

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

UNITED STATES OF AMERICA	:	CRIMINAL ACTION
	:	
v.	:	NO. 15-449-ALL
	:	
AKANMU AKINDELE and RONALD DAVIS	:	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

KEARNEY, J.

March 14, 2019

Sometime before September 2010, the United States began investigating Akanmu Akindele, a citizen of the United States and Nigeria, for credit card and identity fraud. At the same time, the Commonwealth held an outstanding arrest warrant for Ronald Davis relating to aggravated assault and a firearms offense. Midday on September 28, 2010, federal and state authorities arrested Mr. Davis on the outstanding arrest warrant while he met with Mr. Akindele in a large parking lot after giving him boxes alleging containing a television and a computer. Checking Mr. Akindele's name through investigative databases, federal task force officers discovered the ongoing investigation of Mr. Akindele and contacted the investigating agents. Special agents of the Secret Service and a Postal Inspector then arrived at the parking lot and, with Mr. Akindele's consent, interviewed him later the same day. They did not contact him thereafter.

Almost five years later on September 22, 2015, our grand jury indicted both men on conspiracy and fraud occurring at a variety of retail stores from September 21 to September 27, 2010. On September 22, 2015, this Court granted the United States' Motion to seal the indictment and issued warrants to arrest both men. Not knowing of the indictment, Mr. Akindele flew to Los Angeles on September 22, 2015 and Mr. Davis remained in state prison on the aggravated assault

charges. The United States knew Mr. Akindele flew to Los Angeles on the same day as the sealed indictment. The special agents later learned he reserved a flight from Nigeria to Atlanta on October 2, 2015.

For the next several years, the United States' efforts to serve the arrest warrants consisted entirely of checking passport alert systems to see if Mr. Akindele passed through a domestic airport or was found in Pennsylvania. The United States knew Mr. Davis remained in state prison but decided not to prosecute him without Mr. Akindele.

The passport alert systems notified the special agents of Mr. Akindele's presence in the Atlanta airport on December 6, 2018. The special agents arrested him and brought him to Philadelphia for trial. Several weeks later, the United States charged Mr. Davis at his prison. Given the initial entries of appearance, we originally set Mr. Akindele's trial date for March 4, 2019 and Mr. Davis's trial date for March 28, 2019. The parties agreed to try the case on March 28, 2019. Messrs. Akindele and Davis now move to dismiss under the Sixth Amendment.

After evaluating the adduced evidence and assessing credibility of witnesses at our February 25, 2019 hearing and March 13, 2019 oral argument, and mindful of the severity of the only possible remedy when the United States delays over forty-one months in bringing an indicted person to trial who it knew routinely travelled to Nigeria without knowing of the sealed indictment, finding the United States admittedly did nothing more to proceed to trial against either man consistent with the Sixth Amendment other than wait for an electronic alert of Mr. Akindele's return to United States, and absent evidence Mr. Akindele knew of the September 22, 2015 indictment and avoided prosecution for offenses arising in September 2010, we enter findings of fact and conclusions of law supporting the accompanying Order granting the motions to dismiss:

I. Findings of Fact

On September 28, 2010, immediately after arresting Mr. Davis on a state arrest warrant, Secret Service special agents interviewed Mr. Akindele.

1. In September 2010, Special Agent Steven Campbell of the United States Secret Service and Postal Inspector Samuel Bracken (“Special Agents”) investigated Mr. Akindele relating to conduct among unknown individuals and through allegedly counterfeit credit cards and gift cards.

2. Mr. Akindele manages at least one business found on the internet involved in the cash economy, including auctions, flea markets and gift cards.

3. Mr. Akindele holds dual citizenship in the United States and in Nigeria. The United States knew Mr. Akindele held both United States and Nigerian passports.

4. The Special Agents could not find Mr. Akindele to interview him in 2010.

5. On September 28, 2010, Mr. Akindele met with Ronald Davis in a large residential parking lot in Philadelphia. At this time, the Pennsylvania state courts had an outstanding arrest warrant for Mr. Davis relating to aggravated assault and possession of an unlicensed firearm. Federal task force officers, in tandem with Pennsylvania officers, were looking to find Mr. Davis and arrest him on this outstanding state warrant.

6. The federal and Pennsylvania officers found and arrested Mr. Davis while he met with Mr. Akindele in Philadelphia midday on September 28, 2010. Before his arrest, Mr. Davis allegedly transferred a television and computer to Mr. Akindele which he obtained earlier in the week. Upon apprehending Mr. Davis under the arrest warrant, a federal task force officer performed a pat search on Mr. Akindele, discovered three or four credit cards and drivers licenses and checked federal investigative databases to check on outstanding issues, if any, with Mr. Akindele.¹

7. Upon learning of the investigation into Mr. Akindele, the task force officers held Mr. Akindele in handcuffs and waited for the special agents.

8. Mr. Akindele agreed to a search of his car and agreed to waive his Miranda rights to allow an interview later the same afternoon with the special agents from Secret Service and Postal Inspector.

9. During the interview, Mr. Akindele told the Special Agents of operating a business known as Triple A Import & Export with an address in Camden, New Jersey. The Special Agents visited this address after the September 28, 2010 interview but learned Mr. Akindele gave them a fictitious address. The Special Agents did not further contact Mr. Akindele to inquire. They pursued no other investigative technique to find Mr. Akindele for several years.

10. A Special Agent knew Mr. Akindele “had a business and he had interaction with overseas acquaintances”; he made “frequent trips overseas from the United States”; and, he had “friends and family overseas.”²

11. After this September 28, 2010 interview and before September 2015, Mr. Akindele traveled on at least three occasions to and from his home in Nigeria and from his home in the United States.

12. The Special Agents never contacted him again.

***The Grand Jury indicts Messrs. Akindele and Davis
in a sealed September 22, 2015 indictment.***

13. On September 22, 2015, Mr. Akindele flew from Philadelphia to Los Angeles.

14. On September 22, 2015, a grand jury returned an indictment after a same day hearing charging Mr. Akindele and Mr. Davis with conspiracy, identity theft and credit card fraud arising from a series of retail purchases from September 21 to September 27, 2010, including the television and computer found with both men on September 28, 2010.

15. This Court granted the United States' motion to seal the September 22, 2015 indictment.

16. On September 22, 2015, this Court issued bench warrants for Mr. Akindele and Mr. Davis.

17. The United States agrees between the September 22, 2015 sealed indictment and his initial appearance in this case on February 11, 2019, Mr. Davis remained incarcerated at the State Correctional Institution in Somerset, Pennsylvania on the state court sentence arising from aggravated assault and firearms offenses.

18. The United States knew Mr. Davis's location since September 2015.

***Mr. Akindele leaves Philadelphia
and the United States does not pursue him.***

19. On September 22, 2015, unaware of the sealed indictment, Mr. Akindele flew from the Philadelphia area to Los Angeles.

20. On September 23, 2015, the United States registered its warrant for Mr. Akindele with four different electronic tracking services: the Treasury Enforcement Communications Systems (TECS) database, the National Criminal Information Center (NCIC) database managed by the Federal Bureau of Investigation, the Reservation Lookout System, and JNET for Pennsylvania contacts.

21. A Special Agent then contacted Agent Brian Maher of the Department of Homeland Security.

22. The United States entered Mr. Akindele's indictment and warrant into each of these systems after he left Philadelphia for Los Angeles.

23. The TECS database confirmed Mr. Akindele flew out of Philadelphia to Los Angeles on September 22, 2015. Agent Maher told Special Agent Campbell of Mr. Akindele leaving Los Angeles at an undefined time.

24. The Special Agent learned Mr. Akindele left the United States to an undisclosed location at an undefined time.

25. The Special Agents did not seek to serve the warrant on Mr. Akindele while in Los Angeles.

26. The Special Agents did not explain why it did not look for Mr. Akindele in the United States, including in Los Angeles where the tracking systems confirmed he flew on September 22, 2015.

27. The United States could have checked the TECS database to find where Mr. Akindele flew after Los Angeles or whether he flew outside of the United States thereafter.

28. Had the Special Agents done so and had Mr. Akindele used a passport as he did when he returned to the United States, the Special Agent would have known of Mr. Akindele's travel.

29. The United States did not do so.

30. A Special Agent admitted he could have "possibly" found out Mr. Akindele landed in Nigeria.³ But he never tried.

31. He never tried even though the Special Agents' internal records from January 2017 confirmed a "criminal research specialist" found Mr. Akindele reserved a seat on a flight from a Nigeria airport to Atlanta on October 2, 2015 – ten days after he left Philadelphia for Los Angeles.

32. Assessing credibility, we question the Special Agent's February 25, 2019 testimony of not knowing where Mr. Akindele went when the internal records confirm a reservation from

Nigeria on October 2, 2015. The Special Agent is technically correct he did “know” Mr. Akindele was in Nigeria or where he was. But the internal report from the criminal research specialist offers a strong clue.

33. The Special Agents did not take steps to investigate in Nigeria — or anywhere outside the United States — after learning this information in January 2017.

34. The United States’ efforts to bring Mr. Akindele to trial were sporadic. A Special Agent contacted Department of Homeland Security Agent Maher approximately two times a year. He periodically made checks on the reservation look out system, the TECS System and the NCIC database.

35. The Special Agents discussed pursuing extradition but decided against it “[b]ecause the reality and then from a practical sense, we didn’t believe that would be an opportunity to actually facilitate that.”⁴

36. The testifying Special Agent swore the United States generally used extradition in cases of homicide or terrorism, not financial fraud.⁵

37. The Special Agents thought attempting extradition would be futile because of an “integrity issue with the foreign government.”⁶ When asked, the Special Agent could not identify which foreign government he was referring to as Mr. Akindele “could have been in any country.”⁷

38. The Special Agents did not pursue extradition through Interpol or otherwise because “[i]t is a headache and a half... We can go over there as agents but we have to coordinate with the embassy, the consulates.”⁸

39. The testifying Special Agent could not credibly describe the extradition process, but he hears “a lot of grumblings of the time element on it because it’s a lot of coordination through multiple entities.”⁹

40. The Special Agents took no official or informal actions towards extradition with any foreign enforcement agency.

41. No foreign authority resisted extraditing Mr. Akindele.

42. The testifying Special Agent swore he has never pursued an indicted person through these available processes.

43. Special Agents never talked to officials from Nigeria.

44. Special Agents never inquired with the Internal Revenue Service or any other agency besides Homeland Security concerning Mr. Akindele's business involvements.

45. Mr. Akindele adduced uncontradicted evidence from earlier this year of Mr. Akindele being readily found on Google with email addresses and one reference to a business location in Lagos, Nigeria.

46. Mr. Akindele adduced evidence of tax and corporate registration records showing addresses for Mr. Akindele in Pennsylvania in 2015. But the United States admitted not checking these records. It admittedly relied solely on the alert systems.

47. The United States never sought Mr. Akindele's credit report.

48. The United States did not adduce evidence of investigating Mr. Akindele's ongoing business and tax obligations in the United States from the indictment until arrest.

The United States arrests Mr. Akindele at the Atlanta airport on December 6, 2018.

49. On December 6, 2018, the NCIC database and the TECS database issued alerts to the Special Agents of Mr. Akindele's use of his passport in the Atlanta airport.

50. Now alerted, the United States arrested Mr. Akindele in Atlanta on December 6, 2018 with the September 23, 2018 warrant issued under the September 22, 2015 Indictment.

51. The United States unsealed the indictment on December 6, 2018.

52. This Court held a detention hearing for Mr. Akindele on January 7, 2019, and for Mr. Davis on February 11, 2019.

53. On January 8, 2019, we set Mr. Akindele's trial for March 4, 2019.

54. On January 22, 2019, the United States petitioned and we ordered the Superintendent of Somerset State Correctional Facility to produce Mr. Davis for an initial appearance scheduled February 11, 2019.

55. On February 25, 2019, following his initial appearance, we initially scheduled Mr. Davis's trial for March 28, 2019.

56. We carefully evaluated the credibility of the United States' witnesses regarding this delay in bringing Mr. Akindele and Mr. Davis to trial.

57. The United States concedes its efforts with respect to Mr. Davis rests on our determination concerning its efforts in seeking Mr. Akindele.

II. Conclusions of Law

58. The Sixth Amendment to the Constitution provides "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial[.]"¹⁰ With the Speedy Trial Act, Congress codified the Sixth Amendment right, providing:

In any case involving a defendant charged with an offense, the appropriate judicial officer, at the earliest practicable time, shall, after consultation with the counsel for the defendant and the attorney for the Government, set the case for trial on a day certain, or list it for trial on a weekly or other short-term trial calendar at a place within the judicial district, so as to assure a speedy trial.¹¹

59. We may dismiss an indictment for violation of the right to a speedy trial.¹²

60. We apply a four-factor test derived from the Supreme Court's decision in *Barker v. Wingo* to determine whether to dismiss the indictment for a violation of the Sixth Amendment

right to a speedy trial: “(1) the length of the delay before trial; (2) the reason for the delay and, specifically, whether the government or the defendant is more to blame; (3) the extent to which the defendant asserted his speedy trial right; and (4) the prejudice suffered by the defendant.”¹³

61. No single *Barker* factor is “talismanic.”¹⁴

The length of the delay before trial.

62. We measure delay from “the date of arrest or indictment, whichever is earlier, until the start of trial.”¹⁵ A fourteen-month delay suffices “to trigger review of the remaining *Barker* factors.”¹⁶ “[T]he seriousness of a postaccusation delay varies depending on the circumstances, and a waiting period during which the defendant is not detained presents fewer concerns than a wait accompanied by pretrial incarceration.”¹⁷

63. The United States Grand Jury indicted Mr. Davis on September 22, 2015. He made his initial appearance in this case on February 11, 2019. We initially scheduled his trial for March 28, 2019. We calculate a forty-one-month delay between the indictment and the trial date.

64. The same grand jury indicted Mr. Akindele on September 22, 2015 and authorities arrested him on December 6, 2018 in an Atlanta airport. We initially scheduled Mr. Akindele’s trial for March 4, 2019. Mr. Akindele calculated a forty-one-month delay between the indictment and the trial date. The parties agree Mr. Akindele lived freely in Nigeria from the time of the indictment until his arrest on December 6, 2018.

65. The United States disputes the calculation but concedes the delays for Messrs. Akindele and Davis exceed the fourteen months to trigger the remaining *Barker* factors. We analyze the remaining factors.

The reason for the delay.

66. We determine whether the United States or Mr. Akindele is more to blame for the delay. The United States bears the burden of justifying the delay.¹⁸

67. Our Court of Appeals identifies three categories of delay and their respective weights: (1) “A deliberate effort by the Government to delay the trial in order to hamper the defense weighs heavily against the government;” (2) “A more neutral reason such as negligence or overcrowded courts also weighs against the Government, though less heavily;” and (3) “a valid reason, such as a missing witness, should serve to justify appropriate delay.”¹⁹

68. The United States must pursue an indicted defendant with “reasonable diligence.” If “the defendant is not attempting to avoid detection and the government makes no serious effort to find him, the government is considered negligent in its pursuit.”²⁰ “To satisfy the requirement of reasonable diligence, the government does not need to make ‘heroic efforts’ to pursue a suspect, but it must at least make a ‘serious effort[.]’”²¹

69. In *Velazquez*, our Court of Appeals found the United States did not pursue the defendant with reasonable diligence. In the six-and-a-half years between the indictment and the scheduled trial date, the United States attempted to locate the defendant by checking the NCIC database approximately eight times and placing the defendant on the “Most Wanted” list for the Philadelphia office of the Drug Enforcement Agency.²² Although the United States had a listed address for the defendant, it made no attempt to locate the defendant at the address.

70. The Special Agent testified after he entered Mr. Akindele’s indictment and warrant information in the TECS, NCIC, JNET, and Reservation Lookout Systems databases, he periodically checked these databases between September 23, 2015 and December 6, 2018 to determine if Mr. Akindele had reentered the United States. He testified he spoke to Agent Maher

from the Department of Homeland Security about Mr. Akindele approximately twice a year during this period.

71. Special Agents knew Mr. Akindele had a Nigerian passport, had traveled to Nigeria in the past, and had business associates and family in Nigeria. But he made no attempts to contact Nigerian officials or seriously consider attempts to extradite Mr. Akindele from Nigeria as it presented “a headache and a half.”²³

72. The United States’ records confirm, as of January 19, 2017, it knew Mr. Akindele had scheduled a flight from Nigeria to the United States for October 2, 2015. And yet Special Agents made no attempts to locate Mr. Akindele in Nigeria or even discuss this possibility with Agent Maher from Homeland Security.

73. No official ordered a credit report for Mr. Akindele or contacted any agency about Mr. Akindele other than Homeland Security.

74. The United States argues, while it knew Mr. Davis’s location for the entire period between the September 22, 2015 indictment and Mr. Akindele’s arrest on December 6, 2018, it chose not to arrest Mr. Davis out of concern the arrest would alert Mr. Akindele the United States also sought to arrest him. The United States concedes its efforts with respect to Mr. Davis rest on our decision concerning Mr. Akindele.

75. The United States did not make a serious effort to locate Mr. Akindele. The United States essentially entered information into a database and waited for an alert. As our Court of Appeals instructed in *Velazquez*, merely checking the NCIC database periodically fails to establish “reasonable diligence.”²⁴ It did not adduce evidence of searching for Mr. Akindele on the internet. It did not visit his purported addresses after the indictment. Special Agents called an agent from Homeland Security but never reached out to another agency. The United States never considered

extradition despite knowing (1) Mr. Akindele possessed a Nigeria passport and (2) Mr. Akindele traveled at least three times to Nigeria in the almost five years from the September 28, 2010 interview and the September 22, 2015 indictment.

76. We also find guidance from the court's analysis in *United States v. Fernandes*.²⁵ The defendant traveled to India to attend to an unrelated matter shortly before the indictment. After learning the defendant went overseas, the United States entered the defendant's information in the NCIC database and the "lookout" system. The United States arrested the defendant twenty-three months after the indictment when he returned to the United States. In dismissing the indictment, the court explained when "a defendant is located abroad for much of the delay—the hallmark of government diligence is extradition."²⁶ "When the United States has a valid extradition treaty in place with a foreign country and prosecutors formally seek extradition pursuant to that treaty, courts routinely hold that the government has satisfied its diligence obligation."²⁷ The court further explained if the United States does not seek extradition, it must present "substantial evidence" extradition would be futile.²⁸ The court found the United States failed to show futility, adducing only investigating agents' testimony they "were told that extradition might take several years."²⁹ With respect to the NCIC database, the court further found entering the defendant's information in a database "is a routine matter and does not satisfy the government's diligence obligation."³⁰

77. We agree with the district court in *Fernandes*. The United States must present substantial evidence of the futility in extradition. The United States and foreign governments presumably sign extradition treaties to address the need to bring indicted defendants back to the United States.

78. Mere speculation or a "headache" is not substantial evidence of futility.

79. The United States offered no evidence of hardship in securing Mr. Akindele in Nigeria. It had information he reserved a plane ticket from Nigeria for October 2, 2015 but did nothing to find out if he stayed there. It waited until its alert system told him of use of his passport in a United States airport.

80. The United States believed it not extradite Mr. Akindele because of an “integrity issue” with foreign governments. The Special Agent could not testify what foreign government had an integrity issue. His conclusion without evidence, especially when he admittedly did not know if Mr. Akindele went to another country, does not excuse extradition. This testimony does not constitute a basis to find extradition is futile.³¹

81. The United States argues we should follow *United States v. Corona-Verbera* to find futility. In *Corona-Verbera*, the United States indicted the defendant for various drug and conspiracy offenses.³² Although the grand jury returned the indictment in 1988, the United States did not arrest and extradite the defendant until 2003. In seeking to dismiss the indictment under *Barker*, the defendant argued the United States caused the delay because the United States did not initially seek extradition while he resided in Mexico for the time between his 1988 indictment and 2003 arrest. The United States argued it could not extradite drug offenders from Mexico during the 1990s and extradition from Mexico only became possible in 2002, at which point the United States pursued and succeeded with extradition in 2003. The Court of Appeals for the Ninth Circuit held where the “government has a good faith belief supported by substantial evidence that seeking extradition from a foreign country would be futile, due diligence does not require our government to do so.”³³

82. The court of appeals in *Corona-Verbera* held the United States offered “substantial evidence” of futility before 2003, including (1) testimony from the investigating agent he contacted

an Assistant United States Attorney who responded “the Mexican government was not extraditing nationals back to the United States”; (2) a defense expert’s admission “no Mexican nationals were extradited to the United States” between 1980 and 1996; (3) a statistical report from the Department of State showing extradition from Mexico was futile before 2002.³⁴ The court explained after extradition became more likely in 2002, the United States “diligently sought extradition.”³⁵

83. Unlike *Corona-Verbera*, the United States here did not present substantial evidence Mr. Akindele’s extradition would be futile. It relies solely on the testifying Special Agent swearing he did not seek extradition because of “an integrity issue with a foreign government” and extradition is a “headache and a half.” The Special Agent failed to describe the integrity issue and implies extradition would be difficult or a headache; not futile. He could not identify the foreign government with an integrity issue. Such conclusory testimony fails to rise to the level of “substantial evidence” described in *Corona-Verbera*.

84. Following close of evidence, the United States asked us to consider *United States v. Fatunmbi* involving extradition issues from Nigeria.³⁶ We cannot consider facts litigated in another court as presumed to be true here. In *Fatunmbi*, the United States indicted the defendant for health care fraud and money laundering in 2013.³⁷ The defendant lived continuously in Nigeria starting in 2010. Shortly after the 2013 indictment, the United States contacted the Department of Justice to prepare an affidavit for extraditing the defendant from Nigeria. At the same time, the United States attempted to locate the defendant in Nigeria. The IRS and Department of Homeland Security notified Interpol of the defendant’s warrant and issued an Interpol “Red Notice,” informing foreign governments of the defendant’s warrant. Department of Homeland Security Agents traveled to Nigeria to help Interpol locate the defendant but were unsuccessful. The United

States presented evidence the Department of Justice “experienced general difficulties in obtaining extraditions from Nigeria between 2013 and 2017” despite a bilateral extradition treaty.³⁸ In 2017, the United States’ relationship with Nigeria improved, including its extradition relationship. The Nigerian government then arrested the defendant in April 2018 and the United States applied for extradition on June 3, 2018. Nigeria extradited the defendant and returned him to the United States on October 27, 2018.

85. In *Fatunmbi*, the United States District Court for the Central District of California held the United States did not violate the defendant’s speedy trial right, finding “[b]y securing Interpol’s assistance, the government has sufficiently demonstrated that its efforts to locate defendant were at least diligent.”³⁹ The court found the United States “worked diligently to coordinate with several American and Nigerian agencies, as well as Interpol, to locate defendant in Nigeria.”⁴⁰ The Court also found the defendant responsible for the delay since he knew of the indictment against him, never informed United States authorities of his location, and fought extradition.⁴¹

86. *Fatunmbi* is distinguishable. The Special Agents made no attempt to contact Interpol or the Internal Revenue Service to locate Mr. Akindele in Nigeria. They simply put Mr. Akindele’s information in a database and spoke to a Homeland Security agent twice a year. No United States official contacted Interpol or visited Nigeria. While the defendant in *Fatunmbi* knew of the indictment and resisted arrest and extradition, Mr. Akindele did not know of the indictment until December 6, 2018 when the United States arrested him in the Atlanta airport.

87. The United States in *Fatunmbi* presented substantial evidence extradition from Nigeria would be futile. But it did not do so here. Even assuming the United States could not extradite Mr. Akindele from Nigeria between the indictment on September 22, 2015 and 2017

when relations improved with Nigeria, it made no attempt to extradite Mr. Akindele at all. The testifying Special Agent did not mention an issue with Nigeria. The United States never tried to extradite Mr. Akindele.

88. The United States also asks we follow *United States v. Tchibassa*.⁴² In *Tchibassa*, a grand jury indicted the defendant in 1991 for taking an American citizen hostage for ransom in Angola and the United States issued an arrest warrant. From 1991 to 1998, the defendant lived in Zaire, a country without an extradition treaty with the United States. In 1993, the United States requested Interpol issue “Red Notices” seeking the defendant’s arrest. The defendant learned of the warrant for his arrest in 1994. When it learned in 1996 the defendant traveled to Congo—with which the United States maintained an extradition treaty—the United States sought the defendant’s extradition from Congo. The United States never succeeded with extradition, but the FBI arrested the defendant in Congo in 2002 and returned him to the United States.⁴³

89. Concerning the period between 1991 and 1993 when the United States requested Interpol issue “Red Notices,” the Court of Appeals for the District of Columbia explained the United States made no attempt to arrest the defendant and this two-year gap “casts some doubt on the government’s diligence and might, under other circumstances, tip the balance against it.”⁴⁴ But the court deferred to the district court’s finding the defendant “was more to blame than the government for the initial delay because he maintained his residence in Zaire, beyond the government’s diplomatic reach.”⁴⁵

90. *Tchibassa* is distinguishable. Mr. Akindele did not know of the indictment until his arrest on December 6, 2018 in Atlanta. The United States never attempted to involve Interpol in his search for Mr. Akindele.

91. The United States did not pursue Mr. Akindele with reasonable diligence. We place the blame on the United States for this delay.

92. The second *Barker* weighs in favor of Messrs. Akindele and Davis.

Messrs. Akindele and Davis's assertion of the speedy trial right.

93. Messrs. Akindele and Davis argue they did not delay their case and asserted their speedy trial rights as soon as possible. We set Mr. Akindele's trial for March 4, 2019 trial in our January 8, 2019 Order.⁴⁶ We set Mr. Davis's trial for March 28, 2019.⁴⁷ Mr. Akindele's counsel moved to dismiss the indictment for speedy trial violations on February 8, 2019 and Mr. Davis's counsel moved to dismiss on February 28, 2019.⁴⁸ The United States concedes this factor.

94. The third *Barker* factor weighs in favor of dismissing this case.

Prejudice suffered by Messrs. Akindele and Davis.

95. Our Court of Appeals identified three types of harm arising from unreasonable delay: (1) "oppressive pretrial incarceration;" (2) "anxiety and concern of the accused;" and (3) "the possibility that the [accused's] defense will be impaired by dimming memories and loss of exculpatory evidence."⁴⁹

96. "Negligence over a sufficiently long period can establish a general presumption that the defendant's ability to present a defense is impaired, meaning that a defendant can prevail on his claim despite not having shown specific prejudice."⁵⁰ In this situation, our Court of Appeals held we may presume prejudice "when there is a forty-five-month delay in bringing a defendant to trial, even when it could be argued that only thirty-five months of that delay is attributable to the Government."⁵¹ Such a delay makes it difficult to locate witnesses or probe faded memories.⁵² When the United States does not act with reasonable diligence, it must overcome the presumption

the delay prejudiced the defendant.⁵³ To overcome the presumption, the United States must “prov[e] a negative—the absence of any prejudice to a defense from the passage of years.”⁵⁴

97. We attribute the entire delay from September 23, 2015 until December 6, 2018 to the United States’ inexplicable failure to diligently pursue Mr. Akindele. This over thirty-eight-month delay until arrest and forty-one months until trial attributed to the United States exceeds the thirty-five-month threshold our Court of Appeals found could warrant presumed prejudice in *Battis*.

98. The United States does not overcome the presumption the delay caused Mr. Akindele prejudice.

99. In *Velazquez*, in an attempt to overcome the presumption of prejudice, the United States argued delay attributable to the United States did not impair the defense because it already recorded all necessary meetings and notes and interviewed all necessary meetings to prove its case.⁵⁵ Our Court of Appeals found while the United States had preserved evidence for its case, such evidence did not necessarily equate to the evidence the defendant needed to challenge the United States’ case.⁵⁶ Explaining “impairment of one’s defense is the most difficult form of speedy trial prejudice to prove because time’s erosion of exculpatory evidence and testimony can rarely be shown,”⁵⁷ the court found the defendant could feasibly claim (1) his memories of the events had faded and (2) he could not locate witnesses due to the passage of time.⁵⁸

100. While she need not argue specific prejudice, Mr. Akindele’s counsel argues the third type of prejudice. She argues she cannot locate witnesses and documents relevant to Mr. Akindele’s defense because of the delay. She argues she does not even know what witnesses and documents would be relevant since Mr. Akindele’s recollection of the events has faded. She explains although the United States does allege a conspiracy between Messrs. Akindele and Davis,

it does not allege Messrs. Akindele and Davis made the purchases with the credit cards. She offers the men may have used “runners” to make the purchases, and one of these “runners” might testify Mr. Davis, and not her client, controlled the operation. Such testimony, if it existed, would be relevant to her client’s defense. But with the passage of time and Mr. Akindele’s faded memory, she cannot locate or even identify such witnesses.

101. Mr. Davis’s counsel argued the delay prejudiced his client because he cannot now obtain cell phone records from 2010. He argues these records, including the cell site location information, would help him prepare a defense for his client as it could show a substantial distance between the crime and his client.

102. The United States argued no prejudice exists because it has maintained all the evidence against Mr. Akindele in three binders collected around 2010. But, as our Court of Appeals counseled in *Velazquez*, such evidence does not equate to the evidence Mr. Akindele’s counsel needs to present her defense. Counsel argued she cannot locate witnesses, such as the “runners” in the conspiracy, who could testify as to the extent of Mr. Akindele’s involvement. The United States fails to successfully rebut the presumption of prejudice.

103. The United States argues the delay does not rise to the level at which we presume prejudice, citing our Court of Appeals decision in *United States v. Claxton*.⁵⁹ In *Claxton*, the court refused to presume prejudice with a delay of three-and-a-half years between indictment and trial.⁶⁰ But the court only attributed nineteen months to the United States.⁶¹ Here, we attribute the entire delay to the United States for failing to pursue Messrs. Akindele and Davis with reasonable diligence.

104. The evidence necessary to prosecute and defend the September 22, 2015 indictment arises from conduct over seven days in September 2010. This is well over eight and a half years

ago. The case involves alleged counterfeiting and false identities of persons in retail stores. This is not a case where intent can be found on tape or video.

105. We lack confidence as to the ability of witnesses in March 2019 to remember retail purchases and conduct from a seven-day period in September 2010. The United States waited almost five years to indict for this conduct occurring in September 2010. The United States decided not to pursue Mr. Akindele and bring Mr. Davis to trial for over forty months. The Defendants' and witness' recall, phone records, calendar entries and other items relating to retail purchases during those seven days in September 2010 are now prejudiced to an impermissible level.

III. Conclusion

Mindful the only remedy for this Sixth Amendment violation is dismissal, we carefully examine the United States' conduct in moving the September 22, 2015 indictment to trial. We waited for the United States to adequately explain why it did not pursue Mr. Akindele after waiting almost five years to indict him for conduct occurring over a week in September 2010. We must decide based on the adduced evidence and our credibility evaluation. After evaluating the credibility of testimony, we assess the blame for this entire delay on the United States and find facts demonstrating all four *Barker* factors decidedly weigh in favor of dismissal. The United States unconstitutionally deprived Messrs. Akindele and Davis of a speedy trial. Based on these unique facts, and not intending to set a bright-line time rule but based on the efforts described in sworn testimony and exhibits presented to us and after evaluating the credibility of witness testimony, we dismiss the case against Messrs. Akindele and Davis.

¹ Mr. Akindele moved to suppress this evidence obtained from him arguing an improper stop and search. ECF Doc. No. 22. As we dismiss the indictment in today's Order, we need not address this motion to suppress.

² N.T., S. Campbell, Feb. 25, 2019, p. 71.

³ *Id.* at p. 103.

⁴ *Id.* at p. 100.

⁵ As the United States showed us on March 13, 2019 after the close of the evidence, the United States has used extradition from Nigeria to arrest a defendant for health care fraud. *United States v. Fatunmbi*, No. 13-00324, 2019 WL 1002949, at *3 (C.D. Cal. Feb. 28, 2019). The Special Agent did not know of this opportunity and did not pursue it.

⁶ N.T., S. Campbell, Feb. 25, 2019, p. 101-02.

⁷ *Id.* at p. 102.

⁸ *Id.* at p. 104.

⁹ *Id.* at p. 105-06.

¹⁰ U.S. Const. amend VI.

¹¹ 18 U.S.C. § 3161(a).

¹² See *United States v. Williams*, No. 17-3422, 2019 WL 1030069, at *1 (3d Cir. Mar. 5, 2019) (remanding with instruction to dismiss indictment for violating the defendant's rights under the Speedy Trial Act); *United States v. Reese*, No. 17-2484, 2019 WL 1030064, at *1 (3d Cir. Mar. 5, 2019) (same).

¹³ *United States v. Velazquez*, 749 F.3d 161, 174 (3d Cir. 2014) (citing *Barker v. Wingo*, 407 U.S. 514, 530 (1972)).

¹⁴ *United States v. Claxton*, 766 F.3d 280, 293 (3d Cir. 2014).

¹⁵ *United States v. Battis*, 589 F.3d 673, 678 (3d Cir. 2009).

¹⁶ *Id.* (citing *Hakeem v. Beyer*, 990 F.2d 750, 760 (3d Cir. 1993)).

¹⁷ *United States v. Dent*, 149 F.3d 180, 184 (3d Cir. 1998) (citing *Barker*, 407 U.S. at 533).

¹⁸ *Battis*, 589 F.3d at 679.

¹⁹ *Claxton*, 766 F.3d at 295.

²⁰ *Velazquez*, 749 F.3d at 174 (citing *United States v. Mendoza*, 530 F.3d 758, 763 (9th Cir. 2008)).

²¹ *Id.* at 180 (quoting *Doggett v. United States*, 505 U.S. 647, 654 (1992)).

²² *Id.*

²³ N.T., S. Campbell, Feb. 25, 2019, p. 104.

²⁴ *Velazquez*, 749 F.3d at 180.

²⁵ *United States v. Fernandes*, 618 F. Supp. 2d 62, 69 (D.D.C. 2009).

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.* at 70.

³¹ See *United States v. Corona-Verbera*, 509 F.3d 1105, 1115 (9th Cir. 2007) (finding “substantial evidence” of futility with testimony the Mexican government refused to extradite Mexican nationals to the United States, a Department of State report supporting futility, and other statistical evidence).

³² *Id.* at 1105.

³³ *Id.* at 1115.

³⁴ *Id.*

³⁵ *Id.* at 1116.

³⁶ *Fatunmbi*, 2019 WL 1002949, at *3.

³⁷ While Special Agent Campbell testified the Government would not use extradition absent terrorism or homicide, the United States sought extradition in *Fatunmbi* for a defendant accused on health care fraud.

³⁸ *Fatunmbi*, 2019 WL 1002949, at *2.

³⁹ *Id.* at *4.

⁴⁰ *Id.* at *3.

⁴¹ *Id.*

⁴² *United States v. Tchibassa*, 452 F.3d 918, 924 (D.C. Cir. 2006).

⁴³ *Id.* at 922.

⁴⁴ *Id.* at 924.

⁴⁵ *Id.* at 925.

⁴⁶ ECF Doc. No. 13.

⁴⁷ ECF Doc. No. 39.

⁴⁸ ECF Doc. No. 21, 42.

⁴⁹ *Claxton*, 766 F.3d at 296 (quoting *Doggett*, 505 U.S. at 654).

⁵⁰ *Velazquez*, 749 F.3d at 175.

⁵¹ *Battis*, 589 F.3d at 683.

⁵² *Id.*

⁵³ *Id.* at 682 (“This presumption of prejudice can be mitigated by a showing that the defendant acquiesced in the delay, or can be rebutted if the Government ‘affirmatively prove[s] that the delay left [the defendant’s] ability to defend himself unimpaired.’”).

⁵⁴ *Velazquez*, 749 F.3d at 175 (quoting *Doggett*, 505 U.S. at 655 (1992)).

⁵⁵ *Id.* at 185.

⁵⁶ *Id.*

⁵⁷ *Id.* (quoting *Doggett*, 505 U.S. at 655).

⁵⁸ *Id.*

⁵⁹ *Claxton*, 766 F.3d at 280.

⁶⁰ *Id.* at 296.

⁶¹ *Id.*