Terri Wood, OSB #88332
Law Office of Terri Wood, P.C.
730 Van Buren Street
Eugene, Oregon 97402
541-484-4171
Fax: 541-485-5923
Email: twood@callatg.com

Attorney for Miles W Simpson

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

UNITED STATES OF AMERICA, Plaintiff, -VS- MILES WAYNE SIMPSON, Defendant	CR. No. 08-60022-AA MOTIONS TO DISMISS (Evidentiary Hearing and Oral Argument Requested)

MILES W SIMPSON, through counsel Terri Wood, pursuant to Rule 12(b)(3), F.R.Cr.P., moves this Court (1) for entry of its Order dismissing the Indictment herein, upon the grounds that the Indictment does not name him as the Defendant nor does it charge crimes committed by him; and, alternatively, if the Court denies that motion and allows amendment of the Indictment, Mr.

Simpson moves this Court (2) for entry of its Order dismissing the Indictment herein with prejudice, or granting such other relief as the Court finds appropriate including but not limited to dismissing Counts 1 and 2 of the Indictment, upon the grounds of unnecessary delay by the government in unsealing the Indictment to commence the prosecution, in violation of Rule 6(e)(4), F.R.Cr.P., and 26 U.S.C. §6531(5); Rule 48(b), F.R.Cr.P.; and Mr. Simpson's rights to Due Process and Speedy Trial, under the Fifth and Sixth Amendments to the United States Constitution.

Mr. Simpson further alleges that the government is responsible for the delay; and that he has been prejudiced thereby, but is unable to make a complete showing of prejudice until after receipt and review of discovery to learn the factual basis for the allegations against which he must defend. Mr. Simpson therefore requests that any pretrial denial of this Motion be without prejudice for him to renew.

These Motions are made in good faith and not for the purpose of delay. They are supported by the points and authorities which follow, the Exhibits attached hereto, and by such other grounds, authorities and evidence as may be offered by way of supplemental memoranda or at hearing on these Motions.

DATED this 22nd day of April, 2010.

/s/Terri Wood
TERRI WOOD, OSB #88332
ATTORNEY FOR MILES W SIMPSON

POINTS & AUTHORITIES

I. The Indictment Does Not Charge Crimes Committed by Mr. Simpson

The Indictment is brought against one "Miles Wayne Simpson." That is not Mr. Simpson's name, and he has never gone by that name. Mr. Simpson is prepared to testify to this fact under oath at the time set for arraignment, and to present a true copy of his birth certificate.

Misnomers generally are mistakes of form that may be corrected by amending the Indictment. See, e.g., *United States v. Perez*, 776 F.2d 797, 799 (9th Cir. 1985). This rule does not apply if the mistake is one of substance or the defendant is prejudiced. *Id.* In many cases, the defendant submitted to prosecution for the crimes prior to raising any objection to the misnomer. *E.g., Perez* at 798-99 (indictment amended at arraignment without objection); *United States v. Mason*, 869 F.2d 414 (8th Cir. 1989)(defendant did not object to error in middle initial until court amended indictment on motion of government at trial); *United States v. Owens*, 334 F.Supp. 1030 (D. Minn. 1971)(defendant arrested for robbery, appointed counsel, and held for arraignment before objecting).

In the case at bar, the indictment alleges that "MILES WAYNE SIMPSON did willfully make and subscribe a United States Individual Income Tax Return, Form 1040, for the calendar year[s 2001, 2002, and 2003], which was verified by a written declaration that it was made under the penalties of perjury and was filed with the Internal Revenue Service, which said income tax return Defendant MILES WAYNE SIMPSON did not believe to be true and correct as to every

material matter, in that said tax return reported gross receipts of [specified amounts], whereas Defendant MILES WAYNE SIMPSON then and there well knew and believed his correct gross receipts from sales for the calendar year . . . were substantially greater that that amount." Each year is alleged as a separate count.

The face of the Indictment therefore makes the identity of the individual who filed these tax returns an essential element of the crimes charged therein; i.e., only the individual who has filed the return, has personal knowledge of the facts stated in the return and declares the truth of those facts under penalty of perjury can be guilty of the crime. The nature of the charge in the case at bar therefore distinguishes it from the general rule that a name is a matter of form, not substance, "given credence in light of the well-accepted principle that a person may be indicted merely as John Doe until his true name becomes known and then an amendment may be allowed," *Owens*, *supra,* 334 F.Supp. at 1031. Presumably, the government submitted the referenced forms 1040 to the grand jury, and those documents bore the name MILES WAYNE SIMPSON. Whoever MILES WAYNE SIMPSON is, he is not Mr. Simpson.

Amending the indictment to show Mr. Simpson's true name would be substantive in that it would change the identity of the person found by the grand jury to have probably committed these crimes. That would prejudice Mr. Simpson by subjecting him to prosecution for crimes that the grand jury found were committed by the named individual, MILES WAYNE SIMPSON.

Assuming the government intended to seek indictment of Mr. Simpson for these crimes, rather than MILES WAYNE SIMPSON, the errors that occurred in the presentation of its case to the grand jury remain cloaked in secrecy, see

generally Rule 6(e)(2), F.R.Cr.P., and the government should return to the grand jury to correct the errors before Mr. Simpson is held to answer to these charges.

II. Unnecessary Delay By The Government In Unsealing The Indictment To Commence The Prosecution

The factual background for the legal arguments under this section are as follows:

On January 25, 2005, federal agents executed a search warrant at Mr. Simpson's residence at 2128 NE Edgewood, Bend, Oregon, as part of "Operation Bring 'Em Back," heralded by authorities through the news media as "the largest investigation of suspected archaeological theft and sale of illegally obtained artifacts in the Pacific Northwest." Agents pounded on the front door around 7 a.m., and entered with guns drawn when Mr. Simpson's domestic partner, Liz Neil, opened the door. Mr. Simpson was in the hallway, naked, and brought into the living room with Ms Neil, where both were commanded to stand with their arms in the air while agents searched for guns in the house. about 20 minutes passed before agents produced the search warrant Mr. Simpson had requested to see. Agents rummaged through the home for approximately 15 hours, seizing thousands of items. Mr. Simpson elected to remain at the residence all day while agents conducted their search.

Mr. Simpson retained counsel, and an agreement was reached with the government for the defense to conduct a videotaped inventory of seized property, excluding the books, photographs, and other records, at a storage facility in Bend on May 24, 2005. That inspection revealed damage to many of

the items, as well as improper packaging and storage conditions contributing to the damage. Mr. Simpson's objections to the property damage and the packaging and storage conditions were communicated to the government by way of letters dated May 25 and June 13, 2005. Mr. Simpson has filed a motion for return of property, currently pending, in this court, Case No. 05-mc-07104-TC, which also seeks compensation for damages to the property.

By way of letter dated July 22, 2005, counsel made the government aware of the following facts, and renewed the request for return of property:

> While the Government has been investigating Mr. Simpson, post-seizure, for about six months now, the cloud of accusation continues to damage his professional reputation and destroy his business. Mr. Simpson is a Marine Corp veteran, has never used or trafficked in illegal drugs, and prior to being targeted by the Government, enjoyed the reputation of being a knowledgeable collector and law-abiding citizen. This investigation has cost him precious resources for attorney fees for me to communicate with you on his behalf about the improper handling, improper storage, and injury to his artifact collection. The seized property includes not only artifacts and alleged artifacts, but books and records needed by Mr. Simpson to do appraisals and operate his business, as well as the evidence he needs to prove the seized artifacts were lawfully obtained. In short, the Government has made grave accusations against Mr. Simpson while depriving him of the evidence needed to refute those accusations, publicly or privately, and has caused unwarranted damage to the artifacts that it claims it wants to protect.

Copy of letter attached as Exhibit 5 to the Memorandum of Law filed in Case No. 05-mc-07104-TC. See also Declarations filed in support of the Motion for Return

of Property, addressing the five-plus years of emotional distress suffered by Mr. Simpson from these public accusations, without access to a judicial forum in which to defend himself, incorporated by reference herein.

Requests for return of property were made during the ensuing years, to no avail. The government continued to assert that Mr. Simpson was a primary target of its investigation of trafficking in archaeological resources unlawfully removed from federal lands, that the investigation was ongoing, and the seized property was "evidence". By 2006, Mr. Simpson was identified in the Oregonian as a major artifact collector whose home was raided as part of the investigation, and he gained a wider forum for ill-repute. See Exhibits 1 and 2, attached.

After exhausting his financial resources, application was made to the Court and counsel was appointed to represent Mr. Simpson, effective March 4, 2008, as a target of the investigation. Continued requests for return of property met with the same response. At all times, Mr. Simpson continued to reside at his Bend address, and the government was at all times aware that he was in touch with and represented by counsel.

On April 7, 2010, the government unsealed a three-count indictment for tax code violations, 26 U.S.C. §7206(1), that was returned over two years earlier, on March 19, 2008. At no time prior to the indictment being unsealed did Mr. Simpson or his counsel have any knowledge that the government had sought or filed charges against him. No charges based upon crimes alleged in the

search warrant application have been filed, and the statute of limitations for those crimes has expired.

Mr. Simpson expressly reserves the right to file further briefing prior to hearing on the following legal issues.

A. Invalid Extension Of The Statute Of Limitations

The statute of limitations for the crimes alleged in this indictment is six years. 26 U.S.C. §6531(5). As charged, the time period for commencing prosecution would have expired on or before April 15, 2008, as to Count 1; on or before April 15, 2009, as to Count 2; and on or before April 15, 2010 as to Count 3.

Rule 6(e)(4), F.R.Cr.P., addresses the sealing of indictments, and provides:

> 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.

The Second Circuit, in *United States v. Watson*, 599 F.2d 1149, 1154 (1979), addressed a claim that the statute of limitations had been exceeded by the delay in seeking the indictment coupled with the 16-month time period it remained sealed:

> The law seems clear that the filing of a sealed indictment within the statutory period serves to toll the statute of limitations even if the indictment is not unsealed until after the period has expired. Under Rule 6(e) of the Federal Rules of Criminal Procedure, an indictment may be kept secret until a defendant is in custody or has given bail, and in that case the clerk

> seals the indictment and its contents remain undisclosed except when necessary for the issuance and execution of a warrant or summons. Thus, where a defendant cannot be found, it is possible nevertheless to indict him within the period of the statute, seal the indictment, and then by virtue of the sealed indictment to arrest him when he is located. There must be limits, however, on the Government's privilege to toll the statute of limitations by a sealed indictment.
>
> We believe that when a sealed indictment has tolled the statute of limitations, the policy of repose underlying the statute demands that the Government unseal the indictment as soon as its legitimate need for delay has been satisfied.

Even if an indictment may be sealed for any legitimate prosecutorial purpose, rather than as restricted by Rule 6(e), the burden is on the government to demonstrate that legitimate purpose(s) existed for the time the indictment remained sealed. *See, e.g, United States v. Thompson*, 104 F.Supp.2d 1303, 1307 (D. Kan. 2000); *United States v. Srulowitz*, 819 F.2d 37, 41 (2nd Cir. 1987). *Thompson* dismissed with prejudice an indictment that had been sealed beyond the statute of limitations, and contains a good discussion of the law on this issue from the various circuit courts. *See also United States v. Shell*, 961 F.2d 138, 141-143 (9th Cir. 1992)(court must engage in a three-part inquiry to determined whether sealed indictment tolled the statute of limitations), *opinion withdrawn and decided on other grounds*, 974 F.2d. 1035. *Thompson* held that no showing of actual prejudice is required to dismiss for a violation of the statute of limitations, citing *Watson, supra*, and other district court decisions.

B. Dismissal Under Rule 48(b), F.R.Cr.P.

Rule 48(b) provides that the Court "may dismiss an indictment . . . if unnecessary delay occurs in: (1) presenting a charge to a grand jury; (2) filing

an information against a defendant; or (3) bringing a defendant to trial." The Advisory Committee Notes observe this rule is a restatement of the court's inherent power to dismiss a case for want of prosecution.

In *United States v. Sherwood*, 38 F.R.D. 14 (D.Conn. 1964), the court dismissed an indictment that was filed just prior to the expiration of the statute and was only unsealed thirteen months later, finding a violation of the speedy trial right under the Sixth Amendment and Rule 48(b); *but see, United States v. Barken*, 412 F.3d 1131, 1136 (9th Cir. 2005)(Rule 48(b) comes into play only after a defendant has been placed under arrest, and indictment should be dismissed only in extreme circumstances and after forewarning the government of the consequences of further delay).

C. Dismissal Under The Due Process Clause Of The Fifth Amendment

When a defendant is available, the government may not seal an indictment for more than a reasonable time after the statute of limitations has expired without violating Due Process. *See United States v. Heckler*, 428 F.Supp. 269, 272 (S.D.N.Y. 1976); *cf., United States v. Barken*, 412 F.3d 1131, 1134-36 (9th Cir. 2005)(defendant who raises pre-indictment delay when indictment returned days before the statute of limitations expired, and not further delayed, faces a heavy burden to establish due process violation).

D. Dismissal Under the Speedy Trial Clause Of the Sixth Amendment

Supreme Court has held that a defendant is not always required to show actual prejudice to prove a violation of his speedy trial rights; rather, no showing of prejudice is required when the delay is great and attributable to the

government. *Doggett v. United States,* 505 U.S. 647 (1992). *See, United States v. Shell*, 974 F.2d 1035 (9th Cir. 1992)(government's mishandling of defendant's file resulting in 5-year delay created strong presumption of prejudice which government did not persuasively rebut, warranting dismissal for violation of Sixth Amendment speedy trial rights).

In *United States v. Dennard*, 772 F.2d 1510 (11th Cir. 1984), the Court found a violation of Sixth Amendment speedy trial rights where the government did not engage in a good-faith investigative effort during a 15-month delay which resulted from the sealing of the indictment, and any need for secrecy terminated while the indictment remained sealed for an additional year, relieving the defendant of establishing actual prejudice.

In *United States v. Mendoza*, 530 F.3d 758 (9th Cir. 2008), the Court explained:

> The Sixth Amendment guarantees that criminal defendants "shall enjoy the right to a speedy and public trial . . . ." U.S. Const. amend. VI. To determine whether a defendant's Sixth Amendment speedy trial right has been violated, we balance the following four factors: "[l]ength of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant." *Barker v. Wingo*, 407 U.S. 514, 530, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972).
>
> None of these four factors are either necessary or sufficient, individually, to support a finding that a defendant's speed trial right has been violated. Id. at 533. Rather the factors are related and "must be considered together with such other circumstances as may be relevant." Id. Further, the balancing of these factors, and other relevant circumstances,

> "must be carried out with full recognition that the accused's interest in a speedy trial is specifically affirmed in the Constitution." Id.

The Ninth Circuit has found that an eight-month delay is "approximately the minimum that would make a *Barker* analysis necessary." *United States v. Gregory*, 322 F.3d 1157, 1162 n.3 (9th Cir. 2003).

RESPECTFULLY SUBMITTED this 22nd day of April 2010.

/s/Terri Wood
TERRI WOOD, OSB #88332
ATTORNEY FOR MILES W. SIMPSON