IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

Plaintiff,

v.

RAUL OLGUIN,

Defendant.

REPORT AND RECOMMENDATION

00-cr-47–1-wmc

REPORT

On May 12, 2000, this prosecution commenced against defendant Raul Olguin with the filing of a criminal complaint, *see* dkt. 1, followed on May 18, 2000 by the grand jury's indictment of Raul Olguin and his brother, Ismael L. Olguin, Sr. Ismael Olguin was arrested and ultimately pled guilty on August 9, 2000, *see* dkt. followed by a two-year prison sentence and deportation. Raul eluded arrest and was believed to have fled back to Mexico. The United States Marshals Service kept its fugitive file open on Raul Olguin; earlier this year, it located him in Memphis, Tennessee and brought him before this court for arraignment on April 17, 2014. Jury selection and trial are set for August 4, 2014.

Now before the court for report and recommendation is Olguin's motion to dismiss the indictment because of prejudicial pretrial delay. *See* dkt. 25. For the reasons stated below, I am recommending that this court deny Olguin's motion.

On June 13, 2014, this court held an evidentiary hearing on the dismissal motion. Having heard and seen the witnesses testify, and having considered the exhibits submitted by the parties, I find the following facts:

FACTS

In 2000, the Division of Narcotics Enforcement of the Wisconsin Department of Justice was working with local law enforcement agencies to investigate a group of suspected cocaine traffickers who worked at two Abbyland meat factories in the Abbotsford area (between Chippewa Falls and Wausau). The suspects included two brothers, Raul Olguin and Ismael Olguin, Sr.[1] As part of this investigation, DNE Special Agent Darren Hynek, acting undercover, made three hand-to-hand cocaine purchases from the brothers on December 29, 1999, January 25, 2000 and February 1, 2000. Agent Hynek had a videocamera inside his car that recorded the second and third transactions. He wore a body wire that audiorecorded all three transactions. Agent Hynek also has an independent recollection of this investigation for two reasons: first, he was surprised that he was able to buy such a large amount of cocaine from Raul and Ismael in his first deal; second, the cocaine they sold him had a unique, pungent odor that almost made Agent Hynek sick.

In an attempt to learn where Raul and Ismael were obtaining their cocaine, on February 9, 2000, the agents surreptitiously placed a GPS tracking device on Raul's van. (This van was registered both to Raul and his wife, Elvia Reyes, and this information was contained in Agent Hynek's subsequent written report). In 2000, the technology for GPS devices did not allow remote tracking in real time; instead, the device simply recorded where it had been, then the agents would have to physically retrieve the device to download the recorded information. That same day, agents watched Raul drive his other vehicle (a pickup truck) to a big box store. They directed a police officer to perform a pretextual traffic stop on Raul to stall him while they

[1] To differentiate between the brothers, I will refer to them by their first names in the fact section.

installed their GPS device on his van. During the traffic stop, Raul provided his name and a date of birth of May 18, 1975. Raul told the officer that he was a Mexican citizen illegally in the United States, and that he was planning on driving back to Mexico the next day.[2] Apparently, February 9, 2000 was the last time law enforcement agents ever saw Raul or his van. They never recovered their GPS device.

The wider investigation continued until May 15, 2000, when the agents performed a dragnet to sweep up all of the Abbyland drug traffickers at once. In anticipation of this group take-down, on May 12, 2000, Agent Hynek obtained separate criminal complaints and arrest warrants for Raul and Ismael. On May 15, 2000 the agents found and arrested Ismael, but they did not find Raul. Following his arrest, Ismael made a statement to the agents; he told them that Raul had, in fact, left for Mexico.

On May 15, 2000, the grand jury returned a four-count indictment against Raul and Ismael. Ismael was detained pending trial. On July 31, 2000, Ismael signed a written plea agreement with the government on which the parties crossed out the "cooperation paragraph that would have required "complete and truthful testimony" from Ismael and did not exclude Raul from its scope. *See* dkt. 9 at 1-2. On August 9, 2000, Ismael pled guilty. As part of his presentence investigation report, Ismael prepared and signed a written statement in which he admitted that he and Raul and sold cocaine three times to an undercover agent. Ismael also provided information about his family, which no one had any reason–or ability–at the time to question. Ismael named Pilar Olguin-Ferniza as his father, Engracia Vega-Rocha as his mother,

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[2] The officer did not arrest Raul upon learning this because that would have ended the investigation before the agents had a chance to learn Raul's cocaine source.

and seven siblings: Maria Auzilidora, José Pilar Olguin, Raul Enriqué Olguin, Ramone Olguin, Rogelio Olguin, Maria De Los Remedios and Maria Guadalupe.

On October 19, 2000, the court sentenced Ismael to 24 months' incarceration. After Ismael served this sentence he was deported back to Mexico.

Following Raul's indictment in May 2000, the United States Marshals Service (USMS) assumed responsibility for locating and arresting Raul. Deputy Randy Brining handled Raul's case from 2000 to 2008, when Deputy Brining retired. In 2014, Deputy Brining recalls discussing the case with Agent Hynek in 2000; his recollection is that he never received a copy of Agent Hynek's case file on Raul. Agent Hynek told Deputy Brining that Raul was believed to have returned to Mexico. All Deputy Brining had to work with was Raul's name and date of birth, which Raul had self-reported, which was unverified. No state or federal agent had any other documentation or information about Raul: no photograph, no fingerprints, no identifying scars, marks or tattoos. Deputy Brining entered Raul's federal arrest warrant into the National Crime Information Center (NCIC), then checked regularly thereafter for hits; he got none. If Raul had been stopped by law enforcement agents or officers anywhere in the United States for any purpose and the agents ran his name and DOB through NCIC, they would have learned of this court's arrest warrant and presumably taken him into custody.

Deputy Brining did not contact INTERPOL: according to Deputy Brining, approaching INTERPOL for assistance locating Raul in Mexico was technically an option but he did not have the information that would meet INTERPOL's criteria even to begin a search. Further, as a practical matter it would have been pointless. INTERPOL in Mexico focused on high profile cases involving murders and drug cartel. Even if the USMS deputies stationed in Mexico were willing to assist Deputy Brining, he had virtually no information to give them: he did not know

if the name and date of birth that Raul had provided during the February 2000 traffic stop was correct; he did not know what part of Mexico to look in. From Agent Brining's perspective (in 2000, with 17 years of experience), it would have been pointless to seek assistance from INTERPOL due to the lack of information about Raul. Deputy Brining did not read Ismael's presentence investigation report because he was not allowed to do so. Deputy Brining did not attempt to interview Ismael to ask where Raul was. He did not speak with any other relatives of Raul's, including Elvia Rocha.

Deputy Brining periodically (that is, more often than yearly) ran Raul's name and DOB through EPIC (El Paso Intelligence Center), which was a repository of federal data banks that EPIC workers could search. EPIC would have shown any record of Olguin entering the United States from Mexico. In eight years, EPIC never got a hit on Raul Olguin. Deputy Brining would have attempted to learn whether Raul was reported to have crossed the border from the United States *into* Mexico, but such a request would have to be directed to a specific point of departure, then it would depend on whether that station had a computer system and whether the staff had made the entry. The records he did check did not reveal a point of departure. Facebook and other social media sites did not exist when Deputy Brining began searching for Raul, and he never checked Facebook or any similar site for information about Raul.[3] During the eight years that Deputy Brining was assigned Raul's case, Raul never contacted him to report that he wished to proceed with his criminal case in this district.

After Agent Brining retired in 2008, another deputy briefly had Raul's file, then Deputy Kent Halverson took over file in January 2009. According to Deputy Halverson, Raul presented

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[3] Facebook was created in 2004 and was made available to the public in September 2006. *See* gov. exh. 8.

a difficult fugitive case because the USMS had so little information to work with: all they had was the name of a Mexican national who was believed to have fled back to Mexico. Deputy Halverson nonetheless ran Raul's name and DOB through the databases available to him; he got no hits. So Deputy Halverson dropped the DOB from his inquiry and searched just for Raul Olguin; he followed up on the only hit he got from Iowa and sent the subject's photograph to Agent Hynek, who responded that this was not the correct Raul Olguin. Between 2009 and 2014, Raul Olguin never contacted Deputy Halverson to report that he wished to proceed with his criminal case in this district.

In 2013, Deputy Halverson decided to take a different approach. He accessed Ismael's case file and learned that Ismael had a wife. Further investigation revealed that Isamel's wife had dropped the surname Olguin and was going by Jolene Wannattee. Deputy Halverson began searching Facebook and found a page for Jolene Wannattee. (Deputy Halverson also found Facebook pages for several different "Raul Olguin"s, but none was the defendant in this case). On Wannattee's page, Deputy Halverson found reference to her son, Ismael Olguin, Jr. Deputy Halverson visited Ismael, Jr.'s Facebook page, which led him to Ismael (Sr.'s) Facebook page, on which Ismael reported that he was living in Memphis Tennessee, and that he had two brothers, Rogelio and José Pilar.

This led Deputy Halverson to the Facebook pages for these two brothers. Rogelio's page listed a brother named Enriqué. Deputy Halverson knew that Ismael had not identified a brother with that name, so he figured this must be either Raul or Ramone. Deputy Halverson ran a database check on Enriqué Olguin in Memphis Tennessee; this name was associated with an address at 4718 Given Street in Memphis; also associated with this address was a person named Elvia Reyes. Deputy Halverson recognized this name from the original 2000 Wisconsin

drug investigation, so he figured he was on the right track. Enriqué also reported on his Facebook page that he was married to Irene Reyes Rocha, which also was familiar. (Deputy Halverson's data base checks revealed that Elvia had used various names, including Irene and Rocha). Deputy Halverson printed some of the photographs from Enriqué's Facebook page and sent them to Agent Hynek. One of the pictures, dated 01/02/2010, showed four men together. *See* gov. exh. 7. Agent Hynek identified one of them as Raul, another as Ismael. (The third man is another brother, the fourth man is unknown).

Enriqué Olguin's Facebook page also mentioned a traffic accident on November 14, 2013; this led Deputy Halverson to obtain the police report of this incident. The police report did not mention Raul Olguin, but it contained a photocopy of a driver's license in the name of José Saldana, DOB 02/02/1973. The photograph on this license was the same person shown in the photographs of Enriqué Olguin on his Facebook page.[4] Deputy Halverson also sent the Saldana driver's license to Agent Hynek; Agent Hynek identified the person in the photograph as Raul Olguin. This phase of Deputy Halverson's investigation took several weeks to complete, given all of his other job responsibilities.

Deputy Halverson enlisted assistance in Memphis, and the USMS Fugitive Task Force tracked down a valid street address for Raul. On February 26, 2014, Deputy U.S. Marshals arrested Raul at 4225 Zaio, Memphis. His wife, Irene Reyes Rocha also was present. Homeland Security Agent Jason White interviewed Raul in Spanish at the scene. Raul twice denied that he was Raul Olguin, but finally admitted that he was. Agent White mentioned that Raul had some problems up in Wisconsin; Raul responded that he knew there was a drug-related warrant

[4] Deputy Halverson also determined that the residence address provided by "Saldana" did not exist. In other words, Raul was using a false name, a false address and a new date of birth.

for his arrest in Wisconsin. Raul's wife also was interviewed; she denied that her husband was the Raul Olguin wanted in Wisconsin, and she denied that they ever had lived in Wisconsin. The USMS learned that Elvia Reyes used six variations of her own name between 2000 and 2014.[5] They did not have all of this information at the time they began searching for Raul, but learned it during their search.[6]

After Raul was arrested on February 26, 2014, he was issued an FBI number and all of his aliases learned during the USMS were put into his file.

At this time–in July, 2014–the videos of Raul and Ismael's cocaine sales to Agent Hynek still exist. The Wisconsin DOJ still has the cocaine that Raul and Ismael sold Agent Hynek and the cocaine still has the pungent odor that Agent Hynek recognizes from the initial sale. Agent Hynek still recognizes Raul as the person who sold him cocaine three times in 1999 and 2000, and he has a "vague" direct recollection of the actual transactions.

No law enforcement agent at any level and no prosecutor at any level ever has attempted to delay the apprehension or the trial of Raul Olguin in this case.

[5] Elvia I. Reyes, Elvia Irene Rocha, Elvia I. Rocha-Reyes, Elvia Reyes, Elvia Irene Reyes and Irene Reyes Rocha, *see* gov. exh. 10.

[6] Raul also has put into the record a copy of a Shelby County, TN April 13, 2005 birth certificate for his daughter, which lists Elvia Reyes as the mother and Enriqué Olguin as the father; a 2007 lease in Memphis that was signed by Elvia Reyes and Enrique Olguin, a Shelby County food stamps application in the name of Enrique Olguin, a February 2014 bank statement in the name of Enrique Olguin-Vega, and a series of 2014 Memphis utility bill sent to Elvia Rocha-Reyes. *See* attachments to dkt. 26.

ANALYSIS

Pointing to the almost fourteen year gap between his indictment and arrest, Olguin argues for dismissal of the indictment against him on the ground that the government has violated his Sixth Amendment right to a speedy trial. *See Barker v. Wingo*, 407 U.S. 514 (1972) and *Doggett v. United States*, 505 U.S. 647 (1992). Olguin cites the presumptive prejudice caused by this delay and further contends that he has been actually prejudiced by the delay and that the government is more to blame for this delay than he is.

In *Barker*, the Court held that courts reviewing speedy trial claims were to review: (1) the length of delay; (2) the reason for the delay; (3) the defendant's assertion of his right to a speedy trial; and (4) the prejudice to the defendant. Absent a delay that could be deemed presumptively prejudicial, courts do not need to inquire into the other facts. *Id*. at 530. In determining whether a delay is presumptively prejudicial, a court must look at the "peculiar circumstances of the case." *Id*.

Generally, the extent of any prejudice to the defendant caused by a delay is determined by looking at: (1) preventing oppressive pretrial incarceration; (2) minimizing the defendant's anxiety and concern; and (3) the possibility of impairing the accused's ability fully to defend himself. *Id*. at 532. This third concern is the most important because a defendant's inability adequately to prepare his case skews the fairness of the entire system. *Id.* But the Court cautioned that these four factors have no talismanic power; they are to be considered in conjunction with other relevant factors as part of a "difficult and sensitive balancing process." *Id*. at 533.

The Court picked up this thread in *Doggett*, 505 U.S. 647, noting that impairment of a defendant's defense is the most difficult form of speedy trial prejudice to prove because time's erosion of exculpatory evidence and testimony rarely can be shown. *Id*. at 655. Obviously, the factors are weighed differently when dealing with a defendant who is not incarcerated and arguably unaware that he even faces charges. The Court stated that excessive delay presumptively compromises the reliability of a trial in ways that neither party can prove, or for that matter, identify. *Id.* at 656. Delays of more than one year between indictment and trial are generally presumed to be prejudicial. *Id*. at 652, n.1; *United States v. Oriedo*, 498 F.3d 593, 597 (7th Cir. 2007).[7] As the Court noted in a subsequent case, "*Barker v. Wingo* expressly rejected the notion that an affirmative demonstration of prejudice was necessary to prove a denial of the constitutional right to a speedy trial." *Moore v. Arizona*, 414 U.S. 25, 26 (1973).[8] Even so, "such presumptive prejudice cannot, by itself, carry a Sixth Amendment claim without regard to the other *Barker* criteria." Rather, presumptive delay is part of the mix of relevant facts and its importance increases with the length of delay. *Doggett,* 505 U.S. at 656.

This segued to the Court's consideration of how to factor the government's diligence into the mix. At one extreme, if the delay was caused by the government's need to track down a defendant who had gone into hiding and the government pursued him with reasonable diligence, then that defendant's speedy trial claim upon apprehension almost certainly would fail. At the

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[7] The defendant in *Oriedo* was arrested promptly following his indictment for crack trafficking, then was detained for 35 months before being tried. During this time the government superseded the indictment four times and the defendants received 20 continuances, many due to Oriedo's need to replace his attorney twice. 498 F.3d at 597-98. The court deemed the defendant responsible for much of the delay and found no Sixth Amendment violation. *Id.* at 601.

[8] *Moore* involved an incarcerated defendant whom the state declined to bring to trial in a timely fashion. *Id*. at 25.

other extreme, if the government intentionally held back its prosecution in order to gain some impermissible tactical advantage over a defendant, then the government's bad faith would present an overwhelming case for dismissal. Between these extremes is government negligence, which "still falls on the wrong side of the divide between acceptable and unacceptable reasons for delaying a criminal prosecution once it has begun." The prejudice presumed from government negligence compounds over time as the presumption of evidentiary prejudice grows. *Doggett v. United States*, 505 U.S. at 656-57.

The dissent in *Doggett* expressed alarm:

> Today's opinion . . . will transform the courts of the land into boards of law enforcement supervision. For the Court compels dismissal of the charges against Doggett not because he was harmed in any way by the delay between his indictment and arrest, but simply because the Government's efforts to catch him are found wanting. . . . Our function, however is not to slap the government on the wrist for sloppy work or misplaced priorities, but to protect the legal rights of those individuals harmed thereby. By divorcing the Speedy Trial Clause from all considerations of prejudice to an accused, the Court positively invites the Nation's judges to indulge in ad hoc and result-driven second guessing of the government's investigatory efforts. Our Constitution neither contemplates nor tolerates such a role.
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> 505 U.S. at 670-71 (Thomas and Scalia, JJ., and Rehnquist, C.J., dissenting).

But the Court in *Doggett* held otherwise: there is an inverse relationship between the amount of prejudice a defendant must establish and the length of the delay in trying him. One logically could infer that at least on some level, the Court's decision rests on the doctrine of repose, but despite asking the parties to brief this point in *Doggett*, the Court did not address it. *See* 505 U.S. at 660 & 660 n.1 (Thomas and Scalia, JJ., and Rehnquist, C.J., dissenting). *Doggett* seems to hold that there is a point on the graph where the post-indictment delay is so long that the presumption of prejudice becomes irrebuttable. The location of that point is influenced by

other salient factors, and, apparently, by the trial court's subjective notion as to how long is too long.

Between 2008 and 2013 the Court of Appeals for the Seventh Circuit has had occasion to apply the *Doggett* four-factor test several times, first in *United States v. Wanigashinghe,* 545 F.3d 595 (7th Cir. 2008), most recently in *Loera v. United States,* 714 F.3d 1025 (7th Cir. 2013), in which the court noted that

> Alas, the four-factor test (six-factor, if the fourth is replaced by its three subfactors) for a violation of the constitutional right to a speedy trial lacks the crispness of the Hand Formula.[9] But a usable compressed version is "the longer the delay and the more vigorous the defendant's demand to be tried speedily, the more reason the state must show for the delay and the less harm (of whatever type) to himslef the defendant need show."
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> 714 F.3d at 1032.

On the facts before it, the court went on to find

> With no prejudice from delay within the meaning given "prejudice" by *Doggett* and other cases (no prejudice in part because of the defendant's acquiescence in the delay, *see Doggett, supra,* 505 U.S. at 658) and no indication of any invidious or otherwise improper ground of or motive for protracted detention, there is no justification for vacating a conviction on constitutional speedy trial grounds, which has the effect of acquittal. The Speedy Trial Act, it is true, imposes much tighter (though still porous) deadlines. But it offsets them by allowing the judge to impose for their violation only the mild sanction of dismissal without prejudice, thus permitting retrial. Given the availability of the Act, there shouldn't be many cases in which federal defendants successful invoke the speedy trial clause.
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> 714 F.3d at 1032.

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[9] "Judge Learned Hand's famous three-factor test (the 'Hand Formula') for negligence: $B < PL$. B is the burden of taking the precaution that would have avoided the accident that injured the plaintiff, P is the probability of the accident if the precaution wasn't taken, and L is the expected loss to the victim if an accident occurred because the precaution had not been taken." *Loera*, 714 F.3d at 1031-32.

I will apply *Loera*'s streamlined *Doggett* test to this case later in this report, but first I will match this case up against a more factually similar case, *United States v. Wanigasinghe*, 545 F.3d 595 (7th Cir. 2008), also from this district. In *Wanigasinghe*, a grand jury in this district returned a bank fraud indictment in 1995 against the defendant, a native of Sri Lanka. The defendant left behind a trail of intentionally incorrect information about where he could be found, then left the country. He was discovered back in the United States over 11 years later, in 2007, and promptly arrested. The defendant then moved to dismiss the indictment for violation of his speedy trial right. This court denied that motion and the court of appeals upheld this decision. The court of appeals noted that "although common sense might indicate that a person who leaves the country to avoid prosecution should not be allowed to complain that he was not prosecuted quickly enough, the law, unfortunately, is not quite that simple." 545 F.3d at 597.

Noting the great length of the 11-year delay, the court in *Wanigasinghe* declared that the first questions to be answered were: what was the reason for the delay, and who was more to blame? The court noted that, at its most basic level, the reason for the delay was that Wanigasinghe had left the country. The defendant contended, however, that the government was at fault because it did not find him although he easily could have been found. The evidence adduced by the trial court, however, established that the defendant had provided deceptive information as to his whereabouts, so that the government could *not* have found him easily. The court of appeals accepted this finding "which favors a conclusion that [defendant] is more responsible for the delay than the government." 545 F.3d at 598.

So also with Raul Olguin. The only information available to the government, from Raul himself during the traffic stop and from Ismael following *his* arrest, was that Raul had returned to Mexico in February 2000. No information that was actually available to the government ever

contradicted that. We now know Raul was in the United States not later than 2005 when his daughter was born in Tennessee; perhaps Raul never left the United States at all, but just moved farther south. Either way, there was no way the USMS or any other federal agency could have known this, because Raul went under the name "Enriqué" Olguin–when it suited him–and "José Saldana when *that* name suited him, with different DOBs. Not so fast, contends Olguin: he says that he was living in Memphis under his "real name" and therefore could have been found, but this mischaracterizes the evidence.

Let's assume that Raul Olguin's "real" name could be "Enriqué." After all, as Olguin points out in his briefs, Ismael reported that this was Raul's *middle* name when Ismael provided information for his presentence investigation report (PSR). But no one involved in *searching* for Raul knew this.[10] Deputy Brining testified that he was not allowed to have access to defendant PSRs. Obviously, this court policy changed over time because Deputy Halverson accessed Ismael's PSR, but Deputy Brining cannot be negligent for not following up on a lead that was not accessible to him. As a result, the USMS only had the name "Raul Olguin" and the DOB that he had provided during the traffic stop. The deputies entered this information into NCIC, and they routinely checked EPIC and federal benefit programs using this information and they got nothing back.

Along these same lines, Olguin's submission of a lease, utility bills, bank statements and hard copy food stamp applications under the name Enriqué Olguin prove nothing. Even if he

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[10] This is as good a place as any to address and reject the suggestion that the government could have learned Raul's location by asking Ismael. First, Ismael's plea agreement had crossed out the cooperation paragraph, showing that the government had broached the topic but Ismael had declined. Second, after serving his sentence, Ismael was deported to Mexico, so there was no reason for anyone to think he would be available to provide information later. Finally, as demonstrated by the January 2, 2010 photograph of the brothers sharing a convivial holiday moment, Ismael *did* return to the United States, apparently illegally, and apparently did nothing to urge Raul to turn himself in. More on this below.

had signed these documents as *Raul* Olguin, there is no suggestion that any of this information would have been available in *any* data base, let alone a data base that could have been searched by the USMS. Keep in mind that Deputy Halverson *did* locate other men named Raul Olguin living in the United States, but was able to determine that they were not his target. It is not clear how Deputy Halverson could have located Raul in Memphis from the documents Raul has submitted. Further, there would have been no official photograph of Raul to access because he had obtained his driver's license under an alias, with a false address.

This segues to Raul's challenge to the adequacy of the government's search for him. As the Court made clear in *Doggett*, where the defendant had lived, worked and voted for six years in Virginia using the same name that the government knew, the government's "inexcusable oversights" in discovering this constituted "official neglect," which fell on the wrong side of the divide between acceptable and unacceptable reasons for delaying a criminal prosecution once it had begun. The longer the neglect continued, the less willing the Court was willing to tolerate it. *Doggett*, 505 U.S. at 656-57. Here, however, Raul Olguin's claim that the government neglected to search for him with sufficient diligence is unpersuasive. As just noted, the government did not have any ability to locate Raul through the information *he* had provided.

Olguin points out that there also was an evidentiary thread in Agent Hynek's file relating to his wife. That said, as with Raul/Enriqué, there is no evidence that the documents Olguin has submitted with Elvia/Irene Rocha/Reyes/Rocha-Reyes' name(s) on them were contained in any data base that the USMS could have searched. The searching deputies cannot be deemed negligent for having failed to have learned that Olguin's wife had signed these documents.

As a result, Olguin's assertion in his brief that the government "had all the information it needed to find Mr. Olguin by September of 2000" is incorrect. As noted in the facts, eventually Deputy Halverson broadened his search to include Facebook searches. As also noted in the facts, Facebook didn't even exist until 2004 and it wasn't available to the public until 2006. When Deputy Halverson started searching Facebook, he had to start at a tertiary level, with *Ismael*'s wife, who had switched back to her maiden name. Even then, the links that eventually led to Raul Olguin were circuitous and required Deputy Halverson to make assumptions and deductions.

Olguin cannot fault Deputy Halverson for having ultimately succeeded in tracking him down this way; instead Olguin faults him for not trying this technique sooner. In 2014, now that Facebook and other electronic social media have become ubiquitous, it is easy to view social media searches by law enforcement officers as an obvious technique on the investigative "to do" list. In the first decade of this century, this was not true, and this court cannot deem it negligent for the USMS not to have attempted such a search. Should Deputy Halverson have tried this technique sooner than 2013? Perhaps, but I hesitate to characterize his failure to use more creative investigate techniques earlier as "official negligence." But let's assume, *arguendo*, that the label applies. This would be the extent of any government missteps. As found in the facts, no government agent or prosecutor *ever* did anything to attempt to slow down Olguin's apprehension and trial in this case. Further, any arguable investigative negligence is offset by the fact that Olguin clearly knew about this prosecution not later than 2010, yet he did nothing to seek its resolution.

Olguin contends that he did *not* know about this case before his arrest. This contention is incredible. The evidence that he knew about this prosecution is irrefutable. Let's start with his own post-arrest admission that he knew about the drug case against him in Wisconsin. (Even if Olguin's statement was un-*Mirandized*–which I doubt, but it's an open question on the court's record–the statement can be used to impeach Olguin's current assertion, through counsel, that he did *not* know). Olguin argues that the record is unclear on this point. I have found otherwise.

Then there's the picture of Raul with Ismael at New Year's in 2010. By then, Ismael had pled guilty to the same offense, served his time, been deported to Mexico, snuck back into the United States, and was socializing with Raul. Raul's name was typed into the same indictment to which Ismael had pled guilty. In his written presentence statement, Ismael told the court that he and Raul had sold cocaine to the undercover agent. It is impossible to believe that Ismael and Raul never talked about what had happened, that Raul was genuinely and absolutely clueless that he was wanted in Wisconsin for the cocaine trafficking he had committed with Ismael and for which Ismael had gone to prison. Therefore, Raul knew about this prosecution. Raul, however, never contacted anyone to demand a resolution of this case by means of a speedy trial.

The final factor to consider is the prejudice to Olguin of this 14-year delay. Pursuant to *Doggett*, there is a presumption of prejudice and it is the government's burden to rebut it. But just as the court observed in *Wanigasinghe*, many of the components of prejudice, such as interference with the defendant's liberty, disruption to his employment, public humiliation and the creation of anxiety for Olguin and his family, are absent. 545 F.3d at 598-99. As in *Wanigasinghe*, this court cannot be sure whether Olguin suffered anxiety because of the charges–

he isn't claiming so, since he now claims that he didn't know about the charges–but if he did, Olguin "could easily have turned himself in to resolve the matter." *Id.*

As for evidentiary prejudice, Olguin claims it rather generically, but the facts establish that there is none. The most important factor in the prejudice analysis would be a lesser chance of acquittal due to the passage of time. *See Loera*, 714 F.3d at 1031. All of the cocaine sales charged against Olguin are audiorecorded and two of them are videorecorded. The recordings literally speak for themselves. Olguin latches onto Agent Hynak's hearing testimony that he "vaguely" recalls his purchases from the Olguins, but this is immaterial in light of the recordings. Agent Hynak vividly remembers the smelly cocaine that the Olguins sold him, and 14 years later, the cocaine, which was brought to the evidentiary hearing, has not lost its nasty pungency.

Olguin points to no evidence or witnesses lost to the passage of time; for the most part, he views the passage of time, by itself, to be sufficient under *Doggett* to merit his pretrial acquittal on charges he knew about while living illegally under a different name in another state 600 miles away. But the court in *Wanigasinghe* agreed with this court that an 11-year delay was not prejudicial in a case in which the evidence was locked in. 545 F.3d at 598-99. The delay here is three years longer, but if anything, the existence of the recordings and the preservation of the unique contraband lock in the evidence that much more tightly. Regardless where we put the point on *Doggett's* prejudice spectrum, the government has rebutted the presumption by virtue of the nature of its evidence.

This suffices to dispose of Olguin's dismissal motion, but I also will apply the *Loera* court's reformulation of the *Doggett* test: "the longer the delay and the more vigorous the defendant's demand to be tried speedily, the more reason the state must show for the delay and

the less harm (of whatever type) to himself the defendant need show." 714 F.3d at 1032. Here, as in *Loera,* there has been no prejudice from delay as defined by *Doggett*; Olguin has at least partly acquiesced in the delay by not seeking to resolve the charges as soon as he learned of them (which was not later than 2010); and there is no indication of any invidious or otherwise improper motive by the government to delay this case. Therefore, there is no justification for dismissing the charges against Olguin on speedy trial grounds. *See* 714 F.3d at 1032. *See Barker*, 407 U.S. at 522, n.16 ("overzealous application of this remedy would infringe the societal interest in trying people accused of crime, rather than granting them immunization because of legal error.")

RECOMMENDATION

Pursuant to 28 U.S.C. §636(b)(1)(B) and for the reasons stated above, I recommend that this court deny defendant Raul Olguin's motion to dismiss the indictment due to pretrial delay.

Entered this 3rd day of July, 2014.

BY THE COURT:

/s/

STEPHEN L. CROCKER
Magistrate Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN
120 N. Henry Street, Rm. 540
Madison, Wisconsin 53703

Chambers of
STEPHEN L. CROCKER
U.S. Magistrate Judge

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July 3, 2014

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Re: U.S. v. Raul Olguin; 00-cr-47-wmc

Dear Counsel:

The attached Report and Recommendation has been filed with the court by the United States Magistrate Judge.

The court will delay consideration of the Report in order to give the parties an opportunity to comment on the magistrate judge's recommendations.

In accordance with the provisions set forth in the memorandum of the Clerk of Court for this district which is also enclosed, objections to any portion of the report may be raised by either party on or before July 17, 2014, by filing a memorandum with the court with a copy to opposing counsel.

If no memorandum is received by July 17, 2014, the court will proceed to consider the magistrate judge's Report and Recommendation.

Sincerely,

/s/ S. Vogel for

Connie A. Korth
Secretary to Magistrate Judge Crocker

Enclosures
cc: Honorable William M. Conley, District Judge

MEMORANDUM REGARDING REPORTS AND RECOMMENDATIONS

Pursuant to 28 U.S.C. § 636(b), the district judges of this court have designated the full-time magistrate judge to submit to them proposed findings of fact and recommendations for disposition by the district judges of motions seeking:

(1) injunctive relief;

(2) judgment on the pleadings;

(3) summary judgment;

(4) to dismiss or quash an indictment or information;

(5) to suppress evidence in a criminal case;

(6) to dismiss or to permit maintenance of a class action;

(7) to dismiss for failure to state a claim upon which relief can be granted;

(8) to dismiss actions involuntarily; and

(9) applications for post-trial relief made by individuals convicted of criminal offenses.

Pursuant to § 636(b)(1)(B) and (C), the magistrate judge will conduct any necessary hearings and will file and serve a report and recommendation setting forth his proposed findings of fact and recommended disposition of each motion.

Any party may object to the magistrate judge's findings of fact and recommended disposition by filing and serving written objections not later than the date specified by the court

in the report and recommendation. Any written objection must identify specifically all proposed findings of fact and all proposed conclusions of law to which the party objects and must set forth with particularity the bases for these objections. An objecting party shall serve and file a copy of the transcript of those portions of any evidentiary hearing relevant to the proposed findings or conclusions to which that party is objection. Upon a party's showing of good cause, the district judge or magistrate judge may extend the deadline for filing and serving objections.

After the time to object has passed, the clerk of court shall transmit to the district judge the magistrate judge's report and recommendation along with any objections to it.

The district judge shall review de novo those portions of the report and recommendation to which a party objects. The district judge, in his or her discretion, may review portions of the report and recommendation to which there is no objection. The district judge may accept, reject or modify, in whole or in part, the magistrate judge's proposed findings and conclusions. The district judge, in his or her discretion, may conduct a hearing, receive additional evidence, recall witnesses, recommit the matter to the magistrate judge, or make a determination based on the record developed before the magistrate judge.

NOTE WELL: A party's failure to file timely, specific objections to the magistrate's proposed findings of fact and conclusions of law constitutes waiver of

that party's right to appeal to the United States Court of Appeals. *See United States v. Hall,* 462 F.3d 684, 688 (7th Cir. 2006).