

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

UNITED STATES OF AMERICA	:	
	:	
v.	:	Criminal No. 21-cr-445 (CKK)
	:	
ANDREW ALAN HERNANDEZ,	:	
	:	
Defendant.	:	

**JOINT MOTION TO CONTINUE AND
TO EXCLUDE TIME UNDER THE SPEEDY TRIAL ACT**

The United States of America and the defendant, Andrew Alan Hernandez, hereby move this Court for a continuance of the status hearing scheduled for January 24, 2022 until on or before March 25, 2022, and further to exclude the time within which a trial must commence under 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). As further explained below, the parties request the continuance in order to provide additional discovery as it is the government’s commitment to ensuring that all arguably exculpatory materials are produced in a comprehensive, accessible, and useable format that, in the main, underlies the government’s request to toll the STA. In addition, the parties need additional time to discuss the possibility of a disposition in this matter.

FACTUAL BACKGROUND

Defendant is charged via Indictment (ECF No. 19) with three felony and three misdemeanor offenses arising out of his conduct in connection with the attack on the U.S. Capitol on January 6, 2021 (the “Capitol Breach”). In brief, the conduct alleged to support these offenses includes the defendant’s entry into the Capitol through the East Rotunda door, parading up the

stairs and hallways and then his entry into the Senate Gallery. The defendant was arrested on February 25, 2021 in California and has been on pretrial release since his arrest.

The government has provided defense counsel with significant initial case-specific discovery including nearly all of the Federal Bureau of Investigation's ("FBI") investigative case file specific to the defendant; social media posts, photographs depicting the defendant inside the U.S. Capitol on January 6, 2021; photographs from a search conducted at the defendant's residence; information retrieved from a device seized during a search of the defendant's residence; copies of arrest and search warrants with accompanying affidavits and returns, and a number of videos obtained by the government in which the defendant is depicted. Pursuant to the Court's Order, the government has provided materials subject to Fed. R. Crim. Pro. 6(e) (ECF No. 30). Defense counsel is currently scheduled to conduct an upcoming walk-through of the crime scene.

The investigation and prosecution of the Capitol Attack will likely be one of the largest in American history, both in terms of the number of defendants prosecuted and the nature and volume of the evidence. Over 600 individuals have been charged to date in connection with the Capitol Attack. While most of the cases have been brought against individual defendants, the government is also investigating conspiratorial activity that occurred prior to and on January 6, 2021. The spectrum of crimes charged and under investigation in connection with the Capitol Attack includes (but is not limited to) trespass, engaging in disruptive or violent conduct in the Capitol or on Capitol grounds, destruction of government property, theft of government property, assaults on federal and local police officers, firearms offenses, civil disorder, obstruction of an official proceeding, possession and use of destructive devices, and conspiracy.

Relevant to this motion, on June 23, 2021, the government filed a Consent Motion to Continue and to Exclude Time Under the Speedy Trial Act (ECF No. 16). On June 30, 2021, the defendant was indicted by a federal grand jury (ECF No. 19). On July 7, 2021, the defendant was arraigned on the charges set forth in the indictment. *See* July 7, 2021 Minute Order. At that hearing, the Court scheduled a status hearing for September 30, 2021, and tolled the Speedy Trial Act in the interests of justice until that hearing. *Id.* On September 21, 2021, the government filed a memorandum regarding the status of discovery (as of September 12, 2021) (ECF No. 23), incorporated herein by reference (“Status Memorandum”). The Status Memorandum largely pertained to the production of discovery from voluminous sets of data that the government collected in its investigation of the Capitol Breach cases, among which may be interspersed information the defense may consider material or exculpatory.¹ On September 22, 2021, the government filed a Consent Motion to Continue and to Exclude Time Under the Speedy Trial Act. (ECF No. 25). On September 23, 2021, the Court granted the motion and continued the status hearing until November 22, 2021 and tolled the Speedy Trial Act in the interests of justice until that hearing (ECF No. 26). On October 21, 2021, the government filed a Memorandum Regarding Status of Discovery as of October 21, 2021 (ECF No. 28). On October 26, 2021, the government filed a Consent Motion for an Order to Disclose Items Protected by Federal Rules of Criminal Procedure 6(e) and Sealed Materials (ECF No. 29), which the Court

¹ The materials upon which the Status Memoranda focused include, for example, thousands of hours of video footage from multiple sources (e.g., Capitol surveillance footage, body-worn-camera footage, results of searches of devices and Stored Communications Act (“SCA”) accounts, digital media tips, Parler video, and unpublished news footage), and hundreds of thousands of investigative documents including but not limited to interviews of tipsters, witnesses, investigation subjects, defendants, and members of law enforcement.

granted (ECF No. 30). On November 16, 2021, the government filed a memorandum regarding the status of discovery (as of November 5, 2021) (ECF No. 31). On November 18, 2021, the parties filed a Joint Motion to Continue and to Exclude Time Under the Speedy Trial Act (ECF No. 32). On November 26, 2021, the Court granted the Joint Motion and continued the status hearing until January 24, 2022 at 11:30 a.m. and excluded the time under the Speedy Trial Act in the interests of justice (ECF No. 33).

On or about January 18, 2022, Government counsel spoke with defendant's counsel and he indicated that the defendant was interested in continuing the status hearing until on or about March 25, 2022, and that he consented to the tolling of the STA. On January 18, 2022, Government counsel sent a copy of the instant motion to the defendant's counsel and he indicated that the defendant would join in the motion and the exclusion of time under the Speedy Trial Act for additional time until a new status hearing date could be set on or before March 25, 2022.

ARGUMENT

I. The Government's Approach to Discovery is Intended to Ensure that All Arguably Exculpatory Materials are Produced in a Comprehensive, Accessible, and Useable Format.

As a preliminary matter to the government's motion, the government's approach to the production of voluminous discovery, as elaborated in our previously filed Status Memorandum, 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.² It is also the

² See <https://www.justice.gov/archives/dag/page/file/913236/download>.

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*³ 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 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

³ *Brady v. Maryland*, 373 U.S. 83 (1963).

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).⁴

II. An Ends-of Justice Tolling of the Speedy Trial Act is Warranted.

Given the due diligence the United States continues to apply to meet its discovery obligations, as set forth above and in our Status Memorandum, the government has established that 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*, 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

⁴ 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.

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 far fewer individuals who were 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”).

Here, the defendant has consented to continuing the status hearing and the tolling of the STA. Nonetheless, there is no requirement that a defendant personally consent to an ends-of-justice continuance; the only question is whether the district court has complied with the procedural requirements of section 3161(h)(7). *See United States v. Sobh*, 571 F.3d 600, 603 (6th Cir. 2009) (“By its terms, § 3161(h)([7])(A) does not require a defendant’s consent to the continuance ‘if the judge granted such continuance on the basis of his findings that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial.’”); *accord United States v. Jones*, 795 F.3d 791, 798 (8th Cir. 2015); *United States v. Williams*, 753 F.3d 626, 635 (6th Cir. 2014); *United States v. Lynch*, 726 F.3d 346, 355 (2d Cir. 2013); *United States v. Gates*, 709 F.3d 58, 65-66 (1st Cir. 2013) (“We hold . . . that in the ordinary course and within the confines of the STA exclusion provisions, defense counsel has the power to seek an STA continuance without first informing his client or obtaining his client’s

personal consent.”); *United States v. Herbst*, 666 F.3d 504, 510 (8th Cir. 2012) (“Herbst’s opposition to his counsel’s request for a continuance does not prevent that time from being excluded from the speedy trial calculation.”); *United States v. Stewart*, 628 F.3d 246, 254 (6th Cir. 2010) (“[W]here an attorney seeks a continuance without the client’s approval, this court has held that the Speedy Trial Act ‘does not require a defendant’s consent to the continuance’ in order for a judge to be able to grant a motion in furtherance of the ends of justice.”). *See also United States v. Stoddard*, 74 F. Supp. 3d 332, 341–42 (D.D.C. 2014) (“Even assuming *arguendo* that Stoddard was not advised of his statutory Speedy Trial rights by his counsel and that his counsel consented to the tolling of the time without Stoddard’s consent, Stoddard was not prejudiced by this error. The Court tolled the time under the Speedy Trial Act pursuant to 18 U.S.C. §§ 3161(h)(8)(A), (B)(i), (B)(ii) & B(iv)(2004). None of those provisions require the consent of the defendant.”); *cf. Zedner*, 547 U.S. at 500-01 (holding the STA cannot be tolled by virtue of a defendant’s waiver of its application).

In this case, a sixty-day 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). The Capitol Breach is likely the most complex investigation ever prosecuted by the Department of Justice.⁵ As described above, the government has provided the defendant vast case-specific

⁵ On August 25, 2021, 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

discovery and is also diligently executing its plan to produce voluminous materials in a comprehensive, accessible, and useable format.

CONCLUSION

For the reasons described above, and any others that may be offered at a hearing on this matter, the parties move this Court to continue the status hearing currently scheduled for January 24, 2022 at 11:30 p.m., to grant a continuance of that proceeding until on or before March 25, 2022, and further to exclude the time within which a trial must commence under 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.

Respectfully submitted,

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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 effect of the continuing pandemic on the ability to hold jury trials may also support tolling of the STA in this case.

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