Government where the defendant asserted his right to a speedy trial soon after learning of the indictment and arrest warrant. *See Ingram*, 446 F.3d at 1335, 1338. By contrast, this Court has also determined that, where a defendant asserted his right to

a speedy trial but also moved for four continuances prior to that trial, the third *Barker* factor did not weigh "heavily" against the Government. *See United States v. Register*, 182 F.3d 820, 828 (11th Cir. 1999). Because the Government does not argue this factor, we assume for our analysis that it weighs heavily against the Government and do not discuss it further.

12 *See supra* notes 7, 9.

13 We also cited *United States v. Beamon*, 992 F.2d 1009, 1015 (9th Cir. 1993), a case holding that a delay of seventeen to twenty months solely attributable to Government negligence was insufficient to excuse the defendants from showing actual prejudice. *Clark*, 83 F.3d at 1354.

14 To the contrary, as earlier noted, the Appellants conceded at oral argument that there was no evidence of bad faith here and that the reason for the delay "probably was an honest mistake."

15 It was approximately twenty-three months between the indictment and the defendants' arrest. We recognize, however, as **Uranga** argues on appeal, that the length of the delay at issue is actually thirty-four months when you factor in the time that it took the defendants to file (and the District Court to eventually rule on) the motions to dismiss. For this argument, **Uranga** has relied on *Villarreal*, where we stated that in determining the length of the pretrial delay for speedy trial purposes, "we calculate the time that elapsed between 'when the Sixth Amendment right attached until trial (or, until the pretrial motion to dismiss on this ground is determined).' " 613 F.3d at 1350 (quoting 5 Wayne R. LaFave, et al., Criminal Procedure § 18.2(b) (3d ed. Thomson/West 2007)). In many cases, the appropriate time frame will indeed be the period between the indictment and trial (or resolution of a pretrial motion to dismiss). *See, e.g., United States v. Knight*, 562 F.3d 1314, 1323 (11th Cir. 2009) (" 'The Sixth Amendment right to a speedy trial attaches at the time of arrest or indictment, whichever comes first, and continues until the date of trial.' "), and *United States v. Gonzalez*, 671 F.2d 441, 444 (11th Cir. 1982) (same), both cases citing and quoting *United States v. Walters*, 591 F.2d 1195, 1200-01 (5th Cir. 1979) ("The proper measure of the delay is the *total time* between arrest and trial.") (emphasis added). But here, **Uranga** argued to the District Court (as late as September 23, 2016, right at the thirty-four month mark) that the relevant time period was the twenty-three months between indictment and arrest. *See* Defendant's Objection to Magistrate Judge's Report and Recommendation, dated September 23, 2016, at 8-9 ("Defendant contends that the nearly two year delay between his indictment and arrest violates his speedy trial rights under the Sixth Amendment. ... [T]he delay in this case is two years[.]"). For his part, in his objections to the Report and Recommendation filed on the same day, Oliva agreed that the length of the delay was the "[t]wenty-three (23) months ... between the indictment of Mr. Oliva and his arrest[.]" *See* Defendant Oliva's Objections to the Magistrate's Report and Recommendation, dated September 23, 2016, at 2. (In fact, Oliva argued in his opening brief *on this appeal* that the relevant time period is the twenty-three month delay between the indictment and arrest. *See* Appellant Oliva's Opening Brief at 6). Based on the foregoing, the District Court analyzed and decided the motion to dismiss as though the delay was the two years between the indictment and arrest. This focuses on the real delay in this case and the defendants' own arguments. If this was error, it was invited error. *See, e.g., United States v. Brannan*, 562 F.3d 1300, 1306 (11th Cir. 2009) (explaining that the doctrine of invited error is implicated when a party induces or invites the district court into making an error, and, when there is invited error, the court may not review that error on appeal). However, even if we were to calculate the delay at issue here at thirty-four months instead of twenty-three months, as **Uranga** now urges, it would not change our analysis or the outcome of this appeal.

16 Also underpinning this conclusion is our hesitance to incentivize rushing to indict defendants the moment there appears to be just enough evidence to do so. Among other maladies, such a practice would "increase the likelihood of unwarranted charges being filed" and even "add to the time during which defendants stand accused but untried." *See United States v. Lovasco*, 431 U.S. 783, 791–92, 97 S.Ct. 2044, 2049–50, 52 L.Ed.2d 752 (1977).

17 *See, e.g.*, *United States v. Jackson*, 473 F.3d 660, 663, 666–68 (6th Cir. 2007) (holding that a twenty-two-month post-indictment delay was not enough to excuse the defendant from demonstrating actual prejudice where the Government did not give a valid reason for the delay); *Jackson v. Ray*, 390 F.3d 1254, 1263 (10th Cir. 2004) (concluding that an unexplained delay of four and one-third years did not excuse the defendant from having to prove actual prejudice); *United States v. Serna-Villarreal*, 352 F.3d 225, 232–33 (5th Cir. 2003) (concluding that a three-year and nine-month delay caused by Government negligence was too short to weigh heavily against the Government).

PETITIONER'S APPENDIX B

Order of the District Court Denying Defendant's Motion to Dismiss the Indictment for Violation of the Right to Speedy Trial

iIN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

UNITED STATES OF AMERICA,	:	
	:	CRIMINAL ACTION NO.
	:	1:13-CR-0463-LMM
v.	:	
	:	
RAFAEL GOMEZ URANGA, DAVID LAZARO OLIVA, and ORLANDO VIDAL,	:	
	:	
	:	
	:	
Defendants.	:	

ORDER

This matter is before the Court on the Magistrate Judge's Report and Recommendation ("R&R"), Dkt. No. [95], recommending that the Court deny Defendants' Motions to Dismiss the Indictment for Violation of the Right to Speedy Trial, Dkt. Nos. [37, 45, 61]. Pursuant to 28 U.S.C. § 636(b)(1), all Defendants filed objections to the R&R. Dkt Nos. [99-101]. After due consideration, the Court enters the following Order:

I. BACKGROUND[1]

This case involves a burglary of a SouthernLinc warehouse on October 23, 2011, and the attempted burglary of a second warehouse belonging to Max Group on November 28, 2011. Dkt. No. [1] ¶ 1. On or about November 21, 2011, the Federal Bureau of Investigation ("FBI") opened an investigation into the two

[1] The facts recited in this section are undisputed unless otherwise noted.

burglaries.[2] Dkt. No. [46-1] ¶ 2. On or about March 27, 2012, FBI Task Force Officer Michael Donnelly was assigned as the sole investigator in the case. Id. ¶ 3. This was the first time Donnelly had been given such an assignment. Id.

On November 25, 2013, over two years from the first burglary, a grand jury sitting in the Northern District of Georgia returned a two count indictment against Defendants Uranga, Oliva, and Vidal. See Dkt. No. [1]. The Indictment was sealed that same day and arrest warrants for Defendants were issued. Dkt. No. [3] (Order sealing Indictment); Dkt. Nos. [5, 7, 9] (arrest warrants).

It is undisputed that from the time the arrest warrants were issued, it was Donnelly's responsibility to locate and arrest Defendants. Dkt. No. [46-1] ¶ 10. However, he claims that he mistakenly believed the United States Marshals Service ("USMS") was responsible for locating and arresting Defendants and that they would enter Defendants into the National Crime Information Center ("NCIC"), used by law enforcement to determine whether an individual has an outstanding arrest warrant.[3] Id. ¶ 7. Donnelly claims it was not until a meeting with his supervisor in late September 2015 that he learned he was responsible for locating and arresting Defendants and for entering their names into the NCIC. Id. ¶ 10.

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[2] The Court notes that, throughout the briefing for these Motions, and in the R&R itself, the investigation into *both* burglaries is said to have begun before the second burglary. Presumably the investigation began with the first burglary only but then incorporated the second burglary once it was committed.

[3] While Defendants question how Donnelly could not have known about the FBI procedure for effectuating an arrest warrant, they do not specifically object to Donnelly's claim that his understanding of the procedure was mistaken.

Donnelly admits, however, that before he found out about the FBI procedure, but several months after the Indictment was issued, he realized nothing was happening in the case.[4] Id. ¶ 9. He conferred with Josh Thompson, another Task Force Officer who had recently worked for the USMS. Id. Donnelly gave Thompson copies of the arrest warrants and possible locations of Defendants. Id. He asked Thompson to communicate with the USMS to encourage them to locate Defendants. Id.

At an evidentiary hearing held by the Magistrate Judge, Thompson testified about his role in the case. Dkt. No. [76]. He remembered calling someone from the USMS and learning that Marshals are not responsible for effectuating arrest warrants when the case is controlled by the FBI. Id. at 33:24-34:1. He testified that it may have been within a day or a month from when Donnelly gave him the warrants that Thompson discovered this information. Id. at 40:6.

Thompson then testified that, after a month of receiving the warrants, he realized he had not given the papers back to Donnelly. Id. at 40:6-7. He then took the warrants back to Donnelly and discussed some information that neither Officer can now recall. Id. at 40:6-9. However, Thompson admits that he did *not* inform Donnelly that the FBI handles its own arrest warrants. Id. at 40:23-25. Additionally, Thompson testified that Donnelly never asked him about the

[4] The parties appear to agree that Donnelly noticed the case was stalled around January of 2014.

procedure or whether the Marshals would begin locating Defendants. Id. at 42:1-16.

After this discussion, Donnelly did not do anything in the case until the meeting with his supervisors in late September of 2015; nearly 21 months after the Indictment was issued. Dkt. No. [46-1] ¶ 10. However, within 24 hours of learning the FBI procedure, Donnelly entered Defendants into the NCIC and began searching for Defendants' location. Id. ¶¶ 11-12.

On October 9, 2015, Defendants Vidal and Uranga were arrested in the Southern District of Florida. Id. ¶ 17. On October 13, 2015, Defendant Oliva was arrested in the Southern District of New York. Id. ¶ 18.

Defendants each filed Motions to Dismiss for Violation of the Right to Speedy Trial. Dkt. Nos. [37, 45, 61]. The Government objected and the Magistrate Judge recommended that the Court deny Defendants' Motions. Dkt. No. [95]. Defendants objected to the Magistrate Judge's R&R for several reasons. The Court will discuss each objection.

II. LEGAL STANDARD

Under 28 U.S.C. § 636(b)(1), the Court reviews the Magistrate's Report and Recommendation for clear error if no objections are filed to the report. 28 U.S.C. § 636(b)(1). If a party files objections, however, the district court must determine *de novo* any part of the Magistrate Judge's disposition that is the subject of a proper objection. Id.; FED. R. CRIM. P. 59(b)(3). As Defendants filed objections to the R&R with respect to its findings regarding and analysis of Defendants'

Motions, the Court reviews the Magistrate Judge's findings and recommendations regarding these conclusions on a *de novo* basis, including the Magistrate Judge's findings of fact. 28 U.S.C. § 636(b)(1).

III. DISCUSSION

As discussed above, Defendants have filed several objections to the Magistrate Judge's finding that no Speedy Trial violation occurred. The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy . . . trial." U.S. CONST. amend. VI. The Sixth Amendment recognizes that delay between arrest, indictment, and trial may unconstitutionally prejudice a defendant's defense. U.S. v. MacDonald, 456 U.S. 1, 8 (1982). However, the Amendment is "not primarily intended to prevent prejudice to the defense caused by the passage of time; that interest is protected primarily by the Due Process Clause and by statutes of limitations." Id. Instead, the Sixth Amendment "is designed to minimize the possibility of lengthy incarceration prior to trial, to reduce the lesser, but nevertheless substantial, impairment of liberty imposed on an accused while released on bail, and to shorten the disruption of life caused by arrest and the presence of unresolved criminal charges." Id.

In determining whether a post-indictment delay has caused a Speedy Trial violation, courts look to the four-factor balancing test established in Barker v.

Wingo, 407 U.S. 514 (1972).[5] The factors used in the balancing test are: (1) the length of delay; (2) the reason for delay; (3) the defendant's assertion of the speedy trial right; and (4) prejudice to the defendant. Barker, 407 U.S. at 530.

For the first factor, the defendant must allege "that the interval between accusation and trial has crossed the threshold dividing ordinary and presumptively prejudicial delay. Doggett v. U.S., 505 U.S. 647, 651-51 (1992). If the defendant is able to satisfy this threshold inquiry, only then does the court analyze the remaining factors. Id.

In this Circuit, post-indictment delays exceeding one year are generally considered presumptively prejudicial. Ingram, 446 F.3d at 1336; U.S. v. Clark, 83 F.3d 1350, 1352 (11th Cir. 1996). In this instance, the parties agree that the twenty-two month delay between Indictment and Defendants' arrests satisfies this threshold inquiry for the first factor (length of delay). As a result, the Magistrate Judge analyzed the remaining Barker factors.

[5] Defendants make several arguments regarding the *pre*-indictment delay from when the crimes were committed to when the Indictments were issued. However, pre-indictment delays do not constitute violations of the right to Speedy Trial. See MacDonald, 456 U.S. at 6 ("On its face, the protection of the Amendment is activated only when a criminal prosecution has begun . . . [and does not] require the Government to discovery, investigate, and accuse any person within any particular period of time.") (quoting U.S. v. Marion, 404 U.S. 307, 313 (1971)). Pre-indictment delays can, however, be used to inform the Barker factors discussed below. See U.S. v. Ingram, 446 U.S. 1332, 1339 (11th Cir. 2006) ("[O]nce the Sixth Amendment's speedy trial analysis is triggered, it is appropriate to consider inordinate pre-indictment delay in determining how heavily post-indictment delay weighs against the Government.").

Importantly, under Eleventh Circuit law, if the first three factors "weigh heavily against the Government, the defendant need not show actual prejudice (the fourth factor) to succeed in showing a violation of his right to speedy trial." Ingram, 446 F.3d at 1336. However, if the factors do not weigh heavily against the Government, even if they still weigh against the Government, then the defendant must show actual prejudice.[6] Id.

Turning to the second factor, reason for delay, the Government bears the burden of establishing valid reasons for delay. Ingram, 446 F.3d at 1337. Courts must allocate different weight to different reasons for delay. U.S. v. Villarreal, 613 F.3d 1344, 1351 (11th Cir. 2010). Specifically, the Supreme Court has grouped possible reasons for delay into three general categories: valid, improper, or neutral. See Barker, 407 U.S. at 527, 531.

Valid reasons weigh in favor of the Government. See Villarreal, 613 F.3d at 1351. Improper reasons weigh heavily against the party responsible for the misconduct. See Barker, 407 U.S. at 531. And neutral reasons are weighted against the Government, "since the ultimate responsibility for such circumstances must rest with [it] rather than with the defendant." Id. However, neutral reasons are weighted less heavily than improper reasons. Id.

[6] The Court notes that the parties agree that the first and third factors are met. "Thus, [the Court] assume[s] *arguendo* that both factors weigh heavily against the government." U.S. v. Woodley, 484 F. App'x 310, 319 (11th Cir. 2012). As such, if the Court were to find that the second factor weighed heavily against the Government, then all three factors would weigh heavily against the Government, relieving Defendants of their need to show actual prejudice.

Examples of valid reasons include: missing witnesses, Barker, 407 U.S. at 531; incompetency of the defendant, Danks v. Davis, 355 F.3d 1005, 1009 (7th Cir. 2004); extradition effort by the government to obtain custody of the defendant, U.S. v. Blanco, 861 F.3d 773, 778-79 (2d Cir. 1988); the unavailability of a co-defendant in a joint trial, U.S. v. Tranakos, 911 F.3d 1422, 1428 (10th Cir. 1990); the illness of an essential witness, U.S. v. Twitty, 107 F.3d 1482, 1490 (11th Cir. 1997); and a prior mistrial, U.S. v. Hall, 551 F.3d 257, 272 (4th Cir. 2009).

Some examples of neutral reasons include negligence on the part of the Government and overcrowded courts. Barker, 407 U.S. at 531. An example of improper reasons includes deliberate attempts by the Government to delay the trial "to hamper the defense." Id. Additionally, "the government's failure to pursue a defendant diligently will weigh against it, more or less heavily depending on if the government acted in good or bad faith." Villarreal, 613 F.3d at 1351. See U.S. v. Bibb, 194 F. App'x 619, 622 (11th Cir. 2006) ("Government actions that are tangential, frivolous, dilatory, or taken in bad faith weigh heavily in favor of finding that the speedy trial violation occurred.").

In this case, the Magistrate Judge found that the Government was grossly negligent in effectuating the arrest warrants post-indictment. Gross negligence, alone, does not weigh heavily against the Government. See Barker, 407 U.S. at 531; Villarreal, 613 F.3d at 1351; Bibb, 194 F. App'x at 622. Instead, post-indictment delay constituting gross negligence, such as that occurring here, should be evaluated in conjunction with the pre-indictment delay.

The Magistrate Judge analyzed the pre-indictment delay to determine whether it pushed the post-indictment delay into "improper" territory. However, the Magistrate Judge found that the pre-indictment delay was not inordinate given the complexity of the case and efforts of the Government such that the post-indictment delay would not weigh heavily against the Government.

The Magistrate Judge's conclusion turned on an analysis of U.S. v. Ingram in which the Eleventh Circuit found a two year pre-indictment delay coupled with a two year post-indictment delay violated the defendant's right to speedy trial. Ingram, 446 F.3d at 1339. While mechanically looking at the length of Defendants' post- and pre-indictment delays in relation to Ingram would have led the Magistrate Court to conclude a speedy trial violation occurred, the Magistrate Court instead compared the reasoning, facts, and circumstances of Ingram with the facts and circumstances of this case. This led the Magistrate Judge to determine that the pre-indictment delay in this case was unlike the pre-indictment delay in Ingram such that this particular Barker factor did not weigh heavily against the Government.

In Ingram, the defendant, a convicted felon, attempted to purchase a firearm at a pawnshop. Id. at 1334. In doing so, he completed and signed a legal form attesting he had never been convicted of a felony. Id. When the pawnshop submitted the defendant's form to the National Instant Criminal Background Check System, the application was denied. Id. As a result, in March of 2000, Special Agent Kunz began investigating the transaction. Id. First, Kunz spoke to

the pawnshop owner. Id. Then, in July of 2000, Kunz interviewed the defendant at his place of employment. Id. at 1335. The defendant admitted to Kunz that he was a convicted felon and that he had attested he was not a convicted felon on the firearm form. Id. The defendant gave Kunz his cell and home phone number as well as his home address. Id. Additionally, he informed Kunz that his brother was a police officers in the area. Id.

Kunz later turned in his investigative report to the U.S. Attorney's office that summer but did not hear anything else about it for over two years. Id. When he checked with the U.S. Attorney's office in 2002, Kunz was told that the case had been misplaced. Id. On October 25, 2002, over two and half years after the incident, the defendant was indicted for violation of 18 U.S.C. §§ 922(a)(6) and 924(a)(2). Id.

In analyzing the delay, the Eleventh Circuit clarified that "there is no hard and fast rule to apply here, and each case must be decided on its own facts." Id. at 1338. While the Eleventh Circuit mostly focused on the two year post-indictment delay, it did find that, "[a]fter a review of the record," the investigation into the defendant was not "performed diligently." Id. at 1339.

In analyzing Ingram, the Magistrate Judge conceded that the Eleventh Circuit has not provided detailed guidance about what exactly makes a pre-indictment delay inordinate. However, the Magistrate Judge accurately determined that many lower courts grappling with this issue compare the complexity of the crime at issue with the complexity of the crime in Ingram.

For instance, in United States v. Henao-Toro, No. 04-20065-CR, 2010 WL 1459472, at *13 (S.D. Fla. April 12, 2010), the Southern District of Florida determined that the five-year pre-indictment delay was not inordinate as compared to the two-year pre-indictment delay in Ingram. Henao-Toro, 2010 WL 1459472 at *13. Specifically, the court determined that its case "was not an ordinary street crime but a large drug trafficking conspiracy stretching from Colombia, to Jamaica, to the Bahamas into the United States." Id.

Similarly, in United States v. Valiente, No. 04-20046-CR, 2009 WL 1313198, at *12 (S.D. Fla. May 12, 2009), the same court determined that a four-year pre-indictment delay was not inordinate because it resulted from "the complexity of the IRS investigation into the allegations of tax fraud . . . which resulted in charges being filed against Defendant and three additional co-defendants and involved claims filed by 32 separate individuals." Valiente, 2009 WL 1313198 at *12. Additionally, the court took into account "the issuance of two search warrants and the issuance of summonses for bank records, as well as [at] least 12 interviews with Defendants, her eventual co-defendants, and various witnesses." Id. "Following a two-year investigation," the agent submitted her report and it was reviewed by her superiors for another two years, as per IRS protocol. Id.

In concluding that the pre-indictment delay in this case was not inordinate, the Magistrate Judge looked at the complexity of the two crimes, the type of investigation that ensued, and whether Donnelly was diligent in his investigation

of the crimes. In Ingram, the defendant had simply lied on a firearm application. In this case, Defendants are allegedly part of a large conspiracy crossing state lines. In Ingram, the investigation was relatively simple, with the investigating officer discovering rather quickly who had committed the crime and where to find him, yet waiting two years to seek an indictment. In this case, however, the Magistrate Judge determined that there were 25 witnesses, over 100 exhibits, multiple search warrants, a grand jury subpoena, analysis of phone records, and scientific analysis of shoe tread patterns. As a result, the Magistrate Judge found that the cases were different and Defendants' pre-indictment delay was not inordinate.

After determining that the pre-indictment delay was not inordinate, the Magistrate Judge focused on whether the post-indictment delay, on its own, weighed heavily against the Government. In making that determination, the Magistrate Judge found that this case closely resembled United States v. Clark, 83 F.3d 1350 (11th Cir. 1996).

In Clark, the defendant was arrested on July 1, 1993, for allegedly selling narcotics to an informant. Clark, 83 F.3d at 1351. A federal indictment was returned against the defendant on September 7, 1993. Id. However, the defendant was not arrested under the indictment until February 22, 1995, over 17 months after the indictment was issued. Id.

Prior to the time of the indictment until his arrest, the defendant lived in the same apartment listed on the arrest warrant. Id. The only attempt to arrest

the defendant prior to his actual arrest occurred when a city police officer knocked on his door and left when no one answered. Id. At that point, the city police suspended efforts to arrest the defendant, apparently under the impression that the USMS would take over. Id.

In analyzing the reason for the 17-month delay, the Eleventh Circuit determined there was no evidence that the defendant attempted to elude authorities or that he was even aware of the indictment at the time of his arrest. Id. at 1352. In fact, it appeared to the Eleventh Circuit that the defendant "was well within the considerable reach of the Government during the entire 17-month period between his indictment and eventual capture." Id.

Nonetheless, the Eleventh Circuit concluded that there was no evidence the Government acted in bad faith. Id. Instead, the Eleventh Circuit found that the reason for the post-indictment delay was entirely due to the police's erroneous belief that the USMS would effectuate the arrest. Id. As such, the Eleventh Circuit determined that the second Barker factor did not weigh heavily against the Government. Id.

Because the Magistrate Judge determined that the reason for the post-indictment delay in this case resembled the post-indictment delay in Clark, it required Defendants to demonstrate that they experienced actual prejudice. In their Motions, only one Defendant, Uranga, argued that he suffered actual prejudice. Nonetheless, the Magistrate Judge found that it was not prejudice related to the alleged Speedy Trial violation. Instead, the prejudice was simply

the type of prejudice any defendant would experience waiting for trial. As a result, the Magistrate Judge recommended that the Court deny their Motions.

In response to the R&R, Defendants have separately asserted multiple objections. The Court has carefully reviewed the Magistrate Judge's application of both the Ingram and Clark cases and agrees with the Magistrate Judge's conclusions and interpretation of these Eleventh Circuit cases as explained in the Court's analysis of each objection below.

a. Defendant Vidal's Objections

Defendant Vidal has made four objections to the Magistrate Judge's R&R. They are: (1) that the Magistrate Judge erred when concluding that the Government's actions/inactions in failing to arrest Defendants were grossly negligent but did not lack due diligence; (2) the Magistrate Judge erred when improperly shifting the burden to the Defendants by requiring Defendants to prove the pre-indictment delay was the Government's fault and improperly gave weight to the pre-indictment delay; (3) the Magistrate Judge erred when concluding that the post-indictment delay does not weigh heavily against the Government; and (4) the Magistrate Judge erred when concluding that Defendants had to demonstrate that they suffered actual prejudice resulting from the post-indictment delay.

i. Gross negligence vs. Lack of due diligence

Vidal first argues that the Magistrate Judge erred when she found the Government's delay was due to gross negligence rather than a lack of diligence.

He argues that, if the Magistrate Judge had found the delay was based on a lack of diligence, the second Barker factor would have weighed heavily against the Government, negating the need to find actual prejudice.

In Villarreal, the Eleventh Circuit, relying on Barker, held that the Government's "failure to pursue a defendant diligently will weigh against it, more or less heavily depending on if the government acted in good or bad faith." Villarreal, 613 F.3d at 1351. In other words, if the Government fails to pursue the defendant diligently for "bad faith" reasons, then the factor weighs heavily against the Government. If, however, the failure was not a result of bad faith, the factor does not weigh *heavily* against the Government.

In this instance, Vidal has provided several examples as to why the failure was due to a lack of due diligence. However, he fails to explicitly argue that the failure occurred because of bad faith. Additionally, the Court's review of the record does not show that the Government acted in bad faith. Instead, it appears that Donnelly took *some* active steps to effectuate the arrest warrant, even if his attempts were unduly lacking. Additionally, there is no evidence that Donnelly failed to effectuate the arrests purposefully for any bad faith reasons.

While the Government may have exercised a lack of due diligence, its failure does not amount to bad faith and therefore the factor does not weigh heavily against the Government. As such, Vidal's first objection is overruled.

ii. The burden of the pre-indictment delay[7]

Vidal next argues that the Magistrate Judge erred by placing the burden to prove an inordinate pre-indictment delay on Defendants. Specifically, Vidal challenges two related findings. First, Vidal challenges the Magistrate Judge's assertion that "the parties have not created any record or presented any argument tending to show that the evidence needed to obtain an indictment was amassed well in advance of the Indictment or that the period of the investigation prior to Indictment included *inordinate* delay." Dkt. No. [99] at 5-6 (emphasis in original). According to Vidal, this statement impermissibly places part of the burden on Defendants to prove that the pre-indictment delay was inordinate when, legally, the burden is completely on the Government to prove the delay was *not* inordinate. See Ingram, 446 F.3d at 1337 ("[T]he burden is on the prosecution to explain the cause of the pre-trial delay.").

Next, Vidal challenges the Magistrate Judge's finding that "Defendants have not shown that any portion of the time during which federal prosecutors analyzed whether the cases against the Defendants should be brought before a Grand Jury and to prepare the case to be brought before the Grand Jury amounted to inordinate delay." Dkt. No. [99] at 6. Again, Vidal argues that this

[7] Vidal labels this objection "The Magistrate Judge Improperly Shifted The Burden To The Defendants . . . And Improperly Gave Weight To The Inordinate Pre-Indictment Delay." Dkt. No. [99] at 5. However, in that section, Vidal never discusses the weight of the delay. As such, this issue is not before the Court.

finding impermissibly places the burden on Defendants to show the delay was inordinate.

While it is true that the burden is not on Defendants to prove inordinate delay, Defendants' lack of evidence was not the only reason for the Magistrate Judge's finding. Instead, the Magistrate Judge relied on the Government's ample evidence already on the record demonstrating that the investigation was actively pursued for the entire two years before indictment. See Dkt. No. [95] at 20 (citing evidence showing Donnelly's active investigation up until indictment). As discussed above, the Magistrate Judge looked at the number of witnesses that were interviewed, the type of scientific analyses used by investigators, the number of exhibits amassed, and the numerous Grand Jury subpoenas. Id.

While Vidal may have read the R&R as finding that Defendants had to produce evidence as a matter of law, instead, the R&R simply suggested that Defendants did not produce rebutting evidence that would have nullified the evidence already on the record.

Nonetheless, even if the R&R impermissibly placed the burden on Defendants, the Court finds that the evidence on record shows that the pre-indictment delay was not inordinate given the complexity of the case and the fact that the investigation continued almost until the time the Indictment was obtained. See e.g., Dkt. No. [48-1] at 20 (information requested by Donnelly in November of 2012, regarding Defendants' alleged U-Haul rental in November of 2011); Id. at 41 (official FBI record created by Donnelly in December of 2012

listing potential suspects); Id. at 43 (Gomez Uranga's driving record obtained by Donnelly in mid June of 2013); Id. at 44 (Gomez Uranga's license information obtained by Donnelly in mid August of 2013); Dkt. No. [46-1] ¶ 3 ("From March 27, 2012, going forward, I diligently investigated the case, gathering evidence and interviewing victims."); Dkt. No. [103-2] (report by Donnelly chronicling the investigation's timeline from the date of the burglaries until the time of the report, created at least after February 22, 2013, the date of the last request for information).

In particular, Donnelly's investigative report describes a lengthy and complicated investigation with multiple suspects, inquiries, and search warrants. See Dkt. No. [103-2]. While some of the evidence that led Donnelly to recommend federal indictment for Defendants was gathered early in the investigation, the report shows that Donnelly was collecting important evidence at least until June of 2013, when he obtained Uranga's driving record. Dkt. No. [48-1] at 44. There is no indication that the information was not necessary or that Donnelly could have gathered it earlier in the investigation. The report, coupled with the documents demonstrating the steps Donnelly and other investigators took, shows that the pre-indictment delay was not inordinate.

iii. Weight of the post-indictment delay

Vidal next argues that, because the pre-indictment delay was actually inordinate, or at least the Government has not proven it was *not* inordinate, the Magistrate Judge should have found that the second Barker factor weighed

heavily against the Government. As discussed above, the Eleventh Circuit holds that when a pre-indictment delay is inordinate, the post-indictment delay weighs heavily against the Government. Ingram, 446 U.S. at 1351.

However, for the reasons explained *supra*, the pre-indictment delay was not inordinate. As such, the Magistrate Judge properly weighed the second factor against the Government.

iv. Actual prejudice

Vidal argues that, because the Barker factors weigh heavily against the Government, the Magistrate Judge erred in finding that he had to prove actual prejudice. However, as discussed above, the factors do not weigh heavily against the Government. As such, Vidal's objection is overruled.

b. Defendant Uranga's Objections

Unlike Defendant Vidal, Defendant Uranga makes one broad objection to the Magistrate Judge's R&R. Uranga generally argues that the Barker factors require dismissal of the indictment. In coming to that conclusion, Uranga focuses on the second and fourth factors.

i. Second factor: Reason for delay

Like Vidal, Uranga argues that the Magistrate Judge should not have found that the Government's actions were simply negligent. Instead, Vidal argues, Donnelly's actions were dilatory and thus weigh heavily against the Government.

As discussed above, "Government actions that are tangential, frivolous, *dilatory*, or taken in bad faith weigh heavily in favor of finding that the speedy

trial violation occurred." Bibb, 194 F. App'x at 622 (emphasis added). Uranga argues that the Magistrate Judge's factual findings only allow for a finding of dilatory motive.[8]

As support, Uranga points to the R&R where the Magistrate Judge says Donnelly's actions were "inexplicabl[e]" and "defie[d] logic." Dkt. No. [95] at 12. Uranga argues that this language demonstrates that the Magistrate Judge actually discredited Donnelly's testimony and therefore should not have credited his excuses. Instead, Uranga urges, the Magistrate Judge should have simply found that Donnelly's actions were dilatory.

The Court disagrees. The Magistrate Judge did not automatically discredit Donnelly's testimony by stating that his actions were inexplicable or defied logic. In fact, she never says that she has discredited his testimony. Her words simply acknowledge that Donnelly's actions were extremely careless as to be grossly negligent.

Uranga then argues that, even if the Magistrate Judge's language does not discredit Donnelly, the Magistrate Judge still should have found he was dilatory. Black's Law Dictionary defines "dilatory" as, "Designed or tending to cause

[8] Uranga also argues that, if the Government's actions were not dilatory, they at least demonstrate a lack of due diligence, which, he argues weighs heavily against the Government. However, as discussed above, lack of diligence on its own does not weigh heavily against the Government. Instead, a bad faith lack of diligence weighs heavily against the Government. Both Vidal and Uranga state that simple lack of diligence is enough. However, a review of the precedent in this Circuit requires the Court to find *bad faith* lack of diligence. See discussion *supra*. It is clear that simple lack of diligence amounts to negligence which, while weighing against the Government, does not weigh *heavily* against the Government.

delay," or, "Given to or characterized by tardiness." *Dilatory*, BLACK'S LAW DICTIONARY (10th ed. 2014). This definition proffered by Uranga connotes essentially two meanings; intended delay and unintended delay.

The Court finds that the term "dilatory," as used in Bibb, connotes intended delay as opposed to unintended delay. Looking at the quotation used by Uranga, the Eleventh Circuit said, "tangential, frivolous, dilatory, or [actions] taken in bad faith" weigh heavily against the Government. Bibb, 194 F. App'x at 622. The words surrounding "dilatory" all connote an action other than unintended delay. For instance, tangential or frivolous actions taken by the Government are likely intended to cause delay as they imply an action or series of actions done unnecessarily. Additionally, actions taken in bad faith are certainly intended to cause outright delay.

Looking at other cases that do not specifically use the term "dilatory," it is still clear that, to weigh heavily against the Government, a post-indictment delay taken on its own must be purposeful.[9] For instance, in Barker, the Supreme Court specifically found that *deliberate* attempts to delay weigh heavily against the Government. Barker, 407 U.S. at 532. Negligent, non-purposeful delays, on the other hand, do *not* weigh heavily against the Government. Id.

[9] The Court differentiates between cases where only a post-indictment delay occurred and cases were both pre and post-indictment delays occurred. As discussed *supra*, in combination cases, a pre-indictment delay can help a post-indictment delay weigh heavily against the Government even without evidence of *purposeful* post-indictment delay. See Ingram, 446 F.3d at 1336.

These cases put the term "dilatory" in context and require that the delay be purposeful. Therefore, the Court finds "dilatory" is used to connote intentional or bad faith delay.[10] See Doggett v. U.S., 505 U.S. 647, 657 (1992) ("[N]egligence is obviously to be weighed more lightly than a *deliberate* intent to harm.") (emphasis added).

Because the Court has determined that dilatory actions must be purposeful, the Government's reasons for delay do not weigh heavily against it. Specifically, there is nothing tending to show that Donnelly purposefully delayed in effectuating the arrest warrants. Instead, as discussed in Vidal's objections, the Government showed that Donnelly took at least some steps to determine the FBI procedure. While those steps were unduly lacking and only half-completed, they tend to show that the delay was not made purposefully or in bad faith.[11]

Uranga then focuses on the pre-indictment delay, arguing that the Magistrate Judge erred in finding that it was not inordinate and therefore did not help the post-indictment delay weigh heavily against the Government. First, Uranga challenges the way in which the Magistrate Judge compared the complexity of this case to the complexity of the Ingram case in concluding

[10] Furthermore, if the Court were to use the other connotation of "dilatory" (i.e. merely tending to cause delay), the dilatory action would more closely resemble negligent behavior rather than purposeful delay.

[11] Uranga also argues that the Court should consider the United States Attorney's Office ("USAO") when determining whether the Government's actions were dilatory. However, Urgana does not explain why the USAO's actions matter when the parties agree it was Donnelly's responsibility to move the case along.

Defendants' pre-indictment delay was not inordinate. He argues that no Eleventh Circuit case has suggested that courts should compare complexity, and therefore it was error to do so.

While the Court agrees that no Eleventh Circuit case has specifically instructed courts to compare their cases' complexities with the Ingram complexities, the Magistrate Judge's approach and conclusions were still proper.[12] In concluding that the pre-indictment delay was inordinate, the Eleventh Circuit considered "the crime . . . , the state of the proof against [the defendant] on the date of the indictment, and the Government's knowledge of [the defendant's] whereabouts." Ingram, 446 F.3d at 1339. The Eleventh Circuit found that the relatively non-complex nature of the crime and evidence made the two-year delay inordinate. Id.

Based on the Eleventh Circuit's reasoning, the Court should look at this case's complexity and compare it with Ingram's complexity to determine whether they were similar such that the pre-indictment delay was inordinate. In fact, the Eleventh Circuit's language even encourages such comparison See id. ("[T]he two-year post indictment delay in [Ingram] weighs more heavily than a two-year delay *in another case* might . . .") (emphasis added). Uranga provides no reason why this tactic constituted error, nor can the Court find any reason why the Magistrate Judge should not have compared the cases.

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[12] Additionally, as the Court discussed *supra*, comparing the facts of Ingram with the case at issue is the trend among lower courts within this Circuit. See, e.g., Henao-Toro, 2010 WL 1459472 at *13; Valiente, 2009 WL 1313198 at *12.

Next, Uranga argues that, if the Magistrate Judge can compare complexities, she should not have compared Defendants' case as a whole. Instead, Uranga argues the Magistrate Judge should have focused on the individual Defendants. Specifically, Uranga argues that, while the other Defendants' cases may have been complex, his was straight forward and did not require two years to investigate.

Uranga points first, to the fact that he was actually arrested at the scene of the second burglary. He was then immediately charged in state court based on the evidence available that very night. He argues that on the night of his arrest the officers had surveillance footage of the burglars inside the warehouse and were able to see that it was Uranga on the video. Additionally, Uranga argues that, on the night of the burglary, officers found a shoe print that exactly matched the shoe Uranga was wearing when arrested. According to Uranga, the Government had all it needed to indict Uranga within a few days of his arrest; and to wait two-years to indict was inordinate delay.

Though it may be true that the Government may have had enough information to indict Uranga within a few days of the second burglary on burglary charges, Uranga ignores the fact that he was also indicted for one count of conspiracy under 18 U.S.C. § 371. Dkt. No. [1]. That statute dictates, "If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any

purpose . . . each shall be fined . . . or imprisoned not more than five years, or both." 18 U.S.C. § 371.

The Supreme Court has held that prosecutors and law enforcement officers working to bring charges against a defendant "have a right to investigate [a case] fully." U.S. v. Cerrito, 612 F.2d 588, 593 (1st Cir. 1979) (citing U.S. v. Lovasco, 431 U.S. 789, 790-91 (1977)). Just because it was clear Uranga had participated in the burglary does not mean their investigation into his role in a larger conspiracy was complete on the day they initially arrested him. Additionally, the Supreme Court has held that prosecutors "are under no duty to file charges as soon as probable cause exists." Lovasco, 431 U.S. at 790. Instead, prosecutors are permitted to gather more evidence such that "they are satisfied they will be able to establish the suspect's guilt beyond a reasonable doubt." Id.

In this instance, if Defendants were only charged with burglary or transportation of stolen goods across state lines, the Court might be more likely to find that Uranga's pre-indictment delay was inordinate given the FBI's knowledge of his role early in the case. However, because Uranga was also charged with conspiracy, he was implicated in a larger, more complex scheme that required the FBI to gather far more evidence in an attempt to establish guilt beyond a reasonable doubt. For that reason, the Court is not persuaded by Uranga's argument that the individual investigation into his conduct was relatively simple, and thus the delay in his indictment was inordinate. Instead,

the Court finds that Uranga's pre-indictment delay was not inordinate given the complexity of the conspiracy.

ii. Fourth factor: Actual Prejudice

As discussed above, Uranga was the only Defendant to argue he had suffered actual prejudice. He claimed that, after he was arrested for the second burglary and subsequently released, he learned that the FBI was investigating the crimes. As such, he claims he suffered anxiety and distress related to the investigation as he did not know if or when he would be indicted and then arrested. The Magistrate Judge, however, found that his alleged anxieties and distress were conclusory and no different from the type of anxiety and stress a person might suffer after he or she has been arrested, let out on bond, and awaiting prosecution.

In Barker, the Supreme Court emphasized that "prejudice should be assessed in light of three interests:" (1) to prevent oppressive pretrial incarceration; (2) to minimize anxiety and concern of the accused; and (3) to limit the possibility that the defense will be impaired. Woodley, 484 F. App'x at 319 (citing Barker, 407 U.S. at 532). "Of these, the most serious is the last, because the inability of a defendant [to] adequately prepare his case skews the fairness of the system" Id. Nonetheless, "[t]he defendant must proffer more than 'conclusory assertions of prejudice' or 'unsubstantiated allegations of witnesses' faded memories.'" Id. (quoting U.S. v. Hayes, 40 F.3d 362, 366 (11th Cir. 1994)).

Uranga states that his prejudice falls within the second category: minimizing anxiety and concern of the accused. He states that, when he found out about the federal case in 2014, he was not told whether he had been indicted, who the prosecutor was, or whether this arrest would be forthcoming. Accordingly, he states that he could not make plans in advance as he was not sure when he would be arrested. Additionally, he claims he had to worry every day that he sent his kids to school that he would be arrested before they came home.

While Uranga's worries may have been difficult, the Court agrees with the Magistrate Judge that he has failed to present more than conclusory assertions that he suffered anxiety.[13] See id. As such, Uranga's objection is overruled.

c. Defendant Oliva's Objections

Oliva appears to make one objection to the Magistrate Judge's findings. Specifically, he states that the Magistrate Judge found that the reason for the delay (factor two) weighed heavily against the Government while the length of the delay (factor one) did not. However, Oliva's starting premise is incorrect. The Magistrate Judge found, and both parties agreed, that the length of the delay was presumptively prejudicial, triggering the other three Barker factors. The Magistrate Judge did *not* find that the reason for the delay weighed heavily against the Government, as Oliva suggests.

[13] The Court notes that, with the second factor, the burden was on the Government to present valid reasons for delay. However, for the fourth factor, Defendants have the burden of proving actual prejudice. See Woodley, 484 F. App'x at 319.

It appears that Oliva is actually concerned with the Magistrate Judge's handling of the Ingram, pre-indictment delay analysis. As such, the Court will focus on those arguments.

First, Oliva argues that the Magistrate Judge should not have concluded that the pre-indictment investigation took the full two years because there is insufficient evidence to support this conclusion. Oddly, however, in making this argument, Oliva recites all the supporting evidence and outlines the investigative steps executed by Donnelly. Nonetheless, he argues that many of the steps were unnecessary and therefore, the pre-indictment delay was inordinate.

For instance, Oliva focuses on the 25 witnesses interviewed by Donnelly. He claims that, of the 25, 16 were law enforcement officers, two were managers of the burglarized stores, one was an employee of a burglarized store, one was the owner of a burglarized store, and another was an investigator for Georgia Power, the parent company of one of the burglarized stores.

Next, Oliva focuses on the 92 exhibits presented by the government. He states that, of the 92, 20 were comprised of photographs and the vast majority of the evidence appears to have been gathered in the investigation of the robbery scene before Donnelly became involved.

While Oliva focuses on these pieces of evidence and lists them in his brief, he does not actually present an argument as to why they are insufficient to show the complexity of the case. Nevertheless, even if Oliva had made such an argument, Ingram does not require the Court to micromanage law enforcement

investigations to determine whether each witness and each exhibit was necessary to procure.[14] As the Government argues, the Ingram court did not evaluate each piece of evidence. Instead, it took a "high level view of the facts" to determine whether the delay was inordinate. Dkt. No. [102] at 10.

Next, Oliva contends that the evidence shows that the majority of the investigation into the two burglaries was completed before March 27, 2012, the date Donnelly took over the investigation. However, Oliva simply states that the investigation was mostly complete without explaining why the evidence shows most of the investigation was completed prior to Donnelly's assignment. Nonetheless, as the Court has already discussed, the report written by Donnelly demonstrates that important evidence was procured and investigative steps were being taken after Donnelly joined the case and even within a few months of indictment.[15] See Dkt. No. [103-2]. As such, Oliva's argument that the investigation should not have taken two years is unpersuasive.

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[14] At one point, Oliva contends that the evidence obtained by Donnelly in June and August of 2013 is not relevant in determining the length of the investigation. However, Oliva gives no actually argument as to *why* that evidence does not inform the length of the investigation. He merely asserts the evidence is not relevant.

[15] Defendants have asked for an evidentiary hearing regarding whether the investigation should have lasted two years and whether the information gathered during the two years was necessary for the Indictment. However, the Magistrate Judge already held an evidentiary hearing on these issues presented in Defendants' Motions. Additionally, as the Court has already discussed, Ingram does not ask the Court to micromanage law enforcement investigations. The information produced by the Government sufficiently demonstrates that the investigation was reasonably long given the complex nature of this alleged conspiracy.

Lastly, Oliva appears to take issue with the Magistrate Judge's finding that the reason for the delay did not weigh heavily against the Government.[16] Oliva appears to agree that the Government's actions evidenced gross negligence. See Dkt. No. [101] at 7 ("Indeed, it is the lack of diligence and credibility presented by the Government that evidences gross negligence."). However, as the Court has already discussed, gross negligence alone does not weigh heavily against the Government. Additionally, to the extent Oliva attempts to argue that the Government exercised a lack of diligence, as discussed above, lack of diligence also does not weigh heavily against the Government. As such, Oliva's objections are overruled.

IV. CONCLUSION

In sum, although the Court finds the Government's delay extremely troubling, an analysis of the Supreme Court and Eleventh Circuit precedents supports the Magistrate Judge's conclusion. In accordance with the foregoing, the Court **ADOPTS** the Magistrate Judge's R&R [95]. Defendants' Motions to Dismiss the Indictment is **DENIED** [37, 45, 61]. The Clerk is **DIRECTED** to refer this case back to Magistrate Judge Walker to assess pre-trial motions.

[16] As discussed *supra*, Oliva actually categorizes this objection as an objection to the Magistrate Judge's finding that the *length* of the delay did not weigh heavily against Defendants. However, in discussing this issue, Oliva focuses on the law informing *reason* for delay. As such, the Court construes Oliva's objection as to the Magistrate Judge's finding that the reason for delay does not weight heavily against the Government.

IT IS SO ORDERED this 3rd day of November, 2016

LEIGH MARTIN MAY
UNITED STATES DISTRICT JUDGE

PETITIONER'S APPENDIX C

Magistrate Judge's Order and Report and
Recommendation Denying Defendant's
Motion to Dismiss the Indictment for Violation of
the Right to Speedy Trial

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

UNITED STATES OF AMERICA, v. RAFAEL GOMEZ URANGA, DAVID LAZARO OLIVA, and ORLANDO VIDAL, Defendants.	CRIMINAL CASE NO. 1:13-CR-463-LMM-LTW

MAGISTRATE JUDGE'S ORDER AND REPORT AND RECOMMENDATION AND ORDER CERTIFYING DEFENDANT VIDAL FOR TRIAL

Pending before this Court is Defendants Orlando Vidal, Rafael Gomez Uranga, and David Lazaro Oliva's Motions to Dismiss the Indictment for Violation of the Right to Speedy Trial. (Docs. 37, 45, 61). Also before the Court is Defendant Oliva's Motion to Adopt Co-Defendants' Motions to Dismiss and Related Pleadings to Dismiss the Indictment for Violation of the Right to Speedy Trial. (Doc. 58). Defendant Oliva's Motion to Adopt is **GRANTED**. (Doc. 58). Having considered the parties' briefs and all supporting documents submitted, and for the reasons set forth below, this Court **RECOMMENDS** that Defendants' Motions to Dismiss the Indictment for Violation of the Right to Speedy Trial be **DENIED**. (Docs. 37, 45, 61). Because there are no more motions or other matters to address for Defendant Vidal, the undersigned certifies

Defendants Vidal ready for trial.[1]

DEFENDANTS' MOTIONS TO DISMISS FOR VIOLATION OF THE RIGHT TO SPEEDY TRIAL

Defendants argue the Indictment against them should be dismissed because the nearly two-year delay between the Indictment, entered in late November 2013, and their October 2015 arrest compromised their right to a speedy trial in violation of the Sixth Amendment of the United States Constitution. In support, Defendants argue the lengthy delay was inexcusable because it was caused by the Government's lack of diligence. The Government responds that because the reason for the delay stemmed only from a task force officer's mistaken belief that the United States Marshal's Service would locate and arrest the Defendants without prompting from him, and because the Defendants cannot prove that they suffered from any prejudice from the delay, the Defendants' speedy trial rights have not been violated.

I. BACKGROUND

On or around November 21, 2011, the Federal Bureau of Investigation ("FBI") opened an investigation into the burglaries of two Norcross, Georgia warehouses, one maintained by SouthernLINC Wireless and the other by Max Group, containing cellular

[1] Defendant Gomez Uranga has an outstanding Motion to Suppress Statements. (Doc. 41). If the District Court adopts this Court's Report and Recommendation, this Court will immediately set an evidentiary hearing in connection with the Motion to Suppress Statements. Defendant Gomez Uranga's Daubert Motion to Exclude Shoe Print Identification has been **DEFERRED** to the District Court. (Docs. 40, 44). Defendant Oliva filed a Motion to Reopen Bond Hearing on August 2, 2016, which this Court will hear on September 12, 2016. (Doc. 90).

devices. (Aff. of Michael Donnelly, hereinafter "Donnelly Aff.," ¶ 2; Doc. 1, at 2). On March 27, 2012, FBI Task Force Officer Michael Donnelly ("TFO Donnelly") took over the investigation after the former FBI case agent was deployed overseas. (Donnelly Aff. ¶¶ 1, 3). TFO Donnelly was assigned to the FBI Atlanta's Safe Streets Gang Task Force in 2010 and has served with the Gwinnett County Police Department since 2003. (Donnelly Aff. ¶¶ 1, 3). TFO Donnelly became the sole investigator assigned to the case. (Donnelly Aff. ¶ 3).

On November 25, 2013, the Grand Jury charged a two count Indictment against Defendants Rafael Gomez Uranga, David Lazaro Oliva, and Orlando Vidal (collectively referred to as "Defendants"). The Indictment charged that Defendants conspired and aided and abetted each other with transporting in interstate commerce more than $5,000 in electronic equipment and pallets of cellular telephones which were stolen, converted, or taken by fraud from the SouthernLINC Wireless and Max Group warehouses in violation of 18 U.S.C. §§ 2, 2314. (Doc. 1). On the same day, the Indictment was placed under seal and arrest warrants for each Defendant were issued. (Donnelly Aff. ¶ 4; Doc. 3).

A. TFO Donnelly Mistakenly Relies on the Marshal's Service to Arrest the Defendants

According to TFO Donnelly, in a typical Gwinnett County investigation where the locations of the defendants are not known, the Gwinnett County Sheriff's Department, not the investigating officer, is "the primary agency tasked with locating

and arresting the defendants." (Donnelly Aff. ¶ 6). In Gwinnett County, the Gwinnett County Sheriff's Department also enters warrants for arrest into the National Crime Information Center ("NCIC") database, which is used by law enforcement to query whether an individual has an outstanding arrest warrant. (Donnelly Aff. ¶ 7). TFO Donnelly testified that in Gwinnett County, once an indictment is entered and he obtains an arrest warrant from the magistrate judge, his involvement ends. (May 11, 2016 Tr. of Evid. Hrg., hereinafter "Tr2," 35). The investigating officer also does not enter information for the arrest into the NCIC database. (Donnelly Aff. ¶ 7).

TFO Donnelly states that until mid to late September 2015, he believed that the United States Marshal's Service operated the same way in the federal system as the Gwinnett County Sheriff's Office did in the state system. (Donnelly Aff. ¶ 8). As a result, TFO Donnelly believed that the United States Marshal's Service ("the Marshal's Service") would enter the Defendants' information into the NCIC database and would locate and arrest Defendants. (Donnelly Aff. ¶ 8). Thus, TFO Donnelly presumed incorrectly that the U.S. Attorney's office or someone else would provide information to the Marshal's Service so that they would know where to locate the Defendants. (Tr2 42). TFO Donnelly did not confirm with anyone as to the precise process used in the federal system. (Tr2 39). TFO Donnelly never asked anyone who entered the information into NCIC. (Tr2 43).

TFO Donnelly states that several months after the Indictment was returned, he realized that Defendants had not been arrested. (Donnelly Aff. ¶ 9). TFO Donnelly

states that he then conferred with Task Force Officer Josh Thompson ("TFO Thompson"). (Donnelly Aff. ¶ 9; Tr. of Mar. 23, 2016 Evid. Hrg., hereinafter "Tr.," 32). TFO Thompson had served as a Task Force Officer with the Marshal's Service for ten years until he was reassigned to the FBI Safe Streets Gang Task Force in September 2013. (Donnelly Aff. ¶ 9; Tr. 32). TFO Donnelly states that since TFO Thompson had formerly served as a TFO with the Marshal's Service, he gave TFO Thompson copies of the arrest warrants and possible locations of the Defendants and asked him to communicate with the Marshal's Service to encourage them to locate the Defendants. (Donnelly Aff. ¶ 9). TFO Donnelly testified that he told TFO Thompson, "Can you see what the Marshals can do about finding these guys, because I haven't heard anything yet." (Tr. 25). TFO Donnelly further testified that he asked TFO Thompson to follow up with the Marshal's Service to see "if anybody was even looking at it." (Tr2 40).

TFO Thompson testified that he took the paperwork TFO Donnelly gave him back to his desk and called someone from the Marshal's Service. (Tr. 33). TFO Thompson testified that his contacts with the Marshal's Service informed him that when warrants or indictments are issued, a copy goes to the Marshal's Service, but the warrants are not worked by the Marshal's Service. (Tr. 33). Instead, the arrest warrant is worked by the investigating agency. (Tr. 34). TFO Thompson states that he found out that for a Marshal to be assigned to an arrest, it has to be requested by a federal agency or the Marshal. (Tr. 33-34, 39-40). TFO Thompson admits that obtaining this information did not require much effort on his part. (Tr. 43).

TFO Thompson states that he returned the paperwork to TFO Donnelly within three weeks or a month after he received it. (Tr. 34, 40). TFO Thompson recalls writing some information on the back of one of the criminal histories about information he had gotten. (Tr. 34). Although TFO Thompson believes that he may have written down information received from one of his Marshal's Service contacts in Florida, he does not remember what the information was. (Tr. 34-35). TFO Thompson remembers that he found the paperwork in his desk with notes on it, reviewed the paperwork, discussed with TFO Donnelly the information he had written on the paperwork but now cannot remember, and returned the paperwork to TFO Donnelly. (Tr. 36, 40; Tr2 11). TFO Thompson testified that he cannot remember what he and TFO Donnelly discussed during the conversation. (Tr2 11). TFO Thompson testified, however, that he knows he did not tell TFO Donnelly that the FBI handles its own arrests. (Tr. 40-42).

TFO Donnelly states that TFO Thompson eventually returned the materials back to him, but never discussed it with him. (Donnelly Aff. ¶ 9). TFO Donnelly subsequently testified that he may have spoken with TFO Thompson briefly when TFO Thompson returned the documents, but he does not recall what was discussed. (Tr2 40-41). TFO Donnelly states that after TFO Thompson returned the materials back to him, he was still under the impression that the Marshal's Service was responsible for arresting the Defendants. (Tr2 40). TFO Donnelly never followed up with the Marshal's Service about the matter. (Tr. 26). Likewise, TFO Donnelly never inquired about the matter with his supervisors at the FBI. (Tr. 26). TFO Donnelly does not recall

placing any calls to the AUSA between the time of indictment and October 2015. (Tr2 33). The AUSA assigned to the case never contacted TFO Donnelly regarding the status of the arrest. (Tr. 26).

B. TFO Donnelly Discovers His Error and Initiates the Defendants' Arrest

TFO Donnelly states in his Affidavit that around mid to late September 2015, he discussed his open cases with his supervisors. (Donnelly Aff. ¶ 10; Tr. 12). TFO Donnelly later testified that he discussed the matter with his supervisor on October 6, 2015. (Tr. 12). TFO Donnelly also testified that this was the only meeting of this nature he had with any of his supervisors since the Defendants were indicted. (Tr. 30). At that time, TFO Donnelly's supervisor informed him that the Marshal's Service does not enter arrest warrants for cases investigated by the FBI and that instead, the investigating agent is responsible for calling the NCIC office at the FBI to enter the arrest warrant into the NCIC database. (Donnelly Aff. ¶ 10; Tr. 29-30). TFO Donnelly states that he also learned that a lead should have been sent to the FBI's Miami, Florida office to locate and arrest Defendants. (Donnelly Aff. ¶ 10). On or around late September or early October 2015, TFO Donnelly contacted the NCIC office at the FBI and had the arrest warrants entered into the NCIC database. (Donnelly Aff. ¶ 11; Tr. 12). In late September or early October, TFO Donnelly accessed the CLEAR database, a database that contains public records for individuals, to find current potential addresses for Defendants and forwarded information about the Defendants' potential addresses to the FBI's Miami, Florida

office. (Donnelly Aff. ¶ 12; Tr. 12-13).

On October 9, 2015, Defendants Vidal and Gomez Uranga were arrested in the Southern District of Florida. (Donnelly Aff. ¶ 17). On October 13, 2015, Defendant Oliva was arrested in the Southern District of New York. (Donnelly Aff. ¶ 18). In order to locate Defendant Oliva, TFO sent out a lead to the FBI in Miami with an address in Miami. After the FBI in Miami contacted Defendant Oliva's father, Defendant Oliva turned himself in. (Tr2 23).

Defendant Gomez Uranga had previously been arrested at the scene by Gwinnett County police in November 2011, for the burglary of the Max Group, but was later released. (Tr. 21; Ex. A, Doc. 48-1, at 2; Doc. 81-1, at 4). On February 11, 2014, an Assistant District Attorney in the state court criminal action against obtained an order entering nolle prosequi in the case. (Doc. 81-1, at 4). The Assistant District Attorney explained in her motion that "the U.S. Attorney's Office is going to prosecute [Defendant Gomez Uranga] for his role in a criminal enterprise whose activities included these crimes." (Id.).

II. LEGAL ANALYSIS

Defendants argue the Indictment should be dismissed because the nearly two- year delay between the Indictment, entered in late November 2013, and their October 2015 arrest compromised their right to a speedy trial in violation of the Sixth Amendment of the United States Constitution. In support, Defendants contend that the delay was the product of TFO Donnelly's and the U.S. Attorney's Office's lack of diligence. The

Government responds that Defendants' right to a speedy trial has not been violated because the reason for the delay was only TFO Donnelly's mistaken belief that the Marshal's Service would locate and arrest the Defendants and Defendants cannot meet their burden of proving that they were prejudiced by the delay.

The Sixth Amendment of the United States Constitution guarantees an accused the right to a speedy trial. U.S. Const. amend. VI; United States v. Villarreal, 613 F.3d 1344, 1349 (11th Cir. 2010). A court is required to dismiss the indictment if it finds a violation of the defendant's right to a speedy trial. Villarreal, 613 F.3d at 1349. When determining whether a defendant's speedy trial right is violated, a balancing test is applied. Villarreal, 613 F.3d at 1350 (citing Barker v. Wingo, 407 U.S. 514, 522 (1972)). In Barker v. Wingo, 407 U.S. 514 (1972), the Supreme Court has explained that the following four factors are considered when determining whether the defendant's constitutional right to a speedy trial has been violated: (1) the length of the delay; (2) the reason for the delay; (3) the defendant's assertion of the speedy trial right; and (4) the prejudice to the defendant. Id. at 530; United States v. Ingram, 446 F.3d 1332, 1336 (11th Cir. 2006). Before the speedy trial analysis is begun, however, the defendant must allege "that the interval between accusation and trial has crossed the threshold dividing ordinary from presumptively prejudicial delay." Doggett v. United States, 505 U.S. 647, 651-52 (1992); Villarreal, 613 F.3d at 1350; Ingram, 446 F.3d at 1336. If the defendant is able to satisfy the threshold inquiry, only then are the remaining factors considered. Villarreal, 613 F.3d at 1350; Ingram, 446 F.3d at 1336. Delays exceeding one year are

generally found to be presumptively prejudicial. Ingram, 446 F.3d at 1336; United States v. Clark, 83 F.3d 1350, 1352 (11th Cir. 1996). The presumption that pretrial delay has prejudiced the accused intensifies over time. Ingram, 446 F.3d at 1338. The rationale for presuming prejudice is that "excessive delay presumptively compromises the reliability of a trial in ways that neither party can prove or identify." Ingram, 446 F.3d at 1339. Here, the Government concedes that the twenty-two month delay between Indictment and the Defendants' arrest satisfies the threshold inquiry. (Gov't's Br., Doc. 89, at 9); see also Ingram, 446 F.3d at 1337.

A. Reason for Delay

Once the threshold inquiry is satisfied, the court may proceed with the remaining factors. The next factor to be weighed is the reason for the delay. Villarreal, 613 F.3d at 1351. "Government actions that are tangential, frivolous, dilatory, or taken in bad faith weight heavily in favor of a finding that a speedy trial violation occurred." United States v. Bibb, 194 F. App'x 619, 622 (11th Cir. 2006); see also Villarreal, 613 F.3d at 1351 (explaining that a deliberate attempt to delay the trial in order to hamper the defense is weighed heavily against the Government). In contrast, reasons for delay, such as overcrowded courts, or contested interlocutory appeals, will not be weighed heavily against the Government. Villarreal, 613 F.3d at 1351; Bibb, 194 F. App'x at 622 (citing United States v. Schlei, 122 F.3d 944, 987 (11th Cir. 1997)). Negligence is often considered a middle ground. Doggett, 505 U.S. at 656. Although negligence obviously weighs less than a deliberate attempt to harm the accused's defense, it still "falls on the

wrong side of the divide between acceptable and unacceptable reasons for delaying a criminal prosecution once it has begun." Doggett, 505 U.S. at 657. "While not compelling relief in every case where bad-faith delay would make relief virtually automatic, neither is negligence automatically tolerable simply because the accused cannot demonstrate exactly how it has prejudiced him." Doggett, 505 U.S. at 657. As the Supreme Court explained, "[c]ondoning prolonged and unjustifiable delays in prosecution would both penalize many defendants for the state's fault and simply encourage the Government to gamble with the interests of criminal suspects assigned a low prosecutorial priority." Doggett, 505 U.S. at 657. Thus, the more protracted the negligence, the more the presumption of evidentiary prejudice grows. Doggett, 505 U.S. at 657.

Here, the Government's actions in failing to procure the Defendants' arrest were grossly negligent. TFO Donnelly testified that he did not take any action to arrest the Defendants because he assumed that the federal system for procuring a defendant's arrest was the same as the system in Gwinnett County and that the Marshal's Service would handle the arrest without his involvement. (Donnelly Aff. ¶¶ 7-8; Tr2 42). TFO Donnelly did not inquire as to the process in the federal system. (Tr2 39). TFO Donnelly also had numerous opportunities to discover that the Marshal's Service would not be handling the arrest. TFO Donnelly knew within several months after the arrest warrant issued that the Defendants had not yet been arrested by the Marshal's Service, but still did little to ascertain what the process was in the federal system. While TFO

Donnelly elicited help from TFO Thompson, he did not follow through. (Donnelly Aff. ¶ 9; Tr. 32). TFO Donnelly testified that he asked TFO Thompson to follow up with the Marshal's Service to see "if anybody was even looking at it" and gave TFO Thompson copies of Defendants' arrest warrants. (Tr2 40; Donnelly Aff. ¶ 9). Nevertheless, even though TFO Thompson admits that he learned that the Marshal's Service was not responsible for arresting Defendants while looking into the matter for TFO Donnelly, he inexplicably maintains that he failed to communicate this fact to TFO Donnelly. (Tr. 33-34). TFO Thompson testified that he cannot remember the discussion that he had with TFO Donnelly when he returned the files to him, other than he thinks he conveyed some information he had written on the back of paperwork TFO Donnelly gave him, information he now does not remember. Yet TFO Thompson knows he did not tell TFO Donnelly that the FBI is responsible for handling its own arrests. (Tr. 34-42; Tr2 11). That TFO Donnelly and TFO Thompson never discussed the FBI's responsibility for handling its own arrests at the time of the discussion where TFO Thompson returned the files to TFO Donnelly defies logic. Despite having asked TFO Thompson to check with the Marshal's Service to see "if anybody was even looking at [the arrest warrants]," when TFO Thompson reported back to TFO Donnelly and returned the materials TFO Donnelly had given him, TFO Donnelly presumably did not inquire of TFO Thompson what the Marshal's Service was doing with the warrants. (Tr2 40). Despite the passage of time of nearly two years, TFO Donnelly never followed up with the Marshal's Service or inquired about the matter with his supervisors at the FBI. (Tr. 26; Tr2 40). Under

these circumstances, this Court has no difficulty concluding that this factor weighs in favor of the Defendants. Doggett, 505 U.S. at 657 (explaining that although negligence weighs less than deliberate attempt to harm the accused's defense, it still "falls on the wrong side of the divide between acceptable and unacceptable reasons for delaying a criminal prosecution once it has begun").

B. Defendants' Assertion of Right

The third factor for consideration is the defendant's assertion of his right to a speedy trial. Villarreal, 613 F.3d at 1353-54. The defendant's assertion of his speedy trial right is entitled to strong weight in determining whether he is deprived of the right because a timely demand for speedy trial often supports the inference that the defendant was not at fault for the delay and that the delay prejudiced the defendant. Id. The defendant's failure to make a demand is not counted against him for periods in which he was unaware of the charges against him. Id. The Government concedes that the Defendants timely asserted their speedy trial rights and that this factor also weighs in Defendants' favor. (Gov't's Br., Doc. 89, at 16).

C. Prejudice

Because all three of the Barker factors weigh against the Government, the Court is next tasked with determining whether the factors weigh heavily against the Government. Ingram, 446 F.3d at 1338. If the first three factors do not weigh heavily against the Government, then the Defendants must demonstrate actual prejudice in order succeed in proving a violation of their speedy trial rights. Ingram, 446 F.3d at 1338.

When determining whether the reason offered for the delay and the length of the delay weighs heavily against the Government, two seminal Eleventh Circuit cases guide the Court's analysis. In the first case, United States v. Clark, 83 F.3d 1350 (1996), the defendant was charged with six counts related to controlled substance violations and one count of carrying a firearm during a drug trafficking crime. Id. at 1351. A federal indictment was returned against Clark on September 7, 1993, but he was not arrested until over seventeen months later in February 1995. Id. Clark was unaware of the federal indictment and continually resided in the same apartment listed on the arrest warrant and attended classes at Alabama State University where he was eventually arrested while attending class. Id. The Montgomery Police Department had attempted to locate Clark on one occasion at his home but no one answered the door. Id. at 1352. The Montgomery Police Department suspended efforts to locate Clark following the attempt, under the impression that the Marshal's Service was taking over. Id. at 1352. There, the Government conceded that it was negligent in pursuing Clark, but argued that its lack of diligence was excusable because it was due to its erroneous assumption that the Marshal's Service was responsible for the arrest. Id. at 1353. The Eleventh Circuit Court of Appeals agreed with the Government, reversed the trial court, and found that the defendant must prove prejudice in order to establish that he suffered a violation of his speedy trial rights. Id. at 1353-54. The Court there reasoned that the Government's negligence stemmed not from a deliberate delay, but rather an erroneous assumption that the Marshal's Service had taken over the case. Id. at 1353. The Court further concluded

that the seventeen-month delay was significantly less than the eight-and-one-half-year-delay found intolerable by the Supreme Court in Doggett v. United States, 505 U.S. 647, 651-52 (1992), and was close to the fourteen and a half months of negligent Government delay found acceptable by the Fifth Circuit in Robinson v. Whitley, 2 F.3d 562 (5th Cir. 1993). Clark, 83 F.3d at 1353-54 (citing United States v. Beamon, 992 F.2d 1009, 1015 (9th Cir. 1993), for the proposition that seventeen to twenty-month delays solely attributable to Government negligence was insufficient to relieve defendants from showing actual prejudice). Thus, the Eleventh Circuit found that the district court had erred in excusing Clark from showing actual prejudice resulting from the delay. Clark, 83 F.3d at 1354.

In contrast, in United States v. Ingram, 448 F.3d 1332 (11th Cir. 2006), the Eleventh Circuit concluded that the Government's negligence in delaying the defendant's arrest weighed heavily against the Government. Ingram, 446 F.3d at 1339. In that case, Ingram, a convicted felon, attempted to purchase a firearm and lied on his application on February 28, 2000, when asked whether he had ever been convicted of a felony. 446 F.3d at 1334. The firearm owner submitted paperwork to the National Instant Criminal Background Check System, and the request to purchase the firearm was denied. Id. In March of the same year, a special agent with the Bureau of Alcohol, Tobacco, and Firearms ("ATF") began investigating the transaction. Id. By July 2000, the special agent interviewed Ingram at his place of employment where Ingram admitted that he was a convicted felon but had denied being a convicted felon on the application.

Id. at 1335. At that time, Ingram also gave the ATF special agent his home address and telephone numbers and told Ingram that his brother was a police officer with the City of Fort Lauderdale. Id. On October 25, 2002, more than two and a half years after the incident at the pawn shop, Ingram was indicted under federal law for making false statements to a firearms dealer in connection with an attempted acquisition of a firearm. Id. at 1335. The indictment was sealed on the same day that it was entered, and a warrant was issued for Ingram's arrest. Id. at 1335. The ATF special agent made only a minimal effort to arrest Ingram. Instead, the ATF special agent left some telephone messages for Ingram in 2002, and Ingram returned the special agent's calls. Id. at 1335. Although the special agent drove by Ingram's residence and place of work on several occasions, he never exited his car. Id. at 1335. After the special agent called Ingram's work on July 27, 2004, Ingram's coworker gave the special agent another number to use to call Ingram, the special agent left a message at this new number, and Ingram returned his call on July 28, 2004. Id. Ingram surrendered in court on August 3, 2004. Id.

In that case, the Eleventh Circuit concluded that the post-indictment delay, twice the threshold for presuming prejudice, weighed heavily against the Government. Id. at 1338-40. In reaching that conclusion, the Eleventh Circuit explained that it was appropriate to consider "*inordinate* pre-indictment delay" in determining how heavily post-indictment delay weighs against the Government. Id. at 1339. The Circuit reasoned that it was appropriate to do so because the "rationale for presuming prejudice is, after all, that 'excessive delay presumptively compromises the reliability of a trial in

ways that neither party can prove or, for that matter, identify.'" Id. at 1339. Thus, the court found that the two-year post-indictment delay in Ingram weighed more heavily than a two-year delay in another case might if, in that case, the post-indictment delay began shortly after the allegedly criminal acts occurred. Id. at 1339. Likewise, the court compared the case to Clark, *supra*, finding that the delay in Ingram was more weighty. Id. at 1339. The Eleventh Circuit further concluded that the negligence also weighed more heavily against the Government than in Clark because the record in Ingram did not support any reasonable explanation for the Government's neglect in executing the warrant. Id. at 1339. The Eleventh Circuit found that there was much more that the Government could have done to arrest Ingram and that the investigation was not performed diligently. Id. The court noted that given the crime for which Ingram was indicted, the state of the proof on the date of the indictment, and the Government's knowledge of his whereabouts, the two-year post-indictment delay was intolerable. Id. The Court further explained that the delay that can be tolerated for an ordinary street crime was considerably less for a serious, complex conspiracy charge. Id.

This case falls squarely in between Ingram and Clark. Defendants have persuaded the Court that the Government's negligence in this case is every bit as culpable as that of the ATF special agent in Ingram. The length of time of the delay in this case, however, does not weigh as heavily as it did in Ingram. In this case and in Ingram, a nearly two-year post-indictment delay is at issue. But in this case, unlike Ingram, there is no *inordinate* pre-indictment delay to weigh against the Government. The Eleventh

Circuit has not yet provided much guidance as to what would amount to inordinate pre-indictment delay for purposes of the Sixth Amendment speedy trial analysis. Lower courts addressing the matter have considered and compared the complexity of the crime to the crime in Ingram and analyzed whether the crime was an ordinary street crime or involved a more complex conspiracy, analyzed whether, like in Ingram, the investigative delay extended beyond the point in time that the Government had everything it needed to bring an indictment, and evaluated whether reasonable investigative efforts were being performed diligently during the investigative period. See, e.g., Ingram, 446 F.3d at 1339 (citing a Second Circuit case for the proposition that the delay between the Government's discovery of the offense and its filing of the information is relevant); United States v. Gonzalez-Castro, No. 6:09-CR-142-Orl-36GJK, 2013 WL 3153979, at *18 (M.D. Fla. June 19, 2013) (finding that it was appropriate to weigh the post-indictment delay more heavily because the Government did not explain why it waited more than one year and nine months after the defendant confessed to obtain an indictment); United States v. Henao-Toro, No. 04-20065-CR, 2010 WL 1459472, at *12-13 (S.D. Fla. Apr. 12, 2010); United States v. Johnson, No. 05-00196-WS, 2009 WL 2612306, at *4 (S.D. Ala. Aug. 21, 2009).

The pre-indictment delay in this case is distinguishable from the pre-indictment delay found inordinate in Ingram. Here, the investigation was much more complex than the investigation in Ingram. Notably, in Ingram, there was a single defendant who engaged in a street crime. The investigation was simple. The investigation needed to

bring an indictment against Ingram consisted of a review of Ingram's criminal history and paperwork submitted by the gun dealer as well as interviews with the gun dealer and Ingram. Ingram, 446 F.3d at 1334-35. All of these steps of the investigation were accomplished by July 2000 and there is no indication that any further investigation occurred after that point. Id. at 1335. Nevertheless, the defendant was not indicted until more than two years later on October 25, 2002. Id.

In contrast, the investigation in the instant case did not involve a simple street crime and was not so compact. According to TFO Donnelly's investigative report and the Indictment, the crimes at issue here were believed to be committed by a conspiracy and involved multiple burglaries. The law enforcement officers here were not able to make their entire case from review of paperwork and a couple of witness interviews. Instead, the investigation in this case identified twenty-five witnesses, at least eight of whom were not associated with law enforcement, and almost one hundred exhibits. (Def. Oliva's Ex. 1, at GWPD - 000004-000016). Unlike the single-defendant case in Ingram, the investigation here identified nine suspects. (Def. Oliva's Ex. 1, at GWPD - 000040-000044, 000057-000061). Moreover, the investigation in this case included the execution of at least seven search warrants, a grand jury subpoena, and court orders so that law enforcement could obtain cellular phone data, phone records, and cell tower analysis. (Def. Oliva's Ex. 1, at GWPD - 000011-000015). The investigation also included scientific analysis of shoe tread patterns, cellular phone analysis and forensic reports, cellular tower analyses, SIM card analysis, review of surveillance footage,

fingerprint and DNA analysis, multiple witness interviews, analysis of criminal histories, and translation of text messages from Spanish. (Id. at 000011-000015, 000019, 000021, 000025-000027, 000033, 000046-000056). Unlike the investigation in Ingram, which appeared to be completed more than two years and three months before the indictment was obtained, the investigation here appeared to continue almost until the time the Indictment was obtained. (See Def. Oliva's Ex. 1, at GWPD-000056 (indicating that TFO Donnelly obtained three search warrants on February 22, 2013, in order to obtain the text messages on several suspects' telephones and subsequently had the text messages translated by a linguistics analyst); Gomez Uranga's Ex. H (driver's record information obtained in mid-June 2013); Gomez Uranga's Ex. I (driver's license information dated mid-August, 2013)). There is no indication that parts of the investigation were unnecessary or purposefully done to delay Indictment. Furthermore, the parties have not created any record or presented any argument tending to show that the evidence needed to obtain an indictment was amassed well in advance of the Indictment or that the period of the investigation prior to the Indictment included *inordinate* delay. Futhermore, Defendants have not shown that any portion of time during which federal prosecutors analyzed whether the cases against the Defendants should brought before the Grand Jury and to prepare the cases to be brought before the Grand Jury amounted to inordinate delay. For all of these reasons, this Court concludes that the pre-indictment investigation period here did not count as "inordinate" pre-indictment delay.

As a result, the Court cannot conclude that the post-indictment delay weighs heavily against the Government. The amount of delay is analyzed on a case-by-case basis and no case law in the Eleventh Circuit has precisely defined what amount of delay would weigh heavily against the Government. Clark, 83 F.3d 1350. While the undersigned is very troubled by the Government's gross negligence in this case, because there was no inordinate pre-trial delay in this case, the twenty-two months of post-indictment delay between the Indictment and the Defendants' arrests resembles the seventeen and a half months of post-indictment delay in Clark instead of the more than four years combined pre-indictment and post-indictment delay in Ingram. Compare Clark, 83 F.3d at 1353-54 (citing United States v. Beamon, 992 F.2d 1009, 1015 (9th Cir. 1993), for the proposition that seventeen to twenty-month delays solely attributable to Government negligence was insufficient to relieve defendants from showing actual prejudice); with Ingram, 446 F.3d at 1335 (finding that the twenty-two months of post-indictment delay weighed heavily against the Government because given that there was two and a half years of inordinate pre-indictment delay, the post-indictment delay was more prejudicial to the defendant); see also United States v. Bibb, 194 F. App'x 619, 622 (11th Cir. 2006) (finding that eighteen months of delay between indictment and arrest due to Government negligence in locating and arresting the defendant did not weigh heavily against the Government and did not excuse the defendant from demonstrating actual prejudice resulting from the delay). Thus, this Court finds that the amount of delay does not heavily favor the Defendants and Defendants must prove

actual prejudice in order to establish a violation of their right to a speedy trial. Indeed, courts from outside this Circuit have uniformly rejected the defendants' arguments that similar delays excuse them from proving actual prejudice. Jackson v. Ray, 390 F.3d 1254, 1263 (10th Cir. 2004) (concluding that unexplained delay of four and one-third years did not excuse defendant from having to prove actual prejudice); United States v. Jackson, 473 F.3d 660, 667-68 (6th Cir. 2007) (holding that twenty-one-month delay between indictment and arrest not enough to excuse the defendant from demonstrating actual prejudice where Government did not give a good reason for the delay); United States v. Serna-Villareal, 352 F.3d 225, 232-33 (5th Cir. 2003) (concluding that at least three-year delay caused by the Government's negligence was too short to weigh heavily in favor of a finding of presumed prejudice); United States v. Beamon, 992 F.2d 1009, 1013-14 (9th Cir. 1993) (explaining that twenty-month delay between indictment and arrest caused by the Government's negligence did not excuse requirement that defendant prove actual prejudice); United States v. Martin, No. 2:08-CR-0060-GMN-LRL, 2010 WL 5575324, at *2 (D. Nevada Oct. 12, 2010) (finding that twenty-seven-month delay not enough to relieve defendant of proving actual prejudice even though the Government made virtually no attempt to locate or apprehend the defendant during period of delay).

Because the first three Barker factors do not weigh heavily against the Government, Defendants must demonstrate that they suffered actual prejudice resulting from the delay to establish their speedy trial violation. The prejudice suffered by the defendant is evaluated in light of the three interests of the defendant to a speedy trial:

"(1) to prevent oppressive pretrial incarceration; (2) to minimize anxiety and concern of the accused; and (3) to limit the possibility that the defense will be impaired." Villarreal, 613 F.3d at 1355. The most important factor is the possibility that the defense will be impaired because the inability of a defendant to adequately prepare his case "skews the fairness of the entire system." Villarreal, 613 F.3d at 1355. The defendant must proffer more than conclusory assertions of prejudice or unsubstantiated allegations of witnesses' faded memories. United States v. Woodley, 484 F. App'x 310, 319 (11th Cir. 2012); United States v. Hayes, 40 F.3d 362, 366 (11th Cir. 1994).

Defendants Vidal and Oliva do not attempt to demonstrate any actual prejudice resulting from the delay in this case. Defendant Gomez Uranga contends that he can demonstrate actual prejudice due to his anxiety and concern because when the state court case against him was dismissed in 2014, the dismissal notice informed him that the United States Attorney's Office was going to prosecute him for his role in a criminal enterprise whose activities included the state crimes. (Doc. 47, at 7). Defendant Gomez Uranga contends that as a result, he did not know he had been indicted, but knew that a prosecution was forthcoming and endured the anxiety of knowing that he had a federal prosecution "hanging over his head." Defendant Gomez Uranga asserts, through the argument of counsel, that he could not make long-term plans because he did not know when the prosecution would upend his life. Defendant Gomez Uranga further contends that "every day when he sent his kids to school, he had to worry that he could be whisked off to jail before [his kids] returned in the afternoon." (Doc. 81, at 12).

Defendant Gomez Uranga, however, presents no evidence beyond the conclusory argument of counsel concerning the alleged distress and anxiety suffered. Thus, there is no evidence here that Defendant Gomez Uranga would have been less anxious had his arrest been timely. Even if Defendant Gomez Uranga had been timely arrested, it is just as likely that his time with his family would have been equally marred by the certainty of arrest and prosecution. Likewise, Defendant Gomez Uranga's plans for his future and his family would have been plagued earlier with the possibility that the prosecution could lead to his conviction. Without more, it is also not clear how much of Defendant Gomez Uranga's alleged anxiety stemmed from the delay or the anxiety and strain normally attendant with an impending prosecution. Accordingly, Defendant Gomez Uranga's conclusory allegations of anxiety here are not sufficient to establish that he suffered actual prejudice resulting from delay. See, e.g., Woodley, 484 F. App'x at 319-20 (explaining that the defendant's conclusory assertions of unsanitary prison conditions and inability to access a law library, without more, were insufficient to establish actual prejudice); Hayes,40 F.3d at 366 (conclusory allegations of prejudice insufficient); United States v. Avalos, 541 F.2d 1100, 1115 (5th Cir. 1976) ("Anxiety of the sort present to some degree in virtually every case does not amount to actual prejudice."); United States v. Graham, 538 F.2d 261, 265 (9th Cir. 1976) (rejecting the defendant's conclusory allegations of prejudice resulting from general anxiety and strain exacerbated by the strain of the delay of the trial and finding that such allegations of anxiety and strain normally attend any criminal prosecution). Under these circumstances, this Court

is not persuaded that Defendant Gomez Uranga suffered actual prejudice as a result of the delay in his arrest. Given that the Court cannot find that the first three Barker factors weigh heavily against the Government and because the Defendants cannot demonstrate actual prejudice, they cannot prevail in establishing a violation of their right to a speedy trial. Bibb, 194 F. App'x at 623; Ingram, 446 F.3d at 1337. While this Court agrees with Defendants that the Government's negligent delay in this case is very troubling, based upon the legal precedents established in this Circuit and beyond, this Court does not find that Defendants have established a violation of their speedy trial rights. Accordingly, this Court **RECOMMENDS** that Defendants' Motions to Dismiss the Indictment be **DENIED**. (Docs. 37, 45, 61).

CONCLUSION

Based on the aforementioned reasons, this Court **RECOMMENDS** that Defendants' Motions to Dismiss the Indictment for Violation of the Right to Speedy Trial be **DENIED**. (Docs. 37, 45, 61). Defendant Oliva's Motion to Adopt Co-Defendants' Motions to Dismiss and Related Pleadings to Dismiss the Indictment for Violation of the Right to Speedy Trial is **GRANTED**. (Doc. 58). Because there are no more motions or other matters to address for Defendant Vidal, the undersigned certifies Defendant Vidal ready for trial.

SO ORDERED and REPORTED AND RECOMMENDED, this 9 day of September, 2016,

LINDA T. WALKER
UNITED STATES MAGISTRATE JUDGE