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**APPENDIX A**

**UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT**

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No. 18-1601

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UNITED STATES OF AMERICA

v.

JAMES BAILEY-SNYDER,  
Appellant

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(M.D. Pa. No. 3-16-cr-00175-001)

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**SUR PETITION FOR REHEARING**

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Present: SMITH, *Chief Judge*, MCKEE, AMBRO,  
CHAGARES, JORDAN, HARDIMAN, GREENAWAY,  
JR., SHWARTZ, KRAUSE, RESTREPO, BIBAS,  
PORTER, MATEY, SCRIRICA and RENDELL,<sup>1</sup> *Circuit  
Judges*.

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<sup>1</sup> Judge Scirica and Judge Rendell's cotes are limited to panel  
rehearing.

The petition for rehearing filed by appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is denied.

BY THE COURT,

*s/ Thomas M. Hardiman*  
Circuit Judge

Dated: July 10, 2019

kr/cc: James Bailey-Snyder  
Todd K. Hinkley, Esq.

**APPENDIX B**

**UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT**

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No. 18-1601

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UNITED STATES OF AMERICA

v.

JAMES BAILEY-SNYDER,  
Appellant

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On Appeal from the United States District Court for  
the Middle District of Pennsylvania

(D.C. No. 3-16-cr-00175-001)

District Judge: Honorable Malachy E. Mannion

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Argued February 6, 2019

Before: HARDIMAN, SCIRICA, and RENDELL,  
*Circuit Judges.*

(Filed May 3, 2019)

Todd K. Hinkley [Argued]  
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## OPINION OF THE COURT

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HARDIMAN, *Circuit Judge.*

This appeal presents a question of first impression in this Court: does an inmate's placement in administrative segregation while he is under investigation for a new crime trigger his right to a speedy trial under the Sixth Amendment of the Speedy Trial Act? We hold it does not, so Bailey-Snyder was not entitled to dismissal of his complaint. Nor was there improper vouching or cumulative error in Bailey-Snyder's trial. We will affirm.

### I

While incarcerated at the Federal Correctional Institution, Schuylkill, James Bailey-Snyder was moved to administrative segregation after officers found a seven-inch homemade plastic weapon (shank) on his person. *United States v. Bailey-Snyder*, 2017 WL

6055344, at \*1 (M.D. Pa. Dec. 7, 2017). He remained in isolation in the Special Handling Unit (SHU) pending further investigation by the FBI. *Id.*

Ten months later, Bailey-Snyder was indicted in June 2016 on one count of possession of a prohibited object in prison. *Id.*; *see* 18 U.S.C. § 1791(a)(2), (b)(3). He pleaded not guilty and filed a number of motions for extension before filing a motion to dismiss in November 2017. *Bailey-Snyder*, 2017 WL 6055344, at \*1. Focusing on his placement in administrative segregation as the start of the speedy trial clock, Bailey-Snyder moved to dismiss his indictment, alleging violations of his constitutional and statutory rights to a speedy trial. *Id.*

The District Court denied the motion to dismiss without an evidentiary hearing, reasoning that placement in the SHU does not constitute an arrest or accusation that would trigger speedy trial rights. *See id.* at \*2. The case went to trial a month later.

The trial focused on the credibility of the two officers who testified that they found a shank on Bailey-Snyder's person when they searched him in a staff bathroom that was not equipped with cameras. In an effort to undermine the officers' credibility, defense counsel cross-examined them regarding the Bureau of Prisons incentive programs for recovering contraband. On redirect, the Government elicited that the programs do not reward individual contraband recoveries and that one of the officers did not receive any award for the search of Bailey-Snyder. The other officer had made similar points during the defense's cross-examination. Neither officer discussed the potential consequences they would face for planting a

shank on an inmate and then lying about it. The Government's only other witness was the FBI agent who investigated the case. The defense rested without offering testimony or evidence.

Following the Court's charge to the jury, both parties gave closing statements. The Government's closing and rebuttal drew two defense objections relevant to this appeal. During summation, the prosecutor concluded: "I feel as if I'm not up here long enough. There really isn't much to say. The defendant is guilty of his crime and we're asking you to find him guilty of it. Thank you, your Honor." App. 232. The defense objected on the basis that the prosecutor had expressed personal belief in the defendant's guilt; the District Court agreed, so the prosecutor had to make a corrected statement to the jury.<sup>1</sup> The defense's closing focused on the searching officers' "believability." App. 234. After tying "policy incentive of the Bureau of Prisons" to the searching officers' motives, the defense claimed: "[a]nd I wouldn't buy that home on the word of either of the two people that were on that stand if I were you." App. 234–35. In response to that challenge to the officers' credibility, the Government argued in rebuttal: "[i]t's conjecture to say that these correctional officers would put their jobs, their careers, their livelihoods on the line to possibly plant a shank on this defendant to maybe, maybe, have a little notch to get

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<sup>1</sup> "Ladies and gentlemen, I think near the end of my oral argument to you I indicated that if you find that the defendant is guilty you should find him so. I think I may have mumbled during the beginning of that and said the defendant is guilty, you should find him guilty. What I really meant to say if you found, if within your common sense, and when you look at all the testimony and evidence presented, if you find that he's guilty you should find him guilty." App. 233–34.

a promotion.” App. 237. The defense objected, claiming the Government was “arguing a fact not in evidence,” but the Court overruled the objection. App. 238.

The jury convicted Bailey-Snyder and he was sentenced to 30 months’ imprisonment to run consecutively to his underlying offense of conviction. This timely appeal followed.

## II

The District Court had jurisdiction under 18 U.S.C. § 3231. We have jurisdiction under 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a).

## III

The questions whether speedy trial rights attach when a prisoner is placed in administrative segregation is one of first impression for our Court. Bailey-Snyder argues that the District Court should have dismissed his indictment because the 10 months and 18 days<sup>2</sup> between his placement in the SHU and his indictment violated his right to a speedy trial under the Sixth Amendment to the Constitution and the Speedy Trial Act.

### A

We begin with Bailey-Snyder’s constitutional argument. The Sixth Amendment states: “[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial.” U.S. CONST. amend. IV.

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<sup>2</sup> Although Bailey-Snyder’s brief references “approximately eleven-month segregation,” *e.g.*, Opening Br. 14, it also concedes we should not count “approximately 75 days” from this period because of “violations committed while in SHU.” *Id.* So the time period at issue is closer to eight months. Bailey-Snyder also does not challenge the time between the indictment and trial.

This guarantee attaches at a defendant's arrest or indictment, whichever comes first, because it does not "require the Government to discover, investigate, and accuse any person within any particular period of time." *United States v. Marion*, 404 U.S. 307, 313 (1971); *see id.* at 321 (declining to extend the constitutional speedy trial right "to the period prior to arrest"); *United States v. Velazquez*, 749 F.3d 161, 183 (3d Cir. 2014).

We again decline to extend the constitutional speedy trial right "to the period prior to arrest." *Id.* (quoting *Marion*, 404 U.S. at 321). Unlike police and prosecutors, the Bureau of Prisons does not operate in a prosecutorial posture when it decides to place prisoners in administrative segregation. Such decisions are not dependent on a decision to prosecute. Indeed, here it preceded any such decision. Prison officials instead segregate inmates for myriad reasons, including: investigation, discipline, protection, prevention, and transition. *See generally* FEDERAL BUREAU OF PRISONS, PROGRAM STATEMENT CPD/CSB 5270.10 (effective Aug. 1, 2011) (detailing objectives and policies of SHUs, including reasons for placement there), *superseded by* PROGRAM STATEMENT CPD/CSB 5270.11 (effective Nov. 23, 2016) (same). Neither the United States Attorney nor the FBI orders these placements and they are not typically notified when such placements are made. For that reason, SHU placements have their own administrative review and appeals processes. *See generally id.* (citing Administrative Remedy Program, 28 C.F.R. § 542, subpart B).

Our holding today is consistent with all five courts of appeals that have considered the issue. *See United States v. Wearing*, 837 F.3d 905, 909 (8th Cir. 2016) (per curiam); *United States v. Daniels*, 698 F.2d 221,

223 (4th Cir. 1983); *United States v. Mills*, 641 F.2d 785, 787 (9th Cir. 1981); *United States v. Blevins*, 593 F.2d 646, 647 (5th Cir. 1979) (per curiam); *United States v. Bambulas*, 571 F.2d 525, 527 (10th Cir. 1978) (per curiam). Our sister courts have persuasively rebutted the reasons Bailey-Snyder asks us to break ranks with them. Citing the factors in *Marion* that inform the speedy trial right, Bailey-Snyder argues that SHU placement (like an arrest): restrains the inmate's liberty, worries friends and family, prevents the inmate from gathering evidence, and focuses the prison population's obloquy on the segregated inmate. But such placement occurs in "the peculiar context of a penal institution where the curtailment of liberty is the general rule, not the exception." *Daniels*, 698 F.2d at 223 n.1 (quoting *Mills*, 641 F.2d at 787). That administrative context explains why inmates like Bailey-Snyder have an opportunity to administratively challenge their segregation's length prior to arrest or accusation, and why administrative segregation does not constitute an arrest or public accusation for purposes of the Sixth Amendment right to a speedy trial.

In sum, because Bailey-Snyder was not arrested when he was placed in administrative segregation, his Sixth Amendment right to a speedy trial did not attach and his constitutional right was not violated.

## B

We turn next to Bailey-Snyder's statutory argument. Congress enacted the Speedy Trial Act to give effect to the Sixth Amendment's speedy trial guarantee by setting time limits within which trials must begin. *United States v. Rivera Constr. Co.*, 863 F.2d 293, 295 (3d Cir. 1988). The Speedy Trial Act requires the Government to "file an indictment or information

against a defendant ‘within thirty days from the date on which such individual was arrested or served with a summons in connection with such charges.’” *United States v. Oliver*, 238 F.3d 471, 473 (3d Cir. 2001) (quoting 18 U.S.C. § 3161(b)).

For the same reasons we rejected Bailey-Snyder’s constitutional argument, we hold that administrative segregation is not an arrest for purposes of § 3161(b). In doing so, we again join every other circuit court of appeals that has addressed this question. *See Wearing*, 837 F.3d at 908 (per curiam); *United States v. Harris*, 12 F.3d 735, 736 (7th Cir. 1994); *United States v. Jackson*, 781 F.2d 1114, 1115 (5th Cir. 1986) (per curiam). Bailey-Snyder was already imprisoned for another offense, so several non-prosecutorial reasons justified his segregation once he was found in possession of a lethal weapon. Moreover, he could have challenged his prolonged HSU placement independent of the Speedy Trial Act. *See* Administrative Remedy Program, 28 C.F.R. § 542, subpart B; PROGRAM STATEMENT 5270.11.

#### IV

In addition to his legal arguments regarding his speedy trial rights, Bailey-Snyder claims he is entitled to a new trial because of improper comments by the prosecutor during his summation. Bailey-Snyder claims the prosecutor’s comments about the credibility of the Government’s two key witnesses constituted improper vouching.

Three things are required to reverse a conviction for improper vouching: (1) the prosecution assured the jury of its witnesses’ credibility, (2) the assurance came from fact(s) not in the record, and (3) the assurance prejudiced the defendant. *See United States v.*

*Walker*, 155 F.3d 180, 184 (3d Cir. 1998); *United States v. Zehrbach*, 47 F.3d 1252, 1265 (3d Cir. 1995) (en banc). A statement that an “officer would be risking his career to lie under oath” may or may not constitute improper vouching, depending on the context. *United States v. Weatherly*, 525 F.3d 265, 271 (3d Cir. 2008).

In *Weatherly*, the prosecutor posed this rhetorical question to the jury: “Why would Officer[s] . . . risk their 32–34 years of experience on the police force over this case?” 525 F.3d at 271. We held that question was not improper for three reasons. *See id.* at 271–273. First, evidence in the record showed that discipline generally affects officers’ careers, which allowed the jury to conclude that officers could risk their careers by committing misconduct. That defeated an element of improper vouching: fact(s) not of record. *See id.* at 271–72. Second, the prosecutor’s question reasonably responded to the defense’s own speculative attack on the officers’ credibility, which excused any impropriety. *See id.* at 272. And third, even if improper, the defendant was not prejudiced because the brief, isolated comment was responsive to defense attacks and because the judge had “thoroughly instructed” the jury that counsel’s statements are not evidence. *Id.* at 272–73. We also noted that arguing an officer “had too much to lose to commit perjury merely to convict th[e] defendant” could be “a common sense conclusion” the prosecution may *properly* ask the jury to reach without evident in the record to support it. *Id.* at 271 n.7 (quoting *United States v. Bethancourt*, 65 F.3d 1074, 1082 (Cd Cir. 1995) (McKee, J., dissenting)). In other words, such a statement may not be improper vouching at all.

In this appeal, the Government's comment was similar to the rhetorical question in *Weatherly*. The prosecutor said: "It's conjecture to say that these correctional officers would put their jobs, their careers, their livelihoods on the line to possibly plant a shank on this defendant to maybe, maybe, have a little notch to get a promotion." App. 237. We hold that this common sense conclusion was not improper vouching, even without explicit evidence in the record to support it. Although neither officer testified that they risked their jobs if they planted a shank on Bailey-Snyder, it should be obvious that falsifying evidence, filing dishonest sworn reports, and lying in open court should (and would) jeopardize one's career as a correctional officer. The Government's comment was "brief and appropriate," *Weatherly*, 525 F.3d at 272, and exactly "the kind of effective and logical response to an attack on an agent's credibility that has been made in countless numbers of closing arguments, and will be made in countless more." *Id.* at 271 n.7 (quoting *Bethancourt*, 65 F.3d at 1082 (McKee, J., dissenting)). Although there was no admitted evidence of discipline affecting these officers' careers—and although the Government's case depended entirely on the officers' testimony—the Government briefly responded to the defense's credibility attacks with a proper, common sense conclusion.

Also like in *Weatherly*, the challenged statement here does not involve the prosecutor "invok[ing] his own oath of office to defend the [officers'] credibility," which we have held to be improper. *Id.* (citing *United States v. Pungitore*, 910 F.2d 1084, 1125 (3d Cir. 1990)). In *Pungitore*, the prosecutor's improper vouching took the form of claiming "the U.S. Attorneys and

law enforcement could not have behaved as unscrupulously as defense counsel alleged they did without violating their oaths of office and jeopardizing their careers.” 910 F.2d at 1125. Here, the prosecutor did not invoke his oath of office. Indeed, the Government here did not “vouch” in the strictest sense of the word: it did not swear to or make promises about the officers’ credibility. Instead, the Government supported its witnesses’ credibility by pointing out obvious consequences they would face for lying after the defense insinuated they had a motive to do so. The Government need not have elicited testimony or admitted evidence that planting evidence and then lying about it under oath would harm their careers before saying so in rebuttal.

We also note that, even if the Government’s comment were improper vouching, it still would be excusable here as “a reasonable response to allegations of perjury by [the defense.]” *Weatherly*, 525 F.3d at 272. As in *Weatherly*, Bailey-Snyder’s single theory was that the officers who discovered the shank had a motive (the prison’s incentive policies) and opportunity to fabricate doing so. *See id.* The defense’s closing focused on those motives and incentives to find shanks, even though nothing in the record established they affected these officers. So the defense speculated about the officers’ motives, and the Government’s brief, logical response appropriately characterized that as “conjecture.” App. 237; *see Weatherly*, 525 F.3d at 272.

## V

Lastly, we address cumulative error. To reverse a conviction for cumulative error requires more than one error. *See United States v. Hill*, 976 F.2d 132, 145 (3d Cir. 1992). And this is a demanding standard that

warrants reversal only when the combined errors “so infected the jury’s deliberations that they had a substantial influence on the outcome of the trial.” *Id.*

Because the Government’s comment about its witnesses’ credibility was proper, there is no error to compound with the Government’s comment on Bailey-Snyder’s guilt. Even if there were unexcused improper vouching, the Government’s brief comment about Bailey-Snyder’s guilt was stricken by the Court, and immediately corrected by the Government itself. *See supra* Note 1. Furthermore, the Court had instructed the jury before closing that lawyers’ statements, including those made in closing, are not evidence. These facts leave us with little reason to believe that the Government’s statements improperly influenced the jury at all, let alone substantially. Thus, there was no cumulative error.

\* \* \*

The District Court did not err in denying Bailey-Snyder’s motion to dismiss the indictment for a speedy trial violation. Nor was there improper vouching or cumulative error at trial. We will therefore affirm the judgment of conviction and sentence.

**APPENDIX C****UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF PENNSYLVANIA**

UNITED STATES OF  
AMERICA

v.

JAMES BAILEY-SNYDER,  
Defendant

CASE NO. 3:16-CR-  
175

(JUDGE MANNION)

**MEMORANDUM**

Pending before the court is the defendant James Bailey-Snyder's motion to dismiss the indictment. (Doc. 50). Based upon the court's review of the motion and related materials, the defendant's motion will be **DENIED**.

**I. BACKGROUND**

On August 10, 2015, federal inmate James Bailey-Snyder, who was then being housed at the Federal Correctional Institution in Schuylkill, Pennsylvania ("FCI-Schuylkill"), was found to be in possession of a seven-inch homemade plastic weapon that was sharpened to a point with a shoelace string attached as a handle (commonly known as a "shank"). (Doc. 1). Later that same day, Bailey-Snyder was transferred to FCI-Schuylkill's Special Handling Unit ("SHU"), which is an administrative segregation facility, where Bailey-Snyder remained in isolation pending further investigation. (Doc. 51).

The parties attempted to reach a preindictment plea agreement but were unable to do so. (Doc. 56). As such, the matter was presented to a grand jury for the Middle District of Pennsylvania, which issued a single-count indictment against Bailey-Snyder in the above-captioned case on June 28, 2016. (Doc. 1). The indictment charged Bailey-Snyder with violating 18 U.S.C. §§1791(a)(2) and (b)(3), which forbid the possession of a prohibited object while serving time as a prison inmate. (*Id.*).

Bailey-Snyder pled not guilty to the crimes charged on July 19, 2016. (Doc. 9). After filing a series of motions to extend time limitations and to continue the trial date, Bailey-Snyder filed the instant motion to dismiss the indictment, along with a brief in support, on November 17, 2017. (Doc. 50; Doc. 51). The government filed its brief in opposition to the instant motion on November 30, 2017. (Doc. 56). Trial is currently scheduled for December 11, 2017. This matter has been fully briefed and is now ripe for disposition.

## **II. DISCUSSION**

### **A. The Defendant's Speedy Trial Rights**

Bailey-Snyder's primary argument in favor of dismissing the indictment is that the government violated his constitutional and statutory rights to a speedy trial under the Sixth Amendment and the Speedy Trial Act, 18 U.S.C. §§3161-3174. To this end, Bailey-Snyder alleges that his rights were violated because the government indicted him ten months and eighteen days after his placement into the SHU, which Bailey-Snyder claims constituted an "arrest" for speedy trial purposes. (Doc. 51).

The Sixth Amendment provides that “[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial.” U.S. CONST. AMEND. XI. The Sixth Amendment’s protections are “activated only when a criminal prosecution has begun and [extend] only to those persons who have been accused [during] the course of that prosecution.” *United States v. Marion*, 404 U.S. 307, 313 (1971). Thus, the Sixth Amendment “afford[s] no protection to those not yet accused,” nor does it “require the government to discover, investigate, [or] accuse any person within any particular period of time.” *Id.* The Supreme Court has interpreted the word “accused” to mean any person who has been arrested or formally indicted. *See id.* at 321 (holding that “[i]nvocation of the speedy trial provision . . . need not await indictment, information, or other formal charge. But we decline to extend that reach of the Amendment to the period prior to arrest. Until this event occurs, a citizen suffers no restraints on his liberty and is not the subject of public accusation”).

The Speedy Trial Act (“the Act”) establishes more specific time limitations to ensure that the various stages of a criminal proceeding progress promptly. Specifically, the Act provides that “[a]ny information or indictment charging an individual with the commission of an offense shall be filed within thirty days from the date on which such individual was arrested or served with a summons in connection with such charges.” 18 U.S.C. §3161(b). The Act, however, specifically exempts certain causes of delay from consideration when calculating the total amount of elapsed time, including “delay resulting from any pretrial motion” and “delay resulting from a continuance granted by any judge.” *Id.* §3161(h).

This case presents an issue of first impression in the Third Circuit, as out courts have yet to encounter the question of whether an inmate's placement into administrative segregation amounts to an "arrest" for speedy trial purposes. While the Third Circuit has yet to decide this issue directly, other Court of Appeals have squarely addressed it, and the court finds their reasoning both persuasive and instructive. Those Courts of Appeals that have faced this issue have uniformly concluded that being held in administrative segregation pending criminal charges is not an arrest under either the Sixth Amendment or the Speedy Trial Act. *See, e.g., United States v. Wearing*, 837 F.3d 905, 909 (8th Cir. 2016); *United States v. Daniels*, 698 F.2d 221, 223 (4th Cir. 1983); *United States v. Mills*, 641 F.2d 785, 787 (9th Cir. 1981); *United States v. Blevins*, 593 F.2d 646, 647 (5th Cir. 1979); *United States v. Bambulas*, 571 F.2d 525, 527 (10th Cir. 1978).

The Supreme Court has previously outlined the contours of what constitutes an arrest for speedy trial purposes. "Arrest is a public act that may seriously interfere with the defendant's liberty . . . and that may disrupt his employment, drain his financial resources, curtail his associations, subject him to public obloquy, and create anxiety in him, his family, and his friends." *Marion*, 404 U.S. at 320. An inmate's placement into administrative segregation, by contrast, is "in no way related to or dependent on prosecution by the federal government" and is instead "a method of disciplining or investigating inmates who break prison regulations, of protecting certain inmates from members of the general population, and of providing a general cooling-down period for inmates involved in events that could disrupt the general [inmate] population."

*Wearing*, 837 F.3d at 909 (quoting *United States v. Duke*, 527 F.2d 386, 390 (5th Cir. 1976)).

Here, FCI-Schuylkill's disciplinary procedures "did not focus obloquy upon [the defendant], did not disrupt [his] employment or drain [his] financial resources." *Mills*, 641 F.2d at 787 (9th Cir. 1981) (quoting *United States v. Clardy*, 540 F.2d 439, 441 (9th Cir.), *cert. denied*, 429 U.S. 963 (1976)). While Bailey-Snyder's "[a]ctual physical restraint may have increased and [his] free association [may have] diminished . . . unless we were to say that imprisonment . . . is a continuing arrest, these criteria bear little weight in the peculiar context of a penal institution where the curtailment of liberty is the general rule, not the exception." *Id.* In other words, Bailey-Snyder's placement into the SHU was not a "public act with public ramifications," as an arrest is often considered to be; instead, it was merely a private act. *Id.* In every case where this question has been directly addressed, courts have found that the confinement of a prison inmate in administrative segregation is not the equivalent of an arrest for purposes of either the Sixth Amendment or the Speedy Trial Act. As such, Bailey-Snyder's motion to dismiss cannot succeed on this basis. Finally, since there was no post-accusation delay in this case, the balancing test enunciated in *Barker v. Wingo*, 407 U.S. 514, 530 (1972), is inapplicable. See *Mills*, 641 F.2d at 787; *Blevins*, 597 F.2d at 647.

## **B. The Defendant's Due Process Rights**

Bailey-Snyder's second argument in favor of dismissing the indictment is that his Due Process rights were violated due to the government's pre-accusation delay in bringing an indictment against him.

While statutes of limitations are the criminal defendant's primary safeguard against prejudice from pre-accusation delay, Due Process guarantees stemming from the Fifth Amendment also provide certain protections. *See Marion*, 404 U.S. at 323-24. *See also United States v. MacDonald*, 456 U.S. 1, 7 (1982) (noting that “[t]he Sixth Amendment right to a speedy trial is . . . not primarily intended to prevent prejudice to the defense caused by passage of time; that interest is protected primarily by the Due Process Clause and by statutes of limitations”). To establish a Due Process violation based on pre-accusation delay, the defendant must “show both (1) that the delay between the crime and the federal indictment actually prejudiced his defense; and (2) that the government deliberately delayed bringing the indictment in order to obtain an improper tactical advantage or to harass him.” *United States v. Beckett*, 208 F.3d 140, 150 (3d Cir. 2000). “[T]he due process inquiry must consider the reasons for the delay as well as the prejudice to the accused.” *United States v. Lovasco*, 431 U.S. 783, 790 (1977). The reasons for said delay generally must amount to “prosecutorial bad faith.” *United States v. Sebetich*, 776 F.2d 412, 430 (3d Cir. 1985).

Here, Bailey-Snyder has offered no concrete evidence of prosecutorial bad faith, and any evidence of prejudice is speculative at best. On the first prong of the Due Process analysis, Bailey-Snyder contends that exculpatory video surveillance evidence was lost due to the government’s delay in bringing an indictment. (Doc. 51). Specifically, Bailey-Snyder claims that a lost video recording captured corrections officers’ initial search of his person, where no prohibited objects were found. (*Id.*). The government counters

this contention by arguing that even if such video evidence existed, the corrections officers ultimately found the shank on Bailey-Snyder's person during a search inside a prison restroom, where no video surveillance is conducted. (Doc. 56). Surveillance recordings at FCI-Schuylkill are preserved only for a set period of time before being disposed of, so Bailey-Snyder argues that these allegedly exculpatory video recordings were lost while he was confined in the SHU and that the government's delay in bringing an indictment subsequently prejudiced his defense. (Doc. 51). Bailey-Snyder further claims that several unidentified defense witnesses, whose names he does not remember, could have been located while he was confined in the SHU but now cannot be found. (*Id.*).

Bailey-Snyder's contentions, however, amount to little more than mere speculation and do not satisfy his burden of demonstrating actual prejudice to his defense. *See United States v. Robles*, 129 F. App'x 736, 738 (3d Cir. 2005) (Stating that “[t]o prevail in a Fifth Amendment Due Process claim based on the [g]overnment's pre-accusation delay, a defendant must prove that he was actually prejudiced by the delay”). Even if it could be verified that such video evidence actually existed, there is no guarantee beyond conjecture that the video would have been beneficial to Bailey-Snyder's defense. In addition, Bailey-Snyder is in no worse a position to locate his witnesses now than he was before any alleged or perceived delay. Bailey-Snyder offers no specific, articulable facts or proposed witness testimony in support of his claims, and such speculative offerings are insufficient to demonstrate prejudice. *See Golley*, 526 F.3d at 820 (noting that “[t]o establish prejudice, the defendant must offer more than mere speculation of lost witnesses, faded

memories or misplaced documents; he must show an actual loss of evidence that would have aided the defense and that cannot be obtained from other sources"). Bailey-Snyder also remains fully able to testify about his own recollection of the events surrounding the corrections officers' search, to cross-examine the corrections officers who searched him, and to develop a record of what actually occurred during the search. Moreover, Bailey-Snyder or his attorney could have requested preservation of this video evidence if they believed that that it would be central to their defense. As such, Bailey-Snyder has not demonstrated any actual prejudice to his defense resulting from pre-accusation delay.

As to the second requirement for establishing a Due Process violation based on pre-accusation delay, Bailey-Snyder has failed to produce any evidence in support of his claim that the government's delay in issuing the indictment was deliberate. Even if Bailey-Snyder's defense were prejudiced by some alleged loss of evidence, a criminal defendant must further demonstrate that such delay was the result of intentional government misconduct to establish a Due Process violation. *See, e.g., Lovasco*, 431 U.S. at 783. No such government wrongdoing occurred here. Accordingly, Bailey-Snyder's Due Process challenge to the issued indictment fails, and his motion to dismiss will be denied.

### III. CONCLUSION

Based on the foregoing, the defendant's motion to dismiss the indictment, (Doc. 50), will be **DENIED**. An appropriate order shall issue.

[Malachy E. Mannion]  
**MALACHY E. MANNION**  
**United States District Judge**

**Date: December 7, 2017**