capital by making an informal request for the defendant, even though, as a result, trial was delayed and the defendant was disadvantaged. See id. at 83-84. In fact, the Court held that the Speedy Trial Clause did not even require the Attorney General to spend bureaucratic capital by "try[ing] to persuade the Department of State" to make such a request. Id. at 84 (quoting Hooker, 607 F.2d at 289). The "traditional deference" owed by courts to the Executive Branch in matters of foreign policy compelled the conclusion that the Government could choose to prioritize diplomacy over law enforcement without running afoul of the Speedy Trial Clause. Id. at 83 (quoting Salzman, 48 F.2d at 403).

(U) In the present case, the argument for deference to Executive Branch decision-making is even stronger than it was in Diacolios, for two reasons. First, like Diacolios, this case implicates the "traditional deference" owed to the Executive Branch in foreign policy and related matters. See, e.g., First Nat'l City Bank, 406 U.S. at 767 (foreign policy); see also, e.g., Harisiades v. Shaughnessy, 342 U.S. 580, 588-89 (1952) (stating that deference is owed to the Executive Branch in immigration-related matters). In addition, however, it implicates the strong deference owed to the Executive Branch in

matters relating to national security, especially during time of war. As the Supreme Court has explained, "courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs." Department of the Navy v. Egan, 484 U.S. 518, 530 (1988) (citing cases); see also, e.g., Sims, 471 U.S. at 179 ("The decisions of the Director [of the CIA], who must of course be familiar with 'the whole picture,' as judges are not, are worthy of great deference given the magnitude of the national security interests and potential risks at stake.") (internal quotation marks omitted); Haig, 453 U.S. at 293 ("Matters intimately related to foreign policy and national security are rarely proper subjects for judicial intervention . . . ."); Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 111 (1948) (stating that decisions relating to military affairs "are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil. They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and have long been held to belong in the domain of political power not subject to judicial intrusion or inquiry.") (citing cases). That is particularly true when, as here, the country is at war. See, e.g., Ex parte Quirin, 317 U.S. 14, 25

(1942) ("[T]he detention[,] ordered by the President in the declared exercise of his powers as Commander in Chief of the Army in time of war and of grave public danger[, is] not to be set aside by the courts without the clear conviction that [it is] in conflict with the Constitution or laws of Congress constitutionally enacted . . . .").

(U) Second, judicial deference to Executive Branch decision-making is even more appropriate in this case than it was in Diacolios because the President here was acting with the express authorization of Congress. See, e.g., Dames & Moore v. Regan, 453 U.S. 654, 674 (1981) (stating that where "the President acts pursuant to an express or implied authorization from Congress, he exercises not only his powers but also those delegated by Congress[, and i]n such a case the executive action 'would be supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it'") (quoting Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637 (1952) (Jackson, J., concurring)). Whereas the Executive Branch's decision in Diacolios was based solely on its own policy judgment, see Diacolios, 837 F.2d at 81, 83, the decisions at issue here were authorized by Congress. See AUMF, Pub. L. 107-

40, 115 Stat. 224 (authorizing the President "to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001 . . . in order to prevent any future acts of international terrorism"); Military Commissions Act of 2006, 10 U.S.C. § 948b(b) ("The President is authorized to establish military commissions . . . ."); cf. Hamdi v. Rumsfeld, 542 U.S. 507, 518 (2004) (plurality opinion for four Justices) (holding that the detention of a foreign fighter "for the duration of the particular conflict in which they were captured[] is so fundamental and accepted an incident to war as to be an exercise of the 'necessary and appropriate force' Congress has authorized the President to use [in the AUMF]"); id. at 587 (Thomas, J., dissenting) (agreeing with the plurality that the AUMF authorized the President to "detain those arrayed against our troops").

(U) In short, if judicial deference means that a defendant's trial can be delayed to conserve diplomatic or even bureaucratic capital, see Diacolios, 837 F.2d at 84, then it follows that the Government's reasons for delaying the defendant's trial here – to obtain vital intelligence about al Qaeda and to incapacitate a foreign terrorist during a time of

war – were "valid" within the meaning of Barker.

(S//NF) Even without the strong deference to the Executive Branch due here, the Government's decisions in this case to detain and to interrogate the defendant were reasonable ones. The defendant had played an important role in the Embassy bombings, al Qaeda's first successful mass-casualty attack. Between that and his positions in al Qaeda after that attack, there was every reason to believe that he would have crucial, real-time intelligence about senior al Qaeda leaders and al Qaeda plots. [redacted]

(S//NF) [redacted]

[redacted]

(TS [redacted] NF) In an organization as secretive and security-conscious as al Qaeda, the defendant was therefore a rare find, and his then-recent interactions with top-level al Qaeda terrorists made him a potentially rich source of information that was both urgent and crucial to our nation's war efforts. As a result, the defendant was an appropriate candidate for questioning by the CIA, which therefore put him in the RDI Program [redacted] That program involved holding the defendant in a controlled environment outside the

United States.

(S//NF) The results of the CIA's efforts show that the defendant's value as an intelligence source was not just speculative.

[12] (S//NF) Even if the defendant could have been expected to provide the same intelligence information from the MCC that he would have provided in CIA custody, that intelligence information would have been substantially less useful to the United States. It is hard to imagine that anyone would have missed it if the defendant arrived in the Southern District in 2004, waived his right to indictment, and remained at the MCC – with no trial date and no sentencing date. Any sophisticated observer would have known that the defendant was cooperating with the Government, and this would have undermined the utility of any information that the defendant provided.

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[redacted] See id.; see also Farbiarz CIA Declaration, Exhibit S (chart). Moreover, the information supplied by the defendant had important real-world effects – including helping the United States to understand more [redacted] (TS/ [redacted] NF) In short, the need to protect national security was a compelling reason – and, thus, plainly a "valid" reason within the meaning of Barker – to detain and interrogate the defendant [redacted] in CIA custody, even though it had the effect of delaying his criminal trial. The Government's national security interest in delaying the defendant's civilian trial did not cease, however, with the end of his detention by the CIA in September 2006. Even after that period, the Government had "weighty and sensitive" interests in detaining the defendant as an unlawful alien enemy combatant and holding him accountable for his violations of the laws of war. Hamdi, 542 U.S. at 531 (plurality opinion); cf. id. at 518 (calling the detention of a foreign fighter "for the duration of the particular conflict in which they were captured[]" a

"fundamental and accepted . . . incident to war"). It also had a compelling interest in protecting sensitive sources and methods of gathering information -- an interest that, at a minimum, required careful consideration of what forum to prosecute him in and made the initial decision to prosecute him in a military commission reasonable. See, e.g., Military Commissions Act of 2006, 10 U.S.C. § 949d(d), (f) (authorizing, among other things, the closure of proceedings to protect national security information); cf. Haig, 453 U.S. at 307 (stating that "[m]easures to protect the secrecy of our Government's foreign intelligence operations plainly serve" the compelling interest in national security).

(U) It is in the context of these circumstances that the Executive Branch continued holding the defendant as an alien enemy combatant and opted to prosecute him in a military commission for his violations of the laws of war. Those decisions also warrant this Court's deference. See, e.g., Boumediene, 128 S. Ct. at 2276 ("In considering both the procedural and substantive standards used to impose detention to prevent acts of terrorism, proper deference must be accorded to the political branches. . . . The law must accord the Executive substantial authority to apprehend and detain those who pose a

real danger to our security."). And in light of Diacolios, 837 F.2d at 83-84, discussed above, that deference undermines the defendant's speedy trial claim. The fact that, following a change in policy, the Executive Branch decided to pursue civilian charges against the defendant instead of the military charges does nothing to undermine or lessen the weight of the Government's interests or the degree of deference owed to its earlier decisions of how best to vindicate them.

(U) In sum, the United States had an extraordinarily powerful national security interest in detaining and interrogating the defendant, with the consequence that his criminal trial was delayed. Lives were at stake. If the Government may deliberately delay a criminal trial for the purpose of strengthening its case against a defendant – as Vassell and the other cases discussed above make clear – it follows that the United States may seek to protect national security, even if it has the collateral effect of delaying a defendant's criminal trial. The first reason (convicting a defendant) is not even remotely as significant as the second (protecting innocent lives from a ruthless enemy possessing the demonstrated willingness and capacity to kill thousands of civilians). And while the first reason skirts close to the core

concerns of the Speedy Trial Clause, the latter – which essentially disadvantages third parties (the terrorists about whom the defendant provided intelligence) – does not.

2. (U) The Defendant's Counter-Arguments Are Unavailing

(U) In the face of the strong rationale for the delay in his trial, the defendant makes two primary arguments. First, suggesting that national security is merely a post hoc Government rationale for his detention, the defendant contends that national security should not be permitted to "trump" his Sixth Amendment right to a speedy trial. See Deft. Mem. at 1 ("[T]his motion asks one primary question: Can national security trump an indicted defendant's Constitutional Right to a Speedy Trial?"); id. at 44 (suggesting that the Government argues that "the interests of national security shield them from the consequences of depriving Mr. Ghailani of his Constitutional right to a Speedy Trial"). Second, he contends that, whether or not national security was a legitimate reason for the Government's decisions, having made those decisions and delayed his trial as a result the Government must now "live with the consequences" – namely, dismissal of the Indictment. Id. at 35. Neither of these arguments has merit.

(U) The defendant's first contention – that the Government

is invoking national security to "trump" his constitutional rights — is based on a misunderstanding of the Barker analysis. Under Barker, the question is not whether the Government's reason for the delay is sufficient to justify a violation of the defendant's constitutional rights, but whether — in light of the Government's reasons and the other factors — there was a violation in the first instance. That is, the Court is expressly required by Barker to assess the reasonableness of the Government's justification for the delay in deciding whether the defendant was deprived of his right to a speedy trial. The defendant assumes as a given that he has been deprived of that right, and then argues that national security cannot "trump" that deprivation. But the Government's argument is that, in light of the compelling interest in national security, among other factors, there is no Sixth Amendment violation at all.

(U) For this reason, the defendant's reliance on Boumediene and other Supreme Court cases concerning the right to habeas corpus, see Deft. Mem. at 44-50, is misplaced. The defendant contends that just as the Court held in those cases that a foreign national is "entitled . . . to enjoy the protection of the Suspension Clause," he "was entitled to the full meaning of his Sixth Amendment Right to a Speedy Trial once he was in the

custody of the United States." Id. at 48. But there is no dispute that the defendant is "entitled to the full meaning" of his constitutional speedy trial right. The dispute here is over the substantive contours of the defendant's right, and to the limited extent that Boumediene and the other cases cited by the defendant speak to that issue, they cut against the defendant's argument, not in its favor. As the Court made clear in Boumediene, where national security is at stake, that fact may be considered even in defining the substantive contours of a constitutional provision. See, e.g., Boumediene, 128 S. Ct. at 2276 ("In considering both the procedural and substantive standards used to impose detention to prevent acts of terrorism, proper deference must be accorded to the political branches.") (emphasis added); id. at 2275 ("Practical considerations and exigent circumstances inform the definition and reach of the law's writs, including habeas corpus. The cases and our tradition reflect this precept.") (emphasis added); id. at 2276 ("[Our cases] stand for the proposition that the Suspension Clause does not resist innovation in the field of habeas corpus. Certain accommodations can be made to reduce the burden habeas corpus proceedings will place on the military . . . .").

(U) The defendant's second argument — that, having decided

to delay his trial for national security reasons, the Government must now "live with" dismissal of the Indictment -- is equally meritless. It too puts the cart before the horse by assuming the existence of a speedy trial violation. In addition, to adopt that argument would tie the hands of the United States any time that it captured on the battlefield a enemy combatant who was previously indicted, by effectively requiring the military or other authorities to bring that enemy combatant promptly to civilian court rather than interrogating him or holding him incident to the war. That would be contrary the Second Circuit's decision in Diacolios, discussed above. As noted, that case stands for the proposition that where the decision-making of the Executive Branch is entitled to deference, the Speedy Trial Clause should not be construed to require the Executive Branch to exercise that discretion in a particular manner. See Diacolios, 837 F.2d at 83-84.

(U) To hold that the Speedy Trial Clause now precludes the United States from trying the defendant for his crimes because it opted initially to treat him as an intelligence asset and alien enemy combatant would do just that. It would calcify decision-making precisely where and when it needs most to be flexible -- by forcing the Executive Branch, "in time of war and of grave public

danger," Quirin, 317 U.S. at 25, and on pain of a constitutional violation that would preclude criminal prosecution forever, to prioritize law enforcement over national security. As the Second Circuit has made clear, the Speedy Trial Clause requires no such thing.

3. (U) The Existence of Other Proceedings Was Another Valid Reason for the Delay in this Case

(U) There is an independent — and more ordinary — reason that justified much of the delay in the defendant's trial, a reason that finds direct support in the case law cited above: It is "reasonable to delay" a prosecution during the pendency of other proceedings. Jones, 91 F.3d at 8. The underlying principle — that the Government is allowed to deliberately delay a prosecution in order to permit other proceedings to go first — dates to the Supreme Court's first speedy trial decision in Beavers, 198 U.S. at 86-87, and has been reaffirmed many times since, see, e.g., Thomas, 55 F.3d at 150; United States v. Brown, 325 F.3d 1032, 1035 (8th Cir. 2003); Rayborn, 858 F.2d at 89; United States v. Nesbitt, 852 F.2d 1502, 1513 (7th Cir. 1988); Prince v. Alabama, 507 F.2d 693, 701-702 (5th Cir. 1975); Mejias, 552 F.2d at 443. Further, that principle applies even where the initial prosecution and the later prosecution relate to the same underlying conduct. See, e.g., Mejias, 552 F.2d at 443

(rejecting a speedy trial claim where, after being arrested following a joint federal-state investigation, the defendants were initially prosecuted by the state and only prosecuted federally when they had won a suppression ruling in the state proceedings, even though the original arrests were assumed arguendo to have triggered the Sixth Amendment right).

(U) The reach of the principle is perhaps most vividly illustrated by the Second Circuit's decision in Jones. As discussed above, Jones involved a speedy trial claim with respect to the Government's decision to delay its prosecution in the Southern District of New York until another prosecution in the Eastern District of New York had been completed, a process that took 25 months because the defendant's initial conviction in the Eastern District of New York was vacated on appeal. The District Court had granted the defendant's motion to dismiss, reasoning that, among other things, there had been long stretches of inactivity in the Eastern District of New York prosecution and appeal during which the defendant could readily have been brought across the Brooklyn Bridge to the Southern District of New York. See United States v. Jones, No. 92 Cr. 925 (LMM), 1995 WL 296736, at *6 (S.D.N.Y. May 16, 1995).

(U) The Second Circuit reversed, holding that "[i]t was

reasonable to delay the prosecution in the Southern District case until the Eastern District proceedings ended." Jones, 91 F.3d at 8. The Court of Appeals explained:

> We do not believe that the time Jones was involved in pre-trial, trial, and sentencing proceedings should be regarded as prosecutorial delay. . . . As the Supreme Court has noted, a defendant cannot be tried in different districts at the same time. Beavers v. Haubert, 198 U.S. 77, 86 (1905). A defendant must not only be present in court during the trial, but his presence is also needed during pretrial conferences and arguments on motions and hearings. . . . Moreover, for an incarcerated defendant, each appearance in another district requires a transfer between jails.

Id.; see also McGrath, 622 F.2d at 41 (dismissing a speedy trial claim when, among other things, one federal trial was delayed in favor of another); Mejias, 552 F.2d at 443 (rejecting a speedy trial claim when a federal prosecution was delayed by an initial state prosecution based on the same conduct); United States v. Penn, 434 F. Supp. 2d 229, 232 n.5 (S.D.N.Y. 2006) (holding that the Government was permitted to await the end of proceedings in the Eastern District of New York before proceeding with its prosecution in the Southern District of New York); United States v. Stein, 18 F.R.D. 17, 21-22 (S.D.N.Y. 1955) (denying a speedy trial claim where proceedings were delayed pending a separate trial in another district and explaining that "obviously both trials could not proceed simultaneously. A defendant so

circumstanced cannot dictate which of the two indictments should be tried first. The orderly administration of criminal justice leaves that choice with the prosecuting officials to be exercised in good faith.")' (citation omitted).

(U) Applying this principle here, the delay attributable to the defendant's detention and prosecution at Guantanamo was plainly "reasonable." First, the defendant was the subject of the CSRT hearing, a proceeding intended to confirm whether he could be held as an alien enemy combatant, in March 2007. See Farbiarz Filings Declaration, Exhibit A (Unclassified CSRT Hearing Transcript). In addition, military commission charges were pending against the defendant, in one form or another, from March 2008 through the date of his transfer to the Southern District of New York in June 2009. See DoD Declaration ¶¶ 8-10. Further, prior to March 2008, the Government was preparing for the military commission prosecution, a task that required gaining a familiarity with the military commission system, which was authorized by Congress only after the defendant's arrival at Guantanamo. See id. ¶¶ 2-7; cf. Williams, 372 F.3d at 113 (affirming denial of a speedy trial claim when, among other things, "much of the delay before trial was justifiably required" for Government preparations – namely, "investigation associated

with the superseding indictment"). In fact, the regulations and rules governing the military commission proceedings were not even fully enacted until May 2007. See DoD Declaration ¶ 4 & n.1.

(U) That the Government, following a change in policy, opted not to see the military commission prosecution of the defendant to its end does not alter the analysis. The holding in Jones did not depend on the outcome, or even the completion, of the other proceedings. In fact, the first prosecution in Jones ended in an acquittal. See 91 F.3d at 7; see also Mejias, 552 F.2d at 443 (denying a speedy trial claim where the federal prosecution followed an aborted state prosecution involving the same conduct). More basically, it would be perverse to hold that the only way the Government could have delayed the defendant's civilian trial pending his military commission trial was to wait even longer – until the military commission proceedings were finally and fully completed.

(U) Nor does it matter that the military commission proceedings and the instant proceedings were brought by the same sovereign and that they relate to some of the same underlying conduct by the defendant. With respect to the former point, Beavers and Jones make clear that it is valid to delay a prosecution even when the same sovereign – in both of those

cases, the federal Government – is involved and that sovereign has made a deliberate choice to prioritize one proceeding over another.

(U) As for the latter point, the principle that a federal prosecution may reasonably be delayed during the pendency of another prosecution applies whether or not the other prosecution relates to different conduct. See, e.g., Mejias, 552 F.2d at 443. Moreover, the charges against the defendant in the military commission proceedings related to his conduct beyond the Embassy bombings. They included the defendant's assistance to al Qaeda over the course of six years, from 1998 through 2004. See DoD Declaration ¶ 8. Finally, the military commission charges differed as a matter of law from the charges here because, by definition, they were for the defendant's violations of the laws of war, not for his violations of the criminal code. The jurisdiction of military authorities "to punish those guilty of offenses against the laws of war is long established." Johnson v. Eisentrager, 339 U.S. 763, 786 (1950); see Quirin, 317 U.S. at 42 n.14 (listing numerous uses of military commissions during the Revolutionary War). As the Sixth Circuit noted in a case where the defendant, a U.S. Army Medical Corps colonel, had been indicted after initial charges for the same conduct had been

dismissed in the courts martial system (like the military commission system, a system of military justice): "[I]t is well established that, under proper circumstances . . . , military and civilian courts enjoy concurrent jurisdiction . . . , and such concurrent jurisdiction affords the pertinent authorities a choice of forum in which to prosecute the offender, an election generally resolved by considerations of comity and relevant military and civilian interests." United States v. Talbot, 825 F.2d 991, 997 (6th Cir. 1987); see also id. at 997 n.4 (rejecting the defendant's speedy trial claim).

(U) In fact, if anything, there was a stronger case for delaying the trial in this case than there was in Jones and the other cases cited above, for two reasons. First, while the Government in Jones theoretically could have managed to pursue the two prosecutions simultaneously with little difficulty – the Marshals Service routinely brings prisoners from Brooklyn to court in the Southern District of New York – the same cannot be said of the military commission prosecution in Guantanamo and the civilian trial here. Cf. Thomas, 55 F.3d at 150-51 (citing avoidance of "increas[ing] inmate transportation back and forth between the state and federal systems with consequent additional safety risks and administrative costs" in deeming it reasonable

to delay federal prosecution until completion of state prosecution).

(U) Second, one rationale for allowing the Government to delay a second prosecution is that the Government could decide to forego the second prosecution if the punishment imposed in the first proceeding is "commensurate with the crime." Id. at 150 n.6. That rationale has added force where, as here, the death penalty could be imposed in the first proceeding. See infra (noting that prosecutors initially sought the death penalty against the defendant in the military commission proceedings, although the Convening Authority did not authorize it).

(U) In sum, under Beavers and Jones, it was plainly "reasonable" for the Government to delay the defendant's criminal trial while he was detained and prosecuted at Guantanamo.

(U) In the final analysis, the defendant cannot establish what he must to hold the deliberate delays in this case against the Government: that the Government sought the delays to "hamper the defense." Barker, 407 U.S. at 531. For 67 months — the majority of the time between his indictment and arraignment — the defendant was a fugitive and an active participant in al Qaeda, a group with which the United States was and is at war, and he was actively assisting terrorists responsible for planning attacks on

American and other Western targets. When he was finally captured during the war with al Qaeda, the defendant was – like other high-value al Qaeda terrorists taken into United States custody – detained, interrogated, and prosecuted for violations of the laws of war.

(U) In treating the defendant in this manner, the Government did not seek a "tactical advantage" against him in a criminal trial. It did not Mirandize the defendant at any point to preserve the possibility of later using his inculpatory statements. It did not maintain a strict chain of custody with respect to physical evidence in the manner of a law enforcement agency. It did not ask him for a waiver of speedy presentment. As evidenced by this motion, what the Government did during that period, far from "hampering" the defense in this case, has provided the defense with legal arguments it never would have had if the defendant had been brought promptly to trial in the Southern District of New York. It follows that the Government's delays – deliberate though they may have been, in a sense – were not for the purpose of "hamper[ing]" the defense in this criminal trial. Nor were they negligent. Instead, they were "valid" within the meaning of the second Barker factor.

III. (U) The Defendant's Failure to Demand a Speedy Trial Weighs Heavily Against His Claim

(TS [redacted] NF) The third Barker factor – whether and when the defendant "assert[ed]" his right to a speedy trial – cuts heavily against the defendant. The defendant was well aware that he was wanted in the United States during the 67-month period in which he was a fugitive and an active participant in al Qaeda, yet – for obvious reasons – he never sought a trial on the charges during that period. Nor did he seek a trial on the criminal charges during the [redacted] period he was in United States custody, even though for much of that period he was represented by skilled counsel and he demonstrated no hesitation to assert other rights. Put simply, the defendant expressed no interest in a criminal trial, speedy or otherwise, until the Speedy Trial Motion. Under well-established Supreme Court and Second Circuit case law, that tardy and opportunistic invocation of the right weighs heavily against his speedy trial claim.

A. (U) Applicable Law

(U) As noted, the third Barker factor is "the defendant's responsibility to assert his right." 407 U.S. at 531. This factor is a product of the Barker Court's observation that the right to a speedy trial differs from an accused's other constitutional rights because a "deprivation of the right may

work to the accused's advantage." Id. at 521. Because the prosecution bears the burden of proof and over time witnesses may become unavailable or their memories may fade, "[d]elay is not an uncommon defense tactic." Id. Weighing the "frequency and force" of a defendant's objections to the lack of a speedy trial allows a court to distinguish genuine claims from opportunistic claims, and prevents a defendant from sandbagging the Government by delaying a trial only to seek dismissal of the charges at a later date. Id. at 529.

(U) Thus, in Barker, the Court explained that "[w]hether and how a defendant asserts his right is closely related to the other factors," because the "strength of his efforts will be affected by the length of the delay, to some extent by the reason for the delay, and most particularly by the personal prejudice . . . that he experiences." Id. Reasoning that "[t]he more serious the deprivation, the more likely a defendant is to complain," the Court concluded that a defendant's assertion of his speedy trial right is therefore "entitled to strong evidentiary weight in determining whether the defendant is being deprived of the right." Id. at 531-32. To underscore the point, the Court expressly "emphasize[d] that failure to assert the right will make it difficult for a defendant to prove that he was

denied a speedy trial." Id. at 532 (emphasis added); accord Doggett, 505 U.S. at 653 (stating that, if a fugitive defendant knew of an indictment and failed to assert his right to a speedy trial, the third Barker factor "would be weighed heavily against him").

(U) Courts applying the Barker test have made clear that a defendant's delay in asserting the right to a speedy trial militates strongly against granting a motion to dismiss the indictment on that ground. See, e.g., United States v. Vasquez, 918 F.2d 329, 338 (2d Cir. 1990) (holding that the defendants' 22-month delay in asserting the right "weigh[ed] heavily" against their speedy trial claims because it "hardly render[ed] plausible their contention that an expeditious resolution of their cases was a matter of pressing constitutional importance for them"). Courts have greeted with particular skepticism an assertion of the right to a speedy trial that is made for the first time in a motion to dismiss an indictment. See, e.g., Abad, 514 F.3d at 275 (discounting the defendant's "opportunistic[]" invocation of his speedy trial rights); Stone, 510 F. Supp. 2d at 343 (noting that the defendant "did not until this motion [to dismiss the indictment] make any effort to assert his speedy trial rights"); see also, e.g., United States v. Sears, Roebuck & Co., 877 F.2d

734, 740 (9th Cir. 1989); McGrath, 622 F.2d at 41. Such a record "suggests that [a defendant] did not want a speedy trial until [his] right to a speedy trial became a possible means by which to obtain dismissal of the charges against [him]." United States v. Colombo, 852 F.2d 19, 26 (1st Cir. 1988).

(U) Significantly, a defendant's failure to express an interest in a speedy trial early, forcefully, or frequently weighs against a motion to dismiss on such grounds even if his failure to raise the issue occurred while he was a fugitive, so long as the defendant knew about the charges against him (or, more to the point, so long as the defendant does not show otherwise). See, e.g., Doggett, 505 U.S. at 653; Stone, 510 F. Supp. 2d at 343. In other words, the mere fact that a defendant may rationally want to avoid trial altogether – and thus chooses to remain a fugitive – does not excuse his failure to express an interest in a speedy trial for purposes of the third Barker factor.

(U) This Court's decision in Stone is instructive. In Stone, the defendant was indicted in 1992 for securities fraud and other offenses. See 510 F. Supp. 2d at 339. At the time of indictment, however, the defendant had left the United States for Costa Rica. Although the United States Government promptly

submitted a request to Costa Rica for a provisional arrest warrant, the Costa Rican authorities did not arrest the defendant until 2006 – 14 years after he had been indicted. See id. at 339-40. Once in the Southern District of New York, the defendant moved to dismiss the indictment for lack of a speedy trial. This Court denied the motion in part due to his failure to raise the issue while he was in Costa Rica. See id. at 343. Moreover, the Court did so despite the defendant's claim – unsupported by evidence – that he was unaware of the indictment prior to 2002. The Court explained that "[e]ven if the unsubstantiated claim of ignorance of the indictment between 1992 and 2002 were credited . . . defendant concededly has known of the indictment since 2002 and done nothing either to proceed to trial or to assert the claim now being asserted." Id.

B. (U) Discussion

(U) As in Stone, the third Barker factor weighs heavily against the defendant's speedy trial claim here because he did not assert his right until the instant motion. Notably, that failure began long before he was even in United States custody because the defendant indisputably knew about the charges against him while he was a fugitive. The Indictment and his co-defendants' trial were well and widely publicized, and the

defendant admitted that he knew he had been wanted. See FBI Declaration ¶ 9 n.2 (describing that the defendant showed his wife his wanted poster while he was a fugitive); see also Stone, 510 F. Supp. 2d at 342-43 & n.22 (noting that it is the defendant's "burden at least to submit evidence that, if credited, would establish that the Barker factors," including the third factor, "weigh in his favor"). The defendant's failure, as Barker itself made clear, is "entitled to strong evidentiary weight in determining whether the defendant is being deprived of the right" to a speedy trial. Barker, 407 U.S. at 531-32. It "weigh[s] heavily against him." Doggett, 505 U.S. at 653.

(U) The fact that the defendant was represented by multiple lawyers during much of the time he was at Guantanamo, yet never asserted an interest in a speedy trial on the Indictment, makes his claim even weaker.[13] Under the law, a defendant's failure to demand a speedy trial is deemed significant even where he was unrepresented by counsel at the time of that failure. See, e.g.,

[13] (TS/[redacted]NF) The defendant's apparent failure to assert an interest in a speedy trial during his detention by the CIA presumably should not weigh against him because he did not have a meaningful opportunity to assert such an interest. Nevertheless, it bears noting that the defendant's conduct did not evidence an interest in a speedy trial either before that detention (when he was a fugitive) or after (when he was in DoD custody).

Doggett, 505 U.S. at 653; Stone, 510 F. Supp. 2d at 343. Where, as here, a defendant has a lawyer, his silence is even more noteworthy. That his lawyers may have represented him primarily in the military commission proceedings makes no difference. Cf. Jones, 91 F.3d at 8 (finding that the District Court had erred in disregarding a notice of the indictment sent to the defendant's lawyer in a different proceeding because "[as] both an agent and a fiduciary," the defendant's lawyer had been obligated to keep him advised of relevant matters).

(U) In contending that the third Barker factor weighs in his favor, the defendant ignores his failure to assert the right during the entire 67-month period in which he was a fugitive. See Deft. Mem. at 50-52. He also alleges that he did raise his right to a speedy criminal trial in several court filings beginning in July 2008. See id. at 51 (citing a habeas corpus petition filed in the District of Columbia dated July 10, 2008). But even assuming arguendo that this allegation were true, the third Barker factor would still weigh against the defendant because July 2008 was long after he learned of the Indictment as a fugitive. It was even 17 months after his March 2007 CSRT hearing, when he was expressly told about the Indictment. See Farbiarz Filings Declaration, Exhibit A, at 4 (Unclassified CSRT

Hearing Transcript). That delay alone cuts against the defendant's speedy trial claim. Cf. Vasquez, 918 F.2d at 338 (holding that the defendants' 22-month delay in invoking their right to a speedy trial "weigh[ed] heavily" against their claim, even where they had invoked the right four months before trial began).

(U) In fact, the third Barker factor weighs even more heavily against the defendant than that – because a review of the record makes clear that, despite ample opportunity to do so, he never made even a pro forma request for a speedy trial on the Indictment until the instant motion. See Barker, 407 U.S. at 529 (a trial court may "weigh the frequency and force of the [speedy trial] objections as opposed to attaching significant weight to a purely pro forma objection"). To the limited extent he focused on the Indictment at all prior to arriving in the Southern District of New York, he sought only to dismiss it (and not on speedy trial grounds), which does not suffice. See, e.g., Lane, 561 F.2d at 1079 (holding that a demand for a speedy trial is inadequate when, inter alia, the relevant motions were "indicative of an interest in having the indictment dismissed, rather than of an interest in expediting the proceedings").

(U) Nor is his failure to seek a speedy criminal trial

while at Guantanamo all that surprising, for at least two reasons. First, whereas the death penalty was taken off the table in the military commission proceedings relatively early in the process, see Farbiarz Filings Declaration, Exhibit B (October 3, 2008 Direction of the Convening Authority) (removing the death penalty as an option in the military commission proceedings), it remained throughout the defendant's detention at Guantanamo a realistic prospect in a federal criminal trial.[14] Thus, as in Barker itself, the defendant likely "did not want a speedy trial" because by waiting he thought he might avoid a civilian criminal trial altogether. Id. at 535-36.

(U) Second, the defendant exhibited no real interest in a speedy trial even in the military commission proceedings. To the contrary, as discussed below, he expressly consented to a delayed trial date, see Farbiarz Filings Declaration, Exhibit C (Scheduling Motion) at 2, and only later — when there was a higher likelihood of being brought to New York, where the death penalty was still a possibility — did he request a speedy trial.

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[14] (U) Although the death penalty was not ultimately imposed, it was sought against the other defendants who were previously tried in this case, perhaps giving the defendant more reason to believe it would be sought against him in a civilian trial. The Department of Justice determined not to seek the death penalty against the defendant only on October 2, 2009. See Farbiarz Filings Declaration, Exhibit D (October 2, 2009 letter).

Seeking an adjournment to prepare for trial only to complain later about that delay is precisely the sort of gamesmanship that the Barker "demand" factor was designed to prevent. See, e.g., Abad, 514 F.3d at 274-75 (rejecting a speedy trial claim because the defendant invoked it "opportunistically, raising his speedy trial right when it suited his interests, but not when the delay benefitted him").

(U) In his Memorandum, the defendant claims that he "put the Government on immediate notice of his intent to assert his right to a Speedy Trial" by filing four documents: (1) a petition for the writ of habeas corpus filed by counsel in the District of Columbia on July 10, 2008 (the "Second Petition"); (2) a petition for the writ of habeas corpus filed pro se in the Southern District of New York on March 9, 2009 (the "Third Petition"); (3) a letter submitted to Judge Duffy dated May 9, 2009 (the "Duffy Letter"); and (4) a "Demand for Speedy Trial" filed by his appointed counsel in the military commission proceedings on May 12, 2009 (the "Commission Demand Letter"). See Deft. Mem. at 51 (citing filings). The defendant's claim does not withstand scrutiny.

(U) As an initial matter, the Second Petition was actually preceded by a first habeas petition (the "First Petition"),

unmentioned in the Defendant's Memorandum, which was filed by counsel on or about May 29, 2008, in the United States Court of Appeals for the District of Columbia. See Farbiarz Filings Declaration, Exhibit E (First Petition). That petition, filed over 14 months after the CSRT hearing and almost 10 years after the Indictment, made no mention of the Indictment, let alone a desire for a speedy trial on the Indictment. Instead, the First Petition merely sought review of the determination made in the CSRT hearing that the defendant was an enemy combatant. See Farbiarz Filings Declaration, Exhibit E (First Petition) at 1. Moreover, a few weeks after the First Petition was filed, the defendant requested, through his military lawyers, that the First Petition be dismissed. See Farbiarz Filings Declaration, Exhibit F (July 23, 2008 Acuff Declaration) ¶ 5. Even more significant, he directed "that no legal actions be filed on his behalf in any court outside of Guantanamo," id. – thereby making absolutely clear that he was not, and had not been previously, interested in seeking a speedy trial in federal court.

(U) In spite of the defendant's stated wishes that no filings be made in any court outside of Guantanamo, on or about July 10, 2008, an attorney named Scott Fenstermaker filed the Second Petition on his behalf in the United States District Court

for the District of Columbia. See Farbiarz Filings Declaration, Exhibit G (Second Petition). Although the defendant ultimately adopted the substance of the Second Petition, see Farbiarz Filings Declaration, Exhibit F (July 23, 2008 Acuff Declaration) ¶ 7; Farbiarz Filings Declaration, Exhibit H (July 22, 2008 David Declaration) ¶ 4, it too made no mention either of the Indictment in the Southern District of New York or of a desire for a speedy trial on the Indictment.[15] Instead, the substantive portion of the Second Petition read in its entirety: "Petitioner Ghailani maintains his innocence of all wrongdoing . . . . Petitioner Ghailani is being held in violation of the law and Constitution of the United States, as well as the international law of armed conflict." Farbiarz Filings Declaration, Exhibit G (Second Petition) at 1-2. Accordingly, the Second Petition did not constitute an assertion of the right to a speedy trial either.

(U) In the meantime, the military commission proceedings

[15] (U) Although the defendant embraced the Second Petition, Fenstermaker's notice of appearance was stricken on or about August 19, 2008. See Farbiarz Filings Declaration, Exhibit I (August 19, 2008 Order). Thereafter, the defendant's lead lawyer on the Second Petition was David Remes of Covington & Burling. See id. No further filings were made in support of the Second Petition, and it ultimately was dismissed voluntarily on or about May 21, 2009, after the District Court ordered the plaintiff to show cause why the petition should not be dismissed for failure to prosecute. See Farbiarz Filings Declaration, Exhibit J (May 12, 2009 Order to Show Cause).

against the defendant at Guantanamo were proceeding apace. Despite being represented by multiple lawyers in those proceedings, however, the defendant made no request for a speedy trial on the Indictment. In a filing before the military commission dated October 20, 2008, the defendant's military lawyers did ask for a trial date of July 15, 2009 — but only in the military commission proceedings, with no mention made of the Indictment. See Farbiarz Filings Declaration, Exhibit C (Scheduling Motion) at 2. Further, in light of the complexity of the case, the defendant "specifically agree[d] that all delay from the date of this request until the date of trial is attributable to the Defense." Id. at 3. In subsequent hearings and filings, the defendant made no mention either of the Indictment in the Southern District of New York or of any interest in a trial on the Indictment. See, e.g., Farbiarz Filings Declaration, Exhibit K (October 22, 2008 Transcript), Exhibit L (November 17, 2008 Defense Motion to Modify Protective Order #1), Exhibit M (December 8, 2008 Defense Request for Bill of Particulars).

(U) As noted in the Background section above, on January 22, 2009, President Obama signed Executive Order 13492. To the extent relevant here, the Executive Order directed the immediate

halt to military commission proceedings, see Executive Order 13492 § 7; stated that the detention facilities at Guantanamo would be closed within one year, see id. § 3; and provided that detainees not tapped for release or transfer would be considered for prosecution in federal criminal court, see id. § 4(c)(3). Because, as the defendant's own lawyers recognized, a man as dangerous as the defendant was not a likely candidate for release or transfer, see Farbiarz Filings Declaration, Exhibit N (April 13, 2009 Defense Reply for Prosecution Response to Defense Motion to Compel Discovery) at 4 ("any suggestion . . . that the United States Government may release Ghailani is laughable"), the Executive Order significantly increased the prospect that he would be brought to the Southern District of New York to be prosecuted on the Indictment.

(U) Far from inviting this outcome, however, the defendant began doing all he could to avoid the instant prosecution – either by seeking a speedy trial in the military commission proceedings at Guantanamo or by seeking dismissal of the Indictment on other grounds. Thus, for example, when, on January 23, 2009 (the day after the President issued the Executive Order), military prosecutors sought a continuance of the trial date in light of the Executive Order, see Farbiarz Filings

Declaration, Exhibit O (January 23, 2009 Government Motion for 120-Day Continuance), the defendant's military lawyers objected to the request and argued that the defendant's speedy trial rights required the military prosecution to go forward without delay, see Farbiarz Filings Declaration, Exhibit P (January 23, 2009 Defense Response to Government Request for 120-Day Continuance in the Interests of Justice) at 3-4. In filing after filing thereafter, the defendant continued to seek a speedy trial in the military commission proceedings or dismissal of the military commission charges. See Farbiarz Filings Declaration, Exhibit Q (February 9, 2009 Defense Response to Prosecution Supplemental Filing), Exhibit R (February 19, 2009 Defense Motion to Reconsider the Ruling on Government Motion to Continue), Exhibit S (March 27, 2009 Defense Motion to Compel Discovery). None of these filings mentioned a desire for a speedy criminal trial on the Indictment.

(U) The final three documents invoked by the defendant in his Memorandum – the Third Petition, the Duffy Letter, and the Commission Demand Letter – were filed on March 9, 2009, May 9, 2009, and May 12, 2009, respectively, which was, at best, almost 24 months after the CSRT hearing, when he was expressly advised about the Indictment. Cf. Vasquez, 918 F.2d at 338 (holding that

a 22-month delay "weigh[ed] heavily" against the defendants' speedy trial claim). Even then, the defendant himself made no assertion of anything approximating a speedy trial right.

(U) In the Third Petition, which was filed pro se, for example, the defendant demanded dismissal of the Indictment, but made no mention of the right to or an interest in a speedy trial. See Farbiarz Filings Declaration, Exhibit T (Third Petition). See, e.g., Douglas v. Cathel, 456 F.3d 403, 418 (3d Cir. 2006) (providing that a pro se filing "must make a 'reasonable assertion' of the right so as to put authorities on notice of his Sixth Amendment claim"); Lane, 561 F.2d at 1079 (holding that seeking dismissal is not "indicative . . . of an interest in expediting the proceedings"). The Commission Demand Letter, on the other hand, did not seek a speedy trial on the Indictment in the Southern District of New York; instead, it merely sought a speedy trial on the military commission charges at Guantanamo. See Farbiarz Filings Declaration, Exhibit U (Demand).

(U) The only document that even plausibly invoked the right to a speedy criminal trial was the Duffy Letter, which was filed on May 9, 2009 — 26 months after the CSRT hearing and almost 11 years after the Indictment, and only one month before the defendant's arraignment in this Court. See Farbiarz Filings

Declaration, Exhibit V (Duffy Letter). The Duffy Letter did indeed expressly "demand[] a speedy trial" pursuant to the Speedy Trial Clause and other provisions. Id. But rather than being a "Pro Se Letter," Deft. Mem. at 51, the Duffy Letter was prepared by Fenstermaker, the same attorney who initially filed the Second Petition against the defendant's wishes and was subsequently stricken from that petition and barred from making any further filings for the defendant. As this Court is aware, on May 27, 2009, Judge Duffy entered an Order recounting the numerous filings that Fenstermaker had made on behalf of Guantanamo detainees, including the defendant. See Farbiarz Filings Declaration, Exhibit W (Order) at 1-2. In light of this history, Judge Duffy indicated that Fenstermaker's notice of appearance in the Southern District of New York would be stricken if he did not file an affidavit by June 8, 2009. See id. at 3. No affidavit was filed. See Farbiarz Filings Declaration, Exhibit X (docket sheet excerpt covering the period from May 1, 2009 through July 1, 2009). Accordingly, on June 30, 2009, Fenstermaker was relieved as counsel. See id. (June 30, 2009 Minute Entry).

(U) Thus, the Duffy Letter was filed by a lawyer who could not and did not speak for the defendant, and is therefore legally irrelevant. Moreover, even if it were deemed an effective

assertion of the defendant's desire for a speedy trial, the letter was filed only on the eve of the defendant's appearance in Court – many years after he first learned of the Indictment.

(U) In short, a review of the defendant's history makes clear that he has not, until now, asserted his right to a speedy trial on the Indictment. The record therefore "suggests that [the defendant] did not want a speedy trial until [his] right to a speedy trial became a possible means by which to obtain dismissal of the charges against [him]." Colombo, 852 F.2d at 26; see also, e.g., Abad, 514 F.3d at 275 (discounting defendant's "opportunistic" invocation of his speedy trial rights). In fact, even accepting the defendant's inaccurate interpretation of the record, and ignoring the 67-month period in which the defendant was a fugitive but indisputably learned about the Indictment, the third Barker factor weighs heavily against him – so much so that it is "difficult for [him] to prove that he was denied a speedy trial." 407 U.S. at 532.

IV. (U) The Delay Did Not Prejudice the Defendant

(U) Finally, the fourth Barker factor – prejudice – favors the Government as well. The defendant alleges two kinds of prejudice. Although it may raise concerns in other contexts, the

first kind of prejudice cited by the defendant – the oppressiveness of his "pretrial" custody by the CIA – is immaterial for purposes of the Speedy Trial Clause, because there is no causal relationship between such oppressiveness and the Indictment in this case. The second kind – prejudice to the defendant's ability to mount a defense – does not survive scrutiny. There is no basis to presume such prejudice in this case, and the defendant has failed to identify any particularized way in which he was prejudiced. That failure is especially notable given the extensive record in this case and the number of capable lawyers that are working or have worked on the defendant's behalf.

A. (U) Applicable Law

(U) As noted, the fourth and final Barker factor is "prejudice to the defendant." 407 U.S. at 532. In contrast to other areas of the law, in which prejudice generally means harm to the defense, the Supreme Court has recognized that "prejudice" for speedy trial purposes can take three different forms. See Doggett, 505 U.S. at 654; Barker, 407 U.S. at 532. As the Barker Court explained:

> Prejudice, of course, should be assessed in the light of the interests of defendants which the speedy trial right was designed to protect. This Court has identified three such interests: (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. Of these, the most serious is the last . . . .

Barker, 407 U.S. at 532 (footnote omitted).

(U) As a general matter, although all the Barker factors must be balanced, the "prejudice" factor tends to loom especially large, and a defendant can rarely prevail on a speedy trial claim absent a showing of actual prejudice. See, e.g., Reed v. Farley, 512 U.S. 339, 353 (1994) ("A showing of prejudice is required to establish a violation of the Sixth Amendment Speedy Trial Clause, and that necessary ingredient is entirely missing here."); Rayborn, 858 F.2d at 94 (stating that "courts generally have been reluctant to find a speedy trial violation in the absence of genuine prejudice") (internal citation omitted). Affirmative proof of particularized prejudice is not always required, because the erosion of exculpatory evidence and testimony can "rarely be shown." Barker, 407 U.S. at 532; accord Doggett, 505 U.S. at 655; Moore v. Arizona, 414 U.S. 25, 26 (1973) (per curiam). However, a presumption of prejudice is generally warranted only where the other Barker factors weigh strongly in the defendant's favor. See Doggett, 505 U.S. at 658; United States v. Koskotas, 888 F.2d 254, 257 (2d Cir. 1989) (holding that when the three other Barker factors do not favor either side, the "possibility

of prejudice" is not sufficient to establish a speedy trial violation); Rayborn, 858 F.2d at 94 (citing an Eleventh Circuit case for the proposition that "unless the other three Barker factors all weigh heavily against the government, defendants must demonstrate actual prejudice").

B. (U) Discussion

(U) In the present case, the defendant alleges only two out of the three forms of prejudice identified in Barker. He makes no claim that he was prejudiced "by living under a cloud of anxiety, suspicion, [or] hostility." Barker, 407 U.S. at 533. Instead, he alleges, first and foremost, that his detention by the CIA (but not by DoD) was "oppressive," Deft. Mem. at 52-67; and, second, that the delay prejudiced his ability to defend against the charges at trial in various ways, see id. at 40-41, 67-70. Neither argument weighs in the defendant's favor.

1. (U) The Defendant's Detention and Interrogation by the CIA Were Not Caused by the Indictment and Therefore Do Not Qualify as "Pretrial" Detention for Speedy Trial Clause Purposes

(U) The primary form of prejudice invoked by the defendant – the alleged "oppressiveness" of his detention by the CIA, see Deft. Mem. at 52-67 – does not support his speedy trial claim. While the length and nature of that detention may have relevance to other legal arguments or claims, they are not

relevant to his speedy trial claim for one simple reason: There was no causal relationship between the Indictment itself and the defendant's detention and interrogation by the CIA. That is, the defendant would have been detained and interrogated by the CIA in the manner he was whether or not he had been indicted.

(U) For the oppressiveness of pretrial detention to be relevant under the fourth Barker factor, case law requires some causal connection between the criminal charges the defendant seeks to dismiss and that oppressiveness. See, e.g., United States v. Lainez-Leiva, 129 F.3d 89, 92 (2d Cir. 1997) (per curiam) (holding that the defendant could not "claim prejudice traceable to any oppressive pretrial incarceration, because he would have been serving his state sentence in any event"). Where a defendant is detained pending trial on the very charges he seeks to dismiss, that causal relationship is self-evident. See, e.g., Barker, 407 U.S. at 520-21, 532-33; see also Smith v. Hooey, 393 U.S. 374, 378 (1969). A defendant may also satisfy the causation requirement, however, by showing that the criminal charges he seeks to dismiss somehow aggravated the otherwise unrelated detention, by, for example, making him ineligible for early release or for a rehabilitation program. See, e.g., Prince, 507 F.2d at 703, 707; United States v. Brown, 520 F.2d

1106, 1112 (D.C. Cir. 1975).[16]

(U) The key point is that, where a defendant's detention was due to causes or charges unrelated to the charges that the defendant is seeking to dismiss, and the charges he seeks to dismiss did not in any way worsen the detention, the detention itself cannot give rise to a claim of prejudice for speedy trial purposes. See Lainez-Leiva, 129 F.3d at 92; see also, e.g., United States v. Knight, 562 F.3d 1314, 1324 (11th Cir. 2009) (rejecting a claim of prejudice where the defendant "complain[ed]

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[16] (U) In Smith, the Supreme Court discussed several ways in which incarceration in another jurisdiction on unrelated charges may be relevant to a speedy trial claim. See, e.g., 393 U.S. at 378-79. The primary ways identified by the Court involve situations where new charges aggravate the length or conditions of incarceration. See, e.g., id. at 378 & n.8 ("[U]nder procedures now widely practiced, the duration of [a defendant's] present imprisonment may be increased, and the conditions under which he must serve his sentence greatly worsened, by the pendency of another criminal charge outstanding against him."); see also Moore, 414 U.S. at 26 (noting that where a defendant is incarcerated after conviction in another state, new charges may have a "possible impact . . . on his prospects for parole and meaningful rehabilitation"). But the Smith Court noted also that "the possibilities [of] long delay . . . impair[ing] the ability of an accused to defend himself are markedly increased when the accused is incarcerated in another jurisdiction." 393 U.S. at 379-80 (internal quotation marks omitted). That form of prejudice, however, is not related specifically to the conditions of confinement, which is the gravamen of the defendant's claim with respect to his detention by the CIA. Instead, it relates to the general risk inherent in any period of pretrial delay of prejudice to a defendant's ability to defend against the charges at trial. As discussed in the next section, the defendant makes a trial-related prejudice argument here, but it is unpersuasive.

about the conditions of his detention in a maximum-security facility" on the grounds that "he would have been otherwise serving a state sentence of imprisonment and was housed in the maximum-security facility because of his earlier escape"); United States v. Watford, 468 F.3d 891, 907 (6th Cir. 2006) (holding that because the defendant "was already incarcerated on state murder charges, he had suffered no oppressive pretrial incarceration at the hands of federal authorities"); United States v. Sprouts, 282 F.3d 1037, 1043 (8th Cir. 2002) (holding that because the defendant "would have been serving a sentence on another charge even had he not been indicted for escape" he "was not oppressively incarcerated while awaiting trial for" escape); United States v. Grimmond, 137 F.3d 823, 830 (4th Cir. 1998) (rejecting a claim of prejudice based on "oppressive pretrial incarceration" because, "[a]lthough [the defendant] was incarcerated during the 35-month period between his indictment and his arraignment, his pretrial incarceration was a result of his [a separate crime]").

(TS/[redacted]/NF) This rule of causation is fatal to the defendant's claim of prejudice from the allegedly oppressive nature of his interrogation and detention by the CIA because the mere fact that he was indicted neither caused nor worsened the

interrogation and detention. The defendant was detained by the CIA because he met the criteria of the RDI Program, which was designed to obtain actionable intelligence [redacted]

Some of these terrorists, including the defendant, had previously been indicted; others had not. [redacted] But whether a charging document had been filed was not one of the RDI Program's selection criteria. [redacted] Indeed, the goal of the RDI Program was remote from law enforcement; the Program's purpose was to gain intelligence, not to get admissible confessions or to gather admissible evidence. [redacted] The CIA does not even have law enforcement authority, and it did not hold people in the RDI Program as criminal suspects. [redacted][17]

[17] (TS/[redacted]NF) Of course, there is no reason to believe that the conduct underlying the Indictment would have been irrelevant to the CIA's decision to interrogate the defendant in the RDI Program – because that conduct was compelling evidence of his longstanding involvement in terrorist operations and al Qaeda. [redacted], and also noted the historical fact of the Indictment. See Farbiarz CIA Declaration, Exhibit V [redacted]. The key point is that, had the CIA been aware of everything it knew about the

[redacted]

(TS[redacted]NF) Significantly, although the defendant suggests in his Memorandum that he was subjected to EITs "to extract information about the Embassy Bombings," Deft. Mem. at 61, [redacted] See supra pp. 18-19. [redacted] Put simply, the defendant's detention by the

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defendant [redacted] but ignorant of the fact that he had been indicted, it would have treated him in the same way; the indictment qua indictment did not affect his treatment. [redacted] see also Farbiarz CIA Declaration, Exhibit W [redacted]

[redacted]

[redacted]

CIA, and the conditions of that detention, had nothing to do with the Indictment that he now seeks to dismiss.[19]

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(U) In the final analysis, for this Court to invoke the Speedy Trial Clause to redress harms caused by sources other than the Indictment would upset the carefully calibrated scheme of constitutional remedies established by the Supreme Court. The speedy trial right is unusual in that it requires "the unsatisfactorily severe remedy of dismissal of the indictment when the right has been deprived." Barker, 407 U.S. at 522. That is because, while a new trial can remedy the deprivation of other trial-related constitutional rights, a new trial would merely aggravate the harms of an unconstitutionally delayed trial. See, e.g., Strunk, 412 U.S. at 439. In light of the "unsatisfactorily severe remedy of dismissal," however, it would make little sense to extend the protection of the Speedy Trial Clause to a defendant, such as the one here, who alleges harms unrelated to the indictment he is seeking to dismiss. The "serious consequence" that "a defendant who may be guilty of a serious crime will go free, without having been tried," Barker,

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407 U.S. at 522, is warranted under the Speedy Trial Clause only where a defendant's constitutional claim actually stems from the delay in prosecution.

(U) To the extent that a defendant has suffered harms that stem from other causes, there are of course a variety of remedies he may pursue. What happened to the defendant during his detention by the CIA, for example, may be relevant to other legal arguments in this case; in theory, the defendant could also seek civil remedies against those involved. But dismissal of an unrelated indictment on speedy trial grounds, which would deprive the public of its right to see those who commit crimes held to account, is not the appropriate remedy for such harms.

2. (U) The Defendant Has Not, and Cannot, Show Prejudice To His Ability to Defend Against the Indictment at Trial

(U) The defendant's second prejudice-related argument — that the delay in his trial has harmed his ability to mount a defense at trial in various ways, see Deft. Mem. at 67-69; see also id. at 40-41 — is similarly unavailing. In particular, the defendant identifies four ways in which the delay has allegedly caused actual prejudice to his defense: (1) some of the evidence may be "fruit of the poisonous tree" because it was derived from involuntary custodial statements, see id. at 68; (2) some of the

statements made at his CSRT hearing have been widely disseminated, potentially harming his right to a fair trial, see id. at 70; (3) he appears to his lawyers "so damaged" by the CIA RDI Program that "decisions and ability to assist counsel in preparing his defense appear to have been hampered," see id. at 40-41; and (4) his military defense lawyers allegedly found that FBI agents had interfered with their access to witnesses in Tanzania, see id. at 68. In addition, he relies on an argument that delay "presumptively compromises the reliability of a trial in ways that are difficult, if not impossible, to prove or identify." Id. at 67. These arguments should be rejected.

(U) As an initial matter, none of the "actual" prejudice arguments — even if, assuming arguendo, they were meritorious — would call for "the unsatisfactorily severe remedy of dismissal of the indictment." Barker, 407 U.S. at 522. That is because none of these alleged harms resulted from the delay itself. See, e.g., McGrath, 622 F.2d at 41 (stating that the fourth Barker factor requires a defendant to identify "specific and substantiated prejudice arising from the delay") (emphasis added). That is, they are not species of prejudice relevant to the defendant's speedy trial claim. To the extent the arguments have merit, the defendant has remedies available other than a

motion to dismiss the Indictment on speedy trial grounds.

(U) First, the defendant's "fruit of the poisonous tree" argument is more properly raised in a suppression motion. In connection with its November 19, 2009 motion made pursuant to Section Four of the Classified Information Procedures Act ("CIPA"), the Government submitted to the Court proposed summaries of statements made by the defendant [redacted][20] These proposed summaries were prepared so as to provide the defendant with the same core of substantive information as the underlying documents from which they are derived. Cf. CIPA § 6(c)(1) (describing the standards that are applicable when the Government offers as trial evidence a summary of classified evidence in lieu of the classified evidence itself). Accordingly, when these summaries are provided in discovery – as they will be shortly in light of the Court's recent ruling – the defendant will know what he said about the Embassy bombings and when he said it. If, based on these summaries, the defendant believes his statements led to the discovery of evidence that the Government may offer at trial, he

[20] ~~(S/[redacted]/NF)~~ As noted above, see supra note 6, the Government does not intend to use any statement made by the defendant in response to interrogation – on any subject – during the period when he was in [redacted] CIA, or DoD custody.

can then file a motion to suppress that evidence. There is no need to dismiss the Indictment to protect the defendant's Fifth Amendment rights in that respect.

(U) Similarly, if the defendant believes he cannot receive a fair trial because of publicity associated with the CSRT hearing, he can request a searching voir dire of prospective jurors, as there was in the first Embassy bombings trial (where some defendants' confessions had also been widely publicized). In the unlikely event that voir dire would be inadequate to address the problem, the appropriate remedy would be a transfer of venue, not dismissal. See, e.g., United States v. Yousef, 327 F.3d 56, 155 (2d Cir. 2003) (stating that "the key to determining the appropriateness of a change of venue is a searching voir dire of the members of the jury pool," and holding that the District Court's "extensive voir dire" was adequate to address the pre-trial publicity about the first World Trade Center bombing).

(U) As for the passing reference to the defendant's mental competency, the defendant's various pro se submissions — including the lucid, lengthy letter he recently submitted to the Court about his military defense lawyers, see Farbiarz Filings Declaration, Exhibit Y (Ghailani letter) — suggest by themselves that there is no viable mental competency claim to be raised.

Nevertheless, assuming the defendant's lawyers believe or come to believe otherwise, they are entitled to make an appropriate competency motion. See, e.g., 18 U.S.C. §§ 4241 et seq.[21]

(U) Finally, even assuming arguendo that FBI agents improperly interfered with the defendant's access to witnesses in Tanzania, that would not be a basis to dismiss the Indictment for lack of a speedy trial. The appropriate remedy for such conduct, if it occurred, would be a missing-witness instruction at trial. See, e.g., United States v. Desena, 287 F.3d 170, 176 (2d Cir. 2002).

(U) In any event, the defendant's claim of interference — as alleged in a Declaration submitted in support of the Speedy Trial Motion by Colonel Colwell (the "Colwell Declaration")[22] — is unpersuasive on the merits, for several reasons.

(U) First, the defendant has not established, and there is no reason to believe, that any of the witnesses Colonel Colwell

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[21] (U) In Indiana v. Edwards, - U.S. -, 128 S. Ct. 2379 (2008), which is cited by the defendant, see Deft. Mem. at 41, the Supreme Court held that a state may insist upon representation by counsel for a defendant who lacks the competence to represent himself, even if he is competent to stand trial. That holding does not appear to be relevant in this case.

[22] (U) Solely for the purposes of this Speedy Trial Motion, the Government assumes that the Colwell Declaration is accurate.

sought to interview would have been useful to the defense. See, e.g., Desena, 287 F.3d at 176 ("[A] defendant who alleges a violation of due process and compulsory process due to a missing witness must show the witness would have provided favorable evidence which was neither cumulative nor irrelevant.") (internal quotation marks omitted). In fact, in an e-mail sent to request funding for the trip to Tanzania, Colonel Colwell, apparently speaking for the military defense team, stated that "we believe a majority of these witnesses may possess information adverse to our client." Colwell Declaration, Attachment C, at 6.

(U) Second, it cannot be said that the FBI or military prosecutors "interfered" with the defense by not providing contact information for the witnesses. In the military commission context, the defendant moved for an order directing the military prosecutors to supply the relevant contact information, and – as would likely have happened in federal criminal court, see, e.g., United States v. Bejasa, 904 F.2d 137, 139 (2d Cir. 1990) – the motion was denied. See Colwell Declaration ¶¶ 8, 13. Handing over contact information in a terrorism case for witnesses, let alone witnesses from a different country, raises obvious safety and privacy concerns – and the military prosecutors' decision not to go beyond what they

were obligated by the Military Judge to do hardly suggests a basis for inferring that the defense has somehow been prejudiced.

(U) Third, even on its own terms, the Colwell Declaration does not support a conclusion that the FBI interfered with witnesses. The Colwell Declaration identifies three witnesses with whom the FBI allegedly "interfered." But one of these witnesses is described as having been "fully cooperative," id. ¶ 24, and one consented to an interview with military defense lawyers but apparently cut it off when they refused to compensate him for his time, see id. ¶ 18. The Colwell Declaration identifies only one witness who, "[u]pon information and belief," refused to answer some questions "based primarily on his encounter with the FBI on the day prior and his past experiences with these agents." Id. ¶ 23. But the description of this witness' prior interactions with the FBI, if accurate, is innocuous. See id. ¶¶ 20, 21.

(U) Finally, it is entirely possible, if not probable, that some of the Tanzanian witnesses sought by Colonel Colwell became unavailable during the nearly six years when the defendant was a fugitive, not to mention during the nearly 11 years before the defendant first asserted — in the current motion — his interest in a speedy trial. See, e.g., United States v. Lasker, 481 F.2d

229, 237 (2d Cir. 1973) (rejecting a defendant's claim of prejudice relating to the deaths 5 and 11 months after the indictment of two potential defense witnesses, on the ground that the defendant had made "no complaint . . . about the delay until 24 months after the indictment"). Similarly, there is no basis to believe that the allegedly uncooperative witnesses would have been more likely to cooperate with the representatives of an accused terrorist before [redacted] 2004 (when the defendant was captured) than they are now. And it "ill behooves" the defendant to complain about evidence lost or equally unavailable while he was fleeing from justice. Rayborn, 858 F.2d at 94.

(U) In short, there is no reason to dismiss the Indictment prophylactically to protect against the various forms of "actual" prejudice alleged in the Defendant's Memorandum. To the extent these non-speedy trial claims have merit, they can be protected without resort to such an "unsatisfactorily severe remedy." Barker, 407 U.S. at 522.

(U) That leaves the defendant's argument that the prejudice to his defense should be presumed given the passage of time. See Deft. Mem. at 67. However, although there are circumstances where prejudice can be presumed and a defendant need not make a particularized showing of prejudice, see, e.g., Doggett, 505 U.S.

at 658, this is not one.

(U) For one thing, a presumption of prejudice is generally warranted only where the other three factors of the Barker analysis weigh strongly in the defendant's favor. See id.; Koskotas, 888 F.2d at 257 (holding that when the three other Barker factors do not favor either side, the "possibility of prejudice" is not sufficient to establish a speedy trial violation); Rayborn, 858 F.2d at 94 (citing an Eleventh Circuit case for the proposition that "unless the other three Barker factors all weigh heavily against the government, defendants must demonstrate actual prejudice"). Where, as here, the other factors weigh in the Government's favor, a presumption is unwarranted and a showing by the defendant of actual prejudice is generally required. See, e.g., Stone, 510 F. Supp. 2d at 343 (requiring a showing by the defendant of "actual prejudice" where the Barker factors generally favored the Government, notwithstanding a 14-year delay between indictment and trial).

(U) Second, any presumption is rebuttable, see Doggett, 505 U.S. at 658, and it is rebutted here. Indeed, the defendant's contention that it would be "difficult, if not impossible, to prove or identify" prejudice in this case is extraordinary. The first Embassy bombings trial lasted many months, involved

hundreds of exhibits, and filled thousands upon thousands of pages of court transcripts. Discovery was provided long ago to the defendant's two lawyers in the military commissions context – and those two lawyers, who were readying themselves for a trial at Guantanamo, were able to stay on this case through the preparation and filing of the Speedy Trial Motion. Moreover, in this case the defendant has three highly capable defense lawyers – and they have been provided with massive quantities of discovery by the Government. If all of these lawyers, with all of this evidence, cannot articulate any trial prejudice it is because it does not exist. The Supreme Court has noted that "[t]he essence of a defendant's Sixth Amendment claim in the usual case is that the passage of time has frustrated his ability to establish his innocence of the crime charged." United States v. MacDonald, 435 U.S. 850, 860 (1978). Here, even with a prior trial record to work with, the defendant has not even attempted to demonstrate such a claim.

(U) In addition, the primary evidence in this case is not the sort that becomes especially unreliable with the passage of time. In particular, this is not a case in which the Government intends to rely on either the testimony of a cooperating witness about conversations with the defendant, or on the testimony of a

law enforcement agent about a post-arrest confession made by the defendant. See FBI Declaration ¶ 17-18. In those instances, the particular words chosen by a defendant are particularly important – and the memory of the cooperating witness or the law enforcement agent as to those words is likely to have faded over time.

(U) Instead, the Government's case against the defendant depends in good measure on physical evidence, which does not fade over time. For example, the Government intends to offer at trial the results of a 1998 search that was conducted of the defendant's residence in Dar-es-Salaam ("Ghailani's Residence"). See FBI Declaration ¶ 22. The search of Ghailani's Residence revealed, among other things, a detonator; the defendant's stock of clothing, which also bore traces of PETN, a high explosive; a passport application in the name of "Abubakar Khalfan Ahmed," with the defendant's photograph; and cellphone records for a particular telephone number (the "Cell Number"), which bore the defendant's fingerprint. See id.

(U) All of this physical evidence is thoroughly inculpatory. As to the defendant's fraudulent passport materials, hotel records establish that a man named "Abubakar Khalfan Mohammed" met with another Embassy bombings co-

conspirator at a particular hotel in Kenya a week before the bombings – and airline records establish that "Abubakar Khalfan Mohammed" flew, with another Embassy bombings co-conspirator, from Africa to Pakistan, on the day before the bombings. See id. ¶ 23. As to the telephone records, toll records support the inference that the cellphone associated with the Cell Number was used by the co-conspirators. See id.[23]

(U) To be sure, the Government also intends to introduce eyewitness testimony. For example, forensic analysis by the FBI of materials recovered at the bomb crater in Dar-es-Salaam, Tanzania, established that the bomb had been carried there by a particular Nissan truck (the "Bomb Truck"). See FBI Declaration ¶ 20. Multiple eyewitnesses establish that the defendant and one of his co-conspirators together participated in the purchase of the Bomb Truck, about two weeks before the bombings. See FBI Declaration ¶ 24.

(U) Given the nature of the investigation in this case,

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[23] (U) If anything, with respect to the physical evidence, the passage of time has made it more difficult for the Government to prove its case. The clothing described above, which had PETN residue, was provided to the Tanzanian Police Force for a 2003 criminal trial; when the defendant in that trial was acquitted, the High Court of Tanzania mistakenly released the clothing to the defendant and it is no longer available to the Government for use in this case. See FBI Declaration .

however, the relevant portions of such witnesses' testimony were generally carefully documented and that documentation can be used to refresh memories, as necessary, at trial. The fact that the jury may see that a Government witness had to have his memory refreshed does not prejudice the defendant – it prejudices the Government by making it harder to prove its case. See Barker, 407 U.S. at 521 ("As the time between the commission of the crime and trial lengthens, witnesses may become unavailable or their memories may fade. If the witnesses support the prosecution, its case will be weakened, sometimes seriously so. And it is the prosecution which carries the burden of proof."); Flanagan v. United States, 465 U.S. 259, 264 (1984) ("As time passes, the prosecution's ability to meet its burden of proof may greatly diminish: evidence and witnesses may disappear."); cf., e.g., Blanco, 861 F.2d at 780 ("[S]ince delay can just as easily hurt the government's case, [the defendant's] general claim that the delay impaired her defense . . . lacks force.").

(U) As the defendant suggests, see Deft. Mem. at 68, there are some witnesses who have died since 2004. Insofar as the Government is aware, however, none of these witnesses would have substantially assisted the defendant. To the contrary, many of these witnesses were thoroughly inculpatory, and their deaths

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have therefore hurt only the Government. For example, the housekeeper at Ghailani's Residence – who testified at the first Embassy bombings trial for the Government, and helped to establish that the defendant lived at Ghailani's Residence where, among other things, a detonator was found – has died. See FBI Declaration ¶ 30. Similarly, the prior owner of the Bomb Truck – who testified at the first Embassy bombings trial and helped to establish that the defendant and one of his co-conspirators participated in the purchase of the Truck – has also died. See id. at ¶ 29. The defendant has not identified a single exculpatory witness who has died – and, in light of his statements at the CSRT hearing, which amount to a near-confession of his guilt, presumably cannot do so.[24]

(TS/[redacted]NF) Finally, a presumption of prejudice would be particularly inappropriate in this case, where a majority of the time since the Indictment was returned is

[24] (TS/[redacted]NF) If there are any witnesses favorable to the defense who died [redacted], the potential prejudice is likely curable through a pragmatic approach to the problem, and does not warrant dismissal of the Indictment. For example, the Government could be ordered to produce all the FBI 302s for deceased witnesses. If the defendant can then demonstrate that a certain witness died [redacted] and that the witness's testimony would have been favorable to the defense, the Court could order the admission into evidence of the contents of that witness's 302s.

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attributable to the defendant – that is, to the 67-month period in which he was a fugitive and an active participant in al Qaeda. To the extent that witnesses' memories have faded from 1998 and, in some instances, to the extent that witnesses have died, it is just as likely, if not more likely, that the "prejudice" arose during the first 67 months after the Embassy bombings – that is, during the nearly six years the defendant spent as a fugitive and active participant in al Qaeda – rather than during the [redacted] months, when the defendant was in United States custody. Cf. Rayborn, 858 F.2d at 94 (noting that it "ill behooves" a defendant to complain about witnesses who have become unavailable while he was a fugitive).

(U) In sum, there is no basis to presume prejudice in this case and the defendant has failed to identify actual prejudice caused by the Government's delay of his trial. Accordingly, the fourth Barker factor weighs in the Government's favor.

(U) CONCLUSION

(U) In light of the foregoing, a balancing of the four Barker factors in this case compels the conclusion that the defendant's Speedy Trial Motion should be denied.

(TS/[redacted]/NF) First, the majority of the time

between indictment in December 1998 and arraignment in June 2009 is attributable to the defendant, who – despite learning that he was wanted in the United States – remained a fugitive and an active participant in al Qaeda for 67 months. The only potentially relevant period of delay in this case – [redacted] months that the defendant was in United States custody – is arguably long viewed in isolation, but courts have often held, in circumstances far less compelling, that comparable or even longer delays did not run afoul of the Speedy Trial Clause. Additionally, the law is clear that the length of delay is not to be considered in a vacuum, but in light of the seriousness and complexity of the case. This case, as the defendant himself conceded in the military commission proceedings, was and is indisputably complex, and not just because of the charges in the Indictment, but also because of the context and circumstances of the defendant's capture and prior conduct. In these circumstances – circumstances largely of the defendant's own making – the length of the delay does not weigh in the defendant's favor.

(U) Second, two reasons justified the delay: the protection of national security and the existence of other proceedings. Courts have long recognized as valid all manner of reasons for

[redacted]

delay, even where the delay is intended to strengthen the criminal prosecution and patently disadvantages the defendant, such as delays to encourage a co-defendant to testify against the defendant. Measured against these accepted reasons for delay, and mindful of the high degree of deference owed to judgments of the Executive Branch in national security matters during a time of war, the interest in national security plainly justified holding the defendant in this case as an enemy combatant, interrogating him, and prosecuting him for violations of the laws of war, even if that meant delaying his criminal trial. Similarly, the Supreme Court and the Second Circuit have recognized that it is reasonable to delay a prosecution to allow other proceedings to go first. Thus, here, it was reasonable to delay the defendant's criminal prosecution during the period he was at Guantanamo, for the CSRT process and the military commission prosecution.

(U) Third, the defendant's complete failure to assert his right to a speedy trial until the present Speedy Trial Motion weighs heavily against his claim. He could easily have sought a trial during the nearly six years that he was a fugitive (when he demonstrably knew about the Indictment), but he did not — for obvious and self-serving reasons. Later, even when he had a

chance to assert his rights while in United States custody – for example, when he was represented by multiple lawyers and he was filing submissions in both the military commission proceedings and federal court – the defendant failed to express any interest in a speedy criminal trial (where he still potentially faced the death penalty). Under Barker and Doggett, such a tardy and opportunistic invocation of the right to a speedy trial is "entitled to strong evidentiary weight," Barker, 407 U.S. at 531-32, and "weigh[s] heavily" against the defendant, Doggett, 505 U.S. at 653.

(U) Finally, the defendant has not, and cannot, establish prejudice within the meaning of Barker arising from the delay. Although pretrial detention may be relevant to a speedy trial motion, it requires a defendant to show a causal relationship between the criminal charges he seeks to dismiss and that detention. Here, the defendant has not, and cannot, show that causal connection, as the fact that he was indicted in and of itself had no bearing on whether he was detained as part of the CIA's RDI Program, let alone subjected to EITs. Nor can the defendant prevail on his claim of trial prejudice. There is no basis for presuming such prejudice here, in light of both the fact that the other Barker factors support the Government and the

nature of the proof. And the defendant has not identified any particular way in which he was actually prejudiced that could not be remedied through something short of the "unsatisfactorily severe remedy of dismissal." Barker, 407 U.S. at 522. In many ways, the passage of time in this case, as in many criminal cases, has harmed the Government, because the Government bears the burden of proof.

(U) In short, properly understood, all four of the Barker factors support the Government's argument in this case.

(U) Where the Barker factors cut in this manner, courts have routinely denied speedy trial motions, even where the length of the relevant delay was longer than it was in this case. See, e.g., Loud Hawk, 474 U.S. at 315-14 (delay of 90 months does not violate speedy trial guarantee when the defendants' demand for a speedy trial was opportunistic, when the reason for the delay was valid, and where the defendants invoked only the generic "possibility of prejudice"); Lane, 516 F.2d at 1078-79 (delay of 58 months does not violate speedy trial guarantee when the defendant's demand for a speedy trial was opportunistic, when much of the reason for the delay was valid, and where the defendant "cites no specific prejudice to himself from the delay"); Stone, 510 F. Supp. 2d at 341-43 (delay of up to 14

years does not violate Speedy Trial Clause where, among other things, the defendant failed to demand a speedy trial and failed to show "actual prejudice"); see also supra pp. 32-33 (citing additional cases).

(U) Comparison to Barker itself is instructive – indeed, the Supreme Court's denial of the defendant's speedy trial claim there all but compels denial of the claim here. There, as here, the record made clear that the defendant "did not want a speedy trial" and that the "prejudice was minimal." Barker 407 U.S. at 534. But there the relevant delay – "well over five years" – was even longer than it is here. Id. at 533. And, most important, the reasons for the delay in Barker were patently weaker than the reasons here. The primary reason for delay there was the state's desire to prosecute a co-defendant first so that he could testify against the defendant in a subsequent trial. See id. at 516-17. Indeed, the Court expressly noted that "[o]nly seven months" of the more than five-year delay could be "attributed to a strong excuse, the illness of the ex-sheriff who was in charge of the investigation." Id. at 533-34. As discussed above, the reasons for the delay here are far more compelling than even that "strong excuse." In light of the Supreme Court's denial of the defendant's speedy trial claim in Barker, this Court should deny

the defendant's claim here.

(U) After long but legitimate delays, this case is ready to be tried. It should be. As the Supreme Court put it in its first case on the subject, the Speedy Trial Clause "is consistent with delays" – and "[i]t does not preclude the rights of public justice." Beavers, 198 U.S. at 87.

Respectfully submitted,

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