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2  
3 UNITED STATES DISTRICT COURT  
4 EASTERN DISTRICT OF WASHINGTON

5 UNITED STATES OF AMERICA,

6 Plaintiff,

7 v.  
8

9 BUD RAY BROWN,

10 Defendant.

NO. 2:16-CR-00019-JLQ

ORDER RE: PRETRIAL CONFERENCE  
AND DENYING MOTION TO DISMISS

11 A pretrial conference was held on April 1, 2016. Defendant was present, in  
12 custody, and represented by appointed counsel Bryan Whitaker. Assistant United States  
13 Attorney Jared Kimball appeared for the Government.

14 Before the court was Defendant's Motion to Dismiss (ECF No. 24) the Indictment  
15 charging the Defendant with Attempt To Escape and the Government's Motion in Limine  
16 (ECF No. 25). The court heard argument from counsel on the Motion to Dismiss and  
17 issued its oral ruling denying the Motion. The court denied the Motion in Limine.  
18 Defendant then entered a plea of guilty to the pending charge. This Order memorializes  
19 and supplements the court's oral ruling on the Motions.

20 **I. Introduction and Background**

21 The Criminal Complaint in this matter was filed on January 27, 2016, and  
22 Defendant was indicted by the grand jury on February 2, 2016. The Indictment charges  
23 on or about August 19, 2015, Defendant attempted to escape from the Spokane County jail  
24 in violation of 18 U.S.C. § 751. Defendant was previously convicted in the Eastern  
25 District of Washington case number 13-CR-00010, and sentenced by Judge Suko to a  
26 prison term of 180-months on July 12, 2013. He was designated to a Bureau of Prisons

1 (“BOP”) facility to serve the federal sentence. Subsequently, he was transported from the  
2 federal institution to the Spokane County jail pursuant to a *writ of habeas corpus ad*  
3 *prosequendum* issued by the Spokane County Superior Court on a murder charge.

## 4 **II. Defendant’s Motion to Dismiss**

5 Defendant raises two arguments in support of dismissal: 1) vindictive prosecution,  
6 and 2) he was not in federal custody at the time of the alleged escape attempt. Both  
7 arguments lack merit.

### 8 **A. Vindictive Prosecution**

9 Defendant contends shortly after the August 20, 2015 incident at Spokane County  
10 Jail where a rope was observed hanging from his cell window, he “was concerned the state  
11 would file charges against him for escape.” (ECF No. 24, p. 3). Therefore, “contact was  
12 made with the United States Attorney’s office to gauge whether these events might draw  
13 their attention” to the Defendant and allegedly the response was “to the negative”. (*Id.*).  
14 Thereafter, a letter Mr. Brown had written taking responsibility for the escape attempt was  
15 produced in evidence in the federal trial of another individual, Henrikson. The Criminal  
16 Complaint herein against Brown was filed on January 27, 2016. Defendant argues a  
17 presumption of vindictiveness arises because this matter was not charged until five months  
18 after the alleged escape attempt, and after the evidence came to light in the Henrikson trial.  
19 This contention was not advanced at oral argument.

20 A prosecutor violates due process when he seeks additional charges solely to  
21 punish a defendant for exercising a constitutional or statutory right. *United States v. Kent*,  
22 649 F.3d 906, 912 (9<sup>th</sup> Cir. 2011). A defendant may establish vindictive prosecution “(1)  
23 by producing direct evidence of the prosecutor’s punitive motivation, or (2) by showing  
24 that the circumstances establish a reasonable likelihood of vindictiveness” thus giving rise  
25 to a presumption that the Government must in turn rebut.” *Id.* at 912-13. Defendant has  
26 failed to make a showing in either regard.

1 Defendant's claim is in essence that he thought he would not be charged, but after  
2 new evidence came to light in the Henrikson trial, he was charged. As stated by the Ninth  
3 Circuit Court of Appeals, "the Supreme Court has urged deference to pretrial charging  
4 decisions" because "in the course of preparing a case for trial, the prosecutor may uncover  
5 additional information that suggests a basis for further prosecution or he simply may come  
6 to realize that information possessed by the State has a broader significance." *Id.* at 913.  
7 As stated in the Government's Response (ECF No. 26) this is not a situation where a  
8 charge has been filed and then amended to increase the severity. Defendant has produced  
9 no direct evidence of the Government's punitive motivation, nor made a showing of  
10 circumstances that establish a reasonable likelihood of vindictiveness.

### 11 **B. Federal Custody**

12 Defendant claims he was not in federal custody because he was at Spokane County  
13 Jail pursuant to a writ of habeas corpus ad prosequendum and was awaiting trial on state  
14 charges. Defendant's argument ignores the fact he is currently serving a 15-year sentence  
15 on a federal judgment. Defendant did not cite any case law in support of his argument. An  
16 abundance of authority rebuts his contention.

17 Defendant is charged with a violation of 18 U.S.C. § 751(a), which provides in  
18 relevant part:

19 Whoever escapes or attempts to escape from the custody of the Attorney General or  
20 his authorized representative, or from any institution or facility in which he is  
21 confined by direction of the Attorney General, or from any custody under or by  
22 virtue of any process issued under the laws of the United States by any court, judge,  
23 or magistrate judge, or from the custody of an officer or employee of the United  
24 States pursuant to lawful arrest, shall, if the custody or confinement is by virtue of  
an arrest on a charge of felony, or conviction of any offense, be fined under this title  
or imprisoned ...

25 Defendant was clearly in federal custody as he was serving a 15-year sentence imposed in  
26 2013. That he was temporarily in a county jail pursuant to a writ of habeas corpus ad  
prosequendum does not preclude the instant charge. In *United States v. Hobson*, 519 F.2d

1 765, 771 (9<sup>th</sup> Cir. 1975) the court stated: “We hold that escape from an institution  
2 designated by the Attorney General, pursuant to a commitment to his custody, under a  
3 federal sentence, is an escape from ‘the custody of the Attorney General’ in the legal  
4 sense, even though the institution is run by the State.”

5 Other courts have addressed the exact situation presented here, where an individual  
6 is at a federal prison and then transferred to a state facility pursuant to a writ, and have  
7 found the individual remains in federal custody for the purposes of 18 U.S.C. § 751. In  
8 *United States v. Evans*, 159 F.3d 908 (4<sup>th</sup> Cir. 1998) the court found a state writ of habeas  
9 corpus ad prosequendum does not effect a transfer of custody for purposes of § 751(a). In  
10 *Evans*, the defendant was transferred to state custody pursuant to a writ. While in state  
11 custody, he had a seizure and was transferred to a hospital, from which he escaped. The  
12 court rejected defendant’s argument that he was not in federal custody: “we have no doubt  
13 that Evans, at the time he escaped from the United Hospital Center, was in the custody of  
14 the Attorney General ... as the term ‘custody’ is used in § 751(a).” *Id.* at 913.

15 The term “custody” in § 751 “does not require direct physical restraint” and may be  
16 “minimal” and even “constructive”. *United States v. Depew*, 977 F.2d 1412, 1414 (10<sup>th</sup>  
17 Cir. 1992). Defendant Brown was in custody pursuant to his federal 2013 conviction and  
18 sentence. See *United States v. Gowdy*, 628 F.3d 1265 (2010)(“we hold that the custodial  
19 requirement of § 751(a) is satisfied where a lawful judgment of conviction has been issued  
20 by a court against the defendant.”). The fact Defendant was at a state facility pursuant to a  
21 state writ of habeas corpus ad prosequendum at the time of the alleged escape does not  
22 preclude the instant charge. See also *United States v. Maday*, 799 F.3d 776, 777 (7<sup>th</sup> Cir.  
23 2015)(“we note the state had custody of him at the time of his escape only by virtue of a  
24 writ of habeas corpus ad prosequendum ... There was thus enough federal interest in his  
25 continuing in custody even though the actual custodians from whom he escaped were state  
26 employees”).

