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7 Arizona State Bar No. 004156  
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9 **IN THE UNITED STATES DISTRICT COURT**  
10 **FOR THE DISTRICT OF ARIZONA**

11 **UNITED STATES OF AMERICA, ) NO. 4:10-cr-03019-DCB -CRP**  
12 **Plaintiff, )**

13 **s. ) MOTION TO DISMISS**  
14 **) PRE-INDICTMENT DELAY**

15 **RICARDO MENDEZ, JR., )**  
16 **Defendant, )**  
17 \_\_\_\_\_ )

18 **COMES NOW** Ricardo Mendez, by and through undersigned counsel of  
19 record, John D. Kaufmann, and moves to dismiss the above captioned action for  
20 violation of the Defendant's right to speedy trial as guaranteed and protected by the  
21 Fifth Amendment to the United States Constitution.

22 **RESPECTFULLY SUBMITTED** this 8<sup>th</sup> day of April, 2011.

23 *s/ John D. Kaufmann*  
24 \_\_\_\_\_  
25 John D. Kaufmann

1           **I.       STATEMENT OF FACTS**

2           On March 20<sup>th</sup>, 2007, Defendant Mendez and co-defendant Celaya went to Mad  
3 Dog Global Marketing. Two transactions took place. The first transaction was the  
4 purchase of 21 firearms by Defendant Celaya. The second transaction was one  
5 firearm purchased by Ricardo Mendez. Co-Defendant Rodrigo Rodriguez-Contreras  
6 was present at the time of the transactions.  
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8           Although the Indictment contains multiple counts and extends through October of  
9 2007, Mr. Mendez is not alleged to have been involved in other incidents identified  
10 in the indictment. Several weeks after the purchase, Mr. Mendez was with co-  
11 defendant Rodriguez-Contreras at a night club. Rodriguez-Contreras was involved in  
12 a disturbance with a woman at the night club and police were called. The weapon Mr.  
13 Mendez purchased from Mad Dogs was discovered underneath the front seat of a  
14 vehicle owned by Rodriguez-Contreras' girlfriend, but driven by Ricardo Mendez as  
15 Rodriguez-Contreras license was suspended. At the scene of the arrest, Mr. Mendez  
16 indicated that the firearm was his. Rodriguez-Contreras told the same story. Mr.  
17 Mendez asked the Tucson Police Department and ATF for the return of his firearm.  
18 The last act of the conspiracy is alleged to occur in October of 2007. The  
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1 investigation concerning this case was completed shortly thereafter. The Indictment  
2 is returned October 27<sup>th</sup>, 2010.<sup>1</sup>

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4 For three years the government did not indict or pursue charges. During this time,  
5 co-defendant Rodriguez-Contreras was deported to Mexico and his current location  
6 and address are unknown. Secondly, the attorney for Rodriguez-Contreras, Burt  
7 Polis has passed away. Thirdly, the owner of the vehicle driven by Mr. Mendez  
8 cannot be located and is believed to be in Mexico with Rodriguez-Contreras.  
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10 Rodriguez-Contreras would testify that the weapon belonged to Ricardo Mendez.  
11 Mr. Polis would have confirmed Mr. Rodriguez-Contreras' statements. Rodriguez-  
12 Contreras' girlfriend would have stated that she gave permission for Defendant  
13 Ricardo Mendez to drive the vehicle as Rodriguez-Contreras' license was suspended  
14 at the time of the gun seizure.  
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16 **II. ISSUE**

- 17 a. WHETHER THE PRE-ACCUSATORIAL DELAY VIOLATED THE  
18 DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT.  
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25 <sup>1</sup> Paragraph ii in Count one (conspiracy) alleges between February 2007 and August 2008  
firearms were transported to Mexico. However, the last date documented in the Indictment for  
conduct is October 2007.

1       **III. ARGUMENT**

2               **a. THE PRE-ACCUSATORIAL DELAY VIOLATED A DUE**  
3               **PROCESS CLAUSE RIGHT TO SPEEDY TRIAL OF THE**  
4               **FIFTH AMENDMENT.**

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6       The Due Process Clause to the United States Constitution guarantees speedy trial  
7 by guarding against governmental delay that prejudices a defendant. On a Fifth  
8 Amendment motion for dismissal and the right to speedy trial, a Defendant must  
9 show that he has either suffered actual prejudice from the delay or that the  
10 prosecution intentionally or recklessly delayed the indictment for strategic  
11 advantage. See United States v. Lovasco, 431 U.S. 783(1977); United States v.  
12 Loud Hawk, 816 F.2d 1323(9<sup>th</sup> Cir. 1987); United States v. Carruth, 699 F.2d  
13 1017(9<sup>th</sup> Cir. 1983).

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16       In the case before the Court, Mr. Mendez is asserting that he has suffered both  
17 actual prejudice and that that prosecution intentionally or recklessly delayed the  
18 Indictment for strategic advantage. i.e. the deportation of the only eye witness. In  
19 the case before the Court, a key witness was deported by the government after it  
20 had knowledge that his testimony would favor Mr. Mendez. The eyewitness  
21 girlfriend followed him to Mexico. No forwarding address is known. They left or  
22 were deported after the completion of the investigation by the federal government  
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1 in the case. The Defendant shows actual prejudice and intentional prosecutorial  
2 conduct in delaying the indictment for a strategic advantage.

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4 If actual prejudice is alleged, the Court adopts a two prong test. United  
5 States v. Ross, 123 F.3d 1181(9<sup>th</sup> Cir. 1997). The first prong is actual prejudice. If  
6 the Court determines that any prejudice exists, the trier of fact balances the length  
7 of delay, (over three years) with the reasons for the delay in deciding whether the  
8 Defendant's rights are violated. Violating a defendant's Fifth Amendment right to  
9 due process requires dismissal of charges even if the statute of limitations has not  
10 expired. United States v. Doe, 149 F.3d 945(9<sup>th</sup> Cir. 1998). Mr. Mendez requests  
11 dismissal under the Fifth Amendment's due process right to speedy trial.  
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14 **RESPECTFULLY SUBMITTED** this 8<sup>th</sup> day of April, 2011.

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16 s/ John D. Kaufmann  
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