IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,	)	
	)	
v.	)	
	)	**CRIM NO. 21-CR-198-TSC**
TROY ANTHONY SMOCKS,	)	**Judge: Chutkan**
	)	
Defendant.	)	

REPLY TO THE GOVERNMENT'S MEMORANDUM IN OPPOSITION TO MOTION FOR RECONSIDERARION

COMES NOW Troy Anthony Smocks, by and through counsel, and files the following reply to the government's Memorandum in Opposition to Motion for Reconsideration. In support thereof, defendant states as follows:

While the Federal Rules of Criminal Procedure does not specifically provide for motions to reconsider interlocutory orders in criminal cases, some courts have entertained such motions, nevertheless. *See* United States v. McCallum, 885 F.Supp.2d 105, 115 (D.D.C.2012). The basis for the review is the "as justice requires" standard used in civil cases under Federal Rule of Civil Procedure 54(b) to assess motions to reconsider interlocutory orders. *See, e.g.,* United States v. Sunia, 643 F.Supp.2d 51, 60–61 (D.D.C.2009). The court, however, may deny a motion for reconsideration when it raises " 'arguments for reconsideration the

court ha[s] ... already rejected on the merits[,]' " McLaughlin v. Holder, 864 F.Supp.2d 134, 141 (D.D.C.2012) (quoting Capitol Sprinkler Inspection, Inc. v. Guest Servs., Inc., 630 F.3d 217, 227 (D.C.Cir.2011)).

The "as justice requires" reconsideration includes situations in which a court " 'patently misunderstood the parties, made a decision beyond the adversarial issues presented, [or] made an error in failing to consider controlling decisions or data, or [where] a controlling or significant change in the law has occurred.' " Arias v. DynCorp, 856 F.Supp.2d 46, 52 (D.D.C.2012) (quoting Negley v. FBI, 825 F.Supp.2d 58, 60 (D.D.C.2011)). The burden is on the moving party to show that reconsideration is appropriate, and that harm or injustice would result if reconsideration were denied. Husayn v. Gates, 588 F.Supp.2d 7, 10 (D.D.C.2008).

In this case, defendant Troy Smocks asks for consideration for three separate reasons. First, that an "ends of justice" requirement was not fulfilled by the government. Second, that there is a miscalculation of excludable days under the Speedy Trial Act. Third, that the court relied on hearsay that was based upon faulty or unreliable evidence which should require an evidentiary hearing of the underlying facts rather than the conclusory hearsay assumptions the court used to make its findings.

1. No ends of justice findings continuance

As previously argued, the court never made an "ends of justice" for any time period. Accordingly, the government did not have a basis to exclude time that did not fall under the exceptions outlined in 18 U.S.C. § 3161(h)(1). Accordingly, since these exclusions based on weather and medical delay were not requested in timely matter, a *post hoc* exclusion is not permitted. Accordingly, this court should not, and is not, permitted to make a determination now that certain dates can or cannot be excluded due to these reasons. Accordingly, this Honorable Court should not allow for the exclusion of any of the time the government requested for those two reasons. Therefore, the number of days would therefore be beyond the permissible days under the Speedy Trial Act, and this court should dismiss the case.

2. **Exclusion of dates under *Tinklenberg* decision**

The government misconstrues the *Tinklenberg* decision in its opposition. The Supreme Court affirmed the Sixth Circuit decision of finding a violation of the Speedy Trial Act but basing it upon the relevant section of the code which is at issue in this case. In *Tinklenberg,* the court examined § 3161(h)(1)(F), which excludes "delay resulting from transportation of any defendant from another district, or to and from places of examination or hospitalization, except that any

time consumed in excess of ten days from the date an order of removal or an order directing such transportation, and the defendant's arrival at the destination shall be presumed to be unreasonable." United States v. Tinklenberg, 563 U.S. 647, 660 (2011). During Tinklenberg's case, there were 20 transportation days that were into consideration. Accordingly, since 10 days were excludable, that allowed for 10 days that were not excludable. Of those ten not excludable, the court only counted 8 of those days, as it excluded Saturdays, Sundays, and holidays. Accordingly, in Mr. Smock's case, the court should not exclude the weekdays and holidays, thus placing the number of days beyond thirty days and thus causing a violation of the Speedy Trial Act.

3. **COVID-19 Diagnosis**

The government attempts to summarize the defense's evidence by dismissing the arguments and simply indicating that the "Court has already considered the defendant's argument and rejected it." Actually, the opposite is true. The court has considered the declaration of Agent Kevin Wykert. From the outset, the defense has insisted that the court should consider the actual evidence rather than the conclusory hearsay statements of the government's agent. In its filing, the defense provided evidence of the Grady County records that show that Mr. Smocks' medical diagnosis is not as certain as suggested. What Mr. Smocks

presents are his medical records which put into question whether there was a proper medical diagnosis given the discrepancies that exist within the medical records themselves. No one disputes that Mr. Smocks was indeed told he had a diagnosis of COVID-19, and that it was the reason provided for him to not be able to travel. Similarly, no one disputes that the Agent was told of Mr. Smocks' diagnosis and his subsequent denial to travel. However, what is in dispute is whether that diagnosis was actually correct. What Mr. Smocks has provided to the court are his medical records, which presumably are being seen by the court or either party for the first time. What Mr. Smocks is requesting is that the court take testimony from the individuals preparing the medical records and allow them to be cross-examined to determine whether Mr. Smocks was indeed properly diagnosed. If, as the defense has argued, the diagnosis was indeed "made-up" to suit the government's travel limitations, then clearly it is a travesty that Mr. Smocks (and possibly many other arrested defendants) have been subjugated to arbitrary delays simply to fit to the whim of the U.S. Marshal travel limitations. Accordingly, the court should allow for a hearing to consider the records as well as testimony to justify the government's action that caused the delay of Mr. Smocks and subsequently, delays under the Speedy Trial Act.

Mr. Smocks further requests a hearing in order to challenge the findings of the court based upon faulty representations and the conclusions made due to the government's representations. "To require a motion hearing the defendant must raise issues of fact material to the resolution of the defendant's constitutional claim." *See* United States v. Voigt, 89 F.3d 1050 (3rd Cir. 1996). Mr. Smocks submits that a motions hearing is appropriate in this regard for three reasons: 1) the fact that retroactive and/or *nunc pro tunc* continuances that were granted by the court for February 12-20, 2021, and March 7-9, 2021; 2) failure for the court to make "ends of justice" findings on the record under 18 U.S.C. § 3161(h)(7)(A) for these exclusions; and 3) failure to exclude the weekend and/or holidays pursuant to Tinklenburg under the Speedy Trial Act. Accordingly, Mr. Smocks requests hearing in this matter.

WHEREFORE, for the reasons stated above, defendant Troy Smocks respectfully requests that the court reconsider its decision and grant Defendant Troy Smocks' original motion.

Respectfully submitted,

TROY ANTHONY SMOCKS
By Counsel

/s/ John L. Machado

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Certificate of Service

I hereby certify that a true copy of the foregoing was electronically filed with the Clerk of the Court using the CM/ECF system this 9th day of August, 2021, which will send a notification of such filing (NEF) to the following to all counsel of record.

/s/John L. Machado

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