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CLERK

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA

WESTERN DIVISION

UNITED STATES OF AMERICA,	*	CR 08-50079
	*	
Plaintiff,	*	
	*	
vs.	*	ORDER GRANTING MOTION
	*	FOR CONTINUANCE
JOHN GRAHAM, a/k/a/ John Boy Patton,	*	
VINE RICHARD MARSHALL, a/k/a	*	
Richard Vine Marshall, a/k/a	*	
Dick Marshall,	*	
	*	
Defendant.	*	
	*	

Pending before the Court is Defendant Marshall's Motion for Continuance. (Doc. 143.) For the following reasons, the motion will be granted.

BACKGROUND

In 2003, Defendant Graham was indicted with co-defendant Arlo Looking Cloud for the murder of Anna Mae Aquash. Looking Cloud was convicted of First Degree Murder after a jury trial in 2004. After lengthy proceedings in Canada, Defendant Graham was extradited to the United States and was arrested on the 2003 Superseding Indictment on December 6, 2007. In October, 2008, the Court dismissed the 2003 Superseding Indictment against Graham because it failed to allege Graham's Indian status, which is an essential element of an offense under 18 U.S.C. § 1153.

On August 20, 2008, Marshall was indicted for the first time for aiding and abetting the unlawful killing of Anna Mae Aquash pursuant to 18 U.S.C. §§ 1111, 1153, and 2. The jury trial was set for October 28, 2008. On September 9, 2008, Marshall filed a motion to continue. That motion to continue was granted on September 24, 2008, and Marshall's trial was scheduled to commence on February 24, 2009.

A Superseding Indictment was issued by the grand jury on October 7, 2008, charging Graham and Marshall as co-defendants in the murder of Annie Mae Aquash. By Order issued on October 16, 2008, the trial on the 2008 Superseding Indictment was scheduled for February 24, 2009, the same date that the Court had earlier scheduled Marshall's trial to begin.

On January 12, 2009, Defendant Marshall filed the pending motion to continue the trial and to extend all deadlines in the Court's Scheduling Order. Counsel for Marshall asserts that he needs more time for trial preparation in order to provide Marshall with his constitutional right to effective assistance of counsel. Counsel notes that the crime charged in the indictment occurred 33 years ago in 1975. The government has provided him with over 5,000 pages of discovery relating to the investigation into the murder of Anna Mae Aquash. Counsel has read all of the documents, but has not reviewed all of them with Marshall. Counsel for Marshall believes that events related to the American Indian Movement in 1975 are likely to be the subject matter of testimony in Marshall's trial, and that a thorough understanding of those events is essential to his defense. His requests for this type of information from the government have been refused. Furthermore, counsel intends to make motions to compel the government to provide him with copies of more than 100 audio cassette tapes prepared by the government or its informants in the investigation of this case, as well as to compel production of *Brady* and *Giglio* material the government has failed or refused to disclose. Finally, counsel asserts that he needs more than the remaining six weeks until trial in order to locate and interview witnesses, gather records, subpoena evidence, research legal issues and investigate the case. Marshall signed a waiver of his speedy trial rights.

Co-defendant Graham says he has no objection in light of the short period of time since Marshall was indicted. Graham adds that Marshall's ability to prepare a defense "has been hampered by the government's decision not to provide him with copies of the 109 audio taped interviews in this case." Graham has also executed a waiver of speedy trial act compliance.

The government objects to the continuance, citing witness safety concerns and stating that the audio tapes of witness interviews are available for Marshall's counsel to review at the office of the United States Attorney.

DISCUSSION

“District courts are afforded broad discretion when ruling on requests for continuances.” *United States v. Vesey*, 330 F.3d 1070, 1072 (8th Cir. 2003). The Eighth Circuit considers five factors to determine whether a continuance is warranted:

(1) the nature of the case and whether the parties have been allowed adequate timing for trial preparation; (2) the diligence of the party requesting the continuance; (3) the conduct of the opposing party and whether a lack of cooperation has contributed to the need for a continuance; (4) the effect of the continuance and whether a delay will seriously disadvantage either party; and (5) the asserted need for the continuance, with weight to be given to sudden exigencies and unforeseen circumstances.

United States v. Yockel, 320 F.3d 818, 827 (8th Cir.2003) (quoting *United States v. Issaghoolian*, 42 F.3d 1175, 1177-78 (8th Cir.1994)). The Court will address each of these five factors.

First, the Court agrees with counsel for Marshall that this case presents complex legal and factual issues. The crime involves multiple defendants and allegedly occurred as part of a wide-ranging conspiracy arising out of the AIM movement in the 1970's. The Court is aware that Marshall's counsel is a sole practitioner. The scheduled trial date is six months after Marshall's indictment. Under these circumstances, six months is not enough time for trial preparation. Counsel is still undertaking discovery and investigation.

Second, there is no evidence or allegation that counsel has failed to be diligent in his trial preparation efforts.

Third, although there have been disputes over whether Marshall is entitled to copies of the 109 audiotapes of witness interviews, the Court does not believe that the government's conduct has contributed in any significant way to the need for a continuance.

Fourth, despite the government's claims in regard to witness safety concerns, including *ex parte* exhibits 4 and 5 submitted in support of its opposition to Marshall's motion to continue,¹ the Court finds that a continuance will not seriously disadvantage the government.

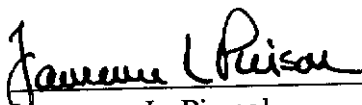
Finally, the Court has determined that counsel's assertion that he needs more time to prepare for trial is credible, and that there is a compelling need for additional time. Accordingly,

IT IS ORDERED:

1. That Defendant Marshall's Motion For Continuance, doc. 143, is granted, and a new Scheduling Order will be issued by the Court.
2. That the government's Motion for *In Camera* Review, doc. 164, is granted, and Defendant Graham's Objection to Submission of *In Camera* Materials, doc. 165, is denied.

Dated this 22nd day of January, 2009.

BY THE COURT:



Lawrence L. Piersol
United States District Judge

ATTEST:
JOSEPH HAAS, CLERK

BY: 

DEPUTY

¹Exhibits 4 and 5 submitted for *in camera* inspection in support of the government's opposition to Marshall's motion to continue are not discoverable material. Accordingly, the government's Motion for *In Camera* Review of these documents, doc. 164, will be granted, and Defendant Graham's Objection to Submission of *In Camera* Materials, doc. 165, will be denied.