No. _____

IN THE SUPREME COURT OF THE UNITED STATES

ROGER RACHON COOLEY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari
To the United States Court of Appeals
for the Eighth Circuit

APPENDIX

/s/Adam Justinger
Adam Justinger (ND#08635 MN#0400351)
SW&L Attorneys
4627 44th Avenue South, Suite 108
Fargo, North Dakota 58104
Telephone: (701) 297-2890
Fax: (701) 297-2896
adam.justinger@swlattorneys.com
ATTORNEY FOR PETITIONER

TABLE OF APPENDICES

United States Court of Appeals
For the Eighth Circuit

No. 22-2201

United States of America

Plaintiff - Appellee

v.

Roger Rachon Cooley

Defendant - Appellant

Appeal from United States District Court
for the District of North Dakota - Eastern

Submitted: February 15, 2023
Filed: March 28, 2023

Before COLLOTON, BENTON, and KELLY, Circuit Judges.

BENTON, Circuit Judge.

A grand jury indicted Roger R. Cooley. He moved to dismiss for violation of his Sixth Amendment right to a speedy trial. The district court[1] denied his motion. A unanimous jury found him guilty of conspiracy to possess with intent to distribute

[1]The Honorable Peter D. Welte, United States District Judge for the District of North Dakota.

(and distribute) a controlled substance in violation of 21 U.S.C. §§ 846, 841(a)(1), 841(b)(1)(C), and 18 U.S.C. § 2. Cooley appeals. Having jurisdiction under 28 U.S.C. § 1291, this court affirms.

I.

On August 21, 2019, a grand jury indicted Roger R. Cooley and eight other defendants. Within two days, an arrest warrant for Cooley issued and was entered into the National Crime Information Center system by the Federal Bureau of Investigation.

About 14 months later, the FBI discovered that, due either to human or technical error, the arrest warrant was removed from the NCIC system around February 28, 2020—about six months after the warrant issued. The FBI then reentered the warrant into the NCIC system. On October 20, 2020, the United States Marshals Service was assigned Cooley's arrest warrant. In February 2021, the USMS confirmed his address. He was arrested March 16, 2021, arraigned March 20, and scheduled for trial on July 13.

After three continuances—including two by Cooley's co-defendants (to which Cooley did not object)—trial was rescheduled. Cooley moved to dismiss on December 28, 2021, asserting his Sixth Amendment right to a speedy trial. The district court denied the motion on January 19, 2022, without holding an evidentiary hearing. Cooley moved for reconsideration. On January 24, the district court, after a "limited evidentiary hearing," denied reconsideration. The jury trial began on January 25. The jury unanimously found Cooley guilty.

Cooley appeals, alleging the district court erred by not holding an evidentiary hearing on his motion to dismiss, and by denying his motion to dismiss for violation of his Sixth Amendment right to speedy trial.

II.

Cooley argues that the district court abused its discretion by not holding an evidentiary hearing on his motion to dismiss. *See* ***United States v. Santos-Pulido***, 815 F.3d 443, 445 (8th Cir. 2016) ("We review the district court's decision to resolve the motion to dismiss without a hearing for the abuse of discretion."). "A district court must hold an evidentiary hearing only when the moving papers are sufficiently definite, specific, and detailed to establish a contested issue of fact." ***United States v. Stevenson***, 727 F.3d 826, 830 (8th Cir. 2013) (motion to suppress). "A hearing is not required if a dispute can be resolved on the basis of the record." ***Santos-Pulido***, 815 F.3d at 446, *quoting* ***United States v. Polanco-Gomez***, 841 F.2d 235, 237-38 (8th Cir. 1988).

Denying the motion for reconsideration, the district court found that Cooley's moving papers were not sufficiently definite, specific, and detailed to establish a contested issue of fact. He contends that the moving papers established contested facts about: (i) the cause for the delay in his arrest, (ii) the oppressiveness of his pretrial incarceration, (iii) his anxiety about the charges and possible punishments, and (iv) the degree of prejudice due to the delay. But, as the district court observed: "The majority of these assertions are unsupported by evidence, either affidavit or otherwise." *See* ***United States v. Saucedo***, 956 F.3d 549, 554 (8th Cir. 2020) ("On appeal, [defendant] does not identify any facts in the record, such as the dates or other factual circumstances of his detention, that are actually in dispute. Rather, he contests certain inferences that can be drawn from those facts and the district court's legal conclusion . . . . Further, [defendant] does not identify what evidence, if any, he would have presented to the district court had it held an evidentiary hearing."); ***Stevenson***, 727 F.3d at 831 ("Where a defendant offers only conclusory allegations in support of a motion . . . and where those allegations are unsupported by any citation to the record, a district court does not abuse its discretion by refusing to hold an evidentiary hearing.").

The district court, "in the interests of fundamental fairness," held a limited evidentiary hearing on the motion to reconsider. Cooley submitted four factual affidavits from his sister, investigator, mother, and himself. According to the affidavits, he has a learning disability, lived with his mother in Detroit, Michigan for eight years, did not know of the arrest warrant, and law enforcement had not stopped by his residence since the indictment. The evidence did not establish a contested issue of fact.

The motion to dismiss, and even the limited evidentiary hearing, addressed only contested inferences and legal conclusions, not facts. *See* ***Saucedo***, 956 F.3d at 554. The district court did not abuse its discretion by not holding an evidentiary hearing on Cooley's motion to dismiss.[2]

III.

Cooley alleges that the government violated his Sixth Amendment right to a speedy trial.[3] "We review the district court's findings of fact on whether a

[2]The government repeatedly notes that Cooley requested only oral argument, not an evidentiary hearing. The government states that the standard of review is abuse of discretion; it does not raise "whether the district court's failure to hold an evidentiary hearing sua sponte constitutes plain error." ***Bath Junkie Branson, LLC v. Bath Junkie, Inc.***, 528 F.3d 556, 561 (8th Cir. 2008) (applying both abuse of discretion and plain error review to a district court's decision not to hold a sua sponte evidentiary hearing on a motion to enforce a settlement). Here, the district court neither abused its discretion nor committed plain error by not holding an evidentiary hearing. *See* ***id.*** ("[T]he district court had no basis to believe that either party desired an evidentiary hearing or had even suggested that the submission of additional evidence, beyond that accompanying their motions, would be necessary or helpful. Under these circumstances, the district court's decision not to hold an evidentiary hearing was not an abuse of discretion.") ("Based on the record before the district court, there was no substantial factual dispute . . . and the district court did not err by deciding not to hold an evidentiary hearing sua sponte.").

[3]On appeal, Cooley does not assert a violation of the Speedy Trial Act. *See* **18 U.S.C. § 3161**; ***United States v. Sprouts***, 282 F.3d 1037, 1041 (8th Cir. 2002)

defendant's right to a speedy trial was violated for clear error but review its legal conclusions de novo." ***United States v. Aldaco***, 477 F.3d 1008, 1016 (8th Cir. 2007).

"The Sixth Amendment right to a speedy trial attaches at the time of arrest or indictment, whichever comes first, and continues until the trial commences." ***United States v. Williams***, 557 F.3d 943, 948 (8th Cir. 2009). "Initially, we must determine whether the delay between indictment and [defendant's] motion to dismiss was presumptively prejudicial." ***United States v. Summage***, 575 F.3d 864, 875 (8th Cir. 2009), *citing* ***Doggett v. United States***, 505 U.S. 647, 651-52 (1992). "If so, we proceed to analyze the four factors governing the Sixth Amendment's speedy trial protections under *Barker v. Wingo*, 470 U.S. 514 (1972)." ***Id.***

The delay between Cooley's indictment and motion to dismiss—about 28 months—is presumptively prejudicial. *See* ***United States v. Jeanetta***, 533 F.3d 651, 656 (8th Cir. 2008) ("A delay approaching one year may meet the threshold for presumptively prejudicial delay requiring application of the *Barker* factors."); ***Doggett***, 505 U.S. at 652 n.1 ("Depending on the nature of the charges, the lower courts have generally found postaccusation delay 'presumptively prejudicial' at least as it approaches one year.").

The *Barker* factors present a four-factor test that balances: "Length of delay, the reason for the delay, the defendant's assertion of his [speedy trial] right, and prejudice to the defendant." ***Barker***, 407 U.S. at 530.

Under the first *Barker* factor, this court considers "whether delay before trial was uncommonly long." ***Aldaco***, 477 F.3d at 1019. A delay of 29 months—the total time from indictment to trial—is a lengthy but not extraordinary delay. *See* ***United States v. Mallett***, 751 F.3d 907, 914 (8th Cir. 2014) ("First, we acknowledge seventeen months is a lengthy delay. But our court, under the Sixth Amendment,

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("Sixth Amendment and Speedy Trial Act challenges for delay are reviewed independently of one another.").

has permitted even longer delays."), *citing* ***Summage***, 575 F.3d at 870, 876 (over 32 months); ***Aldaco***, 477 F.3d at 1018-20 (40 months). *See also* ***United States v. Walker***, 92 F.3d 714, 717 (8th Cir. 1996) (37 months); ***United States v. Richards***, 707 F.2d 995, 998 (8th Cir. 1983) (35 months).

The district court properly found, "On balance, the first factor weighs in Cooley's favor, but not heavily."

"Under the second *Barker* factor, we consider the reasons for the delay and evaluate 'whether the government or the criminal defendant is more to blame.'" ***United States v. Erenas-Luna***, 560 F.3d 772, 777 (8th Cir. 2009), *quoting* ***Doggett***, 505 U.S. at 651. "We weigh an intentional delay by the government heavily against it. We weigh negligence by the government less heavily but still regard such negligence as a considerable factor in the weighing process." ***Id.*** "We weigh delay caused by the defense against the defendant." ***Id.*** "In *Doggett*, the Supreme Court indicated that appellate courts are to treat with 'special deference' a district court's determination concerning whether the government was negligent." ***Walker***, 92 F.3d 718, *quoting* ***Doggett***, 505 U.S. at 652.

The period from Cooley's indictment to his arrest is 19 months of the total 29-month delay. The 10-month period of post-arrest delay was primarily due to motions for continuance submitted by the government and Cooley's co-defendants (for health concerns). For 8 of the first 19 months, Cooley's warrant had been removed from the NCIC database. The district court found no evidence that the government negligently or intentionally delayed prosecution. Although this court treats this finding with special deference, human or technical error resulting in the removal of Cooley's warrant from the NCIC database was the fault of the government.

But this error is attributable only to negligence. There is no evidence that the government intentionally caused any delay. *See* ***United States v. Shepard***, 462 F.3d 847, 864 (8th Cir. 2006). *See also* ***Barker***, 407 U.S. at 531 ("A more neutral reason such as negligence . . . should be weighted less heavily but nevertheless should be

considered . . . ."); ***Williams***, 557 F.3d at 949 ("While any negligence is not weighted as heavily against the prosecution as deliberately dilatory tactics, it would nonetheless fall 'on the wrong side of the divide between acceptable and unacceptable reasons for delaying a criminal prosecution once it has begun.'"), *quoting* ***Doggett***, 505 U.S. at 657. The negligent error accounts for only 8 of the 29 months of delay. The FBI reentered Cooley's arrest warrant into the NCIC system the same day the error was discovered. Except for that error, there is no evidence in the record that the government acted negligently in pursuing Cooley.

Because government negligence resulted in 8 of the 29 months of delay, the second *Barker* factor favors Cooley, but not heavily.

"The third *Barker* factor considers whether in due course the defendant asserted his right to a speedy trial." ***Erenas-Luna***, 560 F.3d at 778. "In *United States v. Richards*, where the defendant was unaware of his indictment until his arrest but later raised a speedy-trial claim, we similarly held that the third *Barker* factor had no application and merely '[could] not be weighed against [the defendant].'" ***Id.*** (alterations in original), *quoting* ***United States v. Richards***, 707 F.2d 995, 997 (8th Cir. 1983). The district court found that Cooley undeniably asserted his right to a speedy trial. This factor is neutral. *See* ***id.*** ("Applying this precedent, we agree with the district court that the third *Barker* [factor] weighs in neither party's favor.").

"The final *Barker* factor—prejudice—considers whether the defendant suffered prejudice as a result of the delay." ***United States v. Rodriguez-Valencia***, 753 F.3d 801, 807 (8th Cir. 2014). "The extent to which a defendant must demonstrate prejudice under this factor depends on the particular circumstances." ***Erenas-Luna***, 560 F.3d at 778. "A showing of actual prejudice is required if the government exercised reasonable diligence in pursuing the defendant." ***Id.*** at 778-79. *See also* ***United States v. Flores-Lagonas***, 993 F.3d 550, 565 (8th Cir. 2021) ("In cases without government negligence, however, we have required the defendant to show actual or specific prejudice."). "Where the government has been negligent,

however, prejudice can be presumed if there has been an excessive delay." ***Erenas-Luna***, 560 F.3d at 779, *citing* ***Doggett***, 505 U.S. at 656-58.

> This factor is assessed "in the light of the interests of defendants which the speedy trial right was designed to protect. . . . (i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired."

Rodriguez-Valencia, 753 F.3d at 807-08 (alteration in original), *quoting* ***Barker***, 407 U.S. at 532.

Here, the 8-month delay from government negligence "was not so great that we are able to discount [defendant's] inability to show particularized prejudice from that delay." ***United States v. Sims***, 847 F.3d 630, 636-37 (8th Cir. 2017) (holding a 12-and-a-half-month delay caused by government negligence insufficient for presumption where defendant could not show prejudice). *See* ***Williams***, 557 F.3d at 950 (same for 16-month delay caused by government negligence); ***Doggett***, 505 U.S. at 657 ("[T]o warrant granting relief, negligence unaccompanied by particularized trial prejudice must have lasted longer than negligence demonstrably causing such prejudice."); ***Rodriguez-Valencia***, 753 F.3d at 808 (holding that, even though the six-year delay was excessive, "the government pursued [defendant] with reasonable diligence" and he failed to "show actual or specific prejudice"). *Cf.* ***Erenas-Luna***, 560 F.3d at 780 (remanding a case for application of presumptive prejudice where "serious negligence of the government" resulted in "a three-year delay between [defendant's] indictment and arraignment"). Except for the 8-month delay, there is no evidence in the record that the government acted negligently in pursuing Cooley. These facts do not warrant a presumption of prejudice.

Cooley alleges actual prejudice in the oppressiveness of his pretrial incarceration and his anxiety from the charges and possible punishments. But his pretrial incarceration was prolonged, in part, due to his codefendants' motions for continuance, to which he did not object. Cooley offers nothing to demonstrate "that

the delay weighed particularly heavily on him in specific circumstances." ***Morris v. Wyrick***, 516 F.2d 1387, 1391 (8th Cir. 1975). *See also* ***Shepard***, 462 F.3d at 865 ("Anxiety, without concurrent prejudice to the defendant's ability to mount a defense, is likely the weakest interest served."). Cooley "has failed to show that the delay was unusually burdensome or oppressive to him." ***Williams***, 557 F.3d at 949-50.

Cooley did not offer evidence that the delay resulted in a loss of evidence or witness testimony, or any impediment to his ability to mount a defense. *See* ***Aldaco***, 477 F.3d at 1019 ("[H]e has not made any showing of how his defense was impaired by the lengthy delay."). The district court properly concluded: "This factor weighs heavily against Cooley."

Based on the *Barker* factors, the government was negligent in failing to maintain Cooley's arrest warrant in the NCIC system, but the government's negligence accounted for only 8 of the 29 months of delay and did not prejudice Cooley's defense. "Negligence by the government requires toleration by the courts that 'varies inversely with its protractedness . . . and its consequent threat to the fairness of the accused's trial.'" ***Williams***, 557 F.3d at 950, *quoting* ***Doggett***, 505 U.S. at 657.

The present case illustrates the Court's wisdom in establishing a balancing test.

> The speedy-trial right is "amorphous," "slippery," and "necessarily relative." It is "consistent with delays and depend[ent] upon circumstances." In *Barker*, the Court refused to "quantif[y] the right "into a specified number of days or months" or to hinge the right on a defendant's explicit request for a speedy trial." Rejecting such "inflexible approaches," *Barker* established a "balancing test, in which the conduct of both the prosecution and the defendant are weighed."

Vermont v. Brillon, 556 U.S. 81, 89-90 (2009) (alterations in original), *quoting* ***Barker***, 407 U.S. at 522, 522-25, 529, 530. *See also* ***Erenas-Luna***, 560 F.3d at 779 ("'We cannot definitely say how long is too long,' and there is 'no constitutional basis for holding that the speedy trial right can be quantified into a specified number of days or months.' As a result, 'any inquiry into a speedy trial claim necessitates a functional analysis of the right in the particular context of the case.'"), *quoting* ***Barker***, 407 U.S. at 521-23.

"Here, because the delay was not of such length to eliminate the need to show particularized prejudice and because there is no evidence that the delay impeded [Cooley's] defense or threatened to deprive him of a fair trial, we conclude that there was no Sixth Amendment violation." *See* ***Williams***, 557 F.3d at 950. The district court properly denied Cooley's motion to dismiss.

* * * * * * *

The judgment is affirmed.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA

United States of America, Plaintiff, vs. Roger Rachon Cooley, Defendant.	)))))))))	**ORDER DENYING DEFENDANT'S MOTION TO DISMISS** Case No. 3:19-cr-00137

Before the Court is Defendant Roger Rachon Cooley's motion to dismiss on speedy trial grounds filed on December 28, 2021. Doc. No. 326. The Government responded in opposition on January 11, 2022. Doc. No. 333. Cooley filed his reply on January 14, 2022. Doc. No. 342. For the reasons below, the motion is denied.

I. BACKGROUND

On August 21, 2019, an indictment was filed charging nine defendants, including Cooley, with various drug, money laundering, and kidnapping conspiracy charges. See Doc. No. 29. Cooley was indicted on two counts: conspiracy to possess with intent to distribute and distribute a controlled substance and money laundering conspiracy. Id., pp. 1, 10-11. This Court issued an arrest warrant on August 22, 2019. Doc. No. 26.

On February 18, 2020, the Government moved to sever Cooley, and other codefendants, arguing in part that it "has been unsuccessful in securing the appearance" of Cooley. Doc. No. 98. The Court granted the Government's motion to sever. Doc. No. 102. A few days later, on March 16, 2021, law enforcement arrested Cooley in Detroit, Michigan. Doc. No. 222. That same day, Cooley had his initial appearance in the Eastern District of Michigan. Doc. No. 223. Cooley appeared for his arraignment in this district on May 20, 2021. Doc. No. 234. Since his

arraignment, Cooley has remained in custody. See Doc. Nos. 234, 240. Cooley's trial was originally set for July 13, 2021. Doc. No. 237.

On May 27, 2021, the Government filed a motion for joinder and a motion to continue trial. Doc. No. 241. Cooley opposed this motion, raising Speedy Trial arguments, among other things. See Doc. No. 248. On June 21, 2021, the Court granted the motion for joinder over Cooley's objection and, as a result, reset Cooley's trial date to the same trial date as his codefendants, August 3, 2021. Doc. No. 249.

On July 19, 2021, two of Cooley's codefendants filed separate motions to continue, both raising health concerns. See Doc. Nos. 251, 252. Cooley did not object to the continuance. See Doc. No. 253. The Court granted the two codefendants' unopposed motion to continue trial, resetting trial for December 14, 2021. Id.

On November 19, 2021, a codefendant requested another continuance, again raising ongoing health issues. Doc. N. 315-1. A few days later, another codefendant filed a separate motion to continue based on her health issues. Doc. No. 322. In the interim, the Government reversed course again and again moved to sever Cooley, explaining that it had "consulted with defense counsel for the various defendants and noted no objections[.]" Doc. No. 321, p. 2. The Court issued an order addressing the motion to sever and the motions to continue trial on December 1, 2021. Doc. No. 323. The Court denied the Government's motion to sever and granted the motions to continue, resetting trial for all remaining defendants in this case for January 25, 2022. Id., p. 4. In that order, the Court specifically noted, "This is a date certain trial date, and the Court will not be inclined to grant any further continuances." Id. Trial is currently set for January 25,

2022. On December 28, 2021, Cooley moved to dismiss based on speedy trial grounds and requested oral argument.[1] Doc. No. 326.

II. ANALYSIS

Although related, constitutional challenges under the Sixth Amendment speedy trial right and statutory challenges under the Speedy Trial Act are reviewed separately. United States v. Sprouts, 282 F.3d 1037, 1041 (8th Cir. 2002). Cooley's motion appears to rely exclusively on the Sixth Amendment. Nonetheless, the Court will briefly address the possibility of a Speedy Trial Act violation at the outset.

A. Speedy Trial Act

The Speedy Trial Act requires trial to commence within 70 days after a defendant is charged or makes an initial appearance before "a judicial officer of the court in which such charge is pending," whichever occurs last. 18 U.S.C. § 3161(c)(1); see also Zedner v. United States, 547 U.S. 489, 497 (2006). That said, a multitude of circumstances toll the speedy trial clock. See 18 U.S.C. § 3161(h). For example, a pending pretrial motion tolls the clock. Id. § 3161(h)(1)(D). Additionally, the speedy clock is tolled by the Court finding that the ends of justice are served by granting a continuance outweigh the interest of the public and the defendant in a speedy trial. Id. § 3161(h)(7)(a). "Exclusions of time attributable to one defendant apply to all codefendants." United States v. Mallett, 751 F.3d 907, 911 (8th Cir. 2014) (cleaned up).

Cooley was indicted in the District of North Dakota on August 21, 2019. His speedy trial clock began to run on May 20, 2021, when he appeared for arraignment before a judicial officer

[1] The Court finds oral argument on this matter unnecessary. The parties have satisfactorily briefed the legal issues at hand.

of this district.[2] See 18 U.S.C. § 3161(c)(1). As the Government correctly points out, far fewer than 70 nonexcludable days have elapsed since then.

Pretrial motions tolled a portion of the time following arraignment. The Government filed a motion for joinder and a motion to continue trial on May 27, 2021. Doc. No. 241. Cooley objected, raising Speedy Trial Act arguments, among other things. Doc. No. 248. The Court granted the Government's motion, over Cooley's objection, on June 21, 2021 (the "June 21 Order"). Doc. No. 249. As a result, Cooley's original trial date of July 13, 2021 was reset to the date of his codefendants' trial, which was then scheduled for August 3, 2021. Doc. No. 249. In the June 21 Order, the Court specifically determined that "[a]ll time which elapses from the date of this order until trial shall be excluded from any Speedy Trial Act calculation" citing 18 U.S.C. § 3161(h)(6) ("a reasonable period of delay when the defendant is jointed for trial with a codefendant as to whom the time for trial has not run and no motion for severance has been granted") § 3161(h)(7)(A), § 3161(h)(7)(B)(i) and (iv). Doc. No. 249. Similarly, in each order continuing trial since, all time elapsing from the date of the order until the new trial date was excluded from any Speedy Trial Act calculation based on the ends of justice. Doc. Nos. 253, 323. Additionally, Cooley's motion to release, which the Court denied on August 30, 2021, also tolled a portion of the speedy trial clock. Doc. Nos. 254, 267.

Because fewer than 70 nonexcludable days have passed, Cooley's motion fails to the extent he seeks dismissal under the Speedy Trial Act.

[2] Although Cooley had an initial appearance in the Eastern District of Michigan on March 16, 2021 [Doc. No. 223], his speedy trial clock did not begin until he "appeared before a judicial officer of the court in which such charge is pending," the District of North Dakota. See 18 U.S.C. § 3161(c)(1).

B. Sixth Amendment

In contrast to the Speedy Trial Act, the Sixth Amendment speedy trial right "attaches at the time the of arrest or indictment, whichever comes first, and continues until the trial commences." United States v. Williams, 557 F.3d 943, 948 (8th Cir. 2009) (citations omitted). A constitutional speedy trial challenge requires a court to "engage in a difficult and sensitive balancing process." Barker v. Wingo, 407 U.S. 514, 533 (1972). Four factors control: (1) length of delay, (2) the reason for the delay, (3) the defendant's assertion of his right, and (4) prejudice to the defendant. Id. at 530. No one factor is "a necessary or sufficient condition" to establish a violation. Id. at 533. The Eighth Circuit Court of Appeals has repeatedly commented, "It would be unusual to find the Sixth Amendment has been violated when the Speedy Trial Act has not." United States v. Titlbach, 339 F.3d 692, 699 (8th Cir. 2003) (citing Sprouts, 282 F.3d at 1042).

In application, the initial length of delay factor is twofold. First, the length of delay must be presumptively prejudicial before consideration of the four Barker factors is warranted at all. United States v. Summage, 575 F.3d 864, 875 (8th Cir. 2009). Cooley was indicted on August 21, 2019—over two years ago. That is enough to establish presumptive prejudice. See Doggett v. United States, 505 U.S. 647, 652 n.1 (1992) (citations omitted) (noting that "the lower courts have generally found postaccusation delay 'presumptively prejudicial' at least as it approaches one year"); United States v. Sims, 847 F.3d 630, 635 (8th Cir. 2017) (concluding that approximately 22-month delay was presumptively prejudicial). Second, the length of delay weighs on the Barker analysis. See Mallett, 751 F.3d at 914. More than two years is certainly a significant delay between indictment and trial. Even so, that duration is not extraordinary, particularly considering that the Eighth Circuit has deemed much longer delays reasonable. See, e.g., Summage, 575 F.3d

at 876 (32-month delay); United States v. Aldaco, 477 F.3d 1008, 1019-20 (8th Cir. 2007) (40-month delay). On balance, the first factor weighs in Cooley's favor, but not heavily.

The second factor is the reason for the delay. As well-stated by the Eighth Circuit:

> We accord "'different weights ... to different reasons.'" Vermont v. Brillon, --- U.S. ----, ----, 129 S. Ct. 1283, 1290, 173 L. Ed. 2d 231 (2009). We weigh an intentional delay by the government "heavily against it." Walker, 92 F.3d at 717 (citing Barker, 407 U.S. at 531, 92 S. Ct. 2182). We weigh negligence by the government "less heavily" but still regard such negligence as "a considerable factor in the weighing process." Id. (citing Barker, 407 U.S. at 531, 92 S. Ct. 2182, and Doggett, 505 U.S. at 652-53, 112 S. Ct. 2686). We weigh "delay caused by the defense ... against the defendant." Brillon, at 1290. The Supreme Court has called this Barker factor "[t]he flag all litigants seek to capture." United States v. Loud Hawk, 474 U.S. 302, 315, 106 S. Ct. 648, 88 L. Ed. 2d 640 (1986).

United States v. Erenas-Luna, 560 F.3d 772, 777 (8th Cir. 2009). Admittedly, the record is scant as to the reason for delay in this case.[3] Nevertheless, the record does shows that Cooley was one of nine codefendants charged. These codefendants were arrested between August of 2019 and March of 2020.[4] See Doc. Nos. 36, 37, 56, 57, 80, 104, 105. While there was a 12-month delay between the arrest of the last codefendant and the arrest of Cooley, based on the limited evidence before the Court, there is no indication that the Government has negligently or intentionally delayed prosecution. See Barker, 407 U.S. at 531. The Court has no evidence regarding whether Cooley did or did not know about the indictment, and as such the Court cannot find him responsible for the delay. Accordingly, the reason for delay weighs does not weigh against the Government.

[3] Both Cooley and the Government assert various (and opposing) reasons for the delay in their motions. See Doc No. 327, pp. 5-7; Doc. No. 333, pp. 4-5. The majority of these assertions are unsupported by evidence, either affidavit or otherwise. The Court will not consider factual assertions raised by either party that are unsupported by evidence. However, the Court can and will consider the docket in this case, and to the extent the parties' assertions rely on the docket the Court will consider them in its analysis.

[4] One codefendant was arrested prior to the Indictment. See Doc. No. 4.

The third Baker factor considers "whether in due course the defendant asserted his right to a speedy trial." Erenas-Luna, 560 F.3d at 778 (internal citation and quotation omitted). In support of this factor, Cooley argues "two separate Sixth Amendment claims:" (1) a claim arising from the time between his Indictment and arrest; (2) a claim arising from the time between his arrest and trial. Doc. No. 342, p. 5. In general, "[C]ourts in the Eighth Circuit have not held that a defendant's assertion of his speedy trial right strengthens his case, only that a failure to assert it may weaken his case." United States v. Soto, No. 5:18-CR-50050-01-KES, 2021 WL 1176068, at *8 (D.S.D. Mar. 29, 2021) (citing United States v. Weber, 479 F.2d 331, 333 (8th Cir. 1973)). Here, Cooley raised his right to speedy trial in response to the Government's motion to join and again here. Cooley has clearly asserted his speedy trial rights in this case. While Cooley's case is not weakened by a failure to assert his claims, nor is it strengthened; this factor is neutral. See Erenas-Luna, 560 F.3d at 778.

For the last factor, "the degree of prejudice required, if any, depends on the defendant's showing under the preceding Barker factors." Sims, 847 F.3d at 636 (internal citation omitted). Because the Government has been reasonably diligent in pursuing this matter, Cooley must establish actual prejudice. United States v. Rodriguez-Valencia, 753 F.3d 801, 808 (8th Cir. 2014). Courts look to the three primary interests of the speedy trial right when examining prejudice: "(i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired." Barker, 407 U.S. at 532.

Cooley has been in custody for a little over nine months. This pretrial incarceration does not weigh in his favor, especially considering the complexities of a multidefendant conspiracy case. He also asserts that "based on the nature and circumstances of the charges and the possible penalties they bring, anyone in Mr. Cooley's position would be anxious about the federal charges

is currently facing." Doc. No. 327, p. 8. But, those concerns apply to anyone accused of a crime. Beyond generalization, Cooley offers nothing to demonstrate "that the delay weighed particularly heavily on him in specific circumstances." Morris v. Wyrick, 516 F.2d 1387, 1391 (8th Cir. 1975); see also United States v. Shepard, 462 F.3d 847, 864-65 (8th Cir. 2006) (citing Barker, 407 U.S. at 534) ("Anxiety, without concurrent prejudice to the defendant's ability to mount a defense, is likely the weakest interest served."). Finally, nothing indicates that the passage of time has caused the disappearance of witnesses or other material evidence to impede Cooley's ability to mount a defense. He cannot show prejudice as a result. This factor weighs heavily against Cooley. After careful consideration of the Barker factors, the Court concludes that Cooley's Sixth Amendment right to a speedy trial remains uninfringed.

IV. CONCLUSION

The Court has reviewed the record, the parties' filings, and the relevant legal authority. The Court finds that the Government did not violate Cooley's rights under either the Speedy Trial Act or Sixth Amendment. See Titlbach, 339 F.3d at 699 (explaining that "[i]t would be unusual to find the Sixth Amendment has been violated when the Speedy Trial Act has not" (citing Sprouts, 282 F.3d at 1042)). For the reasons above, Cooley's motion to dismiss (Doc. No. 326) is **DENIED**.

IT IS SO ORDERED.

Dated this 19th day of January, 2022.

/s/ Peter D. Welte
Peter D. Welte, Chief Judge
United States District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA

United States of America, Plaintiff, vs. Roger Rachon Cooley, Defendant.	)))))))))	**ORDER** Case No. 3:19-cr-00137

Before the Court is Defendant Roger Rachon Cooley's motion for reconsideration filed on January 20, 2022. Doc. No. 353. Cooley seeks reconsideration of this Court's January 19, 2022 order denying his motion to dismiss. Doc. No. 352. The Government responded to the motion on January 23, 2022. The Court held a limited evidentiary hearing on the motion to reconsider on January 24, 2022. For the reasons below, the motion is denied.

I. BACKGROUND

The Court previously reviewed and discussed the procedural posture and relevant factual background of this criminal case in its order denying Cooley's motion to dismiss. See Doc. No. 352. As such, the Court will only address those facts specifically highlighted in the motion to reconsider and at the evidentiary hearing.

In his motion for reconsideration, Cooley raises two arguments – (1) that the Court erred in not holding an evidentiary hearing, and (2) that Cooley had newly discovered evidence that offered additional facts as to the claimed delay between Cooley's indictment and his arrest. Doc. No. 353. By way of review, Cooley moved to dismiss the indictment on Sixth Amendment speedy trial grounds, focusing on the delay between his indictment and ultimate arrest. In the Court's January 19, 2022 order denying Cooley's motion to dismiss, the Court specifically noted the majority of the factual assertions as to the reason for the delay between indictment and arrest were

unsupported by evidence, either affidavit or otherwise. The Court, accordingly, considered the docket and record in reaching its decision on the motion to dismiss.

As support for his motion for reconsideration, Cooley filed four affidavits. Viewed in the light most favorable to Cooley, these affidavits could possibly contain facts in dispute pertaining to his original motion to dismiss. Thus, the Court was placed in a position of having affidavit testimony from Cooley but not from the Government as to what happened from the time of indictment to arrest. Because of the proximity in time to the trial date, the Court ordered a limited evidentiary hearing on the "factual issues raised in the new affidavits concerning the reason for the claimed delay between Cooley's indictment and arrest." Doc. No. 357.

The day before the evidentiary hearing, the Government filed a response to Cooley's motion. Doc. No. 364. As a part of its response, the Government included attachments and communications from the Federal Bureau of Investigation ("FBI") and the United States Marshals Service ("USMS"), which detailed the efforts those agencies made to arrest Cooley after his indictment. Id.

With both parties having presented additional factual support as to the events that occurred (or did not occur), the Court held the limited evidentiary hearing on January 24, 2022. Both parties largely relied on the affidavit testimony and the record in support of their positions. Mr. Kevin Fischer testified for Cooley. Both parties were afforded several opportunities to supplement the record in this case.

II. ANALYSIS

A motion for reconsideration "serves the limited function of correcting manifest errors of law or fact or presenting newly discovered evidence." Bradley Timberland Res. v. Bradley Lumber Co., 712 F.3d 401, 407 (8th Cir. 2013) (cleaned up). Such motions are not "a vehicle to

identify facts or legal arguments that could have been, but were not, raised at the time the relevant motion was pending." SPV-LS, LLC v. Transamerica Life Ins. Co., 912 F.3d 1106, 1111 (8th Cir. 2019) (quoting Julianello v. K-V Pharm. Co., 791 F.3d 915, 923 (8th Cir. 2015)). Nor may a motion for reconsideration attempt "simple reargument on the merits." Broadway v. Norris, 193 F.3d 987, 990 (8th Cir. 1999).

A. Evidentiary Hearing

Cooley first argues the Court was "required" to hold an evidentiary hearing on his motion to dismiss. The Court disagrees. As an initial matter, the Court notes that counsel did not request an evidentiary hearing on the motion; rather, counsel only requested oral argument. Counsel also never requested an evidentiary hearing at a January 14, 2022 status conference, where the motion to dismiss was discussed with counsel. Nevertheless, "A district court must hold an evidentiary hearing only when the moving papers are sufficiently definite, specific, and detailed to establish a contested issue of fact." United States v. Stevenson, 727 F.3d 826, 830 (8th Cir. 2013).

Here, the parties' briefs of the initial motion to dismiss were not "sufficiently definite, specific, and detailed to establish a contested issue of fact[,]" which was why the Court did not initially hold a hearing on the motion. Indeed, while the parties asserted various (and opposing) reasons for delay, they did not explicitly dispute material facts such that the Court was required to hold a hearing. The Court will not, and should not, consider factual assertions that are unsupported by evidence or material facts.

The Court finds that it was not required to hold an evidentiary hearing. In the interests of fundamental fairness, after Cooley submitted four affidavits, the Court held a limited evidentiary hearing to permit both parties an opportunity to present evidence as to what happened (or did not

happen) during the delay between the indictment and arrest. As noted above, neither party had previously offered such factual support.

The Court rejects Cooley's argument that it erred by not holding an evidentiary hearing on the motion to dismiss. The original moving papers were not "sufficiently definite, specific, and detailed to establish a contested issue of fact." See Stevenson, 727 F.3d at 830. Even so, the Court, in its discretion, permitted Cooley and the Government another opportunity to present facts explaining what occurred during the time between indictment and arrest. No facts or evidence were presented at the evidentiary hearing that warrant a reversal of the Court's prior order denying the motion to dismiss. Accordingly, the Court denies Cooley's motion for reconsideration on the grounds that the Court erred in failing to hold an evidentiary hearing.

B. Newly Discovered Evidence

Cooley next argues that his motion for reconsideration is warranted because of "newly discovered evidence." Doc. No. 354, p. 3. Cooley asserts that he retained Kevin Fischer as a private investigator to gather evidence for this case. Id. According to Cooley, Fischer ran out of funding and as such "was unable to interview key fact witnesses pertaining to the Motion to Dismiss." Id. Funding was approved on January 18, 2022. Id. On January 19, 2022, Fischer completed two witness interviews, which Cooley asserts were "two key fact witnesses for the Motion to Dismiss previously filed by Mr. Cooley." Id. Fischer asserts that because funds for the investigation were exhausted on or about January 6, 2022, his first opportunity to interview these two witnesses was on January 19, 2022. Doc. No. 354-1, p. 2.

The Court is not convinced that the interviews of these two witnesses are newly discovered evidence. According to Cooley, Fischer's funding ran out on or around January 6, 2022. However, Cooley filed his motion to dismiss on December 28, 2021—over a week before Fischer's funding

ran out. As such, this evidence could have been, but was not, raised at the time the relevant motion was pending. See SPV-LS, LLC v. Transamerica Life Ins. Co., 912 F.3d 1106, 1111 (8th Cir. 2019) (quoting Julianello v. K-V Pharm. Co., 791 F.3d 915, 923 (8th Cir. 2015)). Accordingly, the Court finds that Cooley has failed to produce newly discovered evidence.

Finally, even after allowing both parties to offer additional factual explanation as to the delay between indictment and arrest, the motion for reconsideration fails on the merits, and the Court's position remains unchanged. There has been no showing of a negligent or an intentional delay, and the delay was not excessive. As previously ordered, Cooley has not demonstrated any actual prejudice to his defense, and he has failed to show his Sixth Amendment right to a speedy trial has been violated.

III. CONCLUSION

The Court has reviewed the record, the parties' filings, and the relevant legal authority. For the reasons above, Cooley's motion for reconsideration (Doc. No. 353) is **DENIED**.

IT IS SO ORDERED.

Dated this 24th day of January, 2022.

/s/ Peter D. Welte
Peter D. Welte, Chief Judge
United States District Court

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 22-2201

United States of America

Appellee

v.

Roger Rachon Cooley

Appellant

Appeal from U.S. District Court for the District of North Dakota - Eastern
(3:19-cr-00137-PDW-7)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

Judge Erickson did not participate in the consideration or decision of this matter.

May 10, 2023

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans