UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

UNITED STATES OF AMERICA	:	
	:	Criminal No.
v.	:	3:98cr208 (AWT)
	:	
FRANCIS PORRINI	:	

RULING ON DEFENDANT'S MOTION TO DISMISS

This matter is before the court on the defendant's motion to dismiss the indictment, which is being denied for the reasons set forth below.

I. Background

On October 21, 1997, the defendant, Francis J. Porrini, pled guilty in the Superior Court of the State of Connecticut to distribution of a controlled substance in violation of Connecticut General Statutes ("C.G.S.") § 21a-277(b) and was sentenced to a two-year prison term which he began serving on December 1, 1997. On July 16, 1998, Porrini applied to participate in a community release program pursuant to C.G.S. § 18-100. He executed an "Agreement for Community Release," pursuant to which he agreed to a set of 21 conditions. Those conditions included the following:

1. I agree that transfer to Community Release is at the discretion of the Commissioner of Correction or his designee.

2. I agree that my transfer to Community Release is based upon the conclusion of the Commissioner of Correction that there is a reasonable probability that I will reside on Community Release without violating the law and that my transfer is not incompatible with the welfare of society. If for any reason, even for circumstances over which I have no control, this conclusion becomes no longer valid then my transfer to Community Release will be revoked or modified accordingly.

3. I agree that after transfer to Community Release, I am still an inmate and such transfer may be modified or revoked at any time at the discretion of the Commissioner of Correction or his designee.

4. I agree at any time I may be classified to any higher security level of confinement, including confinement in a correctional facility at the discretion of the Commissioner of Correction or his designee.

5. I agree the following conditions must be obeyed and even if I obey these conditions, I understand that I am not entitled to stay on Community Release and can have no expectation of staying on Community Release.

6. I realize that I am still an inmate and am responsible to conforming to the rules of the Department.

7. I will abide by all conditions of my release. Failure can result in reincarceration and disciplinary sanctions.

9. I agree that I am guilty of escape in the first degree if I escape from a community release program.

Def.'s Ex. 1. On July 28, 1998, the appropriate official at

Porrini's institution recommended that Porrini be allowed to participate in the community release program based on Porrini's "[e]xcellent institutional performance." Id. It was planned that Porrini would live with his fiancee in Bristol, Connecticut. Porrini's "estimated release date" was August 13, 1999. Id.

However, on August 7, 1998, an Assistant United States Attorney wrote to an official at Webster Correctional Institution, where Porrini was being held, advising that the United States Attorney's Office was conducting an investigation into alleged drug trafficking activities by Porrini and that it was anticipated that Porrini would be formally charged with violating the federal narcotics laws by the end of that month. The government requested that it be informed in advance of the target date for Porrini's release.

Porrini was not released on August 13, 1998, the target date for his release.

On August 14, 1998, Peter W. Harrington of the United States Customs Service filed a criminal complaint (the "Complaint") against Porrini, and the United States obtained an arrest warrant based on the Complaint. The Complaint charged Porrini with conspiracy to possess with intent to distribute cocaine "in approximately the late spring/early summer 1996 (Def.'s Ex. 2)," in violation of 21 U.S.C. §§ 841(a)(1) and 846. According to the Complaint, Porrini, with the assistance of his associate Tobias

Rinaldi ("Rinaldi"), sold for the price of $25,000 one kilogram of cocaine to David Capobianco ("Capobianco") at the Meriden Square Mall in Meriden, Connecticut.

Harrington submitted an affidavit, dated August 14, 1998, as part of the Complaint. The information as to Porrini's alleged criminal conduct set forth in that affidavit had been in Harrington's possession since some time in 1997.

Harrington forwarded the Complaint and the arrest warrant to the United States Marshal, who in turn, on August 17, 1998, provided written notice, in the form of a detainer, to the Warden of the Webster Correctional Facility that federal charges of distribution of cocaine had been filed against Porrini. On August 18, 1998, the Webster Correctional Facility notified the defendant that he had been charged with a violation of 21 U.S.C. § 846. The defendant accepted delivery of the Notification of Warrant/Detainer, but refused to sign an acknowledgment of receipt.

As a consequence of Harrington's filing of the Complaint and the government's obtaining an arrest warrant, Porrini was not permitted to enter the community release program. Harrington was aware that Porrini was scheduled to go into the community release program at the time he filed the Complaint. At least one of Harrington's objectives in lodging the Complaint was to keep Porrini in custody. According to Harrington, there were concerns

about Porrini potentially tampering with witnesses were he to be released.

Thereafter, sometime between August 18 and 21, 1998, counsel for the defendant contacted the Assistant United States Attorney responsible for the case. The AUSA confirmed that an arrest warrant had issued and also explained that the defendant had certain rights under the Speedy Trial Act, 18 U.S.C. § 3161(j). Specifically, the AUSA advised defense counsel that the defendant would not be presented in federal court on the pending federal charge until the defendant requested that it be done.

On October 6, 1998, the defendant, through his counsel, wrote to the government to demand "an immediate hearing before a United States Magistrate, and the invocation of all other rights he may have under the laws of the United States and Rules of Criminal Procedure." (Gov't Objection (Doc. #29), Attachment C.) On October 9, 1998, the government advised defense counsel that an indictment charging the defendant with cocaine trafficking charges would be presented to a grand jury the week of October 27, 1998, and it was agreed that the defendant would be presented in federal court thereafter.

On October 29, 1998, a federal grand jury sitting in Hartford returned a two-count indictment (the "Indictment") against Porrini charging him with violations of 21 U.S.C. §§ 841(a)(1) and 846. Count One charges Porrini with conspiracy

to possess with intent to distribute cocaine from on or about February 25, 1997 to on or about March 6, 1997. Count Two charges Porrini with conspiracy to possess with intent to distribute cocaine from on or about May 2, 1997 to on or about December 1, 1997.

As to Count One, the government alleges the following facts. Porrini and Eric Paradis flew from Hartford to West Palm Beach, Florida on February 25, 1997. Anthony Landrette picked them up from the airport and the three of them then met with Thomas Cacho. Cacho then sold Porrini two kilograms of cocaine for the price of $32,000. Paradis subsequently transported the cocaine back to Connecticut on a Greyhound bus. After returning to Connecticut by air on February 27, 1997, Porrini met Paradis at the bus station in Connecticut, took him home, and took possession of the drugs. Porrini and Paradis repeated the same trip a week later, departing on March 3, 1997. Porrini returned to Hartford by air on March 6, 1997 and Paradis again returned to Connecticut with the drugs via bus.

As to Count Two, the government alleges the following facts. Porrini and Paradis flew from Hartford, Connecticut to Los Angeles, California on May 2, 1997. In California, Porrini purchased one kilogram of cocaine. He taped the cocaine to Paradis' body and Paradis took a flight back to Hartford while Porrini returned on a later flight. Porrini and Paradis took two

more trips to California together, each time to purchase one kilogram of cocaine. Paradis then started making trips to California alone on behalf of Porrini. Paradis took several of these solo trips to California before Porrini began serving his state prison sentence on December 1, 1997. Each time he went to California, Paradis purchased drugs for Porrini from Gustavo Perez.

The bulk of the evidence that the government presented to the grand jury to obtain the Indictment had been collected by the government prior to August 14, 1997. However, Agent Harrington included in the Complaint only the allegations as to the drug sale in Meriden, Connecticut in the late spring or early summer of 1996.

On November 4, 1998, the defendant was presented and arraigned before a magistrate judge on the charges in the indictment. Porrini was not released from state custody until April 19, 1999.

II. Discussion

The defendant makes two arguments in support of his motion to dismiss. The defendant argues that the government, by filing the Complaint, which alleged conduct similar to that for which the defendant has now been indicted and also prevented the defendant from entering the community release program, violated the defendant's right to be free from double jeopardy. He also

argues that because the Complaint was filed solely to prevent the defendant from participating in the community release program, the government's actions violated the defendant's rights to due process and the rights guaranteed to him by the Federal Rules of Criminal Procedure.

A. Double Jeopardy

As a consequence of the filing of the Complaint and the issuance of the warrant for the defendant's arrest obtained by the government, Porrini remained incarcerated from August 13, 1998 to April 19, 1999, a period of approximately eight months, whereas he otherwise would have participated in the community release program during that period. The defendant argues that this additional period of incarceration constitutes punishment for the conspiracy alleged in the Complaint and, in addition, that the conspiracy alleged in the Complaint is the same as those alleged in Counts One and Two of the Indictment. Thus, he concludes that because he has already been punished for the conspiracies alleged in Counts One and Two of the Indictment, the Indictment is barred by the Constitution's prohibition against double jeopardy and therefore must be dismissed.

The Constitution provides that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb." U.S. CONST. amend. V. "This protection applies both to successive punishments and to successive prosecutions for the

same criminal offense." United States v. Dixon, 509 U.S. 688, 696 (1993). See also, United States v. Mohammed, 27 F.3d 815, 819 (2d Cir. 1994).

Even assuming arguendo that Porrini's additional eight months of incarceration constitutes punishment for the conspiracy alleged in the Complaint, the defendant fails to establish that the conspiracy alleged in the Complaint is the same conspiracy as those alleged in Counts One and Two of the Indictment. In determining the merits of double jeopardy claims arising in the context of successive conspiracy prosecutions, the following factors are relevant to the task of determining whether conspiracies are distinct: "(1) the criminal offenses charged in successive indictments; (2) the overlap of participants; (3) the overlap of time; (4) similarity of operation; (5) the existence of common overt acts; (6) the geographic scope of the alleged conspiracies or location where overt acts occurred; (7) common objectives; and (8) the degree of interdependence between alleged distinct conspiracies." United States v. Korfant, 771 F.2d 660, 662 (2d Cir. 1985). See also United States v. Macchia, 35 F.3d 662, 668 (2d Cir. 1994) ("we return[] to the Korfant analysis in determining whether two conspiracies are the 'same offense' for double jeopardy purposes"); United States v. Calderone, 982 F.2d 42, 45 (2d Cir. 1992) ("Calderone II") ("Gambino II has committed this Circuit to a return to Korfant analysis, in the aftermath of

Felix, in deciding whether two conspiracies are the 'same offense' for jeopardy purposes"); United States v. Gambino, 968 F.2d 227, 232 (2d Cir. 1992) ("Gambino II") ("Grady's 'same conduct' test did not supplant our Korfant multi-factor analysis for determining whether successive conspiracy prosecutions run afoul of double jeopardy"). The Korfant factors are to be considered with the "awareness that no dominant factor or single touchstone determines" whether the conspiracy alleged in the Complaint is the same as either of the conspiracies alleged in the Indictment. Macchia, 35 F.3d at 668. Rather the decision is to be made based on the "totality of the circumstances." Korfant, 771 F.2d at 662.

As to the criminal offenses charged, the Complaint and the Indictment both charge Porrini with conspiracy to possess with intent to distribute cocaine in violation of 21 U.S.C. §§ 841(a)(1) and 846. "Similarity at this general level, however, is of limited import." Macchia, 35 F.3d at 669.

As to the overlap of participants, the only participant common to the conspiracy alleged in the Complaint and the conspiracies alleged in the Indictment is Porrini himself. It is well-established, however, that "[t]he participation of a single common actor in what are allegedly two sets of conspiratorial activities does not establish the existence of a single conspiracy." Korfant, 771 F.2d at 663. See also, United States

v. Reiter, 848 F.2d 336, 341 (2d Cir. 1988) ("[s]eparate chains of conspiracy may emanate from the same leadership").

As to the overlap of time, there is none. There is a period of at least eight months between the conspiracy alleged in the Complaint and those alleged in the Indictment. The conspiracy described in the Complaint existed during the late spring/early summer of 1996, while the earliest of the conspiracies alleged in the Indictment came into existence in February 1997.

As to similarity of operation, there is not much. The conspiracy alleged in the Complaint involved Porrini delivering, through his associate Rinaldi, a kilogram of cocaine in exchange for a bag of money in the amount of $25,000 at the Meriden Square Mall in Meriden, Connecticut. The conspiracies alleged in the Indictment involved Porrini and his courier Paradis traveling to Florida or California in order to acquire cocaine from out of state and have Paradis return with it to Connecticut, and eventually, for Paradis to travel on his own to California and return with cocaine. Although each conspiracy involved an intermediary acting on behalf of Porrini in a drug transaction, and an exchange of drugs and money, these rather generic similarities do not establish a similarity of operation between the alleged conspiracies.

As to the existence of common overt acts, there are no common overt acts here. The conspiracy alleged in the Complaint

and those alleged in the Indictment involve discrete and independent sets of acts that do not overlap with one another.

As to the geographic scope of the alleged conspiracies, the conspiracy alleged in the Complaint took place in, and was restricted to, Meriden, Connecticut while the conspiracies alleged in the Indictment took place in Hartford, Connecticut; West Palm Beach, Florida; and Los Angeles, California. Thus, there is no overlap between the Complaint and the Indictment in terms of where the overt acts occurred.

As to common objectives, the objective of the conspiracy alleged in the Complaint was a one-time sale of cocaine here in Connecticut, while the objective of the conspiracies alleged in the Indictment was a series of purchases of cocaine for the purpose of importing that cocaine here to Connecticut, presumably so it could be resold here.

As to the degree of interdependence between the alleged distinct conspiracies, if there is any interdependence at all, it is minimal at best. The sale of cocaine in Meriden, Connecticut in 1996 did not depend on the subsequent purchase of cocaine in California and Florida in 1997 and transportation of that cocaine to Connecticut. Nor is there any indication that the series of purchases of cocaine in Florida and California depended on a one-time sale of a kilogram of cocaine in Meriden, Connecticut many months before. Thus, the conspiracies functioned independently

of one another.

It may be that the conspiracies alleged in the Complaint and in the Indictment could have been charged by the government as part of a single, overarching conspiracy under the direction of Porrini to obtain cocaine from a variety of sources and sell it in Connecticut. If so, then two points are pertinent. First, such a situation is not the type of situation that was addressed by the court in Macchia, i.e., where it was contended that the conspiracy was a subset of the other:

> Defendants argue that the Tarricone Conspiracy was merely a subset of the larger Macchia Conspiracy. "Where the facts of the smaller conspiracy were substantially overlapping with those of the larger conspiracy, we have either held the conspiracies to be the same ... or sufficiently similar to require the Government to prove that they are different...." "[O]nce a defendant introduces sufficient evidence that the two conspiracies alleged were in fact one, the burden shifts to the government to rebut the inference of unity."

Macchia, 35 F.3d at 668 (citations omitted). This is not the case here. The government may have been able to charge the conspiracies at issue here as part of a single, larger conspiracy, but that does not change the fact that there is no substantial overlap between the conspiracies at issue here.

Second, the defendant argues that the Complaint was filed for the purpose of preventing his participation in the community release program. Thus, he argues, he was kept in pretrial custody, without an opportunity to gain pretrial release, on the

charge in the Complaint, which pretrial custody constituted punishment for the crime alleged in the Complaint. Consequently, he argues, the government violated his due process rights by punishing him prior to an adjudication of guilt, and the Indictment should be dismissed because the Complaint is directly related to the investigation that led to the Indictment. However, there are many legitimate reasons why the government could, in its discretion, choose to prosecute smaller, discrete conspiracies involving Porrini, as opposed to such a single, overarching conspiracy. For example, the government may not feel it has sufficiently strong proof to prosecute a larger, overarching conspiracy. The government is not required to charge or prosecute the broadest conspiracy it may be able to prove. Indeed, United States v. Calderone, 982 F.2d 42 (2d Cir. 1992), cautions against the government's prosecution of far-reaching conspiracies that it cannot prove. Therefore, the court held that acquittal of a far-reaching conspiracy precludes subsequent prosecution for a smaller conspiracy entirely contained within the larger conspiracy. Id. at 48. See also, United States v. Sperling, 506 F.2d 1323, 1341 & n.25 (2d Cir. 1974) (cautioning the government against charging a single conspiracy when the alleged criminal acts could be more reasonably regarded as two or more conspiracies).

The defendant also argues that the government could offer

the actions alleged in the Complaint as evidence of the conspiracies alleged in the Indictment, and that such evidence would be sufficient to prove the conspiracies alleged in the Indictment. Thus, he argues, the offenses are the same offense for double jeopardy purposes. However, the court sees no reason to substitute such an approach for the comprehensive analysis required under Korfant. The cases on which the defendant relies all deal with an issue other than double jeopardy, namely, when a variance between the time alleged in the indictment and the time proven is a fatal variance. See United States v. Duke, 940 F.2d 1113, 1119-20 (8th Cir. 1991) (where offense alleged to have occurred on or about May 18, 1989, no fatal variance where offense actually proven to have occurred in 1988); United States v. Wilson, 116 F.3d 1066, 1089 (5th Cir. 1997)("A five-month variance between the date alleged and the date proved is not unreasonable as a matter of law as long as the date proven falls within the statute of limitations and before the return of the indictment"); United States v. Postma, 242 F.2d 488 (2d Cir. 1952) (no fatal variance where conspiracy alleged to have begun on or about June 1951 and evidence showed it did not begin until November 1952).

The bar against double jeopardy requires that under the "totality of the circumstances," including an analysis of the Korfant factors, the conspiracies be distinct. Korfant, 771 F.2d

at 662. Here, because the dissimilarities of the conspiracies at issue substantially outweigh the similarities, the court concludes that the conspiracy alleged in the Complaint is not the same offense for double jeopardy purposes as the offenses set forth in the Indictment. Accordingly, the defendant's double jeopardy argument fails.

B. Due Process

The defendant argues that the government violated his due process rights by filing the criminal complaint because it intended, in doing so, to prevent his release from state custody and, in addition, because it denied him his right, as a federal pretrial detainee, to a federal detention hearing. The court finds neither of these arguments persuasive.

1. The Defendant's Status as a State Prisoner

The safeguard of procedural due process "protects 'the individual against arbitrary action of government.'" Ky. Dep't of Corr. v. Thompson, 490 U.S. 454, 460 (1989)(quoting Wolff v. McDonnell, 418 U.S. 539, 558 (1974)). Procedural due process questions are analyzed in two steps. First, courts must determine whether there exists a liberty or property interest that has been interfered with by the state. See Bd. of Regents v. Roth, 408 U.S. 564, 571 (1972). Second, courts examine whether the procedures provided prior to a given deprivation were constitutionally sufficient. See Hewitt v. Helms, 459 U.S. 460,

472 (1983). "Protected liberty interests 'may arise from two sources--the Due Process Clause itself and the laws of the States.'" Ky. Dep't of Corr., 490 U.S. at 460 (quoting Hewitt, 459 U.S. at 466). Here, the defendant lacks the requisite liberty interest to invoke the procedural protections of the Due Process Clause.

"There is no constitutional or inherent right of a convicted person to be conditionally released before the expiration of a valid sentence." Greenholtz v. Inmates of the Nebraska Penal and Corr. Complex, et al., 442 U.S. 1, 7 (1979). In Greenholtz, the Court explained:

> The natural desire of an individual to be released is indistinguishable from the initial resistance to being confined. But the conviction, with all its procedural safeguards, has extinguished that liberty right: [G]iven a valid conviction, the criminal defendant has been constitutionally deprived of his liberty.

Id. (quotation marks and citation omitted)

In Sandin v. Conner, 515 U.S. 472, 485 (1995), the Supreme Court noted that the Due Process Clause provides prisoners with only limited procedural protections and established a new framework for determining whether prisoners have properly established a liberty interest. The Court stated:

> [W]e recognize that States may under certain circumstances create liberty interests which are protected by the Due Process Clause. But these interests will be generally limited to freedom from restraint which, while not

> exceeding the sentence in such an unexpected manner as to give rise to protection by the Due Process Clause of its own force, nonetheless imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life.

Id. at 483-84 (citations omitted).

In deciding that the state's action in placing a prisoner in administrative segregation for 30 days "did not present the type of atypical, significant deprivation in which a State might conceivably create a liberty interest," the Court looked to whether the state's action affected the duration of the prisoner's sentence and whether it would work a major disruption in the prisoner's environment based on a comparison with other inmates both inside and outside disciplinary segregation. Id. at 486-87.

Following Sandin, courts split on the question of "whether an inmate has a liberty interest in continued participation in a temporary release program such that a hearing is required before the inmate can be removed from the program." Pena v. Recore, 1997 WL 581058, *6 (E.D.N.Y. 1997) (summarizing cases). However, neither the holding nor the analysis in any of those cases can be extended to support the conclusion that a hearing is required before a warden can revoke approval of a prisoner's participation in a community release program.

This conclusion is supported by the Supreme Court's analysis in Young v. Harper, 520 U.S. 143 (1997), where the Court

concluded that a pre-parole program was equivalent to parole for purposes of the creation of a liberty interest. The Court compared the pre-parole program to parole:

> "The essence of parole is release from prison, before the completion of sentence, on the condition that the prisoner abide by certain rules during the balance of the sentence." In Morrissey, we described the "nature of the interest of the parolee in his continued liberty":
>
> > [H]e can be gainfully employed and is free to be with family and friends and to form the other enduring attachments of normal life. Though the State properly subjects him to many restrictions not applicable to other citizens, his condition is very different from that of confinement in a prison.... The parolee has relied on at least an implicit promise that parole will be revoked only if he fails to live up to the parole conditions."
>
> This passage could just as easily have applied to respondent while he was on preparole. In compliance with state procedures, he was released from prison before the expiration of his sentence. He kept his own residence; he sought, obtained, and maintained a job; and he lived a life generally free of the incidents of imprisonment. To be sure, respondent's liberty was not unlimited. He was not permitted to use alcohol, to incur other than educational debt, or to travel outside the county without permission. And he was required to report regularly to a parole officer. The liberty of a parolee is similarly limited, but that did not in Morrissey render such liberty beyond procedural protection.

Young, 520 U.S. at 147-48 (citations omitted). See also Harper v. Young, 64 F.3d 563, 566 (10th Cir. 1995)("[T]he dispositive characteristic that marks the point at which the Due Process

Clause itself implies a liberty interest ... is the fact of release from incarceration.")

Here, while the defendant was approved for participation in the community release program and an estimated date for his earliest placement was computed, he was never released to that program. Therefore, he never acquired the requisite liberty interest that would enable him to invoke the procedural protections of the Due Process Clause.

2. Defendant's Status as a Federal Pretrial Detainee

The defendant also argues that the government violated his rights under the Due Process Clause because he was denied a federal detention hearing on the charge in the Complaint. However, the record does not support his contention.

Federal Rule of Criminal Procedure 5 provides in pertinent part that:

> an officer making an arrest under a warrant issued upon a complaint...shall take the arrested person without unnecessary delay before the nearest available federal magistrate judge....the magistrate judge shall proceed in accordance with the applicable subdivisions of this rule.

The requirement that an arrested person be brought "without unnecessary delay" before the nearest available magistrate judge does not apply to persons in state custody, such as prisoners. United States v. Rivas-Lopes, 988 F.Supp. 1424 (D. Utah 1997); Hodnett v. Slayton, 343 F.Supp. 1142 (W.D.Va. 1972), aff'd, 471

F.2d 648 (4th Cir. 1973).

Rather, in such cases, § 3161(j)(1) of the Speedy Trial Act requires that:

> If the attorney for the Government knows that a person charged with an offense is serving a term of imprisonment in any penal institution, he shall promptly-
>
> (A) undertake to obtain the presence of the prisoner for trial; or
>
> (B) cause a detainer to be filed with the person having custody of the prisoner and request him to so advise the prisoner and to advise the prisoner of his right to demand trial.

Speedy Trial Act, 18 U.S.C. § 3161 (2000).

Here, the defendant was in state custody at the time the Complaint was filed. Within two business days, the warden of the correctional facility where the defendant was incarcerated, presented a Notification of Warrant/Detainer to the defendant. Within one week of the filing of the Complaint, counsel for the defendant was advised of the defendant's right to be presented before a federal court, and that the defendant would not be presented in federal court until he requested a presentment. Once the defendant requested, through counsel, that a hearing be held, it was agreed that the defendant would not be presented before a magistrate judge until after this case was presented to the grand jury. Soon after the grand jury returned the Indictment, the defendant was presented and arraigned before a magistrate judge. Thus, the record here demonstrates that the

defendant was notified in a timely fashion of the existence of federal drug charges and his rights as a federal pretrial detainee.

III. Conclusion

For the reasons set forth above, the defendant's Motion to Dismiss the Indictment [doc. #25] is hereby DENIED.

It is so ordered.

Dated at Hartford, Connecticut, on this _____ day of January 2001.

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Alvin W. Thompson
United States District Judge