**UNITED STATES DISTRICT COURT**
**WESTERN DISTRICT OF MICHIGAN**
**SOUTHERN DIVISION**

---

**UNITED STATES OF AMERICA,**

Plaintiff,

**File no. 1:09-CR-385**

v.

**HON. ROBERT HOLMES BELL**

**JESSE WILLIAM WATERS,**

Defendant.

_____/

**HAGEN W. FRANK**
Assistant United States Attorney
330 Ionia Ave., N.W.
Grand Rapids, MI 49503
(616) 456-2404

**JOHN F. ROYAL (P27800)**
Attorney for Defendant
The Ford Building
615 Griswold, Suite 1724
Detroit, MI 48226
(313) 962-3738

_____/

**DEFENDANT'S MOTION TO DISMISS INDICTMENT AS NOT FOUND WITHIN THE STATUTE OF LIMITATIONS AND MOTION FOR EVIDENTIARY HEARING**

**BRIEF IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS INDICTMENT AS NOT FOUND WITHIN THE STATUTE OF LIMITATIONS AND MOTION FOR EVIDENTIARY HEARING**

**PROOF OF SERVICE**

**DEFENDANT'S MOTION TO DISMISS INDICTMENT AS NOT FOUND WITHIN THE STATUTE OF LIMITATION AND MOTION FOR EVIDENTIARY HEARING**

**NOW COMES** the Defendant, JESSE WILLIAM WATERS, by and through his attorney JOHN F. ROYAL, pursuant to Fed. R. Crim. P. 12(b)(3)(A) and/or (B), and requests the Court to grant his Motion to Dismiss the Indictment in this case as not having been found within the Statute of Limitations, and also grant an Evidentiary Hearing at which the Defendant can present evidence in support of his factual allegations in this motion. In support of this motion, Defendant states the following:

1. The defendant, Jesse William Waters [hereinafter: [Defendant] or [Mr. Waters], is charged as the only defendant in a two-count Indictment with one count of conspiracy to commit arson, 18 U.S.C. § 844(i) and 18 U.S.C. § 844(n); and one count of arson, 18 U.S.C. § 844(i) and 18 U.S.C. §2.

2. The Indictment alleges that Mr. Waters was involved in the arson of logging equipment, specifically a "John Deere" brand Hydro-Ax Shear, or January 1, 2000, near Mesick, Michigan, in Wexford County.

3. The Statute of Limitations applicable in this case is 18 USC 3295, reads as follows:

> § 3295. Arson offenses
> No person shall be prosecuted, tried, or punished for any non-capital offense under section 81 or subsection (f), (h), or (i) of section 844 unless the indictment is found or the information is instituted not later than 10 years after the date on which the offense was committed.

4. On December 30, 2010, two days before the ten year statute of limitations was to expire, the Grand Jury returned the instant Indictment. (Docket Entry No. 1).

5. At the same time, the Government filed a motion and obtained the issuance of an Order to Seal the Indictment. (Docket Entry No. 3). This Order states the reasons why the Indictment was sealed as follows:

> "in order that the execution of the arrest warrant be unimpeded and the investigation continue; and that such sealing remain in force and operation until the defendant is advised of these proceedings, arrested, the investigation is completed, or further order of this court." Id.

6. No motion to unseal the indictment was filed for almost 15 months. On March 21, 2011, the Government filed a Motion to Unseal the Indictment which stated a distinctly different reason why the Indictment had been sealed in the first place. (Docket Entry No. 4). This motion stated:

> "At that time, however, one of the Government's anticipated witnesses was actively assisting the FBI as a cooperating human source (CHS) in its conduct of another arson investigations in numerous other Federal judicial districts. In order to avoid compromising the identity of that CHS before his or her investigative utility was exhausted., the Government sought and obtained an Order sealing the case for an indefinite duration. As a result of the CHS's cooperation, a sealed indictment in an unrelated matter was returned in the Southern District of Indiana on April 14, 2010. That case was unsealed on September 14, 2010, and trial is set to commence on May 23, 2011. Accordingly, it is anticipated that the CHS's identify and activities with the FBI will be disclosed in the near future in the course of discovery in the Southern Indiana case. Further, the undersigned is informed by the FBI that the utility of the CHS, as such, will have been exhausted within the next few weeks, and that no other active investigations are pending in which he is involved.
>
> Accordingly, the Government's investigative equities no longer support keeping this matter sealed, and the Government therefore requests the Court unseal this matter....
>
> (Docket Entry No. 4, at 1-2).

7. On March 21, 2011, this Court issued an Order granting the Government's motion for the following reason: "...the Court being informed that the justification for keeping the matterunder seal has lapsed, the Court hereby Orders that the Indictment be unsealed." (Docket Entry No. 6).

8. The Defendant contends the Order sealing the Indictment in this case did not serve to toll the running of the Statute of Limitations in this case for the following reasons:

(A) The Magistrate who issued the Order to Seal was not provided with accurate information as to why the Indictment should be sealed;

(B) The reasons given in the request to seal and/or in the request to unseal failed to state proper prosecutorial purposes for sealing the Indictment;

(C) The alleged desire to protect the identify of a CHS did not provide a proper prosecutorial purpose for the sealing of this Indictment because the witness whose identify was supposedly being protected by the Order to Seal is a witness with little or no consequence to this case; whose proposed testimony is irrelevant, or, at best, more prejudicial than probative; who has no direct information to offer connecting the defendant to the crimes charged in the Indictment; who has, on information and belief, given conflicting stories to the government about the substance of his testimony, who would not have been placed in any jeopardy had his identify been disclosed earlier; and whose identify, on information and belief, had been disclosed in connection with the Indiana case well before the motion was filed in this case to unseal the indictment.

(D) The Defendant has been materially prejudiced by the sealing of the indictment and the opening of the indictment beyond the running of the statute of limitations.

9. This motion is supported by the attached Brief, which is incorporated herein by reference.

10. Concurrence in the Relief sought in this motion has been requested of Assistant United States Attorney Hagen Frank, and he does not concur in the relief sought**.**

**WHEREFORE**, for all the reasons stated above and in the attached Brief in Support, the Defendant requests that this Court grant his motion for an evidentiary hearing, so he may create a factual record in support of his contentions in this case, and, at the conclusion of this hearing, grant his Motion to Dismiss the Indictment With Prejudice.

Respectfully submitted,

s/John F. Royal
John F. Royal
615 Griswold Street, Suite 1724
Detroit, MI 48226
Phone: (313) 962-3738
E-mail: johnroyal@ameritech.net
P27800

DATED: August 29, 2011

**UNITED STATES DISTRICT COURT**
**WESTERN DISTRICT OF MICHIGAN**
**SOUTHERN DIVISION**

---

**UNITED STATES OF AMERICA,**

Plaintiff,

**File no. 1:09-CR-385**

v.

**HON. ROBERT HOLMES BELL**

**JESSE WILLIAM WATERS,**

Defendant.

_____/

**HAGEN W. FRANK**
Assistant United States Attorney
330 Ionia Ave., N.W.
Grand Rapids, MI 49503
(616) 456-2404

**JOHN F. ROYAL (P27800)**
Attorney for Defendant
The Ford Building
615 Griswold, Suite 1724
Detroit, MI 48226
(313) 962-3738

_____/

**BRIEF IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS INDICTMENT AS NOT FOUND WITHIN THE STATUTE OF LIMITATIONS AND MOTION FOR EVIDENTIARY HEARING**

# TABLE OF CONTENTS

## STATEMENT OF QUESTION PRESENTED

**I. WHERE, AS HERE, A FEDERAL GRAND JURY RETURNS AN INDICTMENT WHICH IS IMMEDIATELY SEALED, AND WHERE THE STATUTE OF LIMITATIONS EXPIRES DURING THE TIME THE INDICTMENT IS SEALED, AND WHERE THERE WAS NO PROPER PURPOSE TO SEAL THE INDICTMENT, AND WHERE THE LENGTH OF TIME THE INDICTMENT WAS SEALED WAS UNREASONABLE, AND WHERE THE DEFENDANT HAS SUFFERED ACTUAL PREJUDICE TO HIS ABILITY TO OBTAIN A FAIR TRIAL AS A RESULT OF THE SEALING OF THE INDICTMENT, MUST THE INDICTMENT BE DISMISSED AS VIOLATIVE OF THE STATUTE OF LIMITATIONS?**

**Defendant's answer: "Yes."**

**PRIMARY AUTHORITIES RELIED ON**

United States v. Wright, 343 F.3d 849 (6th Cir. 2003)

United States v Gigante, 436 F. Supp.2d 647 (S.D.N.Y. 2006)

United States v. Deglomini, 111 F. Supp. 2d 198, 200 (E.D.N.Y. 2000)

United States v. Thompson, 287 F.3d 1244 (10th Cir.2002)

## INDEX OF AUTHORITIES

### CASES

**STATUTES**



**RULES**

## STATEMENT OF FACTS

Many of the relevant facts are stated in the attached Motion, which is incorporated herein by reference.

Defendant Jesse Waters is accused of involvement in the arson of logging equipment that occurred on January 1, 2000 near near Mesick, Michigan, in Wexford County. On, December 30, 2010, two days before the ten year statute of limitations was to expire pursuant to 18 U.S.C. § 3295, the Grand Jury returned an Indictment. (Docket Entry No. 1). This Indictment was immediately subject to an Order to Seal, which was requested by the government. (Docket Entry No. 3).

When the Government sought to have the Indictment unsealed, it filed a motion which had a distinctly different reason in it than had been presented to the Magistrate when the Order to Seal was obtained. (Docket Entry No. 4). This Court issued an Order granting the Government's Motion to Unseal the Indictment on March 21, 2011 (Docket Entry No.6). This was nearly 15 months after the Indictment had been sealed. This Court's order simply notes that "the justification for keeping the matter under seal has lapsed."

The motion to unseal refers to a "cooperating human source" (CHS), whose identify the government was trying to keep secret. Upon information and belief, this CHS has no testimony to present that relates to the arson charges alleged in the Indictment. He will allegedly testify that Mr. Waters attended a workshop at a conference. But he has apparently given the Government conflicting stories. The only information attributed to this CHS in the discovery which has been provided by the Government thus far states that:

> In 2001, Source attended the Southern Girls Conference in Louisville, Kentucky. Source recalled the event was attended by JESSE WATERS, an environmental extremist from Detroit, Michigan. Source advised WATERS taught a radical workshop related to environmental extremist issues. Further, the event was attended by a large number of high-profile environmental extremists from Portland, Oregon. Discovery package, CHS Reporting, 02/02/2008.

However, the Government's Initial Pretrial Conference Summary Statement states that the CHS will present:

"Evidence of Def.'s presentation at Sept. 2000 workshop on illegal "direct action" tactics."

There is no claim that the Defendant made any reference to the arson alleged in the Indictment in his alleged presentation at the alleged workshop.

Further facts will be alleged in the text of this Brief, as necessary.

## ARGUMENT

### I. WHERE, AS HERE, A FEDERAL GRAND JURY RETURNS AN INDICTMENT WHICH IS IMMEDIATELY SEALED, AND WHERE THE STATUTE OF LIMITATIONS EXPIRES DURING THE TIME THE INDICTMENT IS SEALED, AND WHERE THERE WAS NO PROPER PURPOSE TO SEAL THE INDICTMENT, AND WHERE THE LENGTH OF TIME THE INDICTMENT WAS SEALED WAS UNREASONABLE, AND WHERE THE DEFENDANT HAS SUFFERED ACTUAL PREJUDICE TO HIS ABILITY TO OBTAIN A FAIR TRIAL AS A RESULT OF THE SEALING OF THE INDICTMENT, THE INDICTMENT MUST BE DISMISSED AS VIOLATIVE OF THE STATUTE OF LIMITATIONS.

The Supreme Court has stated that statutes of limitation "provide predictability by specifying a limit beyond which there is an irrebuttable presumption that a defendant's right to a fair trial would be prejudiced," United States v. Marion, 404 U.S. 307, 322 (1971), and thus, "are to be liberally interpreted in favor of repose." *Id.*, 323 n. 14 (citing United States v. Habig, 390 U.S. 222, 227 (1968)). In addition to the purpose of protecting individuals from having to defend against charges for events that occurred in the "far-distant past," the Supreme Court has noted that such limitations "may also have the salutary effect of encouraging law enforcement officials promptly to investigate suspected criminal activity." Toussie v. United States, 397 U.S. 112, 114-15 (1970).

But the Federal Rules of Criminal Procedure provide that, under certain circumstances, an Indictment may be sealed so that the Defendant will have no knowledge that the Indictment has been issued, and no opportunity to appear in Court and defend himself. Rule 6(e)(4) of the Federal

Rules of Criminal Procedure provides:

> (4) Sealed Indictment.
> The magistrate judge to whom an indictment is returned may direct that the indictment be kept secret until the defendant is in custody or has been released pending trial. The clerk must then seal the indictment, and no person may disclose the indictment's existence except as necessary to issue or execute a warrant or summons.

In United States v. Wright, 343 F.3d 849, 857 (6th Cir. 2003), the Sixth Circuit addressed a case, such as the instant case, where the Statute of Limitations expired during the time the indictment was tolled, as follows:

> This Court has addressed the legality of sealing indictments only in a brief, unpublished opinion. [United States v]Burnett, [No. 91-1693,] 1992 WL 92669, at *3 [(6th Cir. Apr. 24, 1992)(per curiam)], ("A sealed indictment that is not opened until after the expiration of the statute of limitations will not bar prosecution unless the defendant can show actual prejudice.") (citing United States v. Srulowitz, 819 F.2d 37, 40 (2d Cir.), cert. denied, 484 U.S. 853, 108 S.Ct. 156, 98 L.Ed.2d 111 (1987)). Our opinion in Burnett is consistent with other circuit courts that have considered the issue of sealing indictments in more detailed, published opinions. Several courts have held that when a sealed indictment is not opened until after the expiration of the statute of limitations, the statute ordinarily is not a bar to prosecution if the indictment was timely filed. See [United States v ] Ramey, 791 F.2d [317,] at 320 [(4th Cir 1987)]; United States v. Muse, 633 F.2d 1041, 1041 (2d Cir.1980) (en banc), cert. denied, 450 U.S. 984, 101 S.Ct. 1522, 67 L.Ed.2d 820 (1981). Other courts also have held that the filing of an indictment under seal will toll the statute of limitations if the indictment was properly sealed. See [United States v ] Bracy, 67 F.3d [1421], at 1426 [(9th Cir 1995)]; United States v. Sharpe, 995 F.2d 49, 52 (5th Cir.1993) (per curiam); Srulowitz, 819 F.2d at 40. However, the Tenth Circuit holds the minority position that the sealing of an indictment does not toll the statute of limitations. See United States v. Thompson, 287 F.3d 1244, 1251-52 (10th Cir.2002) (refusing to follow the other circuits and holding that the statute of limitations is not tolled while an indictment is under seal). We follow the rule in our decision in Burnett and the majority of our sister circuits in finding that a timely filed and properly sealed indictment tolls the statute of limitations. We therefore must consider two factors when deciding if a sealed indictment may be opened after the statute of limitation has expired: (1) whether the indictment was properly sealed, and (2) whether the defendant has shown actual prejudice from a sealed indictment being opened beyond the statute of limitations.[4]

---

[4] Wright asks us to consider the three-part inquiry set forth in United States v. Thompson, 104 F.Supp.2d 1303, 1306-07 (D.Kan.), modified by, 125 F.Supp.2d 1297 (D.Kan.2000), aff'd by, 287 F.3d 1244 (10th Cir.2002), to determine whether a sealed indictment tolls the statute of limitations. The test instructs courts to consider: (1) was the original decision to seal the indictment proper; (2) if properly

> sealed, was the length of time the indictment was sealed reasonable; and (3) was the defendant prejudiced by the sealing of the indictment. We decline this invitation to adopt the test in Thompson because the facts of that case are distinguishable. In Thompson, the court found that the government had not shown that the indictment was sealed for a legitimate prosecutorial purpose. Therefore, because we find the lengthy test in Thompson unnecessarily cumbersome, we find that the question in this case is better answered without the use of the test articulated by the district court in Thompson.
> (Emphasis added).

In this case, the decision to seal the indictment was not proper; it was sealed for an unreasonable time; and the defendant has been prejudiced by the undue delay resulting from the sealing of the Indictment.

A. The Government has never claimed that there was a need to seal the indictment until the Defendant was in custody.

The Sixth Circuit in Wright agreed with several other Circuit Courts in holding that the Government's request to seal the indictment should be granted if: "any legitimate prosecutorial purpose or public interest supports the sealing of the indictment." Wright at 858. However, this is not what Rule 6(e)(4) says; it says that the indictment may be sealed: "...until the defendant is in custody or has been released pending trial." The Sixth Circuit's holding in Wright goes way beyond the text of the Rule. Mr. Waters contends that the rule should be strictly construed. The United States Supreme Court has never approved the expansive reading given this rule by several Circuit Courts. The Rule should be construed to mean that an Indictment can only be sealed until "the defendant is in custody or has been released pending trial."

In this case, there was no issue of the availability of the Defendant to be arraigned once an Indictment was issued. Undersigned counsel has been representing the Defendant in connection with this matter since October of 2007. Undersigned counsel spoke with the Assistant U.S. Attorney (AUSA) about this matter several times in 2008 and 2009. Undersigned counsel contacted the AUSA at the beginning of January, 2010, and inquired if an Indictment had been issued, so that he could present the Defendant for arraignment. At that time, the AUSA responded

as follows:

> This is a quick e-mail to acknowledge your two voice-mails of 31 Dec. and 4 Jan. regarding your client, Jesse Waters, and informing me that he is willing to surrender himself rather than be arrested in the event that he has been, or is, charged with a Federal criminal offense in this District.
> Although I can't properly go into specifics at this time, I can tell you that your client's arrest by Federal agents on behalf of the U.S. District Court for the Western District of Michigan is not imminent. Also, any effort to secure his appearance in this District will be initiated through your office.

Therefore, the Government was not concerned with the availability of the Defendant to be arrested and arraigned on the Indictment. Further, when the Indictment was unsealed, the Government promptly notified undersigned defense counsel, who promptly arranged for the Defendant to come to Grand Rapids and be arraigned on the Indictment. So there was clearly no reason to believe that the Defendant would not be available to be arraigned on the indictment. These facts can be established at an evidentiary hearing.

Neither the reasons stated by the Government when it requested that the indictment be sealed (Docket Entry No. 3) or the reasons stated in the Government's Motion to Unseal the indictment (Docket Entry No. 4) are proper reasons for the indictment to be sealed according to a plain reading of the actual language of Rule 6(e)(4). Therefore, Wright was incorrectly decided on this point, and the Indictment should be dismissed because it was not sealed for any proper purpose as set forth in the Court Rule.

B. The Reasons Cited by the Government in Support of the Sealing of the Indictment do not Qualify as Proper Reasons for the Indictment to Have Been Sealed.

As noted above, in Wright, the Sixth Circuit joined several other Circuits and decided that the District Courts have broader authority to seal an Indictment then is indicted by a straightforward reading of Rule 6(e)(4). In determining if an indictment is properly sealed the court in Wright held that it will "look to the Government's request to seal the indictment and evaluate that request to determine whether any legitimate prosecutorial purpose or public interest supports the sealing

of the indictment." Wright at 858 (emphasis supplied). Further, "the Government has the burden of setting forth a justification for sealing the indictment," *Id.* at 857. Where the government is unable to provide a proper purpose, the expiration of the limitations period prior to the unsealing would result in dismissal of the indictment, as in any case in which an indictment were untimely. See for example United States v Gigante, 436 F. Supp.2d 647 (S.D.N.Y. 2006); United States v. Deglomini, 111 F. Supp. 2d 198, 200 (E.D.N.Y. 2000)).

Here, an evidentiary hearing will be required just to determine what was in fact the government's real reason for requesting the indictment be sealed, in light of the distinctly different reasons set forth in the request to seal, when compared to the request to unseal. The request to seal stated that there was a need to arrest the defendant and a need for further investigation. In the circumstances of this case, these are not proper purposes. As discussed above, there was no issue in this case of arresting the Defendant; he was already represented by counsel who was in periodic communication with the AUSA and had offered to surrender the Defendant if an indictment was issued.

One of the primary policies underlying Statutes of Limitations is to encourage the Government to investigate crimes promptly. Toussie, supra. In this case, the Limitations period is an unusually long period of ten years. Yet, the grand jury returned the indictment on the last day possible; and the government immediately asked for the Indictment to be sealed so it could conduct further investigation–not further investigation of additional charges, but further investigation of the very charges already in the indictment. A request to conduct further investigation of the crimes already charged in the indictment cannot possibly be a proper purpose for sealing the indictment. If this is permitted, then the Statute of Limitations is meaningless; the government can simply get an indictment, have it sealed, and continue to investigate the crimes charged for as long as it wants. This effectively allows the government to completely ignore and circumvent the Statute of Limitations.

In United States v. Gigante, supra, the District Court for the Southern District of New York clearly rejected the position that sealing an indictment, "solely to save the statute of limitations," could serve as a legitimate prosecutorial purpose. In that case, prosecutors charged the defendant with making false statements, fraudulent concealment, and tax evasion, in connection with a bankruptcy proceeding. Prosecutors sought and obtained sealed indictments on the false statements and fraudulent concealment charges just before their statutory periods would have expired, one day and five days respectively. Later, the government sought and obtained an additional indictment for tax evasion, a charge that carried a longer statute of limitations, six years instead of five years.

The government claimed that its reason for sealing the false statement and concealment indictments was justified because it needed additional time to continue its tax evasion investigation. Noting that such a purpose would "radically undermine" one of the "primary purposes behind having a statue of limitations at all," the court concluded in Gigante that "[t]he existence of a five-year statute of limitations would have little or no meaning if the Government could extend it, essentially unilaterally, merely because it wanted more time to investigate a potential related charge." Id., at 658.

Further, in United States v Cosolito, 488 F. Supp. 531 (D. Mass 1980), the court dismissed the indictment without prejudice where the Government inaccurately represented to the magistrate who sealed the indictment that the sealing was required in order to protect an ongoing investigation. The statute of limitations expired while the indictment was sealed. See also: United States v Maroun, 699 F. Supp. 5 (D. Mass. 1988).

Wright clearly states that this Court must: "look to the Government's request to seal the indictment and evaluate that request to determine whether any legitimate prosecutorial purpose or public interest supports the sealing of the indictment." Wright at 858 (emphasis supplied). Notably, Wright does not say that this Court should look to the reasons given when the government seeks to unseal the Indictment; the opinion states this Court should look at "the Government's request

to seal...." Wright says that this Court should only look at the "evidence presented to the magistrate judge and the district court to determine if the indictment was sealed for a legitimate purpose." Id., at 859. There is no indication that the Sixth Circuit intended for this Court to consider any evidence except that available to prosecutors at the time they sought to have the indictment sealed.

Here, clearly, the reasons cited by the Government at the time it submitted its request to seal the indictment were not proper reasons. Therefore, the expiration of the limitations period prior to the unsealing of the indictment must result in the dismissal of the indictment, as found in violation of the Limitations period.

C. The Reasons Cited by the Government in Support of the Un-Sealing of the Indictment do not Qualify as Proper Reasons for the Indictment to Have Been Sealed.

However, even if this Court should feel it is appropriate to look at the reasons given in the motion filed by the Government to unseal the indictment, these reasons were sill not proper reasons to have had the indictment sealed. In this case, the motion to unseal the indictment states that prosecutors sought to seal the indictment, "[i]n order to avoid compromising the identity" of a witness who "was actively assisting the FBI as a cooperating human source (CHS) in its conduct of other arson investigations." Further, the government asserts that once the need for protecting the identity of the witness ended, nearly fifteen months after it obtained the indictment, it submitted its motion to unseal.

Importantly, the Government states that it wants to maintain the confidentiality of the CHS because of the work he/she had done in the instant case, but because of the work he/she was doing in unrelated cases, in particular a specific case in the Southern District of Indiana. This rationale was rejected by United States v. Rogers, 781 F. Supp. 1181, 1189 (E.D.MS, 1991), which stated: "Rather, the delay was the result of an effort by the government to investigate a separate crime. That is not a valid investigative justification for the delay."

More significantly, in the instant case, the CHS-witness is insignificant. As stated above,

this CHS has no testimony to present that relates to the arson charges alleged in the Indictment. He will allegedly testify that Mr. Waters attended a workshop at a conference. But he has apparently given the Government conflicting stories. The only information attributed to this CHS in the discovery which has been provided by the Government thus far states that:

> In 2001, Source attended the Southern Girls Conference in Louisville, Kentucky. Source recalled the event was attended by JESSE WATERS, an environmental extremist from Detroit, Michigan. Source advised WATERS taught a radical workshop related to environmental extremist issues. Further, the event was attended by a large number of high-profile environmental extremists from Portland, Oregon.
> Discovery package, CHS Reporting, 02/02/2008.

However, the Government's Initial Pretrial Conference Summary Statement states that the CHS will present:

"Evidence of Def.'s presentation at Sept. 2000 workshop on illegal "direct action" tactics."

There is no claim that the Defendant made any reference to the arson alleged in the Indictment in his alleged presentation at the alleged workshop. The alleged testimony of this witness is challenged as inadmissible in the defense motion objecting to the admission of evidence purportedly offered pursuant to FRE 404b. But even if this Court should rule that this evidence is admissible, there was no basis to seal the indictment in this case to keep the identify of this witness a secret. There is no claim that Mr. Waters poses any threat of physical harm to any witness in this case; there is no claim that the government feared for the safety of the CHS.

The purported need to protect the identity of an insignificant witness cannot possible be considered a proper purpose justifying the sealing of an indictment issued just two days before the expiration of the Limitations period, for almost 15 months. In this case, after an evidentiary hearing, this Court will reject the Government's claim that it needed more time, and that it needed to maintain the secrecy of the investigation, just as these claims were rejected in Gigante, supra, at 657.

In Wright, supra, at 859, the Court upheld the sealing of the indictment because of the need

to keep secret the identify of a witness who: "was involved in an unrelated investigation and provided substantial corroborating evidence in Wright's trial…" Thus, Wright stands for the proposition that where a prospective government witness can only provide limited or tangential evidence of the defendant's guilt, then the protection of that witness' identify will not be a proper purpose. In this case, the evidence offered at an evidentiary hearing will show that the CHS can only provide evidence limited or tangential evidence– not the "substantial corroborating evidence" required by Wright, supra.

For these reasons, the Government has never provided proper reasons justifying the sealing of the Indictment in this case, and therefore the sealing failed to toll the running of the Statute of Limitations. This indictment must be dismissed.

D. If the Indictment was Properly Sealed, the Length of Time It was Sealed Was Unreasonable.

Upon information and belief, the identity of the CHS had been disclosed to the defense in the case pending in the Southern District of Indiana well before the government filed the motion to unseal in the instant case. An evidentiary hearing will be necessary to establish this point. If the Defendant is correct on this point, and if the Government's motion to unseal was filed even two days after the ending of the period of time necessary to fulfill the purposes of sealing, then the Statute of Limitations would have expired, and this Indictment would have to be dismissed.

The U. S. District Court for the Eastern District of New York held that an indictment which has been sealed for an unreasonably long period of time (14 months in that case), during which time the Statute of Limitations expires, must be dismissed. Further, the indictment must be dismissed without a specific showing of prejudice. Deglomini, supra. The Judge in that case analyzed the situation as follows:

> There is no extant precedent for requiring a showing of prejudice to dismiss an indictment found after the limitations period has expired. If the government simply fails to indict by the time the limitations period has expired, the defendant's interest in repose overrides society's interest in punishment; no showing of prejudice is required by the defendant. In such a case, "we bar prosecution — however strong the prosecutorial interest may be." [United States v Watson, 599 F2d 1149 (2d

> Cir.)[hereinafter Watson I], *amended on reh'g. by* 690 F2d 15 (2d Cir. 1979) [hereinafter]]Watson II, 690 F.2d at 16 [*modified en banc sub nom.* United States v Muse, 633 F.2d 1041 (2nd Cir 1980)]. See also United States v. Marion, 404 U.S. 307, 322, 92 S.Ct. 455, 464, 30 L.Ed.2d 468 (1971) ("These statutes [of limitations] provide predictability by specifying a limit beyond which there is an *irrebuttable presumption* that a defendant's right to a fair trial would be prejudiced.") (emphasis added in Deglomini). Similarly, the Second Circuit has held that if the government lacks legitimate prosecutorial purposes in sealing the indictment in the first instance and the limitations period expires before unsealing, the statute of limitations is violated and no prejudice must be shown. See [United States v]Srulowitz, 819 F.2d [37,] at 40-41 [2d Cir 1987)] [footnote omitted]. The Second Circuit has required a showing of prejudice only when it has held that the indictment was found prior to the expiration of the limitations period — that is, timely handed up and properly sealed for a reasonable time. In such a case, a defendant can escape prosecution only by demonstrating that he was actually prejudiced by the delay. See Watson I, 599 F.2d at 1155; Muse, 633 F.2d at 1043.
>
> Deglomini, supra, at 202.

The Court's opinion in Deglomini, supra, concludes:

> Were a defendant required to show actual prejudice after an unreasonable government delay in unsealing an indictment just as he must when the delay is found to be reasonable, Watson's carefully-drawn distinction between reasonable and unreasonable delays would be meaningless. In either case, so long as the initial decision to seal was warranted, the defendant would prevail only if he could demonstrate actual prejudice. Such an outcome would fly in the face of Watson's clear intention. See Watson I, 599 F.2d at 1156 n. 4 ("Indeed, even if the defendant shows no prejudice, delay in unsealing the indictment would be unreasonable if there were no legitimate prosecutorial need for it.") (emphasis in original). To allow delay in unsealing the indictment to toll the limitations period indefinitely, regardless of the reason for the delay, would convert Watson's "narrow exception" into a major loophole in the statute of limitations. In light of both Watson's clear mandate that the government unseal the indictment as soon as its purposes in sealing have been served and the general reluctance of courts to impinge on protections afforded by statutes of limitations, such an outcome is not warranted.
>
> Deglomini, supra, at 203.

The same analysis applies to the instant case, which must also be dismissed without a specific showing of prejudice.

E. The Indictment Should be Dismissed Because the Defendant can Establish Actual Prejudice to his Right to a Fair Trial From the Sealing of the Indictment.

In Wright, supra, the Sixth Circuit held that while "a timely filed and properly sealed indictment tolls the statute of limitations," a showing of "substantial, irreparable, and actual prejudice

when a properly sealed indictment is unsealed beyond the statute of limitations" may bar the prosecution. U.S. v. Wright, 343 F.3d 849, 859 (6th Cir. 2003) (quotations omitted). In this section of the Brief, Mr. Waters argues that he meets this test; however, he is also arguing in the alternative that the test set forth in Wright is unduly stringent, and that in this regard Wright was wrongly decided. Mr. Waters therefore argues in the alternative that, examined under a lesser standard, he has established sufficient evidence of prejudice to warrant dismissal of this indictment.

In this case, Mr. Waters alleges that the lengthy delay in this case has seriously prejudiced his ability to obtain a fair trial. He has had difficulty determining where he was at the time of the alleged offenses, and has been unable to find witnesses who can testify to his whereabouts at that time. Similarly, the Government intends to rely heavily at trial on testimony off witnesses offered pursuant to FRE 404b. The first incident is the arson at the Michigan State University Agriculture Building, which took place on December 31, 1999. The Government claims that Mr. Waters agreed in some fashion to participate in this event, but then declined to accompany the perpetrators when they left to carry out their plan. Mr. Waters is having difficulty determining where he was during the days before and on the day of this incident, and has been unable to find witnesses who can testify to his whereabouts on those days.

Further, the Government intends to offer evidence that Mr. Waters was involved in breaking windows during the demonstrations in Seattle against the WTO in November of 1999. The Government claims to be able to offer testimony that a hooded figure seen in a TV news broadcast was in fact Mr. Waters. Because of the lapse of time, Mr. Waters is having difficulty determine where he was at the time of the incident depicted in the TV video, and has been unable to identify witnesses who could testify that he was somewhere else.

Further, the Government plans to offer testimony from the CHS that Mr. Waters spoke at a workshop at some conference on a topic related to environmental extremis. Yet, according to the Government, the CHS apparently cannot remember when this conference took place. The information

from the Government alleges on the one hand that Mr. Waters spoke at a conference in Louisville, Kentucky sometime in 2001; and on the other hand he is alleged to have spoken at a conference in September, 2000. If the Government's witness does not know when this alleged workshop took place, how if Mr. Waters to defend against this accusation? Without information on the approximate dates of this event Mr. Waters cannot even begin to determine where he actually was at the time of this alleged incident; or determine who his defense witnesses are who can testify that he was elsewhere at the time of the alleged workshop.

The delay in this case has resulted in substantial prejudice to Mr. Waters–loss of his own memory and loss of alibi witnesses to all of the significant event with which he is charged. Further, should he be able to identify any defense witnesses, he anticipates that the Government will be able to cross-examine them about their memories in view of the length of time that has gone on.

Mr. Waters recognizes that the types of prejudice he has described are similar to the claims of prejudice that were rejected by the Sixth Circuit in Wright, supra., at 860. In that case, the Sixth Circuit held that faded memories are not sufficient to establish prejudice, and that as a factual matter the defendant had not shown that the relevant witnesses' memories had actually faded. *Id.* at 860.

So Mr. Waters contends that Wright is wrongly decided on this issue. If this is the test, it is nearly insurmountable, as evidence of actual prejudice is nearly always speculative. See United States v Rogers, 118 F.3d 466, 477, n. 10 (6th Cir 1997).

Under the circumstances of this case, Mr. Waters' contentions regarding the actual prejudice to his case caused by the delay in unsealing the indictment do in fact require the dismissal of the Indictment. This Court should so rule.

**CONCLUSION/RELIEF REQUESTED**

**WHEREFORE**, for all the reasons stated above and in the attached Brief in Support, the Defendant requests that this Court grant his motion for an evidentiary hearing, so he may create a factual record in support of his contentions in this case, and, at the conclusion of this hearing, grant his Motion to Dismiss the Indictment with prejudice.

Respectfully submitted,

s/John F. Royal
John F. Royal
615 Griswold Street, Suite 1724
Detroit, MI 48226
Phone: (313) 962-3738
E-mail: johnroyal@ameritech.net
P27800

DATED: August 29, 2011

**UNITED STATES DISTRICT COURT**
**WESTERN DISTRICT OF MICHIGAN**
**SOUTHERN DIVISION**

---

**UNITED STATES OF AMERICA,**

Plaintiff,

**File no. 1:09-CR-385**

v.

**HON. ROBERT HOLMES BELL**

**JESSE WILLIAM WATERS,**

Defendant.

_____/

**HAGEN W. FRANK**
Assistant United States Attorney
330 Ionia Ave., N.W.
Grand Rapids, MI 49503
(616) 456-2404

**JOHN F. ROYAL (P27800)**
Attorney for Defendant
The Ford Building
615 Griswold, Suite 1724
Detroit, MI 48226
(313) 962-3738

_____/

**CERTIFICATE OF SERVICE**

I hereby certify that on August 29, 2011, I electronically filed the foregoing paper with the Clerk of the Court using the ECF system which will send notification of such filing to the following: Hagen W. Frank.

s/John F. Royal
615 Griswold Street, Suite 1724
Detroit, MI 48226
Phone: (313) 962-3738
E-mail: johnroyal@ameritech.net
P27800