

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

UNITED STATES OF AMERICA	:	
	:	
v.	:	Case No. 22-cr-00198-JEB
	:	
RODNEY KENNETH MILSTREED,	:	
	:	
Defendant.	:	
	:	

**MOTION TO EXCLUDE TIME
UNDER THE SPEEDY TRIAL ACT**

The United States of America hereby moves this Court to exclude the time within which the trial must commence under the Speedy Trial Act, 18 U.S.C. § 3161 et seq., on the basis that the ends of justice served by taking such actions outweigh the best interest of the public and the defendants in a speedy trial pursuant to the factors described in 18 U.S.C. § 3161(h)(7)(A), (B)(i), (ii), and (iv). Defense counsel could not be reached for their position on this motion. In support of its motion, the government states as follows:

I. BACKGROUND & PROCEDURAL POSTURE

On May 24, 2022, defendant Rodney Kenneth was arrested in the District of Colorado on an arrest warrant issued in connection with a Criminal Complaint charging him with Assaulting, Resisting, or Impeding an Officer Using a Dangerous Weapon, in violation of 18 U.S.C. § 111(a)(1) and (b), Assault by Striking, Beating, or Wounding, in violation of 18 U.S.C. § 113(a)(4), Simple Assault, in violation of 18 U.S.C. § 113(a)(4), Obstruction of Law Enforcement During Civil Disorder, in violation of 18 U.S.C. § 231(a)(3), Obstruction of Justice, in violation of 18 U.S.C. § 1512(c)(2), Entering or Remaining in any Restricted Building or Grounds, in violation of 18 U.S.C. § 1752(a)(1), Disorderly and Disruptive Conduct in any

Restricted Building or Grounds, in violation of 18 U.S.C. § 1752(a)(2), Engaging in Physical Violence any Restricted Building or Grounds, in violation of 18 U.S.C. § 1752(a)(4), and Disorderly Conduct, Impeding Passage, and Act of Violence on Capitol Grounds or Buildings, in violation of 40 U.S.C. § 5104(e)(2)(D), (E), and (F). The government moved for his detention based on the danger to the community should he be released pending trial. The magistrate judge in Colorado ordered his release, and the government appealed to this Court for review of that decision.

Milstreed was indicted on June 1, 2022, on the same set of charges contained in the Complaint and set forth above. ECF 13. On June 23, 2022, this Court held a combined detention hearing and initial appearance at which Milstreed was arraigned on the charges in the Indictment. Milstreed was ordered detained pending trial. The Court set a status conference for July 22, 2022, and asked the defendant his position on excluding time under the Speedy Trial Act. Counsel asked for a brief period of time to confer with Milstreed before providing his position. The Court ordered defense counsel to provide his position as to whether he consented to exclude time by June 28, 2022, and excluded time from the date of the hearing to that date. The defendant has not yet provided his position or answered the Court's order. The undersigned government counsel was out of the office on leave from June 27 to July 1, 2022, but attempted to reach counsel for Milstreed as soon as possible after returning to work, on July 5, 2022, and again on July 7, 2022, but has yet to receive any response. At this time, based on the Court's prior minute order, time has been excluded from the date of

II. STATEMENT OF FACTS

Milstreed is charged with offenses related to crimes that occurred at the United States Capitol on January 6, 2021. In brief, on that date, as a Joint Session of the United States House of Representatives and the United States Senate convened to certify the vote of the Electoral College

of the 2020 U.S. Presidential Election, members of a large crowd that had gathered outside forced entry into the U.S. Capitol, including by breaking windows and by assaulting members of law enforcement, as others in the crowd encouraged and assisted those acts. Scores of individuals entered the U.S. Capitol without authority to be there. As a result, the Joint Session and the entire official proceeding of the Congress was halted until the Capitol Police, the Metropolitan Police Department, and other law enforcement agencies from the city and surrounding region were able to clear the Capitol of hundreds of unlawful occupants and ensure the safety of elected officials. This event in its entirety is hereinafter referred to as the “Capitol Attack.”

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. Approximately 900 individuals have been charged in connection with the Capitol Attack. The investigation continues and the government expects that additional individuals will be charged. 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.

Defendants charged and under investigation come from throughout the United States, and hundreds of search warrants have been executed in almost all fifty states and the District of Columbia. Multiple law enforcement agencies were involved in the response to the Capitol Attack, which included officers and agents from U.S. Capitol Police, the District of Columbia Metropolitan Police Department, the Federal Bureau of Investigation, the Department of Homeland Security, the Bureau of Alcohol, Tobacco, Firearms and Explosives, the United States

Secret Service, the United States Park Police, the Virginia State Police, the Arlington County Police Department, the Prince William County Police Department, the Maryland State Police, the Montgomery County Police Department, the Prince George's County Police Department, and the New Jersey State Police. Documents and evidence accumulated in the Capitol Attack investigation thus far include: (a) thousands of hours of surveillance and body-worn camera footage from multiple law enforcement agencies; (b) thousands of electronic devices; (c) the results of hundreds of searches of electronic communication providers; (d) over 210,000 tips, of which a substantial portion include video, photo and social media; and (e) tens of thousands of reports attachments related to law enforcement interviews of suspects and witnesses and other investigative steps. As the Capitol Attack investigation is still on-going, the number of defendants charged and the volume of potentially discoverable materials will only continue to grow. In short, even in cases involving a single defendant, the volume of discoverable materials is likely to be significant.

The United States is aware of and takes seriously its obligations pursuant to Federal Rule of Criminal Procedure 16 and Local Criminal Rule 5.1(a), the provisions of *Brady v. Maryland*, 373 U.S. 83, 87 (1963), *Giglio v. United States*, 405 U.S. 150, 153-54 (1972), and the Jencks Act, 18 U.S.C. § 3500. Accordingly, the government has developed a comprehensive plan for handling, tracking, processing, reviewing and producing discovery across the Capitol Attack cases. The government is working to ensure the plan includes a system for storing, organizing, searching, producing and/or making available voluminous materials such as those described above in a manner that is workable for both the government and hundreds of defendants. This portion of the plan will require more time to develop and implement.

Milstreed is charged with committing multiple separate acts of violence on January 6, 2021, each of which were captured on video recordings from a number of different sources. In this case,

the government has prepared to provide discovery but, despite several requests, has not yet obtained defense counsel's position on a proposed protective order and request to release sealed records. That proposed protective order will help distribute the voluminous and sensitive discovery materials in a safe and secure manner. The discovery the government is prepared to provide includes United States Capitol building surveillance footage from January 6, 2021; Federal Bureau of Investigation (FBI) materials related to the searches and arrest of Milstreed; and FBI materials and video related to Milstreed's statements to law enforcement, among numerous other materials.

III. ARGUMENT

Pursuant to the Speedy Trial Act, as a general matter, in any case in which a plea of not guilty is entered, trial for a defendant must commence within seventy days from the filing date (and making public) of the information or indictment, or from the date the defendant has appeared before a judicial officer of the court in which such charge is pending, whichever date last occurs. 18 U.S.C. § 3161(c)(1). Where a defendant is detained pretrial, Section 3164 additionally provides that trial must commence within ninety days following the beginning of the defendant's continuous pretrial detention. Section 3161(h) of the Speedy Trial Act sets forth certain periods of delay which the Court must exclude from the computation of time within which a trial must commence, which also apply to the time limits set forth in 18 U.S.C. § 3164. As relevant to this motion for a continuance, pursuant to subsection (h)(7)(A), the Court must exclude:

Any period of delay resulting from a continuance granted by any judge on his own motion or at the request of the defendant or his counsel or at the request of the attorney for the Government, 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.

18 U.S.C. § 3161(h)(7)(A). This provision further requires the Court to set forth its reasons for

finding that that any ends-of-justice continuance is warranted. *Id.* Subsection (h)(7)(B) sets forth a non-exhaustive list factors that the Court must consider in determining whether to grant an ends-of-justice continuance, including:

- (i) Whether the failure to grant such a continuance in the proceeding would be likely to make a continuation of such proceeding impossible, or result in a miscarriage of justice.
- (ii) Whether 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 or for the trial itself within the time limits established by this section.
- ...
- (iv) Whether the failure to grant such a continuance in a case which, taken as a whole, is not so unusual or so complex as to fall within clause (ii), would deny the defendant reasonable time to obtain counsel, would unreasonably deny the defendant or the Government continuity of counsel, or would deny counsel for the defendant or the attorney for the Government the reasonable time necessary for effective preparation, taking into account the exercise of due diligence.

18 U.S.C. § 3161(h)(7)(B)(i), (ii), and (iv). Importantly, “[i]n setting forth the statutory factors that justify a continuance under subsection (h)(7), Congress twice recognized the importance of adequate pretrial preparation time.” *Bloate v. United States*, 559 U.S. 196, 197 (2010) (citing §3161(h)(7)(B)(ii), (B)(iv)).

An interests-of-justice finding is within the discretion of the Court. *See, e.g., United States v. Rojas-Contreras*, 474 U.S. 231, 236 (1985); *United States v. Hernandez*, 862 F.2d 17, 24 n.3 (2d Cir. 1988). “The substantive balancing underlying the decision to grant such a continuance is entrusted to the district court’s sound discretion.” *United States v. Rice*, 746 F.3d 1074, 1078 (D.C. Cir. 2014).

In this case, 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 Attack is likely the most complex investigation ever prosecuted by the Department of Justice. Developing a system for storing and searching, producing and/or making available voluminous materials accumulated across hundreds of investigations, and ensuring that such system will be workable for both the government and defense, has taken time. Specifically, loading, processing, searching and reviewing the discovery materials has taken significant time. Further adding to production and review times, certain sensitive materials may require redaction or restrictions on dissemination, and other materials may need to be filtered for potentially privileged information before it can be reviewed by the prosecution.

The need for reasonable time to organize, produce, and review voluminous discovery is among multiple pretrial preparation grounds that Courts of Appeals have routinely held sufficient to grant continuances and exclude the time under the Speedy Trial Act. *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) (finding 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”).

In sum, due to the number of individuals currently charged across the Capitol Attack investigation and the nature of those charges, the on-going investigation of many other individuals, the volume and nature of potentially discoverable materials, and the reasonable time necessary for effective preparation by all parties taking into account the exercise of due diligence, the failure to grant this motion to exclude time under the Speedy Trial Act would result in a miscarriage of justice. Accordingly, the ends of justice served by granting the request to exclude 24 days outweigh the best interest of the public and the parties in a speedy trial.

IV. CONCLUSION

For the foregoing reasons, the government respectfully requests that this Court exclude the

time within which the trial must commence under the Speedy Trial Act, 18 U.S.C. § 3161 et seq., for an additional 24 days from June 28, 2022, to July 22, 2022, on the basis that the ends of justice served by taking such action outweigh the best interest of the public and the parties in a speedy trial pursuant to the factors described in 18 U.S.C. § 3161(h)(7)(A), (B)(i), (ii), and (iv).

Respectfully submitted,

MATTHEW M. GRAVES
United States Attorney
D.C. Bar No. 481052

By: /s/ Emily W. Allen
EMILY W. ALLEN, Cal. Bar No. 234961
Assistant United States Attorney
601 D Street NW
Washington, DC 20530
emily.allen@usdoj.gov
(907) 271-4724