

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

UNITED STATES OF AMERICA

v.

EDWARD DENNIS JONES

*Defendant.*

CASE No. 6:14-cr-00015

MEMORANDUM OPINION

JUDGE NORMAN K. MOON

This matter is before me upon the Defendant, Edward Dennis Jones, Motion to Dismiss Counts 1-4 and 7 of the Indictment (docket no. 261). For the reasons stated in this opinion, I will deny Defendant's motion. However, the Defendant does have the right to immediately appeal the denial of dismissal as concerning Count 1 due to double jeopardy grounds falling within the "collateral order exception" to the "finality rule." *Abney v. United States*, 431 U.S. 641, 662 (1977).

**I. Background**  
**a. EDVA Conspiracy**

On October 9, 2012, in the Eastern District of Virginia ("EDVA"), the Defendant was charged in a one count superseding information with conspiring to distribute more than five kilograms of cocaine from July 2012 to August 22, 2012. This charge arose out of a DEA investigation using a confidential informant from Richmond. The informant, posing as a multi-kilogram dealer of cocaine, had a series of phone calls from Richmond, Virginia, with a known cocaine trafficker named Alejandro Martinez-Mata for the fictitious purpose of selling Martinez-Mata multiple kilograms of cocaine. Over the course of the next three weeks, the informant met

with Martinez-Mata and his associate, Roberto Sanchez-Roque at a restaurant in Danville, Virginia. During the meeting, Martinez-Mata advised the informant that he knew of an individual who would be interested in purchasing large amounts of cocaine. That person was the defendant. The parties ultimately agreed upon the purchase of seventeen kilograms of cocaine at a price of \$30,000 per kilogram of cocaine. Martinez-Mata would act as a broker for the deal while the Defendant was to be the buyer.

On August 22, 2012, Martinez-Mata and Sanchez-Roque met the informant at a restaurant in Lynchburg, Virginia. From there, Sanchez-Roque and the informant proceeded to the Kirkley Hotel in Lynchburg where the deal was to be conducted. Martinez-Mata stayed behind. While Sanchez-Roque and the informant waited in the hotel parking lot, the Defendant arrived in a White Van carrying a large black duffel bag containing more than \$530,000.00 in cash. The Defendant, Sanchez-Roque, and the informant then walked to the hotel room where the deal was to be conducted. As the Defendant entered the room and began taking money out of the duffel bag, the police arrested the Defendant and Sanchez-Roque. A total of \$570,359.00 was recovered from the defendant. Martinez-Mata was subsequently arrested at a nearby shopping mall.

On October 10, 2012, the Defendant pled guilty to the one count conspiracy charge. Martinez-Mata and Sanchez-Roque pled guilty to the same conspiracy charge in separate informations. The Defendant was held accountable for seventeen kilograms of cocaine with a base offense level of 34. Two additional levels were added for possessing a firearm. The Defendant was offered the opportunity to cooperate with law enforcement and provide substantial assistance. He stated that he did not wish to cooperate. For this plea, the Defendant was sentenced to 135 months imprisonment. At his sentencing hearing, the AUSA advised the

defendant that there was an ongoing investigation in the WDVA into his drug trafficking and that future charges were possible.<sup>1</sup>

### **b. WDVA Conspiracy<sup>2</sup>**

Prior to his arrest on August 22, 2012 in Lynchburg, law enforcement in Lynchburg, Virginia, including the FBI Task Force, had been investigating the drug trafficking activities of the Defendant for years. Several witnesses had identified the Defendant as a major trafficker in cocaine in the Lynchburg area for over a decade. In addition, law enforcement had identified the Defendant being present at several undercover purchases of cocaine in 2010 and 2012. As the investigation proceeded after the Defendant's arrest, co-conspirators were identified that either supplied the Defendant with large amounts of cocaine, helped him distribute cocaine or regularly purchased cocaine from him. Many witnesses were interviewed and a number were called to testify before a federal grand jury investigating the Defendant's drug trafficking. The evidence will show that throughout the conspiracy, the Defendant obtained his cocaine from a variety of sources, including suppliers in North Carolina. The evidence will further show that the defendant was responsible for distributing more than 1,000 kilograms of cocaine over the course of more than a decade.

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<sup>1</sup> The Defendant admits to being advised of the continuous investigation. Def. Mot. to Dismiss 21 (“[T]he Government then announced at Mr. Jones’s sentencing hearing that its investigative and prosecutorial activities in the Western District would continue. . . .”).

<sup>2</sup> Throughout the term “WDVA conspiracy” rather than “WDVA alleged conspiracy” is only used to cut down on the unnecessary verbiage, however, the Defendant is innocent until proven guilty therefore any reference to the WDVA events are currently just alleged. Also, in his reply brief, the Defendant suggests that the Government’s use of the terminology “EDVA conspiracy” and “WDVA conspiracy” is artful pleading to make two separate conspiracies. While I will not speculate on the Government’s specific use of terminology, I have used these terms in this opinion only as labels to help organize the evidence for the totality of the circumstances inquiry to determine if the Government has carried its burden. *See e.g., United States v. MacDougall*, 790 F.2d 1135, 1147 (4th Cir. 1986) (labeling the conspiracies as the “Riley-Harvey organization” and the “Rhoad-Foy organization”); *United States v. Jones*, 162 F.3d 1157, at \*4 (4th Cir. 1998) (unpublished) (labeling the conspiracies as the “Florida Conspiracy” and the “Cracker Barrel Conspiracy”); *United States v. Manning*, No. 4:07-cr-81, 2008 WL 5100119, at \*5 (E.D.Va. Dec. 2, 2008) (labeling the conspiracies as the “Powers Conspiracy” and the “Smith Conspiracy”) *aff’d* No. 08-16, 2010 WL 236722 (4th Cir. Jan. 21, 2010)

On July 24, 2012, in the Western District of Virginia (“WDVA”), the Defendant was indicted, along with seven other co-conspirators, for conspiring to distribute more than five kilograms of cocaine during the time frame of September 1998 to August 2012. None of the seven co-conspirators were co-conspirators in the EDVA conspiracy. The named co-conspirators all received cocaine directly or indirectly from the Defendant or were subordinate to him in the drug organization. In addition to the conspiracy charge, the Defendant was also charged with three substantive drug transactions which occurred in 2010 and 2012. The Defendant was also charged with possession of a firearm by an unlawful user of a controlled substance. The firearm charge arose from a search warrant of the defendant’s home subsequent to his arrest on August 22, 2012.

## **II. Legal Standard**

The Double Jeopardy Clause guarantees that no person shall “be subject for the same offense to be twice put in jeopardy of life or limb.” U.S. Const. amend. V. The Fourth Circuit has held that “when a defendant puts double jeopardy in issue with a non-frivolous showing that an indictment charges him with an offense for which he was formerly placed in jeopardy, the burden shifts to the government to establish that there were in fact two separate offenses.” *United States v. Ragins*, 840 F.2d 1184, 1192 (4th Cir.1988); *see also United States v. Mackins*, 315 F.3d 399, 411 (4th Cir.2003) (holding that the defendant failed to make a non-frivolous showing of a double jeopardy violation because the defendant only generally referenced the previous trial transcript and failed to include the relevant portions, failed to offer any evidence in support of his double jeopardy claim, failed to argue the *Ragins* factors, and only relied upon the face of the two indictments). If the court finds that the defendant's double jeopardy objection is not

frivolous, then “the government must prove by a preponderance of the evidence that the indictments refer to two separate criminal agreements.” *Ragins*, 840 F.2d at 1192 (“Because double jeopardy is not an element of the crime but rather a personal privilege, the government need only prove that there were in fact two separate offenses by a preponderance of the evidence.”). To protect a defendant from successive conspiracy prosecutions, the Fourth Circuit adopted the “totality of the circumstances” test:

Under this test the court is to consider five factors in assessing the validity of a double jeopardy claim lodged against successive conspiracy charges: (1) the time periods covered by the alleged conspiracies; (2) the places where the conspiracies are alleged to have occurred; (3) the persons charged as co-conspirators; (4) the overt acts alleged to have been committed in furtherance of the conspiracies, or any other description of the offenses charged which indicate the nature and scope of the activities being prosecuted; and (5) the substantive statutes alleged to have been violated.

*Ragins*, 840 F.2d at 1188; *see also United States v. MacDougall*, 790 F.2d 1135, 1144 (4th Cir.1986). In applying the totality of the circumstances test, the court should adopt “a flexible application of the test rather than a rigid adherence.” *MacDougall*, 790 F.2d at 1144. The double jeopardy conspiracy cases within the Fourth Circuit establish that no one factor is determinative, and that some overlap between the two alleged conspiracies in terms of time periods, geographical locations, coconspirators, overt acts, or substantive statutes does not preclude a determination that the defendant was involved in two separate conspiracies. *See United States v. Jones*, 162 F.3d 1157 (4th Cir.1998) (unpublished) (affirming the district court's finding of two separate conspiracies even though both conspiracies involved the same time period, the same geographical location, and the same coconspirators because the second conspiracy had a different goal and did not constitute “the entirety of the agreement” alleged in the first conspiracy); *United States v. Hoyte*, 51 F.3d 1239, 1249 (4th Cir.1995) (affirming the district

court's finding of two separate conspiracies even though the time period of the second conspiracy included the time period of the first conspiracy, both conspiracies involved drug sales in the Rockland Avenue area of Charlottesville, and both conspiracies even shared an overt act, because the two conspiracies involved different coconspirators and the first conspiracy involved a territory sharing agreement between competitors and the second conspiracy involved acquiring and selling cocaine base); *United States v. McHan*, 966 F.2d 134, 137-39 (4th Cir.1992) (finding that the defendant was involved in two separate conspiracies even though both conspiracies had the same coconspirators and involved the purchase of marijuana in South Texas and its transportation to, and subsequent distribution in, Murphy, North Carolina, because the 1984-1986 conspiracy had a broader scope and organizational structure than the 1988 second conspiracy, and there was a true break between the two conspiracies); *MacDougall*, 790 F.2d at 1141-49 (holding that even though the two organizations involved the same personnel, shared the same locations, occurred during the same time period, and involved the same joint ventures, they were two separate organizations and two separate conspiracies because there were separate agreements, different management structures, and the two organizations pursued primarily independent ventures); *but see United States v. Jarvis*, 7 F.3d 404 (4th Cir.1993) (finding that the two alleged conspiracies were in actuality one conspiracy because the time periods overlapped, the places where the conspiracies were formed and carried out were the same places, the coconspirators were the same for both conspiracies, the overt acts alleged were the same for both conspiracies, and both indictments charged the defendant with the same substantive statute). Denial of a defendant's motion to dismiss on double jeopardy grounds falls within the “collateral order exception” to the “finality rule,” and therefore, it is subject to immediate appeal. *Abney v. United States*, 431 U.S. 641, 662 (1977).

### **III. Double Jeopardy Factor By Factor Analysis**

As explained below, the Defendant has made a non-frivolous showing concerning Double Jeopardy, however, the Government has proven “by preponderance of the evidence that the indictments refer to two separate criminal agreements.” *Ragins*, 840 F.2d at 1192.

#### **a. Time Period Covered**

According to the charging documentation, the EDVA conspiracy allegedly occurred for approximately one month, from July 2012 to August 22, 2012. However, the major act of the conspiracy concerned a single drug transaction that occurred on August 22, 2012 at the Kirkley Hotel in Lynchburg, Virginia. The WDVA conspiracy allegedly occurred over a fourteen year span from September 1998 until August 2012. Therefore, it is clear that the WDVA charged conspiracy “completely embraced the time period covered by the” EDVA conspiracy. *United States v. Jarvis*, 7 F.3d 404, 411 (4th Cir. 1993). However, the Fourth Circuit has held that this is not determinative. *See United States v. McHan*, 966 F.2d 134, 138 (4th Cir. 1992); *United States v. Hoyte*, 51 F.3d 1239, 1246 (4th Cir. 1995) (no Double Jeopardy violation even though “the time period of the second conspiracy. . . included the first conspiracy”); *see also United States v. Jones*, 162 F.3d 1157 (4th Cir. 1998) (unpublished).

Therefore, the overlapping time frame in this case, while important, does not resolve the current issue.

#### **b. Geographic Area**

The second factor involves the location of the conspiracies. While the EDVA conspiracy occurred a little longer than a month, the significant transaction occurred at Kirkley Hotel in

Lynchburg, Virginia. The acts leading up to this transaction occurred in both the Western and Eastern District of Virginia. The WDVA conspiracy, as the Government alleges the evidence will show, occurred in the areas surrounding Lynchburg, Virginia while also involving North Carolina and other areas inside the Western District, such as Danville. Therefore, it can be determined that the EDVA conspiracy took place, at least on August 22, 2012, in the same place as the WDVA, within the boundaries of Lynchburg, Virginia. *Jarvis*, 7 F.3d at 411.

However, the Fourth Circuit has found no violation of the Double Jeopardy Clause even when the second conspiracy charged involved the sale of drugs in the same geographic area as the first conspiracy charged. *See e.g., Hoyte*, 51 F.3d at 1246 (determining that two conspiracies existed in similar geographic area); *MacDougall*, 790 F.2d at 1148 (4th Cir. 1986) (same).

Therefore, the second factor does not carry much weight in the present inquiry. *MacDougall*, 790 F.2d at 1148 (“We, of course, have considered the three other factors in the five-part totality of the circumstances test, but do not find that they bear as heavily on the ultimate determination of whether there were one or more conspiracies.”).

### **c. Co-Conspirators**

The third factor considers the persons charged as co-conspirators. Although the Defendant was the only person charged in his indictment for the EDVA conspiracy, the Fourth Circuit has made clear that the inquiry does not end there. Specifically, the Fourth Circuit stated that a court’s “examination of the conspiracy’s human scope need not be so restricted.” *Jarvis* 7 F.3d at 411. Furthermore, the Fourth Circuit has stated that the court should look at “the persons *acting* as co-conspirators. *Id.*; *see also MacDougall*, 790 F.2d at 1135. Therefore, an extensive inquiry into the persons acting in each conspiracy must be analyzed. Furthermore, there is no

rigid formula for determining at what level of overlap two conspiracies become one. Rather the issue is whether the evidence of overlapping personnel establishes a single conspiratorial scheme. *MacDougall*, 790 F.2d at 1145.

In the EDVA conspiracy, the Defendant was acting with two individuals, whom were charged in separate informations: Martinez-Mata and Sanchez-Roque. In the WDVA, the Defendant was acting with eight charged individuals and numerous other uncharged individuals, including Martinez-Mata and Sanchez-Roque.<sup>3</sup>

While each conspiracy, at best, involved the Defendant, Martinez-Mata, and Sanchez-Roque, this is not enough to determine that all the activity was a result of a single conspiracy. *See e.g., United States v. Jones*, 162 F. 3d 1157, \*4 (4th Cir. 1998) (unpublished); *see also United States v. DeFillipo*, 590 F.2d 1228, 1234 n. 7 (2d. Cir.) (no double jeopardy violation where one indictment named seven persons, the other six, and four overlapped), *cert. denied* 442 U.S. 920 (1979); *United States v. Booth*, 673 F.2d 27, 29 (1st Cir.) (substantially different personnel where ten defendants were common to indictments alleging twenty-four and nineteen defendants, respectively), *cert. denied*, 456 U.S. 978 (1982).. In *Jones*, the Fourth Circuit noted that although both conspiracies involved three of the same individuals the conspiracies had different defendants as well as other unindicted co-conspirators. *Id.* In this case, the WDVA has at least eight unique individuals to the conspiracy and others whom have not been indicted. Therefore, the “conspiracies involved different individuals.” *Id.*

In addition, the overlap of the individuals do not show a single conspiratorial scheme. In

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<sup>3</sup> Sanchez-Roque testified before the WDVA grand jury concerning transactions that occurred between 2011 and 2012. However, Sanchez-Roque does not seem to be in the capacity of the broker that he was in the EDVA conspiracy.

this case, no evidence shows that the individuals were working together to further one conspiracy. *MacDougall*, 790 F.2d at 1146. Instead, the EDVA conspiracy seems to be a separate joint venture for the Defendant to buy a significant amount of cocaine from a different outlet, albeit a fake source, while the WDVA has been a continuous system for him to complete his alleged criminal enterprise over an extended period of time. If anything, this case presents a situation where the Defendant entered into another existing conspiracy headed through the informant along with Martinez-Mata and Sanchez-Roque. Therefore, this case presents an overlap of two separate conspiracies where the distribution chains became acquainted with one another and decided to pool the risk while cooperating with one another. This “cooperation [and] pooling of risk. . . over a prolonged period of time are not inconsistent with a finding of independent conspiracies.” *Id.* at 1147.<sup>4</sup>

#### **d. Nature and Scope**

In addition to the co-conspirators, the fourth factor also bears heavy on the ultimate determination of this case. Under the fourth factor, the court considers “the overt acts alleged to have been committed in furtherance of the conspiracies, or any other description of the offenses charged which indicate the nature and scope of the activities being prosecuted.” *Ragins*, 840 F.2d at 1188; *see also United States v. MacDougall*, 790 F.2d 1135, 1144 (4th Cir.1986).

In this case, the nature and scope of the alleged conspiracies are vastly dissimilar. The EDVA conspiracy concerned a single drug transaction for seventeen kilograms of cocaine. This event, including the planning, occurred for approximately a month prior to the failed transaction.

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<sup>4</sup> At the hearing, the Defendant suggested that the Government’s response to a co-defendant’s request to sever (docket no. 166) shows that this case concerns one conspiracy with different distribution chains. However, as discussed above, I have found that this case presents distribution chains of two separate conspiracies coming together for this transaction rather than one conspiracy having different distribution chains. *See MacDougall*, 790 F.2d at 1146–47.

The WDVA conspiracy, on the other hand, concerns, according to the Government, over 1,000 kilograms of cocaine during a fourteen year period. *United States v. Manning*, No. 4:07-cr-81, 2008 WL 5100119, at \*5 (E.D.Va. Dec. 2, 2008) (finding that one conspiracy “is a vast conspiracy involving numerous co-conspirators over a significant period of time” as opposed to the other) *aff’d* No. 08-16, 2010 WL 236722 (4th Cir. Jan. 21, 2010). The WDVA conspiracy also concerns numerous individuals as compared to the three involved in the EDVA conspiracy. *Id.* (“The Smith conspiracy, on the other hand, is a significantly smaller conspiracy that involved only Manning and Smith.”).

Therefore, the broader scope and organizational structure of the WDVA conspiracy shows that it is a separate and distinct conspiracy. *McHan*, 966 F.2d 1135, 1138 (4th Cir. 1986).

#### **e. Substantive Statutes Allegedly Violated**

The fifth, and final, factor considers the substantive statutes allegedly violated. Because this factor has little bearing on the outcome of this case, it can be disposed of quickly. In both the EDVA and WDVA conspiracies, the Defendant has been charged with violation of 21 U.S.C. § 846. However, these identical charges do not mandate a finding of one conspiracy. *See e.g.*, *Hoyte*, 51 F.3d at 1246 (no double jeopardy violation despite identical alleged statutory violations); *McHan*, 966 F.2d at 138 (same).

In addition, the Defendant is also charged with three substantive distribution charges in violation of 21 U.S.C. § 841 and user in possession of a firearm in violation of 18 U.S.C. § 922(g)(3). *Jones*, 162 F.3d 1157, at \*4 (recognizing the importance of additional charges in addition to the same violation in each conspiracy).

#### **IV. Prosecutorial Vindictiveness and Pre-Indictment Delay**

In addition to dismissal on ground for double jeopardy, the Defendant also requests that Counts 2-4 and 7 should be dismissed on the grounds of prosecutorial vindictiveness and pre-indictment. Because the Defendant has not provided sufficient evidence to carry the burden on these claims, I will deny the Defendant's motion.

##### **a. Prosecutorial Vindictiveness**

A claim of vindictive prosecution “is not a defense on the merits to the criminal charge itself, but an independent assertion that the prosecutor has brought the charge for reasons forbidden by the Constitution.” *United States v. Armstrong*, 517 U.S. 456, 463 (1996). Because this analysis concerns Executive Powers, courts begin with the presumption that the government has properly exercised its constitutional responsibilities to enforce the nation's law. *Id.* at 464 (quoting *Heckler v. Chaney*, 470 U.S. 821, 832 (1985)). In order to overcome this presumption, the Defendant must produce “clear evidence to the contrary.” *Id.* In this case, the Defendant has failed to produce such evidence. Specifically, the Defendant only points to the fact that he is being prosecuted for failing to cooperate in the EDVA. However, this is completely undermined by the fact that the Defendant was aware he was being investigated in the WDVA prior to his plea in the EDVA. Def. Mot. to Dismiss 21.

##### **b. Pre-Indictment Delay**

In order to establish a due process violation for pre-indictment delay, a defendant must show not only actual prejudice, but also that the government deliberately caused the delay for tactical gain. *United States v. Gouveia*, 467 U.S. 180, 192 (1984); *see also United States v. Marion*, 404 U.S. 307, 324 (1971). The Fourth Circuit has clarified this standard. *Howell v.*

*Baker*, 904 F.2d 889, 894 (4th Cir. 1990). In *Howell*, the Fourth Circuit held that a claim of pre-indictment delay may only succeed after a threshold showing of actual prejudice. *Id.* Only after this showing, the Court must balance the Defendant's prejudice against the Government's proffered justification for delay. *Id.*

In this case, the Defendant has failed to make the threshold showing of actual prejudice. As a claim of actual prejudice, the Defendant suggests that the Government's "tactical choice to delay the indictment" until after securing the plea in the EDVA prejudices his ability to testify on his own behalf. Def. Mot. to Dismiss 22–23. However, this argument fails. If any prejudice has resulted, it was based on the Defendant's own actions. No one required the Defendant to plead guilty. Additionally, he agreed that he was freely and willingly pleading guilty in the EDVA. Furthermore, the Defendant was made aware at his sentencing hearing that the WDVA investigation would continue. Def. Mot. to Dismiss 21.

## **V. Conclusion**

As discussed above, the Defendants Motion to Dismiss the Indictment concerning Count 1 is denied because two factors weigh heavily in determining that two conspiracies exist: (1) the persons charged as co-conspirators and (2) the nature and scope of the activities. However, the Motion itself cannot be deemed to be frivolous, therefore, the Defendant has the right to an interlocutory appeal concerning this decision as to Count 1. *Abney v. United States*, 431 U.S. 651, 662 (1977). The Defendants motion is also denied to dismiss Counts 2-4 and 7 due to prosecutorial vindictiveness and pre-indictment delay.

Entered this 4<sup>th</sup> day of December, 2015.

  
NORMAN K. MOON  
UNITED STATES DISTRICT JUDGE