

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,) No. 5:06-cr-20582
Plaintiff,)
v.) DEFENDANT'S OPPOSITION TO
MICHAEL BURT,) GOVERNMENT'S MOTION FOR
Defendant.) CONTINUANCE

COMES NOW the Defendant Michael Burt, by and through his counsel of record, and hereby responds in opposition to the government's motion for continuance (Doc. 17). The government's untimely motion for 120 day continuance comes one week prior to trial. The motion should be denied because this is merely another demonstration of the government's lack of due diligence and refusal to timely prosecute Defendant as required by law. The Defendant does not require a continuance as Defendant has prepared for trial.

If this Court is inclined to grant a continuance, Defendant requests a telephonic hearing or a hearing with sufficient notice to allow Defense Counsel to travel.

Respectfully submitted this 16th day of April, 2007.

/s/ Alan S. Richey
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MEMORANDUM

The government's untimely motion for a continuance ("Motion", Doc. 17) should be denied. The government has requested a continuance for 120 days (Motion, 3). The government claims it is necessary based on "the parties have not been able to engage in the discovery process," that Defendant's Motion for Bill of Particulars "has not been answered and is still pending," and that "due to the medical status of Government's counsel, the denial of a continuance would unreasonably deny the Government both the continuity of counsel and the reasonable time necessary for effective preparation, taking in account the exercise of due diligence" (Motion, 1, 2). The government has cited no legal authority for its untimely motion and unsupported basis for a continuance brought one week before trial.¹

FACTS

The indictment in this case was filed with this Court on November 14, 2006 but appears to have been returned on November 4, 2006 (Doc. 3). The government never sought to arraign Defendant until it obtained a warrant on February 15, 2007 (Doc. 4). Defendant was not arraigned until March 1, 2007, nearly 4 months after the indictment was returned. On March 10, Defendant timely filed a motion for a bill of particulars (Doc. 12). This Court ordered a hearing on the motion and ordered any response to be filed by April 2, 2007 (Docs. 13-14).

On about March 27, 2007, Defense counsel went to Detroit to try to obtain discovery, inasmuch as discovery had not yet been disclosed by the government. The

¹ If the government files a reply and cites any legal authority, this will unduly prejudice Defendant in not giving him an opportunity to respond to any such authority.

Defense was told by government counsel's assistant that she did not know where the case file was and that government's counsel was in the hospital.

On March 28, 2007, Defense Counsel spoke on the phone with Marc Baker, the CID agent handling this case. The agent informed Defense that Mr. Delonis was in the hospital for knee surgery and that he did not know what exhibits would be used and had been unable to meet with government counsel to put together the exhibits for trial; therefore, Defense could not view any discovery. Defense later that morning spoke on the phone with and was told by government counsel's supervisor that he also did not know where the file was and trial may end up not proceeding as scheduled. Defense counsel informed the supervisor that Defendant was unwilling to waive speedy trial and perhaps another attorney for the government should be assigned to the case. Later that day, government's Counsel informed Defense on the phone that he had been unable to review and prepare the exhibits with the case agent which the government planned on using for trial. Government's counsel informed the Defense that the government should be able to have discovery ready and sent out to Defense in about 10 days. The government has yet to provide any discovery.

On April 9, 2007, Defense filed a motion to appear telephonically at the hearing scheduled for April 16, 2007 (Doc. 15), based on the government's refusal to respond as ordered to the motion for Bill of particulars. The court cancelled the hearing and will decide the matter based on the motion alone (Doc. 16).

On Saturday, April 14, 2007, ten calendar days before trial is scheduled to begin, the government filed its Motion (Doc. 17).

ARGUMENT

I. NO CONTINUANCE IS WARRANTED BECAUSE THE GOVERNMENT FAILED TO EXERCISE DUE DILIGENCE.

The government alleged a continuance was necessary for the Defendant to have “effective assistance of counsel and the reasonable time necessary for effective preparation, taking in account the exercise of due diligence.” Motion, 2 (Doc. 17).

Defendant has made clear that he is unwilling to waive speedy trial. Based on that, and this Court’s assignment of trial, Defense counsel continued two other federal criminal cases in order to represent Defendant in a timely manner. Defense has called and met with witnesses, prepared exhibits, and done everything within his ability to prepare for trial on April 24, 2007. The Defense has exercised due diligence.

In stark contrast, the government has not exercised due diligence. The government alleges, “the parties have not been able to engage in the discovery process.” Motion, 1. The government then claims that it THE GOVERNMENT, NOT DEFENDANT, needs “reasonable time necessary for effective preparation, taking into account the exercise of due diligence.” Motion, 2. However, the Speedy Trial Act “prohibits the government’s lack of preparation from being a reason for granting an excludable continuance.” *United States v. Crane*, 776 F.2d 600, 605 (6th Cir.1985). Indeed, such failure to prepare on the part of the government precludes a finding of due diligence on its part. *Id.*

The government, after having an indictment returned on November 4, 2006, waited nearly 4 months before indicting Defendant. In contrast to local rules, the government has not turned over or made available discovery, even when Defense

Counsel went to Detroit to try to view discovery. The government was aware of Defendant's Motion for Bill of Particulars, yet filed no response whatsoever.² The government has made clear that it has not met with the case agent and prepared its exhibits for trial. However, the government obviously presented exhibits to the grand jury and has been in a process of obtaining documents over the course of many years. The government has refused to let the Defense look at its documents, instead wanting to wait until it has its trial exhibits ready.

It is the government who has failed to exercise due diligence, and it now seeks a continuance only so it can prepare to prosecute the Defendant. It seeks this continuance in the face of justice and in the face of Defendant's right to a speedy trial, a right guaranteed by the Constitution.³ The government offers no authority to override the Constitution and deprive the Defendant of his rights. It merely wants more time to prepare to convict the Defendant on four felony criminal counts.

² The government filed no motion for additional time to respond to the motion for bill of particulars, even though it was aware of such before the time for filing its response was due. This circuit has recognized, "The Supreme Court held in *Henderson v. United States*, 476 U.S. 321, 106 S.Ct. 1871, 90 L.Ed.2d 299 (1986), that if a pretrial motion requires a hearing, then section 3161(h)(1)(F) automatically excludes *all* time between the filing of the motion and the conclusion of the hearing on that motion. *Id.* at 330, 106 S.Ct. at 1876." *United States v. Monger*, 879 F.2d 218, 222 (6th Cir.1989); citing also *United States v. Mentz*, 840 F.2d 315, 326 (6th Cir. 1988); *Pelfrey*, 822 F.2d at 633. In this case, however, no hearing was required on the motion for bill of particulars since the government did not respond.

³ Justice White noted in his dissent that the exclusions under the Speedy Trial Act "are not to be used either to undermine the time limits established by the Act, or to subvert the very purpose the Act was designed to fulfill." *Henderson*, 476 U.S. at 333 (White, J., dissenting).

II. THE GOVERNMENT’S REAL NEED FOR A CONTINUANCE IS SO IT CAN PREPARE ITS PROSECUTION OF DEFENDANT.

The government further pleads, “A denial of a continuance would be likely to make a continuation of such proceeding impossible.” Motion, 2. This is the real reason the government wants a continuance; it would not be able to prosecute Defendant and would “likely” have to dismiss the case. Defendant is ready to proceed to trial and has attempted to obtain discovery and was even informed by the government that discovery would be turned over by now, but the government has failed to proceed. The government now seeks the intervention of this Court to allow it to “prepare” to prosecute Defendant and to have more than adequate time to do so, all in contrast to the Constitution and the right to a speedy trial. In reality, the government wants this Court to cover up its inadequacies and lack of due diligence and give it time, contrary to law, to prosecute Defendant. This Court should deny that invitation and require the government to either prosecute this case as scheduled or dismiss the charges; this is what justice requires.

III. THE GOVERNMENT DOES NOT HAVE A RIGHT TO CONTINUITY OF COUNSEL IN THIS CASE, IN LIGHT OF THE CIRCUMSTANCES.

The government next argues that it has a right to “the continuity of counsel.” Motion, 2. The government wants 120 days so its current counsel can go through lengthy rehabilitation, which it believes can occur within the time it requests.⁴ Motion,

⁴ The government argues this is a “complex case,” but fails to point to any novel facts or law to make it such. “While the trial involved significant amounts of documentary evidence and many witnesses, the factual and legal questions involved were not novel. Moreover, as [Defendant] points out, this trial was the result of a seven year investigation; the Government was not surprised or suddenly caught unaware of the Defendant’s Opposition to
Government’s Motion for Continuance

2. The government, with its nearly unlimited resources and attorneys, has failed to demonstrate why it is entitled to continuity of its counsel in this case and cannot appoint another counsel. The government not only has numerous local US assistant attorneys, but it frequently assigns counsel from Washington, D.C. to prosecute tax cases. Defense counsel has handled a number of federal criminal tax cases, each with multiple attorneys and assistants for the government trying these cases. Defense counsel has yet to see a case where only one U.S. assistant attorney, whether local or from the federal capital, tried the case on their own. In this case, the interests of justice do not support a continuance solely so the government counsel can go through a lengthy rehabilitation.

The government makes a plea for a continuance “due to the medical status of Government’s counsel.” Motion, 2 (Doc. 17). Although the Defense does not wish to make light of a health issue, the Defense will point out what appear to be indications that the Motion is not well taken. The government alleges “on March 12, 2007, Government’s counsel sustained an injury which, days later, led to his emergency admission to the hospital.” The government fails to disclose how many “days later” it was—2, 10, 14? This time is highly relevant, yet it is not disclosed. Next, the government failed to disclose that the injury was reported to Defense Counsel as a knee injury. Although this is an injury, the government has not showed that it was unable to proceed on this case. No notice of unavailability or anything of the sort was filed. In fact, lacking in the government’s Motion is any indication of why, prior to March 12,

complexity of the case.” *Crane*, 776 F.2d at 605-06. Indeed, in this case the IRS has been investigating since about 1998. The government’s argument is wholly devoid of any fact or law whatsoever that this case is novel.

2007, the government did not have discovery ready to disclose to the Defendant or why it was not ready to proceed to trial. Also lacking is why the government did not bring a motion to continue earlier than one week prior to trial.

Defendant on the other hand must wait “in the wing” with federal felony charges hanging over him. This has caused a loss of work opportunities and a failure to fully engage in work, because he works in wrongful tax collecting, and facing federal criminal tax evasion charges has had a chilling effect on existing and potential clients.

Therefore, based on the foregoing, continuity of counsel for the government is not a valid basis and only serves to unduly prejudice Defendant, who is forced to continue under the prejudice of being considered by the government a tax protestor and a criminal longer than necessary.

IV. DEFENDANT DOES NOT REQUIRE A CONTINUANCE.

The government’s misplaced “plea” that “the denial of a continuance would unreasonably deny the defendant both the effective assistance of counsel and the reasonable time necessary for effective preparation,” Motion 2, is all due only to the government’s lack of and failure to exercise due diligence. The government’s attempt to blame Defendant for the need for a continuance is wholly misplaced and demonstrates the true lack of legitimate basis the government has for its Motion.

Defendant has contacted witnesses and has them ready for trial. Defendant has put together his exhibits for trial. Although there may be additional witnesses and exhibits needed for rebuttal or based on discovery, Defendant is ready for trial. Defense Counsel has even gone to Detroit to attempt to view discovery, but was not allowed to view it because the government had not decided what exhibits it wanted to use at trial.

The government never said it did not know where discovery was. The government thus prevented Defense from viewing discovery.

Further, any continuance will create the inability of Defense Counsel to participate in trial. Defense Counsel has back to back complex criminal trials in May and June, 2007. He has another trial in July, 2007. He has already committed to two separate weeks in August on different hikes and scout camp with the Boy Scouts of America. Defense counsel has another complex federal criminal trial scheduled for four plus weeks in October, 2007. That case has briefings and hearings scheduled in August and September. He also has federal criminal appeals pending which will need briefing likely between now and October. Therefore, Defense Counsel most likely would not be able to have trial until late November or in December, 2007, so a continuance of 120 days would preclude a continuity of Defense Counsel. Defense Counsel adjusted his schedule to try this matter in April or early May, 2007. Justice does not require a continuance on behalf of Defendant. Justice does not require a continuance at all.

CONCLUSION

Based on the foregoing, the motion must be denied. A continuance would be repugnant to the Constitution. The interests of justice do not require it. Defendant and Defense Counsel oppose it. Only the government in its interest to prosecute Defendant and have additional time to do so seeks it. The continuance must therefore be denied.

Respectfully submitted this 16th day of April, 2007.

/s/ Alan S. Richey
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I did electronically file the foregoing motion using the court's CM/ECF system which will send notice of the filing to the attorney of record for the plaintiff, Richard L. Delonis, and any other counsel of record through the CM/ECF system.

Dated this 16th day of April, 2007.

/s/ Alan S. Richey
Alan S. Richey