Appendix

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NOT FOR PUBLICATION

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MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. MARK ELDON WILSON, AKA Marc Eldon Wilson, Defendant-Appellant.	No. 18-50333 D.C. No. 2:04-cr-00476-SJO-1 MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
S. James Otero, District Judge, Presiding

Argued and Submitted January 14, 2021
Pasadena, California

Before: CALLAHAN and WATFORD, Circuit Judges, and RAKOFF,** District Judge.

Mark Wilson was convicted following a jury trial of multiple counts of mail and wire fraud. On appeal, he contends that his convictions should be reversed

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The Honorable Jed S. Rakoff, United States District Judge for the Southern District of New York, sitting by designation.

based on an alleged violation of his Sixth Amendment right to a speedy trial and several claims of evidentiary error at trial. We affirm.

1. Wilson first argues that the district court erred by concluding that his Sixth Amendment right to a speedy trial attached only when the indictment was filed in April 2004, rather than when the complaint was filed in June 2000. We recognize that a split exists within our circuit over whether a complaint is sufficient to trigger the protections of the speedy trial right. *Compare Northern v. United States*, 455 F.2d 427, 429 (9th Cir. 1972) (per curiam), *and United States v. Terrack*, 515 F.2d 558, 559 (9th Cir. 1975), *with Favors v. Eyman*, 466 F.2d 1325, 1327–28 (9th Cir. 1972), *and Arnold v. McCarthy*, 566 F.2d 1377, 1382 (9th Cir. 1978). But even assuming that Wilson's right to a speedy trial attached upon the filing of the complaint, his claim still fails.

We evaluate whether Wilson's right to a speedy trial was violated by balancing the four factors set out in *Barker v. Wingo*, 407 U.S. 514 (1972): (1) the length of the delay; (2) the reason for the delay; (3) whether the defendant asserted his rights; and (4) whether the defendant was prejudiced by the delay. *Id.* at 530.

With respect to the first factor, approximately six-and-a-half years elapsed between the filing of the complaint and the government's extradition request. That period is sufficiently lengthy to trigger analysis of the remaining *Barker* factors. *See United States v. Gregory*, 322 F.3d 1157, 1161–62 (9th Cir. 2003).

As for the second *Barker* factor, part of the delay may be attributable to the government's lack of diligence in preparing the indictment and extradition request. But it is also true that Wilson contributed to the delay, for he knew of the charges against him potentially as early as 2001 but at the latest by 2003. He could have at that time "ended the delay and avoided any prejudice caused by the passage of time" by voluntarily presenting himself to United States authorities. *See United States v. Aguirre*, 994 F.2d 1454, 1457–58 (9th Cir. 1993). Instead, Wilson initiated lengthy court battles in Canada to prevent the transmission of evidence to the United States, and he forced the government "to run the gauntlet of obtaining formal extradition." *See United States v. Manning*, 56 F.3d 1188, 1195 (9th Cir. 1995). Because Wilson knew of the charges against him years before the government sought his extradition in 2007, the third *Barker* factor, involving assertion of the right to a speedy trial, "weigh[s] heavily against him." *See Doggett v. United States*, 505 U.S. 647, 653 (1992). And because Wilson's failure to assert his speedy trial right contributed significantly to the delay, he is not entitled to a presumption of prejudice under *Barker*'s fourth factor. *See Aguirre*, 994 F.2d at 1458.

Without the benefit of a presumption of prejudice, Wilson bears the heavy burden of showing actual prejudice. *See id.* at 1457. The actual prejudice test is applied "stringently"—the proof of prejudice must be "definite and not

speculative." *Manning*, 56 F.3d at 1194. Wilson claims that he was prejudiced by the delay because the government gained two cooperating witnesses, some electronic evidence was lost, and two of the government's witnesses exhibited lapses in memory that purportedly prevented Wilson from impeaching them. However, neither of the cooperating witnesses Wilson identifies testified at trial, and one of them actually died prior to trial, prejudicing the government rather than Wilson. He has also failed to identify anything from the spoliated electronic evidence that would have aided his defense. Wilson's theory as to how he would have been able to impeach the government's witnesses, and how that would have affected the outcome of the trial, is at best speculative.

Given Wilson's contributions to the delay and his inability to show actual prejudice, the *Barker* factors collectively weigh in the government's favor. The district court therefore properly denied Wilson's motion to dismiss the indictment.

2. As for Wilson's claims of evidentiary error, he must show that the district court abused its discretion (or committed plain error where Wilson failed to object below) in order to prevail. He has not made such a showing. Agent Healy did not impermissibly opine on the ultimate legal issue by using the term "fraud" in his testimony. As this court has noted, "[i]t is sometimes impossible for an expert to render his or her opinion on a subject without resorting to language that recurs in the applicable legal standard." *United States v. Diaz*, 876 F.3d 1194, 1998 (9th

Cir. 2017). Nor did Agent Healy improperly "spoon-feed" the government's interpretation of the evidence to the jury—he merely offered *modus operandi* testimony that this court has consistently held permissible. *See United States v. Gil*, 58 F.3d 1414, 1422 (9th Cir. 1995). The district court also did not abuse its discretion by admitting the "Gribble Tapes," particularly after having independently verified their reliability by listening to them and comparing their contents to testimony given at trial. The FTC press release, the email from Tony Brown, and testimony about customer complaints were properly admitted for the non-hearsay purpose of showing Wilson's state of mind—specifically, his knowledge that his companies were engaging in conduct that was considered fraudulent. Finally, Wilson concedes that, under binding circuit precedent, the district court acted within its discretion in reopening the evidence after the defense's Rule 29 motion. *See United States v. Suarez-Rosario*, 237 F.3d 1164, 1167 (9th Cir. 2001).

AFFIRMED.

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U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. MARK ELDON WILSON, AKA Marc Eldon Wilson, Defendant-Appellant.	No. 18-50333 D.C. No. 2:04-cr-00476-SJO-1 Central District of California, Los Angeles ORDER

Before: CALLAHAN and WATFORD, Circuit Judges, and RAKOFF,* District Judge.

The panel unanimously votes to deny the petition for panel rehearing. Judge Callahan and Judge Watford vote to deny the petition for rehearing en banc, and Judge Rakoff so recommends. The full court has been advised of the petition for rehearing en banc, and no judge requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35. The petition for panel rehearing and rehearing en banc, filed March 25, 2021, is DENIED.

* The Honorable Jed S. Rakoff, United States District Judge for the Southern District of New York, sitting by designation.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CRIMINAL MINUTES - GENERAL

Case No.	**CR 04-00476 SJO**	Date	December 4, 2017

Present: The Honorable	S. James Otero
Interpreter	Not Required

Victor Paul Cruz	Not Present	Ranee A. Katzenstein, Frances S. Lewis
Deputy Clerk	*Court Reporter/Recorder, Tape No.*	*Assistant U.S. Attorney*

U.S.A. v. Defendant(s):	Present	Cust.	Bond	Attorneys for Defendants:	Present	App.	Ret.
Mark Eldon Wilson	Not	x		Kay Otani, DFPD	Not	x	

Proceedings: **(IN CHAMBERS)**: **ORDER DENYING DEFENDANT'S MOTION TO COMPEL DISCOVERY** [Docket No. 95]

This matter is before the Court on Defendant Mark Eldon Wilson's ("Defendant") Motion to Compel Discovery ("Motion"), filed on September 5, 2017. The United States ("Government") filed its Opposition to Defendant's Motion ("Opposition") on September 11, 2017 and a Supplemental Opposition to Defendant's Motion on September 12, 2015 ("Supplemental Opposition"). Defendant replied to the Opposition ("Reply") on September 18, 2017. For the following reasons, Defendant's Motion to Compel is **DENIED.**

I. BACKGROUND

A. Factual Background

On August 4, 2004, Defendant was charged in a 14-count First Superseding Indictment for mail and wire fraud (First Superseding Indictment ("FSI"), ECF No. 12.) Specifically, the FSI charges Defendant with operating a fraudulent telemarketing scheme in Canada targeting senior citizens in the United States. (FSI 2.) Defendant's trial is set for February 20, 2018.

B. Procedural Background and the Instant Motion

On June 14, 2000, the Government obtained a complaint and arrest warrant against Defendant. (Mot. 2, ECF No. 95.) In August 2000, the Government submitted a Mutual Legal Assistance Treaty ("MLAT") Request to Canada to obtain evidence about Defendant. (Opp'n 4, ECF No. 97.) The MLAT Request was granted in February 2001. (Opp'n 4-5.) Defendant unsuccessfully challenged the legality of the search warrant in the Canadian courts, and then appealed the decision and obtained a stay to prevent the transmission of the evidence to the United States. (Opp'n 5.) The stay continued until May 2013, when an appellate court in Canada rejected Defendant's final challenge to the production of the materials. (Opp'n 5.)

On April 28, 2004, the Government obtained an indictment against Defendant, and then filed the FSI against

Defendant on August 4, 2004. (Mot. 2.) In January 2007, Defendant was arrested in Canada. (Mot. 2.) The United States Government arrested Defendant in March 2017 and he remains in custody today. (Mot. 2-3.)

On July 26, 2017, Defendant sent the Government a discovery request, which included a request for "[a]ll materials explaining or relating to the government's failing to arrest or prosecute Mr. Wilson during the period from June 2000, when the complaint was filed, to April 2004, when the indictment was filed." (Mot. 3.) On August 11, 2017, the Government responded to this request:

> The government is not aware of any legal authority for your request for discovery for the period between the filing of the complaint in June 2000 and the filing of the indictment in April 2004. Federal Rule of Criminal Procedure 16(a)(2) exempts from discovery government documents made in connection with investigating or prosecuting the case, and the case was indicted well within the statute of limitations. There is no presumption of prejudice for preindictment decisions, and until defendant can make a showing of actual prejudice, the reasons behind the timing of the government's decision to indict are irrelevant. *See, e.g., United States v. Corona-Verbera*, 509 F.3d 1105, 1112-13 & n.2 (9th Cir. 2007) ("The second prong of the test applies only if [defendant] has demonstrated actual prejudice."); *United States v. Suchecki*, 995 F.2d 234, 1993 WL 188368 (9th Cir. 1993) (unpublished) (affirming denial of discovery into pre-indictment time period because defendant failed to show actual prejudice).
>
> If you believe that defendant experienced actual, non-speculative prejudice during the pre-indictment time period, or if you are aware of authority supporting your request for discovery regarding the preindictment time period, please provide us with that information.

(Mot. 3.) The parties have met and conferred three times via email regarding this issue. (Mot. 4.) On August 16, 2017, Defendant emailed the Government its position that the Sixth Amendment speedy trial rights attached when the complaint was filed in 2000, to which the Government responded that delay prior to the indictment is irrelevant to the attachment of speedy trial rights. (Mot. 4.) The Defendant sent the Government a copy of this Motion on September 1, 2017, but the Government's position remained the same. (Mot. 4.)

Defendant moves to compel discovery relating to the Government's failure to arrest or prosecute Defendant during the period between the time the complaint was filed in June 2000 to when the indictment was filed in April 2004. (Mot. 1, ECF No. 95.) Defendant contends that the discovery is necessary to support a dispositive motion for delay in his prosecution that violated his Sixth Amendment speedy trial rights. (Mot. 1.)

The Government opposes Defendant's Motion on the grounds that: (1) Fed. R. Crim. P. 16(a)(2) exempts the materials from discovery (Opp'n 10-11); (2) Fed. R. Crim. P. 16(a)(1) does not require discovery of this information because it is not material to Defendant's case in chief (Opp'n 11-12); and (3) the requested discovery is not material to any Sixth Amendment or Due Process Speedy Trial claims. (Opp'n 12-17.)

The Court will consider each of Defendant's arguments in turn.

II. DISCUSSION

A. Legal Standard

Defendant seeks the information pursuant to Federal Rule of Criminal Procedure ("Rule") 16 and *Brady v. Maryland* and its progeny. (Mot. 1.) Rule 16 requires, in relevant part, that, upon a defendant's request, the government must disclose documents that are "within the government's possession, custody, or control" and "material to preparing the defense." *See* Fed. R. Crim. P. 16(a)(1)(E)(i). "To receive discovery under this rule, the defendant must make a threshold showing of materiality, which requires a presentation of facts which would tend to show that the Government is in possession of information helpful to the defense." *United States v. Doe* , 705 F.3d 1134, 1151 (9th Cir. 2013) (citation and quotation marks omitted); *see also United States v. Mandel*, 914 F.2d 1215, 1219 (9th Cir. 1990) ("Neither a general description of the information sought nor conclusory allegations of materiality suffice; a defendant must present facts which would tend to show that the Government is in possession of information helpful to the defense.").

Under *Brady* and its progeny, the "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady v. Maryland*, 373 U.S. 83, 87 (1963). To make out a *Brady* claim, there must be "(1) evidence that is exculpatory or impeaching (2) that is suppressed by the state and (3) resulting prejudice." *Aguilar v. Woodford*, 725 F.3d 970, 982 (9th Cir. 2013) (citing *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999)). "Evidence is material for *Brady* purposes if a 'reasonable probability' exists that the result of a proceeding would have been different had the government disclosed the information to the defense. A reasonable probability is one that is 'sufficient to undermine confidence in the outcome' of either the defendant's guilty plea or trial." *United States v. Lucas*, 841 F.3d 796, 807 (9th Cir. 2016) (internal citations omitted). "Any evidence that would tend to call the government's case into doubt is favorable for *Brady* purposes." *Milke v. Ryan*, 711 F.3d 998, 1012 (9th Cir. 2013).

B. Analysis

1. Materiality of Documents Under Rule 16(a)(1)(E)

The requested records and information must be "material to preparing the defense" in order to be discoverable under Rule 16(a)(1)(E). Defendant argues that the Discovery is material to a dispositive motion to dismiss for delay in prosecution, because his Sixth Amendment right to a speedy trial attached when the Government filed the complaint on June 14, 2000. (Mot. 6.) The Government argues that Defendant's speedy trial right did not attach until the Government issued a formal indictment against Defendant on April 28, 2004. (Opp'n 12-19.)

The Sixth Amendment right to a speedy trial attached when the Defendant became the "accused." U.S. CONST. amend. VI. The Supreme Court has held that a defendant becomes the "accused" and thus speedy trial rights attach upon "either a formal indictment or information or else the actual restraints imposed by arrest and holding to answer a criminal charge." *Marion*, 404 U.S. 307, 320 (1971). The Supreme Court "decline[d] to extend that reach of the [Sixth] [A]mendment to the period prior to arrest." *Id.* at 321.

The Government cites two Supreme Court decisions –*United States v. Lovasco*, 431 U.S. 783 (1977) and *United States v. Loud Hawk*, 474 U.S. 302 (1986) –to reiterate its proposition that Defendant's speedy trial rights did not attach when the Government filed its complaint against Defendant in June 2000. (Opp'n 13-14.) Defendant argues

that *Lovasco* and *Loud Hawk* are inapposite, because they fail to address whether a defendant's speedy trial rights attached upon the filing of charging documents other than an indictment. (Mot. 8-9.) Defendant correctly points out that the Supreme Court has not specifically indicated whether the filing of a complaint constitutes an "accusation" sufficient to trigger the Sixth Amendment speedy trial right. (Mot. 9.) Defendant also contends that the Supreme Court has held that speedy trial rights are invoked, absent charges, by "indictment, information, or *other formal charge*," which includes a criminal complaint. (Mot. 6) (quoting *Marion*, 404 U.S. at 320-21.)

Defendant relies on two Ninth Circuit opinions –*United States v. Terrack*, 515 F.2d 558, 559 (9th Cir. 1975) and *Northern v. United States*, 455 F.2d 427, 429 (9th Cir. 1972) –to support the argument that his Sixth Amendment speedy trial rights attached when the Government filed its complaint. (Mot. 1.) However, the Ninth Circuit is divided as to whether the mere filing of a complaint commences the constitutional speedy trial time frame. *Compare Benson v. United States*, 402 F.2d 576, 579 (9th Cir. 1968) ("We have held that the right to a speedy trial guaranteed by the Sixth Amendment does not arise until a formal complaint is lodged against the defendant.")); *United States v. Gonzalez-Avina*, 234 F. App'x 758, 759 (9th Cir. 2007) (assuming without deciding that the pre-trial delay should be measured from the filing of the federal complaint for purposes of a Sixth Amendment speedy trial claim) *with Arnold v. McCarthy*, 566 F.2d 1377, 1382 (9th Cir. 1978) (holding that the Sixth Amendment right to a speedy trial did not attach until the defendant was arrested and arraigned, not when the complaint was filed); *Favors v. Eyman*, 466 F.2d 1325, 1327-28 (9th Cir. 1972) (holding that the Sixth Amendment right to a speedy trial did not attach when the complaint was filed); *see also Gadlin v. Cate*, 2014 U.S. Dist. LEXIS 106010, 2014 WL 3734618, at *19 (C.D. Cal. Jul. 25, 2014) ("The filing of a felony complaint does not trigger a defendant's Sixth Amendment speedy trial rights."); *People v. Martinez*, 22 Cal. 4th 750, 756, 94 Cal. Rptr. 2d 381, 996 P.2d 32 (2000) ("[I]n a California prosecution[,] the filing of a felony complaint, either with or without the issuance of an arrest warrant, is insufficient to engage the federal Constitution's speedy trial protection . . . ."). As such, the Court shall address Defendant's claim under the Due Process Clause.

Pre-indictment delay is tested by "general proscriptions of due process." *Prantil v. California*, 843 F.2d 314, 318 (9th Cir. 1988) (per curiam) (internal quotation marks omitted). In determining whether a pre-indictment delay violated due process, courts apply a two-part test: (1) Petitioner must prove actual, non-speculative prejudice from the delay; and (2) the length of the delay, when balanced against the reasons for the delay, must offend those "fundamental conceptions of justice which lie at the base of our civil and political institutions." *See United States v. DeGeorge*, 380 F.3d 1203, 1210-11 (9th Cir. 2004) (quoting *United States v. Doe*, 149 F.3d 945, 948 (9th Cir. 1998)); *United States v. Huntley*, 976 F.2d 1287, 1290 (9th Cir. 1992). A defendant claiming pre-indictment delay carries a "heavy burden" of showing actual prejudice that is "definite and not speculative." *United States v. Moran*, 759 F.2d 777, 782 (9th Cir. 1985) (as amended); *United States v. Butz*, 982 F.2d 1378, 1380 (9th Cir. 1993). Further, unless the petitioner can demonstrate actual prejudice, the Court "need not weigh the reasons for the delay versus its length." *See United States v. Ross*, 123 F.3d 1181, 1186-87 (9th Cir. 1997) (as amended); *Butz*, 982 F.2d at 1380. Here, Defendant fails to allege "actual, non-speculative prejudice" and thus has not shown that the pre-indictment delay violated due process. Accordingly, Defendant has not made a threshold showing of materiality for purposes of Fed. R. Crim. P. 16(a)(1).

2. Rule 16(a)(2) Discovery Exemption

"[R]eports, memoranda, or other internal government documents made by an attorney for the government or other

government agent in connection with investigating or prosecuting the case" are exempt from discovery. Fed. R. Crim. Pro. 16(a)(2). The emails at issue were exchanged by a FBI Special Agent during the time she investigated Defendant, (Mot. 2) and relate to "protected decisions by the government regarding its investigation into the defendant and its decision into when and how to prosecute this case" (Opp'n 2) and are thus exempt from disclosure to Defendant under Fed. R. Crim. P. 16(a)(2).

3. Discovery Obligations Under *Brady*

Defendant argues that the Government is obligated to produce Special Agent Collas' emails because they are "material either to guilt or to punishment" under *Brady* (Mot. 4) and "at a minimum *Brady* materials for impeachment." (Mot. 7) However, Defendant fails to allege facts suggesting the emails contain impeachment materials or that Defendant is prejudiced by the Government's failure to produce the emails, which are both necessary elements of a *Brady* claim. Accordingly, the Government is not obligated to produce the discovery materials at issue under *Brady*.

III. RULING

For the foregoing reasons, Defendant's Motion to Compel Discovery is **DENIED**.

IT IS SO ORDERED.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CRIMINAL MINUTES - GENERAL

REDACTED

Case No.	CR 04-00476 SJO	Date	March 13, 2018

Present: The Honorable	S. James Otero
Interpreter	Not Required

Victor Paul Cruz	Not Present	Not Present
Deputy Clerk	*Court Reporter/Recorder, Tape*	*Assistant U.S. Attorney*

U.S.A. v. Defendant(s):	Present	Cust.	Bond	Attorneys for Defendants:	Present	App.	Ret.
Mark Eldon Wilson	Not	xx		Kay Otani	Not	xx	

PROCEEDINGS (in chambers): **ORDER DENYING DEFENDANT'S MOTION TO DISMISS INDICTMENT FOR SPEEDY TRIAL VIOLATIONS** [Docket No. 116]

This matter is before the Court on Defendant Mark Eldon Wilson's ("Defendant") Motion to Dismiss Indictment for Speedy Trial Violations ("Motion"), filed on January 15, 2018. The United States ("Government") filed its Opposition to Defendant's Motion ("Opposition") on January 23, 2018. Defendant replied to the Opposition ("Reply") on January 29, 2018. For the following reasons, Defendant's Motion is **DENIED**.

I. FACTUAL AND PROCEDURAL BACKGROUND

On August 4, 2004, Defendant was charged in a 14-count First Superseding Indictment for mail and wire fraud. (First Superseding Indictment ("FSI"), ECF No. 12.) Specifically, the FSI charges Defendant with operating a fraudulent telemarketing scheme in Canada targeting senior citizens in the United States. (FSI 2.) Defendant's trial is set for March 20, 2018.

On June 14, 2000, the Government filed a complaint and issued an arrest warrant against Defendant. (Mot. 1, ECF No. 116.) In August 2000, the Government submitted a Mutual Legal Assistance Treaty ("MLAT") Request to Canada to obtain evidence about Defendant. (Mot. 1.) The MLAT Request was granted in February 2001 and the Royal Canadian Mounted Police ("RCMP") executed the MLAT search warrant on Defendant's businesses that same month. (Mot. 2.)

On January 28, 2002, the Supreme Court of British Columbia held that the evidence seized under the February 2001 MLAT search warrant should be forwarded to the United States. (Mot. 2.) Defendant unsuccessfully challenged the legality of the search warrant in the Canadian courts, and then appealed the decision and obtained a stay to

prevent the transmission of the evidence to the United States.[1] (Opp'n 4-5, ECF No. 119.) Defendant's MLAT appeal was dismissed on February 18, 2010. (Mot. 4.) The stay continued until May 2013, when an appellate court in Canada rejected Defendant's final challenges to the production of materials, but prohibited the forwarding of attorney-client communications. (Opp'n 5-6; Mot. 4). On July 2, 2013, the Government received what was left of the non-spoliated evidence.[2] (Opp'n 6.)

Meanwhile, the Government continued its investigation, conducting dozen of interviews from 2000 through 2004. (Opp'n 6.) On April 28, 2004, the Government filed its indictment, and on August 4, 2004, the Government filed the FSI. (Mot. 3.) In July of 2004, the Government attempted to arrest Defendant in the United States of America. (Opp'n 7.) However, by July of 2005, the Government's attempts remained unsuccessful and the U.S. Attorney's Office initiated the extradition process with the U.S. Department of Justice's Office of International Affairs ("OIA"). (Opp'n 7.)

The Government certified the formal record of the case ("ROC") on January 10, 2007, which was sent to Canada, along with a diplomatic note, on January 11, 2007. (Opp'n 8.) On January 12, 2007, Defendant was arrested in Canada and later released on bail. (Mot. 2.) For the next ten years, Defendant fought extradition. (Opp'n 8.) Defendant efforts proved unsuccessful, and on February 9, 2017, the Supreme Court of Canada dismissed his final extradition appeal. (Mot. 3-5.)

1. First Extradition Hearing

Defendant's first extradition hearing was originally set for November 2007. (Opp'n 9.) However, at Defendant's requests, the hearing was continued to January 2008, then to January 2009, again to June 2009, and ultimately to September 8, 2009. (Opp'n 9.) Canada then asked for an adjournment until October 2009 for the purposes of clarifying evidentiary aspects of the ROC. (Opp'n 9.) The Government provided the material via a supplemental ROC, which was certified on October 13, 2009. (Opp'n 9.) Soon thereafter, Defendant requested another continuance, which was denied. (Opp'n 9.) During the extradition hearing, Canadian government witnesses allegedly displayed "memory lapses due to passage of time." (Mot. 3.) On December 17, 2009, the Supreme Court of British Columbia ordered Defendant committed to extradition to the United States. (Mot. 4.) Defendant immediately appealed. (Opp'n 9.)

2. Appeals to Minister and Court of Appeals

For extradition from Canada, the Canadian government must obtain both a committal and surrender order from the Minister. (Opp'n 9.) Defendant sought three extensions of time during his submissions to the Minister, and the

[1] On March 12, 2002, the Canadian Government appealed the portion of the February 2001 MLAT search warrant ruling that required giving copies of the evidence to Defendant. (Mot. 2-3.) It was not until April 16, 2010 that the Court of Appeal for British Columbia dismissed the Canadian Government's appeal for abandonment. (Mot. 4.) For reasons discussed in section 3(b)., *infra*, the time accrued while the appeal was pending has no bearing on Defendant's allegations of a speedy trial right violation.

[2] On November 7, 2012, the Canadian Government sent a letter to the Supreme Court of British Columbia noting that due to the outdated technology used on some of the seized materials, certain items could no longer be opened and, as a result, would not be transferred to the United States. (Mot., Ex. D.)

Minister ultimately issued a surrender order in December of 2010. (Opp'n 10.) Additionally, Defendant extended the appeal of his committal order from May of 2011 to September of 2011. (Opp'n 10.) On December 16, 2011, the Court of Appeal for British Columbia reversed the lower court's committal order – vacating the surrender order – and directed the lower court to hold a new extradition hearing. (Opp'n 10.)

3. Second Extradition Hearing

The lower court set the new extradition hearing for October of 2012. (Opp'n 10.) During the intermediary, the Government submitted its third and fourth supplemental ROC in July of 2012 and September of 2012, respectively. (Opp'n 10.) In September of 2012, Defendant unsuccessfully attempted to adjourn the October 2012 hearing. (Opp'n 10.) Undeterred, Defendant applied for another adjournment, which he received, effectively postponing the hearing until February 2013. (Opp'n 10.) During the adjournment, the Government submitted a fifth supplemental ROC and on February 19, 2013, the hearing concluded. (Opp'n 11.) On November 8, 2013, the lower court again ordered that Defendant be committed to extradition to the United States. (Opp'n 11.)

4. Appeals to Minister and Court of Appeals

Defendant again appealed his committal order, making numerous submissions with the Minister challenging his surrender. (Opp'n 11.) In the process, Defendant sought and obtained numerous extensions of time to make said submissions. (Opp'n 11.) In July of 2014, the Minister issued a surrender order. (Opp'n 11.) Nevertheless, Defendant sought reconsideration from the Minister and moved to continue his appellate hearing set for February 2015. (Opp'n 11.) The Court of Appeal for British Columbia granted Defendant's request and re-scheduled the hearing for May of 2015. (Opp'n 11). In April of 2015, Defendant requested court-appointed counsel, which he received; the hearing was continued to January 2016. (Opp'n 11.) During the continuance, the Government submitted its sixth supplemental ROC and in October of 2015, the Minister re-confirmed its surrender order from July of 2014. (Opp'n 12.) On July 27, 2016, the Court of Appeal for British Columbia affirmed the lower court's November 2013 committal order and the Minister's July 2014 surrender order. (Opp'n 12.) Defendant's subsequent appeal was denied by the Supreme Court of Canada on February 9, 2017. (Mot. 5.) Thereafter, Defendant was extradited to the United States where he was arrested by the Government on March 1, 2017, in the Central District of California. (Mot. 5.)

II. DISCUSSION

A. Legal Standard

The Sixth Amendment guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial." U.S. Const. amend. VI. The speedy trial right is "amorphous, slippery, and necessarily relative .... consistent with delays and depend[ent] upon circumstances." *Vermont v. Brillon*, 556 U.S. 81, 89 (2009) (quoting *Barker v. Wingo*, 407 U.S. 514, 530 (1972)) (internal quotation marks omitted) (brackets in original). Once the accused demands a speedy trial, the government must "make a 'diligent, good-faith effort' to bring the accused before the court for trial." *United States v. Sandoval*, 990 F.2d 481, 484 (9th Cir. 1993) (citation omitted). To determine whether a defendant's Sixth Amendment right to a speedy trial has been violated, courts balance the following four factors: (1) the length of the delay; (2) the reason for the delay; (3) the extent to which the defendant asserted his right; and (4) whether the defendant suffered prejudice as a result of the delay. *See Barker,* 407 U.S.

at 530; *United States v. Mendoza*, 530 F.3d 758, 762 (9th Cir. 2008). The four factors "must be considered together with such other circumstances as may be relevant." *Barker*, 407 U.S. at 533.

B. Defendant's Speedy Trial Motion is Denied

1. Pre-Indictment Delay

The Court denies the Motion as to the three years and ten and one-half months that elapsed between the filing of the complaint on June 14, 2000, and the filing of the Indictment on April 28, 2004. (Mot. 1-3.) The Court has already held that Defendant's challenge to the pre-indictment time period is analyzed under "general proscriptions of due process," not the Sixth Amendment. (*See* Order Den. Def. Motion to Compel Discovery 4, ECF No. 113) (citing *Prantil v. California*, 843 F. 2d 314, 318 (9th Cir. 1988) (per curium) (internal quotation marks omitted)). In determining whether a pre-indictment delay violated due process, courts apply a two-part test: (1) Petitioner must prove actual, non-speculative prejudice from the delay; and (2) the length of the delay, when balanced against the reasons for the delay, must offend those "fundamental conceptions of justice which lie at the base of our civil and political institutions." *See United States v. DeGeorge*, 380 F.3d 1203, 1210-11 (9th Cir. 2004) (quoting *United States v. Doe*, 149 F.3d 945, 948 (9th Cir. 1998)); *United States v. Huntley*, 976 F.2d 1287, 1290 (9th Cir. 1992). A defendant claiming pre-indictment delay carries a "heavy burden" of showing actual prejudice that is "definite and not speculative." *United States v. Moran*, 759 F.2d 777, 782 (9th Cir. 1985) (as amended); *United States v. Butz*, 982 F.2d 1378, 1380 (9th Cir. 1993). Further, unless the petitioner can demonstrate actual prejudice, the Court "need not weigh the reasons for the delay versus its length." *See United States v. Ross*, 123 F.3d 1181, 1186-87 (9th Cir. 1997) (as amended); *Butz*, 982 F.2d at 1380.

Defendant alleges the delay caused the loss of witness memory at his first extradition hearing and resulted in the accrual of Government witnesses. (Mot. 3.) However, in order to base the claim on "diminished memories," Defendant "must show that the loss of testimony meaningfully has impaired his ability to defend himself" using only "definite and nonspeculative evidence." *United States v. Huntley*, 976 F.2d 1287, 1290 (9th Cir.1992). Defendant has failed to demonstrate that the loss of memory or the Government's new witnesses resulted in "actual, non-speculative prejudice," and thus has not shown that the pre-indictment delay violated due process. Defendant also alleges the delay caused evidence in the Government's possession to spoliate, "depriv[ing] the defense of the ability to contest and impeach regarding [its] contents." (Reply 6.) To make out a due process claim based on the destruction of evidence, the "evidence must both possess an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." *California v. Trombetta* , 467 U.S. 479, 489 (1984). If the evidence is only potentially exculpatory, as opposed to apparently exculpatory, the defendant must show the evidence was destroyed in bad faith." *Arizona v. Youngblood* , 488 U.S. 51, 58 (1988). Defendant has failed to establish that any spoliated evidence was exculpatory or destroyed in bad faith, and thus the Court declines to find that Defendant was denied his due process rights.

2. Delay Between Extradition Request and the Present

This Court also denies the Motion as to the twelve years and ten months that elapsed between his Indictment and the present. Defendant cannot contest the more than ten years he fought extradition between his January 15, 2007 arrest in Canada to his arrival in the United States on March 1, 2017. (Mot. 3-5.) *See United States v. Manning*,

56 F.3d 1188, 1195 (9th Cir. 1995) (where defendant "knew of the indictment against him and . . . 'resisted all efforts to bring him to the United States," "[t]hese determinations are sufficient to support the finding that [defendant] waived his speedy trial rights . . . . [Defendant] cannot avoid a speedy trial by forcing the government to run the gauntlet of obtaining formal extradition and then complain about the delay that he has caused by refusing to return voluntarily to the United States") (citation omitted); *see also Sandoval,* 990 F.2d at 483 (holding that a finding that defendant "purposely absented himself from the proceedings" is sufficient to establish waiver of speedy trial rights). Defendant's numerous appeals from January of 2007 to March of 2017 demonstrate the requisite "resist[ance] of all efforts" showing needed to waive a speedy trial right.[3] *Manning*, 56 F. 3d at 1195.

Accordingly, the Court's *Barker* analysis will focus on the two years, eight and one-half months between the Government's filing of the indictment on April 28, 2004 and the Government's formal request for extradition in January 2007.

3. Delay Between Indictment and Extradition Request

a. Length of Delay

The length of the delay is a "threshold" factor, and a sufficiently lengthy delay "necessitates an examination of the other three factors." *United States v. Sears, Roebuck & Co., Inc.*, 877 F.2d 734, 739 (9th Cir.1989). For speedy trial claims, the length of the delay is usually measured from the time of the indictment to the time of the trial. *See United States v. Gregory*, 322 F.3d 1157, 1162 (9th Cir. 2003). The Court's analysis focuses on the two years, eight and one-half months between the filing of the indictment and the Government's extradition request. (*See, e.g.*, Mot. 2-5.) A delay of almost three years is sufficiently lengthy to trigger an inquiry into the other factors, to which the Court now turns. *See Gregory*, 322 F.3d at 1161–62.

b. Reason for Delay

The second factor, the reason for delay, is "the focal inquiry." *Sears*, 877 F.2d at 739. "If the government can show that the delay was wholly justifiable because it proceeded with reasonable diligence, the defendant's speedy trial claim generally cannot succeed in the absence of a showing of actual prejudice resulting from the delay." *Alexander*, 817 F.3d at 1182 (citing *Doggett v. United States*, 505 U.S. 647, 656 (1992)). "If the government intentionally delayed or negligently pursued the proceedings, however, prejudice may be presumed, and its weight in the defendant's favor depends on the reason for the delay and the length of the delay." *Alexander*, 817 F.3d at 1182 (citations omitted). The Court finds that the Government diligently pursued extradition.

Defendant argues that "the two years, eight and one-half months from filing the indictment to [Defendant]'s arrest were solely the fault of the government," because he had "no control over when the government would arrest him," and there is "no evidence that [Defendant] sought to avoid detection by either Canadian or U.S. authorities." (Mot. 8-10.) Defendant contends that the Government was negligent, because he was not avoiding detection and the Government made no serious effort to find him. (Mot. 10.) Furthermore, Defendant argues the Government caused delay by appealing the MLAT order, objecting to evidence later found admissible, and deferred prosecution

[3] By utilizing the Canadian courts' appeal process from 2007 through 2017, Defendant was able to acquire multiple extradition hearings and have his case reviewed by the Minister and Court of Appeals on several occasions. (*See* Opp'n 9-11.)

to "exert pressure on a potential cooperating witness" who ultimately proffered to the Government on April 7, 2010. (Mot. 11.)

Defendant had no control over when he would be arrested, nor did he seek to avoid detection by Canada or the Government. However, Defendant's conclusion that his visibility warrants a finding of negligence by the Government is flawed. In citing to *Doggett* for this proposition, Defendant relies on a factual situation distinct from the instant case. In *Doggett*, the Supreme Court held that an eight-and-a-half year lag between indictment and arrest violated Doggett's right to a speedy trial. 505 U.S. at 647. Like Defendant, Doggett "lived openly under his own name, and stayed within the law" after being indicted. *Id.* However, unlike Defendant, after Doggett left the States,"the United States, never followed up on his status ... and made no further attempt to locate him." *Id.* Furthermore, Doggett "did not know of his indictment before his arrest." *Id.* Here, the Government monitored Defendant's status and pursued efforts to arrest Defendant in the United States.[4] (Mot. 19-20.) Additionally, by his own admission, Defendant was acutely aware of having been indicted. (*See* Hseih Decl. ¶ 7, Ex. I, ECF 119-3.) Thus, Defendant's argument premised on his visibility to the Government is unpersuasive.

[redacted]

[4] The Government contends that "within three months of the April 28, 2004, indictment [it] worked with law enforcement to attempt to arrest [D]efendant." (Opp'n 19.) These efforts included a July 2004 approval to "secure defendant's presence in the United States to effectuate his arrest," through "recorded phone calls and emails until at least March 2005." (Mot. 19.) In July of 2005, the Government concluded these efforts and began to draft its extradition request. (Mot. 20.)

[5] However, Defendant's "speedy trial claim generally cannot succeed in the absence of a showing of actual prejudice resulting from the delay." *Alexander*, 817 F.3d at 1182 (citing *Doggett*, 505 U.S. at 656). For reasons discussed in section 3(d), *infra*, Defendant has not shown that he suffered actual prejudice from the three-month delay between April 28, 2004 to July 2004, nor from the delay of eight to nine months between July 2005 to March 2006.

[6] [redacted]

[redacted]

Defendant also cites to *Mendoza*, which is factually distinct from the instant case. In *Mendoza*, "[a]fter the indictment, the government put a warrant out on the law enforcement database ... [t]he warrant was the *only* attempt the government made to apprehend [defendant]." *Mendoza*, 530 F. 3d at 762 (emphasis added). In holding this was not enough to rebut a speedy trial claim, the Ninth Circuit stated, "[i]f, in this case, the government had pursued [Defendant] with reasonable diligence, his speedy trial claim would have failed." *Id*. (quoting *Doggett*, 505 U.S. at 656). Here, the Government maintained "reasonable diligence" in their continuous pursuit of Defendant.

Defendant argues the Government caused a period of delay by "appeal[ing] the Supreme Court of British Columbia's MLAT [search warrant] order because it did not want to provide [Defendant] copies of documents it obtained through the MLAT [search warrant]," and this resulted in an appeal that "was not dismissed until April 16, 2010." (Mot. 8.) However, this appeal addresses the release of documents, not Defendant's extradition, and did not affect Defendant's speedy trial rights. (*See* Mot. 2-3) ("The Canadian Government appealed the portion of the MLAT ruling that required giving copies of the evidence to Mr. Wilson").

Defendant's argument that the Government caused delay by "object[ing] to evidence that the appellate court later found admissible," also lacks merit, because the referenced proceedings fall outside the April 28, 2004 to January of 2007 period under review. (*See* Mot. 9.) ("The government also caused the additional one year, eight month delay to December 16, 2011.") Similarly flawed is Defendant's argument that the Government deferred prosecution to obtain a cooperating witness. The witness in question, Ms. Carrie Hope ("Ms. Hope"), was not arrested until January of 2007. (Mot. 11.) She did not proffer to the Government until April 7, 2010, well outside the period under review here. (Mot. 11.)

Defendant asserts that the Government is at fault for the delay between indictment and arrest, because they "had no reasonable expectation of arresting [Defendant] through deception after it filed the indictment." (Reply 3.) In an attempt to bolster this assertion, Defendant alleges the Government, prior to filing the Indictment, was well aware it would not be able to apprehend Defendant in the United States; specifically, Defendant cites a 2001 Government exhibit in which Defendant stated "he didn't want to come across the border because he would be arrested." (*See* Hseih Decl., Ex. E.) Prior to filing the Indictment, the Government may well have believed this. However, upon filing the Indictment, the evidence supports the Government's renewed belief that domestic apprehension was possible. (*See* Opp'n 19.)

Because the Government's efforts provide the requisite showing of "reasonable diligence" to justify the lapse of time between Indictment and arrest, this factor does not weigh in favor of dismissal. *Alexander*, 817 F.3d at 1182 (citing *Doggett*, 505 U.S. at 656.)

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[7] [redacted]

c. The Extent to Which Defendant Asserted His Speedy Trial Right

The Ninth Circuit is divided on the interpretation of the third *Baker* factor. *See United States v. Aguirre*, 994 F. 2d 1454, 1457 (9th Cir. 1993) ("[t]he Speedy Trial Clause primarily protects those who assert their rights, not those who acquiesce in the delay"); *but see United States v. Corona-Verbera*, 509 F.3d 1105, 1116 (9th Cir. 2007) ("because [defendant] asserted his speedy trial right only after requesting numerous continuances, we find this factor weighs neither in favor of dismissal nor in favor of the government.") Accordingly, this factor does not weigh in favor of dismissal.

d. Resulting Prejudice

Finally, the amount of prejudice a defendant must show is inversely proportional to the length and reason for the delay. *See Doggett*, 505 U.S. at 655-56. Defendant argues that because a "[d]elay lasting more than a year is 'presumptively prejudicial,' " he was prejudiced by the two years, eight and one-half months between the filing of the indictment and the filing of the extradition request. (Mot. 4). "While such presumptive prejudice cannot alone carry a Sixth Amendment claim without regard to the other *Barker* criteria, it is part of the mix of relevant facts, and its importance increases with the length of delay." *Doggett*, 505 U.S. at 655-56 (internal citations omitted); *see also Beamon*, 992 F.2d at 1013 (requiring courts to "weigh the reasons for and the extent of the delay against the evidence of actual prejudice"). "If the government pursued [Defendant] 'with reasonable diligence from his indictment to his arrest, his speedy trial claim would fail' unless [Defendant] can show 'specific prejudice to his defense.' " *See Corona-Verbera*, 509 F.3d at 1116 (quoting *Doggett*, 505 U.S. at 656). "Generalized assertions of the loss of memory, witnesses, or evidence are insufficient to establish actual prejudice." *United States v. Manning*, 56 F.3d 1188, 1194 (9th Cir.1995).

Even considering that memories fade, evidence spoliates,[6] and witnesses and victims may have passed away in the interim, Defendant's speedy trial claim fails because he does not demonstrate "specific prejudice." *See Corona-Verbera*, 509 F.3d at 1116. Rather, Defendant asserts that "the delay has caused [him] ... prejudice," because the Government gained "a cooperating witness in Ms. Hope ... caused the loss of witness memory ... caused the loss of electronic evidence," and gained another cooperator under a proffer agreement. (Mot. 13-14.) The Ninth Circuit calls for proof of prejudice to be "definitive and not speculative." *United States v. Moran*, 759 F.2d 777, 782 (9th Cir. 1985). Accordingly, Defendant's conclusive assertion does not sufficiently demonstrate how loss of witnesses' memories or the lost electronic evidence actually prejudiced him. Furthermore, dismissing the instant case "could encourage appointed counsel to delay proceedings by seeking unreasonable continuances, hoping thereby to obtain a dismissal of the indictment on speedy trial grounds." *Vermont*, 556 U.S. at 93.

III. RULING

6 [redacted]

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CRIMINAL MINUTES - GENERAL

REDACTED

For the foregoing reasons, the Court **DENIES** Defendant's Motion to Dismiss for Speedy Trial Violations.

IT IS SO ORDERED.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA - WESTERN DIVISION

HONORABLE S. JAMES OTERO, U.S. DISTRICT JUDGE

UNITED STATES OF AMERICA, Plaintiff, vs. MARK ELDON WILSON, Defendant.	Case No. CR 04-00476(A) SJO (Pages 1 - 183)

REPORTER'S TRANSCRIPT OF TRIAL PROCEEDINGS
TRIAL DAY 6
WEDNESDAY, MARCH 28, 2018
8:36 A.M.
LOS ANGELES, CALIFORNIA

CAROL JEAN ZURBORG, CSR NO. 7921, CCRR, RMR
FEDERAL OFFICIAL COURT REPORTER
350 WEST 1ST STREET, SUITE 4311
LOS ANGELES, CALIFORNIA 90012-4565
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top, right, when you get there?
A Correct.
Q There's a question -- let me first ask you: The prosecutor asked you about Mark Wilson waiving around hundred dollar bills at the call center, right?
A Correct.
Q Now, in 1998, on December the 16th, you were asked: "Did Mark Wilson ever come into the office on George Street?" And your answer was, "He did, but I was never there when he did." Wasn't that your answer in 1998, ma'am?
A Yeah.
MR. DEMIK: Thank you, ma'am.
THE COURT: Thank you very much for your testimony.
THE WITNESS: Thank you.
THE COURT: Any additional witnesses?
MR. STERN: No, Your Honor.
THE COURT: The Government rests?
MR. STERN: Subject to the admission of exhibits, all the Government exhibits, the Government rests.
THE COURT: And we will take a short recess or brief recess. Please return at 25 to the hour. During your absence do not discuss the case amongst yourself or with any other person.
THE COURTROOM DEPUTY: All rise for the jury, please.

(Out of the presence of the jury.)

THE COURT: The jury has been excused. Please have a seat.

So the issue -- one issue is whether the defendants -- or the defense will put on any witnesses, so that needs to be determined. Separate and apart from that, we still have to discuss jury instructions. It's very early in the day, so if the defense does not offer witnesses in the case, it appears that the Court should be in a position to instruct and counsel should be in a position to argue today.

Mr. Demik, do you need additional time with your client at this time?

MR. DEMIK: Five minutes, Your Honor. And I agree with the Court.

THE COURT: Thank you. We are in recess.

(Recess taken from 10:15 a.m. to 11:01 a.m.)

(Out of the presence of the jury.)

THE COURTROOM DEPUTY: Please come to order. This court is now in session.

THE COURT: Okay. We are back on United States versus Wilson. Counsel are present. The defendant is present.

I understand that Mr. Wilson will not be calling any witnesses, and Mr. Wilson has elected not to testify.

MR. DEMIK: That's correct, Your Honor.

We just have a Rule 29, and the defense rests.

THE COURT: Mr. Wilson, I want to make sure you had the discussion with your counsel. You have a right to testify. You understand your right to testify, and you agree to waive that right and not testify in this case; is that correct?

THE DEFENDANT: Yes, I do, sir.

THE COURT: Okay. Thank you.

And then the Rule 29 motion probably should be made after we excuse the jury. Agreed?

MR. DEMIK: That's fine, Your Honor.

THE COURT: And then counsel suggests that the jury return at what time? 12:30?

MR. STERN: 12:30, Your Honor. We are hoping to get through the things we need to get through by then.

THE COURT: Certainly. Let's bring the jury in.

(Pause in proceedings.)

THE COURTROOM DEPUTY: Are you ready, Your Honor?

THE COURT: Yes.

(In the presence of the jury.)

THE COURT: Okay. We have the jury reassembled with the alternates. Counsel are present with the defendant. Please have a seat.

So the Government has rested. The defense has also rested. So there will be no further evidence offered to the jury. I have to handle some additional legal issues, including jury instructions. So the jury will be excused. Return at

testified he made all of the decisions and so forth. So the Government is not going to be arguing, and there's no likelihood the jury is going to infer from the fact that he was -- first of all, where was he present? He wasn't present in the call rooms. They can make that argument. He was the owner of the company, and he made decisions. He was confronted with his wrongdoing. This is not a mere -- this is not a case where a mere presence instruction makes any sense.

THE COURT: I'm not really disputing that. I don't think it hurts to give it, so the instruction will be given.

MR. STERN: Thank you, Your Honor.

THE COURT: And then we go to the motion, Rule 29 motion.

MR. DEMIK: Oh, yes, Your Honor. For the record, Rule 29 motion, all counts, all elements.

MR. STERN: Your Honor, the Government would oppose the Rule 29 motion. We believe there is ample evidence from victim testimony, tape recordings, company insiders, and there was also evidence on the mailings and wirings, and the Government certainly has proved that a rational juror could find beyond a reasonable doubt that defendant was guilty of these crimes.

MR. DEMIK: May I add one thing for the record, Your Honor?

THE COURT: Yes.

MR. DEMIK: To my recollection, no one's identified Mr. Wilson in the courtroom.

THE COURT: Mr. Stern?

MR. STERN: This is true, Your Honor, but everybody -- there was never any issue of identity in this case, and many employees identified Mr. Wilson as their boss. And I think from that, the jury can certainly infer that Mr. Wilson is the person -- it was not even contested by the defense. The defendant on cross-examination said, "You don't know my client, Mr. Wilson." So I don't think it was an issue in the case.

I have not -- I don't think it's required that there be an identification, so we would submit that we certainly proved that this defendant is the person who was named in the indictment. It was not an issue in the case. Employees were asked -- many employees said it was James Eldon Wilson who was the owner of this company.

THE COURT: Mark.

MR. STERN: I'm sorry, Mark Eldon Wilson.

THE COURT: As I recall, we had, let's see, Trevor Dusterhoft, the former RCMP inspector who was involved in serving the search warrant, he did not identify the defendant in court. We have the former shipper, Elizabeth Hjelmseth, and whether she could identify the defendant is not really clear to the Court, but there was no effort to ask her whether she could

ID the defendant.

We have Michele Joly, who was a former employee, who appeared, from the Court's recollection, appeared to recognize him because she was looking at him during the course of the trial, but there was no -- the Government never asked her whether she could identify the defendant. We have the former employee, Katherine Stewart, who probably could have identified the defendant. She was not asked if the defendant in the court is the defendant who was the person who employed her. Then we have Jacqueline Stone, who indicated clearly, a former employee, that she could not identify Mr. Wilson.

I just don't understand the Government not making any effort to identify the defendant.

MR. STERN: Well, also, Your Honor, there were exhibits that were admitted.

THE COURT: Yes, but separate and apart from that, I don't understand the Government not making any effort to identify the defendant in court. In every single trial that I've ever tried in state court, 101 on the checklist is in-court identification, unless there was good reason not to. Now, I recognize that there's other ways to identify a defendant, but I have dismissed two prior cases brought by the U.S. Attorney's Office where there was a failure to identify the defendant in the courtroom.

MR. STERN: I appreciate that, Your Honor.

THE COURT: This comes, again, as somewhat of a surprise because I would think that my prior motions that have been granted would have circulated through the U.S. Attorney's Office so that when you know when you try a case before me, you put that on your checklist.

MR. STERN: I appreciate that, Your Honor.

THE COURT: I have taught at the NAC; identification in the courtroom is 101 in the NAC. And if you do moot court in most of the law schools, it's a 10-point deduction if you don't cause the identification of the defendant during that court proceeding. So I'm just completely surprised.

MR. STERN: Well, Your Honor --

THE COURT: It's so easy to do, and you had so many opportunities to do it, and it was not done.

MR. STERN: Your Honor, I seriously doubt that in closing argument Mr. Demik will argue that Mr. Wilson is not the person who was the boss of this company. He, essentially, as the agent --

THE COURT: It's your burden.

MR. STERN: I appreciate that, Your Honor.

THE COURT: And it's a burden that's easily dealt with by asking one question of one witness and during the course of six days in trial or five days in trial, that was not done.

MR. STERN: We would submit, and we apologize for

that, Your Honor.

THE COURT: It's not a matter of apology. It's a matter of whether this case should now be presented to the jury.

MR. STERN: We would submit that there's ample evidence in the record from which a reasonable juror can infer that Mr. --

THE COURT: Of course you would submit that. Do you wish to reopen?

MR. STERN: Yes, we would, if we have permission, we could reopen.

THE COURT: This should never happen again with the U.S. Attorney's Office.

MR. STERN: Well, I will send that message, Your Honor.

THE COURT: This is the third time it's happened, and I just don't understand it. Every DA I ever dealt with would ask the question. So you will have an opportunity to reopen.

MR. STERN: Thank you, Your Honor.

THE COURT: We are adjourned.

(Recess taken from 11:31 a.m. to 12:37 p.m.)

(Out of the presence of the jury.)

THE COURTROOM DEPUTY: Please come to order. This court is again in session.

THE COURT: We are back on the record on United States versus Wilson, and we have counsel present and the defendant present. Please have a seat.

There was a Rule 29 motion for failure to identify the defendant during trial proceedings. The Court has given the Government the opportunity to reopen the case.

Mr. Demik, I understand that you have an objection to that.

MR. DEMIK: Just an objection for the record, Your Honor, yes.

THE COURT: And do you have another witness to call?

MR. STERN: Yes, we are prepared to proceed. We are going to recall Trevor Dusterhoft.

THE COURT: And before we get to the issue of the recalling of Inspector -- or Former Inspector Dusterhoft, we have the instructions that have been offered, and I have the joint proposed instructions. It appears that the special instructions have been placed at the end of the body of instructions, and they should be reordered, so I'm not sure why they were offered in this manner.

MR. STERN: We can --

THE COURT: I think what you need to do -- do you understand what I'm saying?

MR. STERN: Yes. What we could do is place them closer to the instructions on the elements because they clarify