

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

<b>UNITED STATES OF AMERICA )</b>	<b>Case No. 7:00CR00123</b>
<b>v. )</b>	<b><u>MEMORANDUM OPINION</u></b>
<b>BRIAN WENDELL SMITH, )</b>	<b><u>AND ORDER</u></b>
<b>Defendant. )</b>	<b>By: Samuel G. Wilson</b>
	<b>Chief United States District Judge</b>

The government arrested the defendant, Brian Wendell Smith (“Smith”), on an arrest warrant issued by a United States Magistrate Judge on a criminal complaint charging Smith with impersonating a federal marshal in violation of 18 U.S.C. § 912 and took him before that magistrate judge for an initial appearance. The court failed to conduct a preliminary examination within ten days as required by 18 U.S.C. § 3060(d) and Rule 5 of the Federal Rules of Criminal Procedure. Smith moved to dismiss the complaint and to discharge him from custody. That same day, the grand jury returned an indictment against Smith. The court concludes that the return of that indictment moots Smith’s motion.

**I.**

On November 16, 2000, the United States filed a complaint against Smith charging him with impersonating a federal marshal in violation of 18 U.S.C. § 912. The government arrested him that same day and brought him before a United States Magistrate Judge. The magistrate judge entered a temporary order of detention but failed to set a preliminary examination date. In the magistrate judge’s absence, on November 20, 2000, another judge of this court appointed counsel to represent Smith, conducted a bond hearing, and set bond at \$25,000. Smith was unable to post that bond. Smith did not ask for, however, and the court did not set a preliminary examination. Instead, on December 12, 2000, coincidentally the same date that the grand jury returned an indictment against him, Smith moved to dismiss the complaint and for the court to

discharge him from custody. Smith now has converted his motion to dismiss the complaint to a motion to dismiss the indictment, and the grand jury has returned a superseding indictment.

## II.

With certain limited inapplicable exceptions, a defendant who is in custody on a complaint is entitled to a preliminary examination within ten days following his initial appearance. See 18 U.S.C. § 3060(b)(1); Fed. R. Crim. P. 5(c). The court is required to discharge from custody a defendant held on a complaint unless that prescribed time limit is met. See 18 U.S.C. § 3060(d). The discharge is “without prejudice, however, to the institution of further criminal proceedings against [the defendant] upon the charge upon which he was arrested,” id., and noncompliance is mooted by the finding of probable cause through the return of an indictment. See United States v. Rogers, 455 F.2d 407, 412 (5th Cir. 1972) (stating that § 3060(d) only applies to “detention prior to indictment,” and a defendant held beyond the prescribed time limit is not entitled to discharge if a grand jury returns an indictment before the court orders that discharge); see also United States v. Aranda-Hernandez, 95 F.3d 977, 979 (10th Cir.1996); United States v. Assenza, 337 F. Supp. 1057, 1061 (M.D. Fla. 1972). It follows that the return of the indictment against Smith mooted the basis for Smith’s motion, and, accordingly, the court denies his motion.

## III.

For the foregoing reasons, it is **ORDERED** and **ADJUDGED** that Smith’s motion to dismiss and for discharge is **DENIED**.

**ENTER:** This \_\_\_\_\_ day of January, 2001.

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CHIEF UNITED STATES DISTRICT JUDGE