UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA	:	
	:	
v.	:	**Criminal No. 1:21-MJ-00371**
	:	
TRACI J. SUNSTRUM,	:	
	:	
Defendant.	:	

CONSENT MOTION TO CONTINUE STATUS CONFERENCE AND TO EXCLUDE TIME UNDER THE SPEEDY TRIAL ACT

Pursuant to 18 U.S.C. § 3161 (The Speedy Trial Act), the parties in the above captioned case, by and through the undersigned Assistant United States Attorney, and through defense counsel, respectfully move this Court to continue the currently scheduled status conference and the 30-day time period for filing of the indictment or information by 60 days.

The parties submit that good cause exists and request that the indictment/information return date be continued and that time be excluded from the Speedy Trial Act, 18 U.S.C. § 3161 *et seq*. (the "STA"), on the basis that the ends of justice served by taking such actions outweigh the best interest of the public and the defendant in a speedy trial pursuant to the factors described in 18 U.S.C. § 3161(h)(7)(A), (B)(i), (ii), and (iv).

In support of its motion, the parties state as follows:

FACTUAL BACKGROUND

On April 13, 2021, the defendant was charged in a criminal complaint with knowingly entering or remaining in any restricted U.S. Capitol building or grounds without lawful authority.

The defendant was arrested in Western District of New York where she appeared for an initial appearance on May 19, 2021. Ms. Sunstrum was released with pretrial conditions. Ms. Sunstrum appeared in the D.C. court on May 27, 2021, was appointed counsel (Steven George

Slawinski with Federal Defenders), and waived a preliminary hearing. This Court scheduled a status conference for July 26, 2021 and tolled the Speedy Trial Statute.

On July 12, 2021, the parties again moved to continue the indictment/information return date and exclude time from the Speedy Trial Act. This Court granted that continuance and scheduled a preliminary hearing for September 24, 2021.

On September 13, 2021, after following the pro hac vince procedures, Mr. Dan Dubois entered a substitution of counsel on behalf of Ms. Sunstrum.

LEGAL STANDARD

In determining whether to toll time under the Speedy Trial clock under an "ends of justice" standard, the Court is to consider whether failure to grant the extension of the time would be likely to result in a miscarriage of justice. 18 U.S.C. § 3161 (h)(7)(B)(i). The Court also considers, "[w]hether the case is so unusual or so complex, due to the number of defendants, the nature of the prosecution, or the existence of novel questions of fact or law, that it is unreasonable to expect adequate preparation for pretrial proceedings within the time limits established by this section." 18 U.S.C. § 3161(h)(7)(B)(ii).

Moreover, without an extension, an indictment must be filed within 30 days of the arrest. 18 U.S.C. § 3161(b). The Speedy Trial Act permits the Court to extend the 30-day period between arrest and indictment if it finds that it would be unreasonable to expect the return within 30-days or because the facts upon which the grand jury must base its determination is unusual or complex. 18 U.S.C. § 3161(h)(7)(B)(iii).

The parties submit that there is good cause to extend the time for filing the indictment or information, and to exclude the delay from the Speedy Trial computation on a number of bases.

ARGUMENTS

The parties submit that the ends of justice served by a continuance and extension outweigh the best interest of the public and the defendant in a speedy trial. 18 U.S.C. § 3161 (h)(7)(A). Moreover, failure to grant the extension of the time for indictment would be likely result in a miscarriage of justice. 18 U.S.C. § 3161 (h)(7)(B)(i).

Ms. Sunstrum will not be prejudiced by the requested continuance and extension in that she is not in custody and agrees that the time between this motion and the newly set indictment/information return date should be excluded under the Speedy Trial Act.

The parties agree that the complaint will remain in full force and effect through the new status conference date scheduled by the Court.

The parties agree that this stipulation and any order resulting therefrom shall not affect any previous order of pretrial detention or pretrial release.

COVID-19 Pandemic: The continuing pandemic is affecting the trial schedule. In recognition of the current high rate of transmission of the Delta variant in the District of Columbia, Chief Judge Howell issued Standing Order 21-47, limiting the number of jury trials that may be conducted at one time until at least October 31, 2021. Further, the Court found that "for those cases that cannot be tried consistent with those health and safety protocols and limitations, the additional time period from August 31, 2021 through October 31, 2021 is excluded under the Speedy Trial Act as the ends of justice served by the continuances to protect public health and safety and the fair rights of a defendant outweigh the best interest of the public and any defendant's right to a speedy trial, pursuant to 18 U.S.C. 3161(h)(7)(A)." (As detailed in Standing order 21-47, the Court had previously found that due to the exigent circumstances created by the COVID-

19 pandemic, the time period from March 17, 2020 through August 31, 2021, would be excluded in criminal cases under the STA.) The current restrictions on counsel, particularly those impacting the ability to communicate with witnesses, have slowed the normal litigation process. Thus, the effect of the continuing pandemic on the ability to hold jury trials supports tolling of the STA in this case.

New Counsel: Mr. DuBois is diligently representing Ms. Sunstrum but entered an appearance in the case only a week ago. Defense counsel needs time to review discovery, confer with his client, and conduct due diligence in determining whether it is in his client's best interest to seek a jury trial or whether his client should seek a plea resolution. The government and counsel for the defendant have conferred and are continuing to communicate in an effort to resolve this matter. The additional time requested will facilitate possible pre-indictment resolution of these charges.

Discovery: The United States has diligently been working to collect, review, and process the massive amount of discovery generated from the January 6th riot cases. However, the case presents significant logistical complexity, and the United States is considering additional possible charges beyond those contained in the complaint. Specifically, this case involves thousands of hours of video footage; many different witnesses; and large amounts of records from various sources. Given the complexity of the case, the number of witnesses, the parties request this additional continuance so both parties can be prepared.

The government has provided defense counsel with significant case-specific discovery including videos and interviews, as outlined in discovery notices filed with the Court. The government filed a memorandum regarding the status of discovery, incorporated herein by

reference.

The government's approach to the production of voluminous discovery, as elaborated in our previously filed memoranda, is consistent with the *Recommendations for Electronically Stored Information (ESI) Discovery Production* developed by the Department of Justice and Administrative Office of the U.S. Courts Joint Working Group on Electronic Technology in the Criminal Justice System.[1] It is also the generally accepted approach in cases involving voluminous information. Notably, every circuit to address the issue has concluded that, where the government has provided discovery in a useable format, and absent bad faith such as padding the file with extraneous materials or purposefully hiding exculpatory material within voluminous materials, the government has satisfied its *Brady*[2] obligations. *See United States v. Yi*, 791 F. App'x 437, 438 (4th Cir. 2020) ("We reject as without merit Yi's argument that fulfillment of the Government's obligation under *Brady* requires it to identify exculpatory material."); *United States v. Tang Yuk*, 885 F.3d 57, 86 (2d Cir. 2018) (noting that the "government's duty to disclose generally does not include a duty to direct a defendant to exculpatory evidence within a larger mass of disclosed evidence") (internal citations omitted); *United States v. Stanford*, 805 F.3d 557, 572 (5th Cir. 2015) ("We have previously rejected such 'open file' *Brady* claims where the government provided the defense with an electronic and searchable database of records, absent some showing that the government acted in bad faith or used the file to obscure exculpatory material."); *United States v. Gray*, 648 F.3d 562, 567 (7th Cir. 2011) ("The government is not obliged to sift fastidiously through millions of pages (whether

[1] *See https://www.justice.gov/archives/dag/page/file/913236/download.*

[2] *Brady v. Maryland*, 373 U.S. 83 (1963).

paper or electronic). . . [and] is under no duty to direct a defendant to exculpatory evidence [of which it is unaware] within a larger mass of disclosed evidence.") (quotation marks and citations omitted); *Rhoades v. Henry*, 638 F.3d 1027, 1039 (9th Cir. 2011) (rejecting *Brady* claim on the ground that the defendant "points to no authority requiring the prosecution to single out a particular segment of a videotape, and we decline to impose one"); *United States v. Warshak,* 631 F.3d 266, 297 (6th Cir. 2010) ("As a general rule, the government is under no duty to direct a defendant to exculpatory evidence within a larger mass of disclosed evidence"); *United States v. Skilling*, 554 F.3d 529, 576 (5th Cir. 2009)(same), aff'd in part, vacated in part, remanded, 561 U.S. 358 (2010); *United States v. Pelullo*, 399 F.3d 197, 212 (3d Cir. 2005) ("*Brady* and its progeny . . . impose no additional duty on the prosecution team members to ferret out any potentially defense-favorable information from materials that are so disclosed."); *United States v. Jordan,* 316 F.3d 1215, 1253-54 (11th Cir. 2003) (concluding that the defendant's demand that the government "identify all of the *Brady* and *Giglio* material in its possession," "went far beyond" what the law requires).[3] Given the due diligence the United States continues to apply to meet its discovery obligations, an ends-of-justice continuance under the STA is warranted.

As the Supreme Court has observed, the STA "recognizes that criminal cases vary widely and that there are valid reasons for greater delay in particular cases." *Zedner v. United States,*

[3] Even in the unusual cases where courts have required the government to identify *Brady* within previously produced discovery, no court found that this was a substantive right held by the defendant in every case. For example, in *United States v. Saffarinia*, 424 F. Supp. 3d 46 (D.D.C. 2020), in which the court ordered the government to identify any known *Brady* material within its prior productions because the production involved over a million records and defense counsel was working "*pro bono* with time constraints and limited financial resources," the Court acknowledged that "persuasive authority has articulated a 'general rule' that 'the government is under no duty to direct a defendant to exculpatory evidence within a larger mass of disclosed evidence.'" *Id.* at 84 n.15, quoting *Skilling*, 554 F.3d at 576.

547 U.S. 489, 497 (2006). "Much of the Act's flexibility is furnished by § 3161(h)([7]), which governs ends-of-justice continuances." *Id.* at 498. "Congress clearly meant to give district judges a measure of flexibility in accommodating unusual, complex, and difficult cases." *Id.* at 508. And it knew "that the many sound grounds for granting ends-of-justice continuances could not be rigidly structured." *Id.*

The need for reasonable time to address discovery obligations is among multiple pretrial preparation grounds that Courts of Appeals, including our circuit, have routinely held sufficient to grant continuances and exclude time under the STA – and in cases involving far less complexity in terms of the volume and nature of data, and the number of defendants entitled to discoverable materials. *See, e.g., United States v. Bikundi*, 926 F.3d 761, 777-78 (D.C. Cir. 2019) (upholding ends-of-justice continuances totaling 18 months in two co-defendant health care fraud and money laundering conspiracy case, in part because the District Court found a need to "permit defense counsel and the government time to both produce discovery and review discovery"); *United States v. Bell*, 925 F.3d 362, 374 (7th Cir. 2019) (upholding two-month ends-of-justice continuance in firearm possession case, over defendant's objection, where five days before trial a superseding indictment with four new counts was returned, "1,000 pages of new discovery materials and eight hours of recordings" were provided, and the government stated that "it needed more than five days to prepare to try [the defendant] on the new counts"); *United States v. Vernon*, 593 F. App'x 883, 886 (11th Cir. 2014) (District court did not abuse its broad discretion in case involving conspiracy to commit wire and mail fraud by granting two ends-of-justice continuances due to voluminous discovery); *United States v. Gordon*, 710 F.3d 1124, 1157-58 (10th Cir. 2013) (upholding ends-of-justice continuance of ten months and twenty-four days in case involving violation of federal

securities laws, where discovery included "documents detailing the hundreds financial transactions that formed the basis for the charges" and "hundreds and thousands of documents that needs to be catalogued and separated, so that the parties could identify the relevant ones")(internal quotation marks omitted); *United States v. Lewis*, 611 F.3d 1172, 1177-78 (9th Cir. 2010) (upholding ninety-day ends-of-justice continuance in case involving international conspiracy to smuggle protected wildlife into the United States, where defendant's case was joined with several co-defendants, and there were on-going investigations, voluminous discovery, a large number of counts, and potential witnesses from other countries); *United States v. O'Connor*, 656 F.3d 630, 640 (7th Cir. 2011) (upholding ends-of-justice continuances totaling five months and twenty days in wire fraud case that began with eight charged defendants and ended with a single defendant exercising the right to trial, based on "the complexity of the case, the magnitude of the discovery, and the attorneys' schedules").

CONCLUSION

For the reasons described above, the parties request the Court grant the motion for a continuance of the above-captioned proceeding for sixty days. In this case, it would be unreasonable to expect adequate preparation to file an indictment within 30 days. The delay in filing the indictment is justified, as it would be unreasonable to expect the return and filing of the indictment within the period specified in section 18 U.S.C. § 3161(b) (within 30 days) because the facts upon which the grand jury must base its determination are unusually complex. *See* 18 U.S.C. § 3161(h)(7)(B)(iii).

Additionally, an ends-of-justice continuance is warranted under 18 U.S.C. § 3161(h)(7)(A) based on the factors described in 18 U.S.C. § 3161(h)(7)(B)(i)(ii) and (iv). As described above,

the Capitol Breach is likely the most complex investigation ever prosecuted by the Department of Justice, and the government is diligently implementing its discovery plan to produce voluminous materials to Capitol Breach defendants.

The parties agree that pursuant to 18 U.S.C. § 3161, the time from the initial appearance on May 27, 2021 and the new hearing date shall be excluded in computing the date for speedy trial in this case. The parties request that the currently scheduled status conference as well as the date by which an information or an indictment must be filed, be continued for another 60 days. The parties agree that "the ends of justice served by the granting of such continuance [will] outweigh the best interests of the public and the defendant in a speedy trial," 18 U.S.C. § 3161(h)(7)(A), and the parties request an order to that end.

Respectfully submitted,

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	:	**CASE NO. 1:21-MJ-00371**
v.	:	
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TRACI J. SUNSTRUM,	:	
	:	
Defendant.	:	

ORDER

The Court, having considered the representations of the United States and defense counsel regarding the potential plea, complexity of the case, the voluminous discovery, the ends of justice, and the need for a reasonable time necessary for effective preparation taking into account the exercise of due diligence, as well as the stipulations by defense counsel, and for good cause appearing, the Court makes the following findings:

Good cause exists to continue the indictment/information return date and that time be excluded from the Speedy Trial Act, 18 U.S.C. § 3161 et seq. (the "STA"), on the basis that the ends of justice served by taking such actions outweigh the best interest of the public and the defendant in a speedy trial pursuant to the factors described in 18 U.S.C. § 3161(h)(7)(A), (B)(i), (ii), and (iv).

FACTUAL BACKGROUND

On April 13, 2021, the defendant was charged in a criminal complaint with knowingly entering or remaining in any restricted U.S. Capitol building or grounds without lawful authority.

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status conference for July 26, 2021 and tolled the Speedy Trial Statute.

On July 12, 2021, the parties again moved to continue the indictment/information return date and exclude time from the Speedy Trial Act. This Court granted that continuance and scheduled a preliminary hearing for September 24, 2021.

On September 13, 2021, after following the pro hac vince procedures, Mr. Dan Dubois entered a substitution of counsel on behalf of Ms. Sunstrum.

LEGAL STANDARD

In determining whether to toll time under the Speedy Trial clock under an "ends of justice" standard, the Court is to consider whether failure to grant the extension of the time would be likely to result in a miscarriage of justice. 18 U.S.C. § 3161 (h)(7)(B)(i). The Court also considers, "[w]hether the case is so unusual or so complex, due to the number of defendants, the nature of the prosecution, or the existence of novel questions of fact or law, that it is unreasonable to expect adequate preparation for pretrial proceedings within the time limits established by this section." 18 U.S.C. § 3161(h)(7)(B)(ii).

Moreover, without an extension, an indictment must be filed within 30 days of the arrest. 18 U.S.C. § 3161(b). The Speedy Trial Act permits the Court to extend the 30-day period between arrest and indictment if it finds that it would be unreasonable to expect the return within 30-days or because the facts upon which the grand jury must base its determination is unusual or complex. 18 U.S.C. § 3161(h)(7)(B)(iii).

The parties submit that there is good cause to extend the time for filing the indictment or information, and to exclude the delay from the Speedy Trial computation on a number of bases.

ENDS OF JUSTICE FINDINGS

The ends of justice served by a continuance and extension outweigh the best interest of the public and the defendant in a speedy trial. 18 U.S.C. § 3161 (h)(7)(A). Moreover, failure to grant the extension of the time for indictment would be likely result in a miscarriage of justice. 18 U.S.C. § 3161 (h)(7)(B)(i).

Ms. Sunstrum will not be prejudiced by the requested continuance and extension in that she is not in custody and agrees that the time between this motion and the newly set indictment/information return date should be excluded under the Speedy Trial Act.

The complaint will remain in full force and effect through the new status conference date scheduled by the Court.

COVID-19 Pandemic: The continuing pandemic is affecting the trial schedule. In recognition of the current high rate of transmission of the Delta variant in the District of Columbia, Chief Judge Howell issued Standing Order 21-47, limiting the number of jury trials that may be conducted at one time until at least October 31, 2021. Further, the Court found that "for those cases that cannot be tried consistent with those health and safety protocols and limitations, the additional time period from August 31, 2021 through October 31, 2021 is excluded under the Speedy Trial Act as the ends of justice served by the continuances to protect public health and safety and the fair rights of a defendant outweigh the best interest of the public and any defendant's right to a speedy trial, pursuant to 18 U.S.C. 3161(h)(7)(A)." (As detailed in Standing order 21-47, the Court had previously found that due to the exigent circumstances created by the COVID-19 pandemic, the time period from March 17, 2020 through August 31, 2021, would be excluded in criminal cases under the STA.) The current restrictions on counsel, particularly those impacting

the ability to communicate with witnesses, have slowed the normal litigation process. Thus, the effect of the continuing pandemic on the ability to hold jury trials supports tolling of the STA in this case.

New Counsel: Mr. DuBois is diligently representing Ms. Sunstrum but entered an appearance in the case only a week ago. Defense counsel needs time to review discovery, confer with his client, and conduct due diligence in determining whether it is in his client's best interest to seek a jury trial or whether his client should seek a plea resolution. The government and counsel for the defendant have conferred and are continuing to communicate in an effort to resolve this matter. The additional time requested will facilitate possible pre-indictment resolution of these charges.

Discovery: The United States has diligently been working to collect, review, and process the massive amount of discovery generated from the January 6th riot cases. However, the case presents significant logistical complexity, and the United States is considering additional possible charges beyond those contained in the complaint. Specifically, this case involves thousands of hours of video footage; many different witnesses; and large amounts of records from various sources. Given the complexity of the case, the number of witnesses, the parties request this additional continuance so both parties can be prepared.

The government has provided defense counsel with significant case-specific discovery including videos and interviews, as outlined in discovery notices filed with the Court. The government filed a memorandum regarding the status of discovery, incorporated herein by reference.

The government's approach to the production of voluminous discovery, as elaborated in

our previously filed memoranda, is consistent with the *Recommendations for Electronically Stored Information (ESI) Discovery Production* developed by the Department of Justice and Administrative Office of the U.S. Courts Joint Working Group on Electronic Technology in the Criminal Justice System. It is also the generally accepted approach in cases involving voluminous information. Notably, every circuit to address the issue has concluded that, where the government has provided discovery in a useable format, and absent bad faith such as padding the file with extraneous materials or purposefully hiding exculpatory material within voluminous materials, the government has satisfied its *Brady* obligations. The need for reasonable time to address discovery obligations is among multiple pretrial preparation grounds that Courts of Appeals, including our circuit, have routinely held sufficient to grant continuances and exclude time under the STA – and in cases involving far less complexity in terms of the volume and nature of data, and the number of defendants entitled to discoverable materials. Given the due diligence the United States continues to apply to meet its discovery obligations, an ends-of-justice continuance under the STA is warranted.

Based on the foregoing findings, **IT IS HEREBY ORDERED**:

1. The status conference currently scheduled for September 24, 2021 is VACATED.

2. The ends of justice served by the granting of such a 60-day continuance and extension outweigh the best interests of the public and defendant in a Speedy Trial. 18 U.S.C. § 3161(h)(7)(A).

3. This case is unusual and complex due to the number of witnesses, volume of discovery, and the nature of the prosecution that it is unreasonable to expect adequate preparation

for pretrial proceedings within the current time limit. 18 U.S.C. § 3161(h)(7)(B)(ii).

4. The ends of justice are also best served by granting an extension of the date for the indictment return. The Court specifically finds that it would be unreasonable to expect the indictment return within 30 days of arrest and that the facts upon which the grand jury must base its determination are unusual and complex. 18 U.S.C. § 3161(h)(7)(B)(iii).

5. Requiring an indictment or information within 30 days would deny counsel for the defendant and the United States Attorney the reasonable time necessary for effective preparation, taking into account the exercise of due diligence. 18 U.S.C. § 3161 (h)(7)(B)(iv).

6. Failure to grant the continuance of the extension of the time for indictment or information would be likely result in a miscarriage of justice and prevent a fair trial and grand jury session. 18 U.S.C. § 3161 (h)(7)(B)(i).

7. The Court has carefully balanced the need for the public and the defendant to have a speedy trial against the need for a fair trial, preliminary hearing, grand jury session, and adequate preparation and finds that the scales tip in favor of granting a continuance and extension.

8. Given the potential settlement, the voluminous discovery, the complex nature of the case, the ends of justice, and the need for a reasonable time necessary for effective preparation taking into account the exercise of due diligence, the Court find that the indictment return date be continued through the newly scheduled status conference of _____, with all time excluded under the Speedy Trial Act.

9. Accordingly, the time between May 27, 2021 (the date of the initial appearance in D.C.) and the newly scheduled status conference hearing of_____, is excluded from speedy trial computation for good cause.

DATED this _____ day of _____, 2021.

BY THE COURT:

_____

UNITED STATES MAGISTRATE JUDGE