UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

YAMA MARIFAT, *Defendant-Appellant*, v. UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA, *Plaintiff-Appellee*. UNITED STATES OF AMERICA, *Real Party in Interest.*	No. 18-72168 District Court No. 2:17-cr-00189-WBS (E.D. Cal.)

OPPOSITION OF THE UNITED STATES
TO MARIFAT'S URGENT MOTION FOR A STAY OF PROCEEDINGS

Defendant Marifat has moved to stay district court proceedings, including his criminal trial scheduled to begin on October 2, 2018, pending this Court's decision on his petition for a writ of mandamus (filed August 2, 2018). Marifat sought and was denied a stay in the district court, which held that Marifat did not show either a likelihood of success on the merits of his mandamus petition or irreparable injury absent a stay. This Court likewise should deny the motion because Marifat's mandamus petition is meritless and he will not be irreparably injured absent a stay.

BACKGROUND

On January 28, 2011, the United States filed an Information charging Marifat with bid rigging and conspiracy to commit mail fraud to obtain certain properties offered at public real estate auctions in San Joaquin County. Marifat chose to plead guilty to both counts and entered into a plea agreement with the government. The plea agreement included provisions waiving certain rights, including a waiver of indictment by grand jury. Doc. 11, No. 2:11-cr-00039 (E.D. Cal.).[1] At a plea hearing on March 4, 2011, see 11-cr-00039, Doc. 9, Marifat acknowledged in open court that he wanted to waive his right to be charged by indictment. He also executed a written waiver of indictment, separate from that contained in his plea agreement. 11-cr-00039, Doc. 10. The district court then conducted a Fed. R. Crim. P. 11 plea colloquy and accepted Marifat's guilty plea.

On September 11, 2016, having obtained new counsel, Marifat moved to withdraw his guilty plea. 11-cr-00039, Doc. 67. The district court found that Marifat had established a "fair and just reason" for withdrawal, Fed. R. Crim. P. 11(d)(2)(B), because the prior district judge who took the plea had not advised Marifat of certain rights, and therefore the plea colloquy was technically deficient

[1] Citations are to the district court dockets in case No. 2:11-cr-00039 (E.D. Cal.), in which Marifat executed a waiver of indictment and pled guilty to an information that was later dismissed, and case No. 2:17-cr-00189, in which Marifat currently faces trial on a later-filed indictment.

under Rule 11. 11-cr-00039, Doc 95. The court noted, however, that it did "[n]ot for one minute" believe that Marifat did not understand those rights. *Id*. at 4.

On June 19, 2017, Marifat moved to dismiss the Information. 11-cr-00039, Doc. 110. The government filed a statement of non-opposition. 11-cr-00039, Doc. 111. On July 24, 2017, the district court dismissed the Information but noted that "granting of defendant's motion shall not be construed as a ruling on the merits of the motion." 11-cr-00039, Doc. 113. On October 19, 2017, the grand jury returned an Indictment charging Marifat with one count of bid rigging in violation of 15 U.S.C. § 1, which was substantially similar to the initial Information. 17-cr-00189, Doc. 1.[2]

On February 26, 2018, Marifat moved to dismiss the Indictment as returned outside of the five-year limitations period. 17-cr-00189, Doc. 20. Marifat argued that 18 U.S.C. § 3288, which permits a new indictment to be returned within six months after an indictment or information charging a felony "is dismissed for any reason after the period prescribed by the applicable statute of limitations has expired," did not apply. *Id*. at 4. The court described Marifat's argument as

> based on the following progression of sub-arguments: (1) his waiver of indictment . . . was based on his plea agreement; (2) because he was allowed to withdraw his guilty plea, the plea agreement is now void; (3) because the plea agreement is void, his waiver of indictment is void; (4) because the waiver of indictment is void, the Information . . . is invalid; and (5) because the Information . . . is invalid, the

[2] The Indictment did not charge conspiracy to commit mail fraud.

> government cannot rely on 18 U.S.C. § 3288 to indict him after the 5-year statute of limitations imposed by 18 U.S.C. § 3282 has passed.

17-cr-00189, Doc. 40 at 3. On April 17, 2018, the court denied Marifat's motion and rejected his argument on the basis of the "plain language" of § 3288. *Id.* at 7 (copy of April 17, 2018 Order attached hereto).

On August 2, 2018, Marifat filed a mandamus petition based on the district court's April 17, 2018 Order. This Court has not ruled on the petition. On August 6, 2018, Marifat moved the district court to stay all proceedings pending his mandamus petition. 17-cr-00189, Doc. 49. On August 20, 2018, the district court denied the motion to stay. 17-cr-00189, Doc. 52. The court found that Marifat may directly appeal the denial of his motion to dismiss the indictment; that being forced to stand trial is not inherently prejudicial; that Marifat did not show clear error in the court's denial of his motion to dismiss; and that Marifat did not show that any asserted error is oft-repeated or raises new and important problems or issues of first impression. *Id*. at 3. Marifat therefore did not show that he likely will succeed on the merits of his mandamus petition or show irreparable injury absent a stay. *Id*.

LEGAL STANDARD

"A stay is not a matter of right, even if irreparable injury might otherwise result," and the movant bears the burden of showing that the circumstances of the case justify the Court's exercise of discretion to stay the case pending decision of

an appeal. *Nken v. Holder*, 556 U.S. 418, 433-34 (2009) (citations omitted). Movants must establish (1) that they are likely to succeed on the merits of their appeal, and (2) that they will likely suffer irreparable harm in the absence of a stay. *See id.* at 434. A mere "possibility" of success on the merits is insufficient. *Id.* Likewise, merely showing "some 'possibility of irreparable injury'" fails to satisfy the second factor. *Id.* Only if the movant establishes a likelihood of success and irreparable injury absent a stay should the court consider whether issuing a stay will substantially injure other interested parties and whether a stay serves the public interest. *See id.* at 434-35.

A writ of mandamus is "an extraordinary or drastic remedy," *Calderon v. U.S. Dist. Ct.*, 163 F.3d 530, 534 (9th Cir. 1998) (en banc) (internal quotation omitted), used "only to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so." *Will v. United States*, 389 U.S. 90, 95 (1967) (internal quotation omitted). The petitioner must show that five factors clearly weigh in favor of issuing the writ:

> (1) The party seeking the writ has no other adequate means, such as a direct appeal, to attain the relief he or she desires. (2) The petitioner will be damaged or prejudiced in a way not correctable on appeal . . . . (3) The district court's order is clearly erroneous as a matter of law. (4) The district court's order is an oft-repeated error, or manifests a persistent disregard of the federal rules. (5) The district court's order raises new and important problems, or issues of law of first impression.

DeGeorge v. U.S. Dist. Ct., 219 F.3d 930, 934 (9th Cir. 2000) (quoting *Bauman v. U.S. Dist. Ct.*, 557 F.2d 650, 654-55 (9th Cir. 1977)).

ARGUMENT

Marifat has not made an adequate showing that he likely will succeed in his mandamus petition because none of the mandamus factors supports issuing a writ in this case. Moreover, he has not established that he will suffer irreparable harm absent a stay of proceedings. His request for a stay therefore should be denied.

I. Marifat is Unlikely to Succeed In His Mandamus Petition.

1. Marifat cannot establish clear error in the district court's Order, a defect that "is usually fatal to a petition for writ of mandamus," *DeGeorge*, 219 F.3d at 936. In his mandamus petition, Marifat asserts two claims of error: that the district court improperly denied his motion to dismiss the indictment as time-barred, and that the district court improperly held that Marifat is bound by the terms of his plea agreement, notwithstanding his successful withdrawal of his guilty plea. Both arguments are meritless.

a. First, Marifat asserts that the Indictment is time-barred because the initial Information was "unlawful," Mot. 16, such that the government cannot rely on 18 U.S.C. § 3288 to make the Indictment timely. Marifat argues incorrectly that the withdrawal of his guilty plea rendered his plea agreement void, which in turn rendered his waiver of indictment void, and the Information therefore was not

accompanied by a valid waiver of indictment. The district court, however, expressly found that Marifat's waiver of indictment, which was "executed separately and independently of the plea agreement," using a separate document, was knowing and voluntary, and that "[t]he deficiencies in the plea colloquy [that justified withdrawal of Marifat's guilty plea] had nothing to do with defendant's waiver of indictment." Order at 6 n.5 (Doc. 40). In other words, "the waiver of indictment was not contingent upon defendant's plea being accepted." *Id.* The Information, then, was not "unlawful."

Even if Marifat's waiver of indictment was not executed knowingly and voluntarily, however, the dismissal of the Information triggered § 3288's six-month clock, so that the Indictment was timely filed. Marifat's incorrect argument to the contrary is essentially that dismissal of a charging document with a legal defect—here, an invalid waiver of indictment—cannot trigger § 3288. This Court has held, however, that "a second indictment may properly be returned within the prescribed six-months period where the dismissal of the first indictment is due to a legal defect." *United States v. Charnay*, 537 F.2d 341, 355 (9th Cir. 1976). Likewise, a legal defect in an information does not defeat application of § 3288 following that information's dismissal.

Moreover, as Marifat acknowledges (Mot. 16), at least one court of appeals has held that § 3288 applies to the dismissal of an information that does not simply

have an invalid waiver of indictment (as Marifat claims here), but is entirely unaccompanied by a waiver of indictment. *See United States v. Burdix-Dana*, 149 F.3d 741 (7th Cir. 1998). Marifat asserts that this decision is wrong because two district courts have disagreed with it in dicta. *See* Mot. 16. Both of the decisions in question, however, rested on grounds entirely different from Marifat's case. The district court in *United States v. Sharma*, 2016 U.S. Dist. LEXIS 66227, at *10 (S.D. Tex. May 19, 2016), for example, recognized that § 3288 did not apply because the initial information was not dismissed after the applicable limitations period had expired, as is the case here and as required by § 3288. The district court in *United States v. Machado*, 2005 WL 2886213 (D. Mass. Nov. 3, 2005), meanwhile, did not construe § 3288 at all, but instead dismissed an information on the grounds of lack of subject matter jurisdiction, the speedy trial guarantee of the Sixth Amendment, and failure to prosecute under Fed. R. Crim. P. 48(b). In any event, even if there were a conflict between *Burdix-Dana* and these unpublished district court cases, there is no need to resolve that conflict here. Unlike in *Burdix-Dana*, the Information here was accompanied by a waiver of indictment, and Marifat does not cite a single case in which a district court has held that an information filed alongside a waiver of indictment later deemed to be invalid does

not trigger § 3288's six-month re-indictment period.[3] Thus, even if Marifat establishes that his waiver of indictment was invalid (which it was not), he cannot establish clear error in the district court's denial of his motion to dismiss.

b. Marifat also asserts, incorrectly, that the district court erred by enforcing a provision of his plea agreement—the waiver of indictment—after permitting him to withdraw his guilty plea. The district court, however, did not rule on the enforceability of the plea agreement. Rather, the court held only that Marifat's separate waiver of indictment—which was distinct from his plea agreement—was enforceable. Any argument regarding the enforceability of the plea agreement, then, is not ripe for review.

In any event, the government does not, as Marifat implies (Mot. 18-19), seek to enforce every aspect of his plea agreement against him. As the government indicated in its response to Marifat's district court motion for a stay (17-cr-00189, Doc. 50 at 5 n.3), the government will not seek to compel Marifat to testify at trial, nor will the government seek to compel him to disclose documents or records beyond what the government would be entitled to in discovery in a normal criminal

[3] Marifat also cites *Jaben v. United States*, 381 U.S. 214 (1965), which did not involve § 3288, and *United States v. Grady*, 544 F.2d 598 (2d Cir. 1976), which merely notes in a footnote that § 3288 did not apply there because the limitations period had not run.

case. Moreover, as explained below, the government will not seek to enforce the appeal waiver contained in Marifat's plea agreement.[4]

Even if this issue was ripe for review, however, Marifat is wrong that the withdrawal of his guilty plea automatically precludes enforcement of any aspect of the plea agreement. None of the cases Marifat cites (Mot. 15) holds that withdrawing a guilty plea necessarily nullifies all the terms of a plea agreement. To the contrary, *United States v. Jones*, 469 F.3d 563 (6th Cir. 2006) (cited at Mot. 16), held that when the defendant withdrew his guilty plea he violated the express terms of his plea agreement and freed the government of its contractual obligations. The government could, however, use against the defendant a statement that he had made to the FBI, because "the agreement itself allowed the government to use the statement against Jones if he violated the terms of the agreement." *Id.* at 567. *See also United States v. Jim*, 786 F.3d 802, 806, 809 (10th Cir. 2015), which held that the district court did not err in enforcing the

[4] The government does seek to enforce a provision of the plea agreement specifically stating that "if the defendant successfully moves to withdraw his plea," then "all statements made by the defendant to the government . . . or any testimony given by the defendant before a grand jury or other tribunal, whether before or after this Agreement, shall be admissible in evidence in any criminal, civil, or administrative proceedings hereafter brought against the defendant[.]" *See* 17-cr-00189, Doc. 59 at 2 (citing 11-cr-00039, Doc. 11 at 6). That issue, however, is still being litigated in the district court. *See* Doc. 59 (filed September 4, 2018).

defendant's waiver of Fed. R. Evid. 410 in his plea agreement notwithstanding that the defendant had withdrawn his guilty plea.

Some of Marifat's other cited cases hold only that a defendant cannot seek to enforce the terms of a plea agreement that he has breached. *Fox v. Johnson*, 832 F.3d 978, 988 (9th Cir. 2016) (defendant who withdrew her guilty plea could not thereafter seek specific performance of it). Others discuss the enforceability of appellate waivers, which is not at issue here given that the government does not intend to enforce Marifat's appellate waiver. *See* Mot. 15-16 (citing *United States v. Portillo-Cano*, 192 F.3d 1246, 1252 (9th Cir. 1999) (appellate waiver in plea agreement was not enforceable against defendant who did not understand the charges against him); *United States v. Pena*, 314 F.3d 1152, 1154 n.1 (9th Cir. 2003) (same); *United States v. Bibler*, 495 F.3d 621, 623-24 (9th Cir. 2007) (knowing and voluntary appellate waiver precludes review if the waiver covers the grounds raised on appeal)). The remaining cases also are far narrower than Marifat suggests. In *United States v. Partida-Parra*, 859 F.2d 629, 634 (9th Cir. 1988), for example, this Court held that a mistake of fact did not entitle the government to rescind a plea agreement absent a breach of the agreement by the defendant. In *Cuero v. Cate*, 827 F.3d 879, 891(9th Cir. 2016), meanwhile, this Court held in a habeas corpus case that when the state breached a plea agreement, the defendant could request specific performance of the maximum sentencing range specified in

the agreement. The Supreme Court reversed that decision on the ground that federal law did not clearly require specific performance of the plea agreement. *Kernan v. Cuero*, 138 S. Ct. 4 (2017). None of these cases establishes that the district court clearly erred in denying Marifat's motion to dismiss.

2. Even if Marifat's arguments had merit, which they do not, Marifat cannot establish that he has no other adequate means, aside from mandamus, to obtain the relief he desires, nor can he establish that he will suffer damage or prejudice that cannot be corrected on direct appeal. "Prejudicial harm serious enough to require mandamus relief includes situations in which one's claim will obviously be moot by the time an appeal is possible, or in which one will not have the ability to appeal." *DeGeorge*, 219 F.3d at 935 (internal quotations omitted).

To the contrary, Marifat can raise every error that he complains of, and obtain appropriate relief, on direct appeal. In his mandamus petition, Marifat argued that he cannot obtain relief on appeal because of an appeal waiver in his plea agreement. Pet. 28-29. That position is squarely contrary to Marifat's position here that by withdrawing his guilty plea he nullified his plea agreement completely. Mot. 15. Marifat cannot contend that his plea agreement bars him from direct appeal and also contend, at the same time, that his plea agreement is a nullity. In any event, under the particular circumstances of this case the government will not seek to enforce the appellate waiver in Marifat's plea

agreement. Because Marifat has the option of direct appeal, mandamus is not necessary.

Marifat's primary mandamus argument is that the district court erred by failing to dismiss the Indictment as time-barred. In *DeGeorge*, however, this Court recognized that "the denial of a motion to dismiss an indictment as time barred may be reviewed on direct appeal after trial." 219 F.3d at 935. That Marifat cannot obtain "immediate" review of the district court's denial of his motion to dismiss does not justify mandamus. *See id.* Indeed, "being forced to stand trial despite the running of the statute of limitations on certain charges is not inherently prejudicial" because the statute of limitations "does not entail a right to be free from *trial*[.]" *Id.* at 936 (citations omitted) (emphasis in original).

Marifat also asserts that he faces "potential imprisonment" (Mot. 18). But in *DeGeorge* the defendant actually was confined before trial, yet this Court nonetheless observed that such detention is "not the type [of hardship] that we weigh in determining whether mandamus relief should be granted." 219 F.3d at 936. The mere possibility of conviction and detention pending a direct appeal, which is all that Marifat asserts here, is even less cognizable upon mandamus review.

Marifat also raises the "possibilities" that the government will enforce provisions of his plea agreement that he interprets as requiring that he "testify at

trial, disclose documents or records, and answer the government's questions 'truthfully and completely.'" Mot. 19. Any such concerns are both premature and unfounded. The district court's Order denying Marifat's motion to dismiss did not address whether Marifat remains bound by his cooperation obligations after having withdrawn his guilty plea. Moreover, as noted above the government will not seek to compel Marifat to testify at trial or seek to compel him to disclose documents or records beyond normal criminal discovery. In any event, the improper admission of evidence in violation of Marifat's Fifth Amendment rights can be raised on direct appeal.

3. Finally, Marifat's motion does not explain how the asserted errors set forth above are "oft-repeated error" or manifest a "persistent disregard of the federal rules," nor how they raise "new and important problems" or issues of first impression. *DeGeorge*, 219 F.3d at 940. Even in his mandamus petition, Marifat does not cite any facts or cases demonstrating that these asserted errors are frequently made or persistently disregard the terms of any federal rule. At most he claims that "if" the district court enforces his plea agreement against him then that ruling "will" manifest a disregard of the federal rules (Pet. 34), which does not show any repetitively-made error in the past.

Marifat also erroneously claims that his petition raises a "new and important issue" regarding the applicability of § 3288 after the dismissal of

an information unaccompanied by an indictment waiver. Mot. 17. Not so. The district court's decision rested primarily on a simple application of the plain language of § 3288. In response to Marifat's convoluted chain of reasoning based on the withdrawal of his guilty plea, the court found that Marifat's waiver of indictment was knowing, voluntary, and separate from his plea agreement. There is no need to decide whether an information filed *without* a valid waiver of indictment can toll the statute of limitations pursuant to § 3288. Nor is there any need to decide the effect of a defendant's withdrawal of a guilty plea on the enforceability of his plea agreement, because the district court did not decide that question. The court found only that Marifat's waiver of indictment was separate and independent from his plea agreement, which is not a question of law but one of fact.

II. Marifat Will Not Suffer Irreparable Harm Absent A Stay.

Even if Marifat were likely to succeed on his mandamus petition, which he is not, he has not established that he will suffer irreparable harm if proceedings are not stayed while this Court considers that petition. First, asserted errors by the district court that can be raised and corrected on direct appeal, including the statute of limitations, are by definition not "irreparable" harm. Even assuming, however, that Marifat is correct that the Indictment is untimely, but cannot raise that argument on appeal, he suffers no harm if he goes to trial while this Court

considers his mandamus petition. As noted above, having to stand trial despite the asserted running of the statute of limitations is not inherently prejudicial.

Conclusion

For the foregoing reasons, Marifat's motion to stay should be denied.

Dated: September 14, 2018

Respectfully submitted,

/s/Steven J. Mintz

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Pursuant to Rule 27(d)(2), Fed. R. App. P., the undersigned hereby certifies that:

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/s/ Steven J. Mintz

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