

UNPUBLISHED

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ABINGDON DIVISION**

UNITED STATES OF AMERICA

v.

SAMUEL STEPHEN EALY,

Defendant.

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Case No. 1:00CR00104

OPINION AND ORDER

By: James P. Jones
United States District Judge

Thomas J. Bondurant, Jr., and Anthony P. Giorno, Office of the United States Attorney, Roanoke, Virginia, for United States of America; Thomas R. Scott, Jr., Street Law Firm, Grundy, Virginia, and Thomas M. Blaylock, Roanoke, Virginia, for Defendant.

In this capital case, I deny the defendant's motions to dismiss the indictment, finding that the delay between the time of the alleged commission of the crimes and the indictment did not violate the defendant's right to speedy trial under the Sixth Amendment or right to due process under the Fifth Amendment.

I. Procedural Background.

A Superseding Indictment was handed down on February 15, 2001, charging the defendant and a co-defendant, Walter Lefight Church, with various federal crimes related to the killings of Robert Davis, Una Davis, and Robert Hopewell on April 16,

1989. Defendant Ealy has moved to dismiss the Superceding Indictment against him, arguing that the delay of more than ten years between the alleged commission of the crimes and the indictment violates his Sixth Amendment right to a speedy trial and his Fifth Amendment right to due process. For the reasons stated below, I will deny these motions.

II. Sixth Amendment.

In *United States v. MacDonald*, 456 U.S. 1, 6 (1982), the Supreme Court held that the right to a speedy trial does not attach until a formal criminal charge is brought.

This is so because of the interests the Sixth Amendment is designed to protect:

The speedy trial guarantee is designed to minimize the possibility of lengthy incarceration prior to trial, to reduce the lesser, but nevertheless substantial, impairment of liberty imposed on an accused while released on bail, and to shorten the disruption of life caused by arrest and the presence of unresolved criminal charges.

Id. at 8. Thus, a claim of undue pre-indictment delay cannot be brought under the Sixth Amendment, but may be brought under the Fifth Amendment Due Process clause. *See id.* at 7. Therefore, the defendant's motion under the Sixth Amendment will be denied.

III. Fifth Amendment.

The test to determine whether a defendant's due process rights have been violated by pre-indictment delay has two parts. *See Howell v. Barker*, 904 F.2d 889, 895 (4th Cir. 1990). First, the burden is on the defendant to prove that the delay has caused him actual prejudice. *See id.* If actual prejudice is shown, the court must then balance that prejudice against the government's justification for the delay. *See id.* The central question in the balancing test is whether the government's actions violate "fundamental conceptions of justice or the community's sense of fair play and decency." *Id.* (internal quotations and citations omitted).¹

In his brief in support of his motion, the defendant argued that he will suffer actual prejudice by the delay because of the unavailability of a witness for the defense, Ruby Powers. However, at oral argument, the government represented to the court that Powers had been located and subpoenaed to appear for the trial. Therefore, Ealy's

¹ The government contends that the test also requires the defendant to prove that the delay was purposed "solely 'to gain tactical advantage over the accused.'" *United States v. Lovasco*, 431 U.S. 783, 795 (1977) (quoting *United States v. Marion*, 404 U.S. 307 (1971)). However, the Fourth Circuit has expressly rejected the requirement to prove improper prosecutorial motive in pre-indictment delay due process analysis. *See Howell*, 904 F.2d at 895. The Fourth Circuit has recognized that it has adopted a minority position in this regard, but nonetheless has not overruled *Howell*. *See Jones v. Angelone*, 94 F.3d 900, 905 (4th Cir. 1996). The government cites to an unpublished Fourth Circuit opinion in support of its argument for this requirement. *See United States v. Hakaj*, No. 87-5035, 1988 WL 25290 (4th Cir. March 21, 1988) (unpublished). Not only is this case unpublished, and therefore not binding precedent, but it predates the clear statements of the test in *Howell* and *Jones*.

argument of actual prejudice based on the unavailability of a witness is moot.

The defendant Ealy also argues that if I deny his separate motion to strike the death penalty, he will be prejudiced as a matter of law because he would not have been subject to the death penalty but for the delayed indictment. Although I have not ruled on the defendant's motion to strike the death penalty, I find that the defendant cannot show actual prejudice at this stage of the case regardless of my decision as to the applicability of the death penalty.

The Fourth Circuit has emphasized that the defendant's burden to show actual prejudice is heavy. *See Jones*, 94 F.3d at 907-08. The defendant must establish actual, not speculative prejudice. *See id.* at 907. At this point in the case, Ealy's prejudice is only speculative. First, I have not made a decision as to whether the government will be allowed to seek the death penalty against Ealy under the current Superseding Indictment. Furthermore, even if I were to allow the government to seek the death penalty, the jury may choose not to impose it. Therefore, the defendant can prove only a potential for prejudice, not actual prejudice as is required by the law. As such, the defendant has not met his burden to establish actual prejudice, and his motion to dismiss the indictment based on Fifth Amendment due process will be denied.²

² Because the defendant has not shown actual prejudice, the balancing test cannot be applied.

IV. Conclusion.

For the foregoing reasons, it is **ORDERED** that the defendant Ealy's Motion to Dismiss Fifth Amendment Due Process Clause (Doc. No. 56) and Motion to Dismiss Sixth Amendment Right to Speedy Trial (Doc. No. 57) are denied.

ENTER: June 19, 2001

United States District Judge