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2ND DISTRICT, NEVADA

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March 17, 2000

RECEIVED 3/21/00

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Honorable Anthony J. Scirica, Chairman
Committee On Rules of Practice and Procedure
Judicial Conference of the United States
Administrative Offices
One Columbus Circle NE
Washington, D.C. 20544

Dear Honorable Anthony J. Scirica:

I am writing on behalf of my constituent, Mr. Thomas Kummer. Mr. Kummer had some concerns with the federal law regarding the Statute of Limitations on felony offenses. He specifically proposed some changes to the title 18 of the U.S. Code.

After reviewing his proposals, I respectfully submit his ideas to the Standing Committee on Rules of Practice and Procedure for its consideration as possible changes to Rule 7b of the Federal Rules of Criminal Procedure. Enclosed, please find his correspondence and supporting documentation. I respectfully request that the Committee consider his proposals and respond to him directly regarding this matter.

I appreciate your time and consideration on this matter. If I can be of assistance to you on this or any other matter of interest, please feel free to contact me.

Sincerely,

JIM GIBBONS
Member of Congress

JG/as
Enc.

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Memorandum

To The Honorable James Gibbons
United States House of Representatives

From Thomas L Kummer

Date December 28, 1999

Re 18 U S C §3282 and 18 U.S C. §3288

Introduction

I have been involved in a case in the Federal District Court For The Southern District Of Georgia in which the Court granted summary judgment to the defendants on the sole basis that 18 U S C §3288 applies to allow the United States six months to reindict a criminal defendant after either a voluntary dismissal of an information or dismissal of an information under Rule 7 Federal Rules of Criminal Procedure ("F R C P ")

There was no question that the statute would not apply in such instances before it was amended in 1988 Although there was no apparent intent to change the application of 18 U S C §3288 or its companion statute 18 U.S C §3289. the amendment left the statutes open to misinterpretation and abuse.

The case is now pending before the Eleventh Circuit Court of Appeals.

The Statute Of Limitations, The Fifth And Sixth Amendments, The Speedy Trial Act And Rule 7 Federal Rules Criminal Procedure

The recognition that delay denies justice goes back to the Magna Carta and its interpretation by Sir Edward Coke See Klopfer v North Carolina, 386 U S 213, 18 L Ed 2d 1, 87 S.Ct. 988 (1967). At common law no distinction was made between pre-accusation and post-accusation delay In modern jurisprudence the fundamental concept that unnecessary delay should not be permitted has been addressed by the Constitution and various legislation, often differentiating between delay before and after indictment Together, a mosaic of protections working together, assure a defendant will not indefinitely suffer under the pall of accusation or be forced to face charges after evidence has faded

a The Statute of Limitations The purpose of statutes of limitation was articulated in Toussie v. United States, 397 U S. 112, 114-115, 90 S.Ct. 858, 860 25 L Ed 2d 156 (1970)

> The purpose of a statute of limitations is to limit exposure to criminal prosecution to a certain fixed period of time following the occurrence of those acts the legislature has decided to punish by criminal sanctions Such a limitation is designed to protect individuals from having to defend themselves against charges when the basic facts may have become obscured by the passage of time and to minimize the danger of official punishment because of acts in the far distant past Such a time limit may also have the salutary effect of encouraging law enforcement officials to investigate suspected criminal activity . for these reasons and otherwise we have stated before 'the principal that criminal limitations statutes are to be liberally interpreted in favor of repose'

Statutes of limitations "provide predictability by specifying a limit beyond which there is an irrebuttable presumption that a defendant's right to a fair trial would be prejudiced"

Unwarranted delay in bringing charges against a defendant may result in the denial of a fair trial under the Due Process Clause of the Constitution United States v Jeffery R McDonald, 456 U S 1, 71 L.Ed.2d 696, 102 S Ct 1497 (1982) However, the statute of limitations contained in 18 U S C §3282 and other federal statutes is the most important safeguard for a defendant against the prejudice inherent in delay between the alleged criminal activity and the charges

> The law however has provided other mechanisms to guard against possible as distinguished from actual prejudice resulting from the passage of time between crime and arrest or charge. As we said in United States v Ewell. *"the applicable statute of limitations is the primary guarantee against bringing overly stale criminal charges"* Such statutes represent legislative assessments of relative interests of the State and the defendant in administering and receiving justice *they "are made for the repose of society and the protection of those who may [during the limitation] have lost their means of defense"* Public Schools v Walker .*These statutes provide predictability by specifying a limit beyond which there is an irrebuttable presumption that a defendant's right to a fair trial would be prejudiced. Such a limitation is designed to protect individuals from having to defend themselves against charges*

when the basic facts may have become obscured by the passage of time Such a time limit may also have the salutary effect of encouraging law enforcement officials promptly to investigate suspected criminal activity .." United States v. Marion, 404 U S 307, 322, 92 S Ct 455, 464, 30 L Ed 2d 468 (1971). [Emphasis added]

The statute of limitations is, thus, an important aspect of the overall mechanism because it protects against pre-indictment delay along with the Due Process Clause of the Fifth Amendment in a fashion similar to the protection against post-accusation delay provided by the Sixth Amendment and the Speedy Trial Act.

b The Fifth Amendment To The Constitution And Rule 7 Federal Rules Of Criminal Procedure

Rule 7 Federal Rules Of Criminal Procedure ("F R.C.P."), the predecessor of which was adopted in 1946, implements the Fifth Amendment of the Constitution by requiring a felony be prosecuted by indictment unless the right to indictment is properly waived. The Rule has been amended four times since 1946 (1966 1972, 1979, and 1987) but the amendments have not changed the fundamental principal that to charge a serious offense the defendant has the right to the determination by a grand jury that the charges are warranted

The difference between an indictment and an information is clear and simple An information is an accusatory pleading which comes directly from the United States Attorney without the safeguard of a grand jury It can be filed at any time without sufficient evidence to support the charges, and for that reason is limited to those crimes considered minor in nature. An indictment requires an independent determination by a grand jury that sufficient evidence exists for a prosecution to commence. Because the filing of an information where an indictment is required circumvents the Rules of Criminal Procedure and the Constitution. it has long been held that failure to obtain an indictment where one is required denies the Court jurisdiction Ex parte Bain, 7 S Ct. 781, 121 U S 1, 30 L Ed 849 (1887) Smith v US , 79 S Ct 991, 360 U S 1, 3 L Ed.2d 1041 (1959). U S v Montgomery, 628 F 2d 414, 416 (5th Cir 1980), U S v Choate, 276 F 2d 724, 728 (5th Cir 1960)

Rule 7(b) F R C P permits proceeding on an information only upon a waiver of indictment in open court following an explanation of the nature of the charge and the right to indictment It is inconsequential whether the waiver is

made before or after the information is filed, but a waiver is an essential element in prosecution of a felony by information Without it, the Court has no jurisdiction Ornelas v U S , 840 R 2d 890 (11th Cir 1988), Cf Wright, Federal Practice and Procedure 2d, Indictment and Information Paragraph 122

Thus, the combination of Rule 7 implementing the Fifth Amendment and the statute of limitations protects a potential defendant against spurious charges and delay presumed to harm his ability to defend against the charges whether spurious or warranted

c The Sixth Amendment And The Speedy Trial Act

The Sixth Amendment to the Constitution establishes the right to a speedy trial and that right is as fundamental as any in the Constitution. Klopfer v North Carolina supra The history of the Sixth Amendment underscores that the drafters sought to protect the accused against the hardship of public accusation without the opportunity to quickly resolve the charges against him The right to a speedy trial begins upon arrest or formal charge It is clear that filing of an information publicly sets forth charges against the defendant and can be the basis for arrest even if the crime charged requires indictment It is thus from the time an information is filed that the Constitutional speedy trial protection begins See United States v Marion, 404 U S 307, 320, 30 L Ed 2d 468, 92 S Ct 455 (1971) Cf Barker v Wingo, 407 U S 514, 533, 33 L.Ed 2d 101, 92 S Ct 2182 (1972) Doggett v United States. 505 U S 647, 120 L Ed 2d 520, 112 S Ct 2686 (1992) United States v Loud Hawk, 474 U S 302. 88 L Ed.2d 640, 106 S Ct 648 (1986) United States v MacDonald, supra , Moore v Arizona, 414 U S 25 38 L Ed 2d 183, 94 S Ct 188 (1973), Strunk v United States, 412 U S 434 37 L Ed 2d 56 93 S, Ct 2260 (1973)

Congress enacted the Speedy Trial Act of 1974 (18 U S C §3161 et seq) to legislatively address the prejudice which can be presumed from lengthy delay in bringing a defendant to trial The Speedy Trial Act quantifies the extent of delay after indictment, information or arrest irrefutably presumed to impair a defendant's ability to defend himself Although the Speedy Trial Act is more detailed. and perhaps more stringent, than the Constitutional guarantee of a speedy trial both are directed at the same prejudice and together form a framework for protecting a defendant from extended delay after the charges have been made

Recent Developments Undermining The Protections Of The Fifth Amendment And The Statute Of Limitations

There have been two developments arising from judicial interpretation of 18 U S C §3282 18 U S C §3288 and 18 U S C §3289 which threaten to undermine the Constitutional and legislative protections above described. These developments arise directly from ambiguity in the two statutes found by the Courts and the Government to the detriment of criminal defendants. These "ambiguities" should be clarified legislatively where the policy issues can be considered instead of judicially

a Ambiguity Found In 18 U S C §3282

In United States v Burdix-Dana, 149 F.3d 741 (7th Cir 1998) the United States filed an information within the statute of limitations for a crime which required indictment under Rule 7 F R C P The Seventh Circuit found that filing the information within the statute of limitations met the requirements of 18 U S C. §3282 by seizing upon an "ambiguity" in the statutory language and ignoring the Constitutional mandate for indictment in certain cases and the provisions of Rule 7 F R C P

18 U S C §3282 reads in relevant part

> Except as otherwise expressly provided by law, no person shall be prosecuted tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed

Citing United States v Cooper, 956 F 2d 960 (10th Cir 1992) and United States v/ Watson 941 F Supp 601 (N D W Va 1996), the Seventh Circuit found that the language of 18 U S C §3282 gives the United States the option of "instituting" the prosecution by either seeking an indictment in conformity with Rule 7 and the Constitution or, at the option of the United States, by filing an information even though to do so directly disregards Rule 7 and the Constitutional mandate that the prosecution can only proceed on indictment (The Court went further and in dicta indicated the statute of limitations could be extended by the intentional violation of Rule 7 as addressed below)

The Cooper and Watson cases both involved situations where an information was filed pursuant to a plea bargain which was later nullified for some reason The interaction of Rule 7(b) was important in those cases Under Rule 7(b) a defendant may waive in open court his right to indictment When such a waiver has been knowingly made there is no need for an indictment. In

effect, the entry of an effective waiver of indictment elevates an information to the equivalence of an indictment. Of what effect is an information before the waiver of indictment has been entered in open court? Both Cooper and Watson found the information, even without a waiver, was effective to "institute" the prosecution for statute of limitations purposes.

The case of United States v Podde, 105 F.3d 813 (2d Cir 1997) suggests that this contortion of the statute of limitations is unnecessary to protect the Government The Podde Court found that the United States could not reinstate charges dropped as part of a plea bargain because the statute of limitations had expired The Court, however, noted that by merely obtaining a waiver of the statute of limitations as part of the plea agreement the Government could have protected itself against any future eventuality such as the withdrawal of the plea violation of the plea agreement, or rejection of the plea agreement by the Court The procedure of seeking a waiver of the statute of limitations is routinely utilized by the Internal Revenue and other administrative agencies and presents no undue burden on the United States

In instances where there is a plea bargain giving rise to the filing of an information where the statute of limitations will run before the entry of a waiver of indictment in open court or the acceptance of the plea agreement by the Court, the United States need only require as a condition of the plea bargain a waiver of the statute of limitations to protect the prosecution There is no need to read 18 U S C §3282 as giving effect to an invalid charging instrument for statute of limitations purposes

The logical extension of this line of cases is Burdix-Dana According to Burdix-Dana the United States need do nothing more than bring an information within the statute of limitations even though there is no expectation that the defendant will waive indictment Thereafter, according to the Seventh Circuit, as long as the information has not yet been dismissed, the Government can at its leisure seek an indictment (Furthermore, according to Burdix-Dana, if the defendant is successful in a motion to dismiss the information as violative of Rule 7 F R C P and the Constitution, the United States has six months from the time of the dismissal to bring an indictment under 18 U S C § 3288 as discussed below)

It is hard to discern the ambiguity upon which the Courts have seized in applying 18 U S C §3282 The language seems to clearly indicate that an appropriate charging instrument must be filed within the time specified. Thus, if Rule 7 and the Constitution allow proceeding by information, the filing of an information within the limitations period is sufficient On the other had, if an indictment is required the plain language of the statute would seem to require

that the indictment must be obtained within the limitations period. Yet, the Courts in the cases above cited have not so construed the statute of limitations provisions

The ambiguity perceived by the Courts is easy to remove 18 U.S.C. §3282 should be amended to read as follows with a legislative history sufficient to assure the amendment is not subject to misinterpretation.

Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted if an information is permitted by the Federal Rules of Criminal Procedure within five years next after such offense shall have been committed (Proposed additional language highlighted)

b Ambiguity In 18 U S C §3288 and §3289

18 U S C §3288 and its predecessors have been a part of the statutory and Constitutional scheme to balance the interests of criminal defendants against prejudicial delay and the interests of society since 1934 The purpose of the statute is to protect society against a defendant waiting until the statute of limitations has expired before raising previously undetected procedural defects thereby defeating the prosecution United States v Strewl, 99 F 2d 474 (2nd Cir 1938), cert denied 306 U S 638, 59 S Ct 489, 83 L Ed 1039 (1939), United States v Clawson, 104 F 3d 250 (9th Cir 1996) (18 U S C §3288 has a companion statute, 18 U S C §3289 One applies when the defects are discovered after the expiration of the statute of limitations The other applies when the defects are discovered and raised by the defendant within six months of the expiration of the statute of limitations)

The statute has been amended several times without changing its essential purpose or application. Before 1964 the statute did not apply to the dismissal of informations By amendment in that year the statute was extended to allow indictment after dismissal of an information, but only if there had been a valid waiver of indictment making the information equivalent to an indictment under Rule 7 F R C P (Senate Report No 1414 P L 88-520. 78 Stat. 699) The 1964 amendment was prompted by the case of Hattaway v United States 304 F 2d 5 (5th Cir 1962) holding that the savings statute did not apply to dismissed informations even when there had been a valid waiver of indictment. The 1964 Amendment therefore, was aimed at including only those situations where an information was dismissed for some defect after a valid waiver of indictment had taken place The amendment put informations where a valid waiver of indictment had been properly entered on the same footing as indictments similar to the equivalence found in Rule 7 F R C P

The language of the statute prior to amendment in 1988 made it clear that it was permissible for the United States to seek indictment after the expiration of the statute of limitations only if the initial indictment was dismissed for an "error, defect, or irregularity with respect to the grand jury, or was otherwise defective or insufficient " Pursuant to this language it was universally held that an indictment dismissed because of a violation of the Speedy Trial Act could not be reinstituted pursuant to 18 U S C §3288 See United States v Peloquin, 810 F 2d 911 (9th Cir 1987)

The obvious reason 18 U S C §3288 and §3289 cannot be permitted to apply where the United States violates the Speedy Trial Act is that its application would permit the Government to benefit from its intentional violation of a defendant's fundamental rights and allow it to do so with impunity Because the dismissal arises not because of "an error or defect" subsequently discovered as contemplated in 18 U S C §3288 but rather is attributable to a flaw in substance known to exist by the Government from its inception and intentionally perpetrated, there is no savings statute

Similarly no case prior to the 1988 Amendment can be found where the United States was permitted to gain additional time to seek an indictment by filing an information in violation of Rule 7 F R C P and then utilizing 18 U S.C §3288 or §3289 to justify an indictment after the statute of limitations would have otherwise expired

Furthermore there had never been a case until Burdix-Dana where the voluntary dismissal of a charging instrument was construed to give rise to the application of 18 U S C §3288 or §3289 Obviously, if the Government violates the Speedy Trial Act and cannot reinstitute a prosecution if dismissal is sought by the defendant it is inconsistent with the intent of the statute to allow the United States to voluntarily dismiss the charge and by doing so gain an additional six months to start the prosecution over again In every case where there is a voluntary dismissal, the purposes and intent of 18 U S C §3288 and §3289 precludes their application This is particularly true when the Government intentionally violates Rule 7 by bringing an information when indictment is required and then voluntarily dismisses the information to gain an additional six months to seek indictment

In 1988 Congress "simplified" the statute by providing a six month grace period for re-indictment "whenever an indictment or information is dismissed for any reason" Anti-Drug Abuse Act of 1988, Pub L No 100-690, tit. VII, §7081, 102 Stat (1988 U S C C A N) 4181, 4407 Congress also added a final sentence to the new §3288 and new §3289 stating that it does "not permit the filing of a new indictment where the reason for the dismissal was the failure to

file the indictment or information within the period prescribed by the applicable statute of limitations, *or some other reason that would bar a new prosecution.*" Id [Emphasis Added]

There is no indication in the legislative history that the 1988 amendment was intended to broaden the application of 18 U S C §3288 and §3289. There was no comment on the amendment in the Conference Committee Report or the Reports of the House or Senate If Congress intended the 1988 amendment to expand the application of the "savings statute" to permit re-indictment for all reasons except that the initial charging instrument was not timely filed as suggested in Burdix-Dana the last portion of the last sentence is surplusage and a long standing policy against permitting the Government to benefit from intentional violation of such statutes as Rule 7 F R C P and the Speedy Trial Act was enacted without comment.

If the Burdix-Dana interpretation is correct, a voluntary dismissal even if there has been a Speedy Trial violation or an intentional disregard for the Rules of Criminal Procedure and the Constitution will give the United States six months to bring a new proceeding perhaps years after the statute of limitations would otherwise have expired

If the United States brings an information where an indictment is required, the charging instrument is subject to automatic dismissal absent a waiver of indictment in open court F R C P 7(a) and (b) If the United States were permitted to seek indictment after dismissal of the information on motion of the defendant or voluntarily the United States could defeat the statute of limitations with impunity Not having adequate evidence to indict within the statute of limitations for a crime requiring indictment, the United States would need only file an information in violation of Rule 7 F R C P Thereafter, upon dismissal of the information, the United States could proceed to indictment having gained whatever time it took for the defendant to move for dismissal, the court to grant the dismissal, and six months thereafter Arguably, the United States could keep the statute of limitations open indefinitely by filing a series of such informations until it wished, in its discretion, to seek indictment by taking the matter before a Grand Jury [1]

[1] U S v Civic Plaza National Bank 390 F Supp 1342 (W D Mo 1974) is the only case found which suggests an endless series of informations dismissals and new informations might not be permitted There the United States attempted to reinstitute a prosecution by filing an information within six months of the dismissal of an indictment The Court held that only an indictment would meet the requirements of 18 U S C §3288 and thus the information was dismissed as being barred by the statute of limitations The last sentence of the statute following the 1988 amendment may well reverse this holding, however, because it addresses "the filing of a new indictment or information" Unless the last portion of the last sentence of 18 U S C §3288 is construed to preclude refiling of informations in such circumstances it is not at all clear that the Government cannot continue filing, dismissing, and refiling informations until the United States finally decides to seek an indictment no matter how long after the initial information was filed

The only way to stop the obliteration of the statute of limitations is to make clear that filing an information without a waiver of indictment for crimes which require indictment does not bring 18 U S C. §3288 and §3289 into play unless and until a valid waiver is received in open court as required by Rule 7 F.R.C.P Furthermore, it must be made clear that 18 U.S C. §3288 and §3289 do not apply to voluntary dismissals

The clarification of 18 U S C §3288 and §3289 could be accomplished by adding a new sentence before the last sentence in the current statute and modifying the last sentence as follows

> Any prosecution hereunder must be instituted by indictment. This section does not permit the filing of a new indictment where the reason for the dismissal was the failure to file the indictment or information within the period prescribed by the applicable statute of limitations the dismissal arose from a violation of the Speedy Trial Act or the Constitutional right to a speedy trial, a voluntary dismissal for any reason, or a dismissal pursuant to Rule 7 of the Federal Rules of Criminal Procedure.

The specificity would be further enhanced by eliminating the language currently in the statute which provides inapplicability for "some other reason that would bar a new prosecution" Having included the specific exceptions there is no need for the more general language

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

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May 26, 2000

Mr. Thomas L. Kummer
4829 Eaglewood Court
Reno, Nevada 89502

Dear Mr. Kummer:

Thank you for your letter of December 28, 1999, which was forwarded to me by Representative Jim Gibbons on March 17, 2000. A copy of your letter, with Representative Gibbon's suggestion that the Committee consider changes to Criminal Rule 7(b), in light of your concerns, was sent to the chair and reporter of the Advisory Committee on Criminal Rules for their consideration.

We welcome your suggestion and appreciate your interest in the rulemaking process.

Sincerely,

Peter G. McCabe
Secretary

cc: Honorable W. Eugene Davis
Professor David A. Schlueter
Honorable Jim Gibbons