

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS**

UNITED STATES OF AMERICA,

Plaintiff,

v.

DEVONTE JEMELL STARKS,

Defendant.

Case No. 5:18-CR-40105-01-HLT

MEMORANDUM AND ORDER

The government seeks continuance of the trial set for April 1, 2019, so that Devonte Jemell Starks can be tried with his alleged co-conspirators who were named in a superseding indictment filed March 6, 2019. Mr. Starks opposes the continuance, again asserting his speedy trial rights, and seeks to sever his trial. Given the unique circumstances and procedural posture of the case, the Court denies the government's motion to continue and retains the April 1, 2019 trial date set in the Trial Order.

I. BACKGROUND

On November 14, 2018, a grand jury returned a three-count indictment charging Mr. Starks with drug conspiracy and other drug charges. Doc. 1. Mr. Starks was the sole defendant, and the indictment did not name the alleged co-conspirators. But the grand jury returned two other indictments that same day in different cases, charging Toya Shaneen Avery, Lamika Devon Watt, and Kevin Darnell Scott with the same charges. *See* Doc. 43 at 8 (citing case numbers).

Mr. Starks was arrested and arraigned on January 15, 2019. At his first status conference on February 26, 2019, Mr. Starks asserted his right to a speedy trial. The Court set trial for April 1, 2019, which—at that time—was one day before his speedy trial deadline. The government

agreed to this trial date but noted that Ms. Avery, one of the alleged (but un-named at that time) co-conspirators, had recently been arrested in a separate case and that it might seek a continuance based on her arrest.

On March 6, 2019, the grand jury returned a superseding indictment in the instant case with the same charges but adding Ms. Avery, Ms. Watt, and Mr. Scott as co-defendants. The superseding indictment was unsealed on March 18, 2019. Mr. Starks and Ms. Avery made their initial appearances on this superseding indictment on March 19, 2019. At that hearing, Mr. Starks again asserted his right to a speedy trial.

That same day, the government filed the instant motion requesting a continuance of the trial date for an unspecified amount of time so that all co-defendants could be tried in a single trial. Doc. 25. Mr. Starks filed an opposition and requested severance. Doc. 38. And the government filed a reply.¹ Doc. 43. The Court is now prepared to rule.

II. ANALYSIS

The issues before the Court are whether the government has shown that a continuance is warranted and, if not, whether Mr. Starks's trial should be severed from his co-defendants and proceed as scheduled.

A. MOTION TO CONTINUE

District courts have the inherent authority to manage their dockets with a view toward the efficient and expedient resolution of cases. *Dietz v. Bouldin*, 136 S. Ct. 1885, 1892 (2016). This includes the discretion to grant or deny continuances. *United States v. Dowlin*, 408 F.3d 647, 663

¹ The government also filed a "supplement to reply" regarding the motion for a continuance. Doc. 46. It did not seek leave to do so or provide any justification for filing the supplement. Accordingly, the Court does not consider it in resolving this motion. Even if the Court did, the supplement does not alter the Court's analysis or ruling.

(10th Cir. 2005). Although not cited by the government in its motion, the Court considers four factors in deciding whether to grant a continuance:

(1) the diligence of the party requesting the continuance; (2) the likelihood that the continuance, if granted, would accomplish the purpose underlying the party's expressed need for the continuance; (3) the inconvenience to the opposing party, its witnesses, and the court resulting from the continuance; [and] (4) the need asserted for the continuance and the harm that [the moving party] might suffer as a result of the district court's denial of the continuance.

Id.

Considering these factors, the government has not met its burden to justify a continuance. First, as to the diligence of the moving party, this factor weighs against the government. Although the government did suggest at the status conference that it might seek a continuance, it waited three weeks before filing its motion. The government has not provided any explanation for this delay, nor has it explained what—if anything—changed in that time period. Although the government half-heartedly points to the superseding indictment as justification, this purported justification only further demonstrates lack of diligence, as the grand jury returned the superseding indictment on March 6—still nearly two weeks before the government moved for a continuance.

And the superseding indictment itself is just another unexplained delay. The government originally sought three separate indictments. After Mr. Starks asserted his speedy trial rights, the government sought a superseding indictment consolidating the three indictments into a single case and charging the same violations asserted in the original indictments. The government states that the superseding indictment was presented to the first available grand jury after Ms. Avery's arrest in February. But the government does not offer any persuasive explanation as to why it sought a superseding indictment (as opposed to continuing with the three separate indictments) or any persuasive explanation as to why this superseding indictment justifies the eleventh-hour continuance. The Court agrees with the government that there does not appear to be any

vindictiveness here. But the timing of the superseding indictment charging the defendants together does raise troublesome questions of gamesmanship,² and it counsels against finding that the government has acted with diligence here.

The second factor is the likelihood that a continuance “would accomplish the purpose underlying the party’s expressed need for the continuance.” *Id.* The need expressed in the motion is the government’s preference to have one trial for all four defendants. But the government’s action of initially indicting the four defendants in three separate indictments cuts against this “need.” When the government initially indicted all these individuals in three separate indictments, it was obviously willing to hold three separate trials. It was not until after Mr. Starks’s trial date was set that the government filed a superseding indictment to join all four defendants in a single case.³

The government’s reply expresses a different need for the continuance—to give it time for plea negotiations with Ms. Avery to progress, and to perhaps locate Mr. Scott and make a deal with him, all to presumably lead to cooperation in the case against Mr. Starks. Doc. 43 at 9. Because this argument is raised for the first time in the reply, it is not properly before the Court and is not considered. But, even if considered, the problem here is that the government does not explain how the requested continuance would accomplish this, because the government does not

² The Court notes that the government has indicated in its reply that the filing of a superseding indictment automatically resets the speedy trial clock to zero, citing *United States v. Ray*, 899 F.3d 852, 862 (10th Cir. 2018) and *United States v. Olivo*, 69 F.3d 1057, 1062 (10th Cir. 1995). The Court disagrees with the breadth of the government’s statement. Although *Ray* does contain the broad language quoted by the government—“when the government filed a superseding indictment . . . the speedy-trial clock reset to zero, wiping out those five days”—the footnote accompanying that sentence limits its application to cases in which the superseding indictment adds new charges. *Ray*, 899 F.3d at 862 n.4 (citing *United States v. Andrews*, 790 F.2d 803, 808 (10th Cir. 1986), for the proposition that “when the later charge is merely a part of or only ‘gilds’ the initial charge, the subsequent charge is subject to the same Speedy Trial Act limitations imposed on the earlier indictment”).

³ Nor does the government credibly point to any evidence that would be lacking if the continuance was denied and the defendants were tried separately. The government originally indicted Mr. Starks and the other individuals separately, and so it presumably still has all the evidence available to it that it would have had absent the superseding indictment.

even state the length of the continuance it is seeking. It appears the government wants an open-ended case until the other co-defendants are arrested and arraigned and are presumably ready to provide testimony against Mr. Starks. The Court will not countenance an open-ended period of delay in a situation created by the government's own initial decision to indict Mr. Starks separately. Under these circumstances, the Court is unable to conclude that there is a likelihood that the government's purposes could be accomplished within a reasonable period of delay. Thus, this second factor does not favor granting a continuance.

The third factor is inconvenience to the opposing party, the witnesses, and the Court. *Dowlin*, 408 F.3d at 663. Looking first to the impact on Mr. Starks, he is presumed innocent, has a constitutional right to a speedy trial, has repeatedly asserted this right, and has taken no actions to delay trial. As the government points out, he is out on bond, which reduces his inconvenience. But his release conditions require that he not leave the State of Kansas—which, according to him, is a detriment to his ability to earn a living as a cross-country truck driver. Further, Mr. Starks had every expectation that his fate would be decided at his trial on April 1, and he and his counsel have planned accordingly, as at least one out-of-state witness has been subpoenaed.

The Court is also inconvenienced by a continuance. The Court's normal criminal docket was rescheduled to accommodate this trial, which was a specific setting as opposed to a rolling docket.⁴ While the Court appreciates the judicial economy that can be achieved by trying all co-defendants together, there were no co-defendants when the trial was set. The Court is unwilling to hold Mr. Starks's trial in abeyance for an indeterminate period to accommodate the government's

⁴ Indeed, the inconvenience to the Court is magnified in this case. The Court had already set a trial for this date in another criminal matter. Because of Mr. Starks' speedy trial rights, the Court set this trial for the same dates, which required locating another district court judge who could preside over one of these trials if both proceeded. Another district court judge has been located and arrangements have been made to honor both trial settings.

late decision to join the separately indicted defendants. In sum, the third factor weighs strongly against granting a continuance.

The fourth factor concerns the need asserted for the continuance and the harm that the moving party might suffer if the court denies the motion. *Id.* As discussed above, the government's stated "need" to continue the trial date is to try all defendants in a single trial—a feat that depends, first, on locating the remaining co-defendants. The Court acknowledges the government's argument regarding the strong presumption in favor of trying conspiracy defendants together⁵ and the usual reticence to grant a severance. *See, e.g., United States v. Zar*, 790 F.3d 1036, 1043 (10th Cir. 2015) ("The court recognized the strong presumption favoring trying properly joined defendants together."); *see also United States v. Ramirez*, 45 F.3d 1096, 1100 (7th Cir. 1995) ("There is a presumption that co-conspirators who are indicted together are properly tried together."). While that may be a fair presumption in a typical case, here, where co-defendants, who were initially separately indicted, were only added on the eve of trial for unclear reasons, that presumption can be overcome.

The second stated "need" (again, raised in the reply and not properly before the Court) is the hope that Ms. Avery will take a plea in exchange for her testimony against Mr. Starks, or that Mr. Scott will be located and will likewise give helpful testimony. Denying the continuance may make it difficult for the government to achieve these ends. But that leaves it in no worse a position than it was when it indicted Mr. Starks separately and arrested him on that indictment in January, starting his speedy trial clock. Based on this, there is no serious argument that the denying the

⁵ The Court also recognizes that alleged co-conspirators are appropriately joined under Rule 8(b). However, the rub here is the timing of the joinder.

continuance will force the government to proceed to trial without some essential piece of evidence. This fourth factor therefore weighs against granting the continuance.

B. REQUEST FOR SEVERANCE

This lack of harm to the government should be contrasted with the burden on Mr. Starks, which leads to his request for a severance so that his trial can proceed on April 1.⁶ Rule 14(a) of the Federal Rules of Criminal Procedure states that a court may “order separate trials of counts, sever the defendants’ trials, or provide any other relief that justice requires” if joinder “appears to prejudice a defendant.” Fed. R. Crim. P. 14(a). “Rule 14(a) envisions situations where a joint trial would be inappropriate and harmful to the accused’s constitutional rights even though joinder is proper under Rule 8, which is liberally and broadly applied in the interest of efficiency.” *United States v. DeLeon*, 323 F.R.D. 672, 685 (D.N.M. 2017) (citing *Zafiro v. United States*, 506 U.S. 534, 538 (1993)). Whether to sever is “within the sound discretion of the trial court.” *Id.* In deciding whether to sever a defendant, courts should “weigh the prejudice resulting from a joint trial of co-defendants against the expense and inconvenience of separate trials.” *United States v. Bailey*, 952 F.2d 363, 365 (10th Cir. 1991) (quoting *United States v. Cardall*, 885 F.2d 656, 667-68 (10th Cir. 1989)).

Given the particular facts of this case, the Court believes this balancing weighs in Mr. Starks’s favor. This matter was initiated by the government—first against Mr. Starks individually, and then against him as one of four co-defendants. The government is now the one seeking a continuance so that it can have a trial on the terms of its revised indictment. But granting the continuance and delaying Mr. Starks’s trial would unfairly prejudice him in more significant ways

⁶ Given that Ms. Avery is now an active defendant in this case, it is debatable whether Mr. Starks is the defendant to be severed or Ms. Avery. Given Ms. Avery’s very recent arraignment, it would undoubtedly be prejudicial to her to require her to proceed to trial on April 1 with Mr. Starks. So regardless of who is severed and who remains, the trial on April 1 will only be on Mr. Starks’s charges.

that weigh in favor of applying Rule 14(a). Mr. Starks currently enjoys the presumption of innocence, and while he is out on bond, his conditions of release are inhibiting his livelihood. To the extent one side has to bear the inequity here, it is fair for it to be the government, considering the way this case has been postured (and re-postured) from the start.

III. CONCLUSION

In sum, the Court finds that none of the factors favor granting the government a continuance of the trial date, and Mr. Starks is entitled to the speedy trial he has continually requested. The parties should prepare to proceed to trial on Mr. Starks's charges on April 1, 2019.

THE COURT THEREFORE ORDERS that the government's Motion to Continue Trial (Doc. 25) is DENIED.

THE COURT FURTHER ORDERS that the Trial Order (Doc. 16) remains in effect.

DATED: March 23, 2019

/s/ Holly L. Teeter
HOLLY L. TEETER
UNITED STATES DISTRICT JUDGE