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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

<p>United States of America, <i>Plaintiff,</i> v. Ammon Bundy, <i>et al,</i> <i>Defendant.</i></p>	<p>Case No. 3:16-cr-00051-BR DEFENDANT AMMON BUNDY’S MOTION (AND INCORPORATED MEMORANDUM OF LAW AND AUTHORITY) TO CONTINUE THE APRIL 27, 2016 DEADLINE, OR ALTERNATIVELY TO SEVER AND SET AN IMMEDIATE TRIAL DATE Judge: Hon. Anna J. Brown</p>
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Certificate of Conferral: Prior to the filing of this motion, defense counsel conferred with the other defense counsel and the Government for their positions on this motion: Their positions we received are as follows:

Opposed to Expedited Trial: The Government, Mr. Kohlmetz for Mr. Patrick, Ms. Wood for Mr. Ritzheimer; Mr. Coan for Mr. Santilli; Mr. Andersen for Mr. Stanek; Ms. Baggio for Mr. O’Shaughnessy; Ms. Harris for Ms. Cox, Ms. Maxfield for Mr. Wampler; Mr. Merrithew for Jake Ryan; Mr. Bakker for Sandra Anderson; Mr. McHenry for Sean Anderson; Mr. Audt for Mr. Ehmer; Mr. Warren for Mr. Flores; Mr. Kaufman for Dylan Anderson; Ms. Shertz for Mr. Thorn; Mr. Pagan for Mr. Lequieu; Ms. Shipsey for Mr. Cooper; Mr. Halley for Mr. Kjar.

Not opposed to Expedited Trial: Ryan Bundy. He joins in that motion if the Court grants Mr. Bundy’s requested alternative relief.

Does not oppose motion to extend motion deadline by 5 days, but opposes extension for 30 days: The Government, Ms. Baggio for Mr. O’Shaughnessy; Mr. Coan for Mr. Santilli; Ms. Wood for Mr. Ritzheimer

Does not oppose Motion to Extend Deadline for 30 days: Mr. Halley for Mr. Kjar, Ms. Harris joins in this motion; Ms. Maxfield for Mr. Wampler; Mr. Merrithew for Jake

Ryan, Mr. Bakker for Ms. Anderson; Mr. McHenry for Mr. Anderson; Mr. Audet for Mr. Ehmer; Mr. Kaufman for Mr. Anderson; Ms. Shertz for Mr. Thorn; Mr. Pagan for Mr. Lequieu; Ms. Shipsey for Mr. Cooper; Mr. Kohlmetz for Mr. Patrick does not oppose and joins in this motion.

Does not oppose Mr. Bundy’s Motion to Sever: Ryan Bundy. He joins in the motion and wishes to go to trial on an expedited basis if the Court grants the alternative relief. Ms. Wood for Mr. Ritzheimer opposes the expedited trial date. However, if the Court grants the expedited trial date for Mr. Bundy as alternative relief, she does not oppose Mr. Bundy’s motion to sever.

Opposes motion to sever: Mr. Halley for Mr. Kjar; Ms. Baggio for Mr. O’Shaughnessy; Ms. Harris for Ms. Cox; Ms. Maxfield for Mr. Wampler; Ms. Shipsey for Mr. Cooper; Mr. McHenry for Sean Anderson.

Motion

Defendant Ammon Bundy, by and through counsel, respectfully moves the Court for an order continuing the April 27, 2016 motion deadline required by the Court’s April 11, 2016 “Order.” Dkt. No. 389. For reasons argued below, this continuance must be for at least 30 days, then based upon the status of discovery and its consequences, the pre-trial motion schedule and trial date must be reset pursuant to basic due process principles and as allowed by Rule 12(c)(2) of the Federal Rules of Criminal Procedure.

If the Court is disinclined to grant the continuance, despite the grounds argued below, Mr. Bundy is forced to make the untenable choice between a speedy trial and a fair one. Neither the Speedy Trial Act nor the Sixth Amendment requires that choice, and the Fifth Amendment due process clause – prohibits it. Thus, if the Court denies this request for a continuance, Mr. Bundy moves *alternatively* for relief from prejudicial joinder and for a new, immediate trial date, within the next 30 days, where he can defend himself and the Malheur protest – at trial.¹ Mr. Bundy was the leader of the Malheur

¹ Based upon yesterday’s minute details regarding the arraignment and detention hearing of co-defendant Travis Cox, the court’s calendar is available for a more immediate trial date. *See* Dkt. No. 461 (Setting “4-week Jury Trial” for 6/28/2016.)
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protest because of his commitment to certain basic Constitutional principles. The issue now before the Court is no different. If Mr. Bundy is unable to meaningfully and fairly engage in credible and diligent pre-trial litigation and motion practice, as argued below, while the government piles terabytes of discovery data here and pursues a separate but related prosecution in Nevada, there is no purpose served whatsoever in the prolonged pre-trial incarceration of himself and his colleagues here in Oregon who all share (along with their families) its attendant hardships.²

Statement of Relevant Facts³
Procedural History

1. On February 12, 2016 the Court ordered via minute entry, (Dkt. No. 146), “in the interests of efficiently considering...discovery, access, and case-management issues” and required that from that point forward “counsel for the government and counsel for all Defendants to confer promptly on the issues raised...as to any related discovery and evidence-access-management issues.” *Id.*

2. On February 16, 2016 the Court minute entry referred to its February 12, 2016 order “a single filing” on the specified evidence, access and management issues. (Dkt. No. 157.)

² This is not to suggest that Mr. Bundy prefers the alternative relief. Mr. Bundy prefers the requested continuance, in the interest of fairness.

³ Defendant is attempting a courtesy to the Court by including a detailed procedural review of the extensive docket in this case, and this statement of relevant facts has contributed significantly to the length of this filing. While Defendant understands that the court has previously issued the 10-page limit for pretrial motions, based upon a good faith belief that this filing is outside that parameter Defendant has taken the liberty of choosing a detailed factual history over a shorter filing length. If Defendant has misunderstand the court’s prior order, please respectfully consider this an incorporated motion for an overlength filing.

3. On February 18, 2016 the court minute entry, reminding the parties that based upon the Court's prior orders, "they are not entitled to submit legal memoranda regarding motions to which they are not a party." (Dkt. No. 167.)

4. On February 19, 2016 all of the defendants in this case (at the time) filed a "Joint Consolidated Defense Motion and Assertion of Constitutional Rights" (Dkt. No. 183.) In this joint motion the defendants asserted their constitutional and statutory right to a speedy trial. *Id.* at p. 2. Further, the defendants moved the Court for an order approving their joint stipulation regarding each of them joining in each defense motion unless otherwise specified. *Id.* The Court granted this motion via minute entry on February 25, 2010 (Dkt. No. 210).

5. On February 19, 2016 the defendants filed a "Joint Status Report" wherein they informed the court that, "The defense expect[s] to engage in pretrial motion litigation. However, the defense cannot fully anticipate pretrial motions until it receives discovery and can make informed judgment as to meritorious motions, based upon the nature of the evidence that may be used by the government, and the methods used to acquire it." (Dkt. No. 182 at p. 3.)

6. On February 22, 2016 the Government filed a motion to vacate the previously set trial dates, discovery deadlines, and motion deadlines. (Dkt. No. 185.) The Government argued that the case was "complex" under 18 U.S.C. § 3161(h)(7)(B)(ii) due to the "volume and scope" of discovery, the number of defendants, the unique nature of the alleged crime scene, and the government's decision to pursue simultaneous prosecution in Nevada against key defendants. *Id.*

7. On February 24, 2016 the Court conducted multiple hearings and entered a similar minute entry order setting a schedule of “Monthly Status Conferences” and postponing to rule on the government’s prior “complexity” motion. (Dkt. No. 207, 208, 209). On February 25, 2016 the Court subsequently published its related “Case-Management Order.” (Dkt. No. 210.) In this order, the Court referenced the anticipated filing by the Government of a “superseding indictment” which filing “is necessary in order to implement an effective case-management plan that will permit this matter to proceed to trial without unnecessary delay.” *Id.*, at p. 2. The Court also ruled that during the scheduled status conferences the court would “address any ripe pretrial, non-evidentiary matters on which the parties have conferred but need a ruling to resolve the issue.” *Id.* Prior to each status conference the court has ordered that the parties confer and file a “single, joint status report with a proposed agenda of matters to address.” *Id.* The court also deferred ruling on the government’s motion (#185) related to the Speedy Trial Act, and did not purport to exclude any time in this order. *Id.*, at p. 4.

8. On March 7, 2016 the parties filed a “Joint Status Report” in accordance with the court’s case management order. (Dkt. No. 244). In this report, the court was informed that the government’s request to vacate the April trial date and provide more time for discovery was “over the objection of the defense.” *Id.*, at p. 5. In this status conference a pre-trial motion schedule was proposed which separated potential motions into pure legal motions, mixed legal/fact motions, and fact-specific motions) with the initial deadline for pure legal motions to be April 28, 2016. *Id.*, at 7. The government’s position on discovery was that it would be “substantially complete by May 15, 2016.” *Id.*, at 10.

9. On March 8, 2016 the government filed the superseding indictment. (Dkt. No. 250.)

10. On March 9, 2016, following a status hearing, the Court ordered, among other things, “the parties to confer and to submit to the Court no later than March 24, 2016, a single, joint status report regarding the parties’ specific proposals for the timing and sequencing of pretrial motions...specify[ing] the types of motions that the parties intend to file so that the Court may set a reasonable briefing schedule and determine the amount of time to allocate to each motion.” (Dkt. No. 285.)

11. On March 9, 2016 the Court granted the government’s motion designating the case as complex. (Dkt. No. 289.) In its order, the Court observed that, “Until the Court has the benefit of the parties’ proposals regarding a discovery schedule, the parties’ anticipated pretrial motions, and the procedure and time needed for summoning and selecting a jury, the Court provisionally finds excludable delay for all Defendants from the date of this Order through April 6, 2016.” *Id.*, at p. 5.

12. On March 16, 2016 several defendants were the subject of an “Emergency Motion Prohibiting US Marshals from Removing” them to Nevada for arraignment there on the government’s second and simultaneous prosecution of these certain defendants. (Dkt. No. 312.) While the court initially granted that motion, (*see* Dkt. No. 313), after “a careful review of the parties’ written and oral arguments,” (Dkt. No. 334 at p. 3), it later vacated that order and entered an order granting the transfer. (Dkt. No. 334.) The government had argued, “if a temporary transport to Nevada and back to Oregon were required, then such a transport would not violate the defendant’s constitutional rights in

any way.” (Dkt. No. 331 at p. 3.) Further, in its decision, the court “overrule[d]” the objection by Defendants explaining,

To the extent that the moving Defendants object to execution of the Writs on the basis that such execution will interfere with the proceedings in this court and with Defendants’ attendant rights to a speedy trial, to due process, and to effective assistance of counsel, the Court overrules that objection as premature on the following two premises: First, this Court extends equal respect and comity to the District Court of Nevada in the conduct of its proceedings as this Court expects to receive in return. Second, this Court concludes that allowing these Writs to be executed on this single occasion...for a prompt return to Oregon within approximately ten (10) days would not interfere with this Court’s proceedings or with Defendants’ rights in this forum provided that Defendants’ transport-and-return occurs as directed herein.”

Id. at 4-5. The Court ordered the Defendants be returned by April 25, 2016. *Id.*

13. On March 23, 2016 the parties filed a “Joint Status Report On Timing & Sequencing of Motions.” (Dkt. No. 336). In this report the parties state:

[D]efendants wish to reserve the right to request an earlier trial date, a later trial date, or revisions to the motions schedule (such as adding additional motions or foregoing motions place-marked in the chart below), depending on subsequent or intervening events, including but not limited to, a second superseding indictment, review of discovery, motion practice, specified grounds for severance, rulings on defendants’ detention status, or by virtue of any other intervening event that requires an amendment of the schedule as necessary to provide a fair trial and constitutionally sufficient representation as required by the Sixth Amendment.”

Id.

14. On March 31, 2016 the parties filed a “Joint Status Report” within which the parties proposed an agenda for the April 6, 2016 status conference. On this agenda, the parties proposed consideration of the “Trial Schedule / Timing of Motions (Joint Status Report, Doc. 336; Court’s email of 3/24/2016). (Dkt. No. 359 at 2.) Following the April 6, 2016 status conference, the Court entered an “Order” on April 11, 2016 to, among other things, “address case-management issues in general.” (Dkt. No. 389 at p. 2.)

In this order the court ruled that “it is presently premature for any party to seek a later trial date on the basis that there is insufficient time...the Court continues to expect experienced defense counsel to share the workload on common defense issues and not to repeat the work done by other counsel that can be shared...the Court will not consider any motion to continue the trial date filed before July 7, 2016, that is premised on the basis of insufficient time to prepare.” *Id.*, at 2-3. Also the Court struck “all previously set dates” based upon its prior complexity order. *Id.* The Court also instructed “the parties to provide an update on their progress in making trial preparations.” *Id.*

15. Regarding pretrial motion practice, the Court’s April 11, 2016 order provided, among other conclusions, “unless and until a Defendant has a factual basis to assert an actual speedy-trial violation, a motion to dismiss on that basis is premature and should not be filed.” *Id.*, at 5. “The court directs Defendants to file the remaining motions they specified and any other motions concerning purely legal matters no later than April 27, 2016.” Finally, the Court “directs the parties to confer regarding a schedule for the anticipated second round of pretrial motions and to include in their Joint Status Report due April 28, 2016, their proposals identifying the motions to be filed, their proposed briefing deadlines, and the proposed dates for any necessary evidentiary hearing(s) and/or for oral argument on the second round of anticipated pretrial motions.” *Id.* at 8-9.

16. Also, in the Court’s April 11, 2016 order, it stated, “Defendants Ryan Bundy and Mendenbach, who are both representing themselves *pro se* with the assistance of standby counsel, advised the Court at the status hearing of their concerns regarding their access to discovery and legal materials while in custody. The Court reminds both of

the Defendants that this issue is one of the challenges that they accepted when asserting their right to self-representation, and they must rely on standby counsel to facilitate their access and communication issues.” *Id.* at 13.

17. On April 15, 2016 the Court entered a minute order stating, “Pursuant to the Order (#389) issued 4/11/16, the deadline for filing the first round of Motions in this matter regarding legal issues is 4/27/16...All defense motions are deemed filed on behalf of all Defendants unless noted otherwise in the caption or a specific Defendant opts out in a notice filed with the Court within 3 days of the filing of the motion. All motions require advance conferral with opposing counsel.” (Dkt. No. 418).

18. On April 22, 2016 Defendant Ammon Bundy filed an “Unopposed Motion To Extend Deadline” regarding his planned “Motion to Dismiss for Lack of Jurisdiction.” (Dkt. No. 453.) Mr. Bundy did not request any extra calendar time or rescheduling, but had proposed including this motion in the second round of motions. The Court denied this request, and stated, “Bundy has been aware of the basis of his anticipated motion...since these proceedings began and has not made any showing that he has been unable to prepare sufficiently despite due diligence. Moreover, the compressed timeline on which this case is proceeding (**in large part at Ammon Bundy’s insistence**) does not allow for flexibility as to the timing of this first round of legal motions.” (Dkt. No. 455.) (Emphasis added). There were no findings of fact or an explanation as to how a delay in this one motion would affect the trial date.

GROUND FOR RELIEF

It should go without saying that Defendant Ammon Bundy (as with all the defendants in this case) is entitled to both a fair and a speedy trial. With regard to the

granting of a continuance, “a court should consider: the efficient administration of criminal justice; the accused's rights, including an adequate opportunity to prepare a defense; and the rights of other defendants awaiting trial who may be prejudiced by a continuance.” *United States v. Kikumura*, 947 F.2d 72, 78 (3d Cir. 1991). Clearly, this decision is within “the sound discretion of the trial judge and will not be disturbed unless a clear abuse of discretion exists.” *Sherman v. United States*, 9 Cir., 1957, 241 F.2d 329, 338; *Williams v. United States*, 9 Cir., 1953, 203 F.2d 85. But, a court’s decision cannot be unfair or arbitrary and must comport with basic principles of due process. *Ungar v. Sarafite*, 376 U.S. 575, 589, 84 S. Ct. 841, 850 (1964) (“There are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process. The answer must be found in the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request is denied.”) Further, a court’s “myopic insistence upon expeditiousness in the face of a justifiable request for delay” can violate both a defendant’s due process rights and “can render the right to defend with counsel an empty formality.” *Id.* Thus, as grounds for a continuance, Mr. Bundy advances the following:

I. Due To the Nevada Transfer, Mr. Bundy Has Not Been Able To Meaningfully Confer With Legal Counsel Regarding The Important Finalization of Pretrial Motions.

No Meaningful Access to His Attorney. As the Court knows, Mr. Bundy was transferred by order of the court to Nevada on April 13, 2016 and arrived back in Oregon on April 25, 2016. Despite repeated request, no provision was made to allow Mr. Bundy to communicate via telephone with his attorney in confidence (the calls were recorded.) At the first few days of Mr. Bundy’s time in Nevada, his Oregon counsel traveled to

Nevada and met with Mr. Bundy to continue to work on trial preparation, including specifically pre-trial motions (and the Motion to Dismiss for Lack of Jurisdiction.) However, Mr. Bundy's attorney was denied the ability to bring a computer to review discovery, draft documents, etc. despite repeated requests. Mr. Bundy was also prohibited from having a pencil or pen during his meetings with his attorney. Thus, Mr. Bundy did not have meaningful access to his Oregon attorney for approximately the last two weeks immediately prior to the April 27, 2016 motion deadline, to continue preparations for these Oregon proceedings.

Withheld Attorney-Client Privileged Documents. Despite not being able to meaningfully communicate with his Oregon attorney, Mr. Bundy worked diligently on his own, writing – painstakingly with pencil – notes, directions, arguments and other communications in advance of essential pre-trial motion work required to be completed no later than April 27, 2016. This included time during his initial unjustified placement in solitary confinement. However, upon transfer back to Oregon Mr. Bundy's attorney-client privileged work product was not provided to either his Nevada attorney or his Oregon attorney as had been requested. Instead, his materials were confiscated by the US Marshalls office. *See* Exhibit 1 below, an email from AUSA Ethan Knight.

On Apr 26, 2016, at 8:34 AM, Knight, Ethan (USAOR) <Ethan.Knight@usdoj.gov> wrote:

Mike:

We checked with the USMS and here what we heard: Ammon and Ryan were housed at a different facility in Las Vegas than the other defendants and for some reason their legal work didn't make the plane today. However, USMS in Nevada has FEDEX their legal work to us and as soon as we get it we will deliver it to them.

Let us know if you need anything else.

Ethan

Ethan D. Knight
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District of Oregon
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Thus, despite the helpfulness of AUSA Knight,⁴ the simple fact of the matter is that up against the existing deadlines, not only had Mr. Bundy been deprived of consulting, reviewing, approving, and assisting with pretrial motion preparation directly, (because of his transfer to Nevada), upon return, his painstakingly created “legal work” did not “make it back” for some unexplained reason and the knowledge of his strategies, and the possession of his writings – are now being held by government officers. This delay, through no fault of Mr. Bundy’s and despite his diligence, is impacting most severely at the very time which is essential for meeting the pretrial motion deadline and has thus further crippled Mr. Bundy’s direct involvement in his defense and in preparing, reviewing and approving pretrial motions. *See Avery v. State of Alabama*, 308 U.S. 444, 446, 60 S. Ct. 321, 322 (1940) (Explaining that if a denial of a continuance resulted in “the denial of opportunity for appointed counsel to confer, to consult with the accused and to prepare his defense” it would could result in “nothing more than a formal

⁴ Because of attorney-client privilege issues, AUSA Knight agreed and helped to make arrangements to have the privileged files transferred directly to Mr. Bundy or his legal counsel, and not to have the materials delivered to the United States Attorneys Office. However, as of the time of this motion, those materials **have not been returned** to Mr. Bundy. In fact, two guards at the Multnomah County Detention Center actually reportedly confirmed to Mr. Bundy that at least some of the materials had arrived, and were in the detention center’s possession, that government staff had shockingly reviewed the material outside the presence of Mr. Bundy, and had made determinations based upon the content of that review, that the material would be withheld as personal property. All of this has occurred despite Mr. Bundy’s attorney notifying detention center officers and USAO officers –that such material was critical for the pretrial motion deadlines. As of the time of this motion, government officers are reportedly refusing to deliver the materials to Mr. Bundy and are now informed of and in possession of his attorney-client trial strategy, defense strategy, motion strategy and other communications.

compliance with the Constitution's requirement that an accused be given the assistance of counsel.”)⁵

The Motion To Dismiss For Lack of Jurisdiction. The Court denied Mr. Bundy’s request to move the Motion to Dismiss for Lack of Jurisdiction, as documented in the fact section above. At the time of the motion, neither Mr. Bundy nor his counsel anticipated that Mr. Bundy’s related personal legal materials would not be available prior to the deadline or this would have been added as additional grounds for that motion. Related to this motion particularly, this is significant. The present legal case centers around Mr. Bundy’s alleged leadership of the protest at the Malheur National Wildlife Refuge. One of the core purposes of the protest, as was stated repeatedly and publicly by Mr. Bundy and others during the alleged occupation – was to gain standing to challenge the constitutionality of certain land claims by the federal government and its bureaucracies. Or, to put it simply, Mr. Bundy has been personally involved in this issue for years, and particularly at Malheur, and has not completely delegated the preparation of the jurisdiction motion to his attorneys because he desires direct and meaningful involvement in bringing the argument before the court. Mr. Bundy has acquired personal motivations and personal knowledge related to the legal and political issues involved in the argument and as the court pointed out, “[Mr.] Bundy has been aware of the basis of his anticipated

⁵ All of this is in addition to the physical deprivation suffered during the transfer to Nevada, when Mr. Bundy was initially handcuffed for a period of more than 21 hours, repeatedly deprived meals, and was unjustly held in solitary confinement for a significant period. It is also worth noting that Mr. Bundy has reported one female US Marshall stated, among other things, “I would not give or feed these guys anything, they are pieces of shi**.” Mr. Bundy was subsequently deprived of regular meals. Because of the quite human toll this kind of mistreatment takes on a person, this unjust treatment alone created additional burdens on Mr. Bundy and slowed his ability to effectively advocate and be involved in pretrial motion preparation.

motion...since these proceedings began.” See ¶18 above. As of 8 pm April 26, 2016 despite diligent effort Mr. Bundy has still not been able to review the existing 10+ page memorandum in support of the motion completed by his attorneys, nor had any opportunity to provide meaningful review, feedback, edits, etc. All this added to being without the ability to meaningful participate in this and other motions for the past two weeks – creates a circumstance where Mr. Bundy must ask for a continuance, and the court should grant it. Given the centrality of this argument to this entire case and the political nature of the protest at issue – it would be exceptionally prejudicial to expect Mr. Bundy to forgo being involved in the finalization of this motion and memorandum, and under the circumstances, particularly “myopic” to insist upon expeditiousness “in the face of a justifiable request for delay.” *Sarafite*, 376 U.S. 575, 589, 84 S. Ct. 841, 849 (1964).

Finally, Mr. Bundy has insisted that all substantive motions, but particularly this motion, must be reviewed and approved by him before filing. ORPC 1.2(a) does not permit Mr. Bundy’s attorney to file documents over his protest. Today, because Mr. Bundy has not been accessible to get him a paper copy to review, and telephone contact was cut-off without time to read the full text of the motion allowing him to take notes and comment. Mr. Bundy’s legal counsel made efforts to have staff from another defense team convey (in a sealed envelope) a draft “Motion to Dismiss for Lack of Subject Matter Jurisdiction” to Mr. Bundy physically, but he was unable to get into see Mr. Bundy or provide him the motion, and instead it had to be delivered through “legal mail” at some uncertain time in the future. This is significant, because the court has also ordered Mr. Bundy (through his attorneys) to work as part of a combined legal defense team,

coordinating their efforts and relying upon each other since “the Court continues to expect experienced defense counsel to share the workload on common defense issues and not to repeat the work done by other counsel that can be shared...” See ¶14 above. This creates a problem of detrimental reliance, where prejudice to Mr. Bundy compounds if he is unable to timely file motions agreed upon by the defense group – particularly when a motion to extend time is unopposed by the government.

II. Mr. Bundy’s General Pretrial Release Conditions Have Significantly Interfered with His Efforts to Prepare and File His Anticipated Pretrial Motions by April 27, 2016.

The conditions of Mr. Bundy’s pretrial detention include: no table upon which to write, no chair upon which to sit, only a flimsy ink pen (that can take two days to replace when it runs out of ink), no access to a computer, no direct access to the court’s docket and a very restrictive telephone schedule for access to his attorneys.⁶ Not only were all of Mr. Bundy’s telephone calls monitored while in Nevada but he is also not allowed private access to a phone in Portland despite being on a purported “private” attorney line, (a subject for a separate future motion⁷). The detention center in Portland has also been unable or unwilling to facilitate reasonable and predictable access to Mr. Bundy by his legal team – and the situation has been extreme during the week prior to the Nevada

⁶ In a twenty-four hour period, Mr. Bundy is supposed to have telephone access time for calls on a particular schedule as follows: 8:30 am to 11am (2.5 hours); 1pm to 3pm (2 hours); 4pm to 5pm (1 hour); and 8pm to 10pm (2 hours). Thus, on a perfect day, Mr. Bundy is allowed up to 7.5 hours on the phone for all of his personal and legal communications.

⁷ *Brenneman v. Madigan*, 343 F. Supp. 128, 141 (N.D. Cal. 1972)(“Needless to say, eavesdropping, accomplished either by means of electronic equipment or the presence of a custodial officer, would raise serious constitutional questions. Cf. *Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967).”)

transfer and the two days since he has been back in Oregon. Consider, the following log of attempted but failed calls by one member of Mr. Bundy's legal team involved in preparing pretrial motions since April 1, 2016:

- Call: 4/1/2016 – jail refused access / jailers interrupted call.
- Call: 4/1/2016 – jail refused access / “Call back in two hours.”
- Call: 4/1/2016 – jail refused access / “He’s not available.”
- Call: 4/4/2016 – jail refused access / “We are short staffed, no calls.”
- Call: 4/5/2016 – jail refused access / No answer.
- Call: 4/5/2016 – jail refused access / No answer.
- Call: 4/5/2016 – jail refused access / No answer.
- Call: 4/5/2016 – jail refused access / “Please try back.”
- Call: 4/5/2016 – jail refused access / No answer.
- Call: 4/5/2016 – jail refused access / “Will move deputy, call back.”
- Call: 4/5/2016 – jail refused access / “Phone is unavailable at this time.”
- Call: 4/7/2016 – jail refused access / Short handed.
- Call: 4/7/2016 – jail refused access / Short handed.
- Call: 4/7/2016 – jail refused access / No Answer.
- Call: 4/9/2016 – jail refused access / “No one is answering up there.”
- Call: 4/9/2016 – jail refused access / “No deputy available in dorm.
- Call: 4/9/2016 – jail refused access / “Will bring down later, call back.”
- Call: 4/9/2016 – jail refused access / Hung up, disconnect.
- Call: 4/9/2016 – jail refused access / Hung up, disconnect.
- Call: 4/11/2016 – jail refused access / “He’s not available.”
- Call: 4/11/2016 – jail refused access / Lockdown, no calls.
- Call: 4/25/2016 – jail refused access / Not available.
- Call: 4/25/2016 – jail refused access / Phone is unavailable.
- Call: 4/26/2016 – jail refused access / Call cut short, “Have to go in.”

Mr. Bundy wants to be directly involved in the preparation of his defense, and in the preparation of each substantive pretrial motion. However, during the critical month of the first pretrial motion deadline, Mr. Bundy was absent from the district, when he was present his phone access was severely limited and unpredictable, and the materials he diligently prepared under limited conditions – were held in Nevada (then in Oregon) and not available in the final days before the motion deadline.

This limited access is legally and constitutionally problematic. *Brenneman v. Madigan*, 343 F. Supp. 128, 141 (N.D. Cal. 1972) (“As a general proposition, a pre-trial detainee should be able to visit with whomever he pleases, especially his children, for substantial periods of time each week.”). And the situation is made worse when it is repeated access to his legal counsel that is being infringed. *See Henry v. County of Shasta*, 132 F.3d 512, 519 (9th Cir.1997) (holding a prisoner incommunicado violates his Fifth Amendment due process rights); *Keenan v. Hall*, 83 F.3d 1083, 1092 (9th Cir.1996) (A prisoner has “a First Amendment right to telephone access, subject to reasonable security limitations.”); *Strandberg v. City of Helena*, 791 F.2d 744, 747 (9th Cir.1986). Other courts have found that 13 days without access to communications is a constitutionally impermissible restriction. *Franco-de Jerez v. Burgos*, 876 F.2d 1038, 1042 (1st Cir.1989) (“the Constitution does not permit the government to hold a criminal defendant incommunicado to the point where she must contact her husband by throwing a rock with a message out the window.”) But, this is happening in this case, where Mr. Bundy (along with other defendants) has had to give hand signals through the window to individuals on the street to get messages to his family and his attorneys. *See also Halvorsen v. Baird*, 146 F.3d 680, 689 (9th Cir. 1998).

Thus, a short continuance for this reason alone should be justified. *See Bounds v. Smith*, 430 U.S. 817, 822, 97 S.Ct. 1491, 1495 (1977)(“The Constitution guarantees prisoners meaningful access to the courts.”); *Ching v. Lewis*, 895 F.2d 608, 609 (9th Cir. 1990) (“While prison administrators are given deference in developing policies to preserve internal order, these policies will not be upheld if they unnecessarily abridge the defendant's meaningful access to his attorney and the courts. The opportunity to

communicate privately with an attorney is an important part of that meaningful access.”)(Internal citation and quotations omitted.)

III. The Pretrial Schedule Should Be Reasonably Flexible, And Should Accommodate Short Justifiable Continuances.

As detailed in the procedural history above, the court has granted virtually every government request for delay and indulgence in setting and re-setting discovery deadlines, in setting and re-setting trial dates, and in granting the transfer of defendants for almost two full weeks to Nevada. *See* ¶¶6, 8, 11, and 12 above. In addition to granting the government’s delay for discovery, delay for trial, and delay for transport, the court has also granted an exclusion of time due to “complexity” created by the government’s discretion. By doing this, the Court has issued orders effectively purporting to exclude all time in this case from calculation on the 70-day Speedy Trial Act clock.⁸ While this may have supported the “ends of justice,” a point Mr. Bundy does not address here, these ends cannot be one-sided. As the cCourt well knows – all of the

⁸ Respectfully, Mr. Bundy believes that the court has independently abused its discretion under the Speedy Trial Act related to the “ends-of-justice” order and “complexity” ruling, as well as its other exclusions of time up to this point, based *inter alia*, upon inadequate weighing of the statutory factors, and violation of Supreme Court precedent in issuing the “complexity” ruling, the purported time excluded is actually lapsed on the Speedy Trial Clock and already more than 70-days of unexcluded time has passed, requiring dismissal. However, Mr. Bundy has not had the time or resources, among the other preparations in which he has been engaged, and has been sufficiently handicapped due to the additional conditions of his confinement, to be prepared to bring this motion now. The law allows a Speedy Trial Act motion to be brought before trial, and Mr. Bundy intends to do so. This circumstance presents additional grounds for this motion. Further, the Speedy Trial Act motion would present a mixed question of “facts” and the “law” so it would be appropriate under the second round of motions, since an evidentiary hearing is likely to present evidence on “the facts and circumstances” and “prejudice” factor as part of the Speedy Trial Act’s required considerations upon a 70-day overrun.

government's extensions and delays *have directly resulted in more time for Mr. Bundy and most of his colleagues to remain incarcerated – without trial, under severe conditions*. All of the “complexity” and difficulty in analyzing discovery, reviewing evidence, developing trial preparations certainly accrues to the defense at least to the same degree as it does to the government. Nevertheless, up until this point, as the court has observed, Mr. Bundy has been diligent in insisting upon his right to a speedy trial, and has never balked at its consequences. *See* ¶18 (“[T]he compressed timeline on which this case is proceeding [is due] in large part [to] Ammon Bundy’s insistence”).⁹

In juxtaposition to the Court granting every government request for delay and motion scheduling, the court has been much less than accommodating to Mr. Bundy’s one prior and much smaller request. Just two days ago, before the return of Mr. Bundy from Nevada, the court denied Mr. Bundy’s minimal and unopposed request to re-categorize his “Motion to Dismiss for Lack of Jurisdiction.” ¶18. The Court claimed there was no room for flexibility. But that motion didn’t require any actual calendar “delay” or extra time – it would only have moved a particularly important argument from one “round” of motions to another. Further, the federal rules (as modified in 2014)

⁹ In fact, Mr. Bundy has been diligent in pursuing a speedy resolution of this case from the beginning. On January 29, 2016, when more government initiated violence seemed highly probable, Mr. Bundy reached out on his own initiative, through legal counsel, in an attempt to facilitate a speedy resolution, offering to take all responsibility for the protest – to enter into a plea agreement (subject to certain rights to bring Constitutional challenges at issue with the protest) despite being innocent of the charge and simply requested that the government dismiss charges against all other protesters and let those then at the refuge go home without charges or violence. This is the kind of leadership and responsibility with which Mr. Bundy has been known throughout his life, and certainly throughout this protest. It took the government until February 10, 2009 to formally respond to Mr. Bundy’s offer – which offer the United States Attorney declined stating, *inter alia*, “it is simply too early to discuss resolution of the case.”

clearly provide that there are two classes of pretrial motions. First, “Motions that may be made at any time,” Federal Rules of Criminal Procedure, Rule 12(b)(2), and pre-trial motions, also referenced as “Motions That Must Be Made Before Trial.” *Id.*, at 12(b)(3). A motion challenging jurisdiction is in the first category and can be brought at any time. Significantly, the denial of Mr. Bundy’s prior request was inconsistent with the plain language of the rule, “A motion that the court lacks jurisdiction may be made at any time while the case is pending.” *Id.* at 12(b)(2). Also, the rule expressly allows the court to set pretrial motion schedules, *Id.* at 12(c) but is silent in conferring any authority of the court to require jurisdictional challenges within the pretrial motion period. Thus, the court’s prior treatment of Mr. Bundy and its announcement that there is no room for flexibility appears somewhat quixotic¹⁰ and impermissibly myopic. *Sarafite*, 376 U.S. at 589.

Nevertheless, the grounds offered for this motion are broader – and the issue even more significant. Mr. Bundy has gone to great lengths to respectfully treat the procedural history up to this point, and to fully proffer the factual grounds for the requested 30-day continuance of the April 27, 2016 deadline. This request is consistent with the parties’

¹⁰ This inflexibility is also problematic with regard to the reference that because Mr. Bundy is insisting on rights under the Speed Trial Act, so he somehow should not be asking for any “delay” or “continuances.” The implication is that he either gets fairness or speediness, but not both. This is untenable and again speaks to the court’s problematic handling of the “ends-of-justice” provision in the Speedy Trial Act. First, once any pre-trial motion is pending through to its resolution, time is automatically excluded from the Speedy Trial Act – without any “ends-of-justice” findings or orders, based upon the built in balancing of “fairness” and “speediness” rights as provided by Congress. *See* 18 U.S.C. § 3161(h)(1)(D). Second, the court has already entered its “complexity” ruling for the government’s benefit, and to exclude government created delay – and there is no provision of the Speedy Trial Act’s ends-of-justice provisions that suggest that such considerations only protect one side of the litigation.

prior Joint Status Report submitted on March 23, 2016. *See* ¶14 above. There the defendants were candid with the court, and stated:

[D]efendants wish to reserve the right to request an earlier trial date, a later trial date, or revisions to the motions schedule (such as adding additional motions or foregoing motions place-marked in the chart below), depending on subsequent or intervening events, including but not limited to, a second superseding indictment, review of discovery, motion practice, specified grounds for severance, rulings on defendants' detention status, or by virtue of any other intervening event that requires an amendment of the schedule as necessary to provide a fair trial and constitutionally sufficient representation as required by the Sixth Amendment.”

Id. This notice and reservation of rights was no small issue. Mr. Bundy has had an attorney participating at every hearing, and in every joint status report and has relied upon this framework set-up by the court. Further, this statement was consistent with the defense position as far back as February 19, 2016 where the defendants informed the court that, “The defense expect[s] to engage in pretrial motion litigation. However, the defense cannot fully anticipate pretrial motions until it receives discovery and can make informed judgment as to meritorious motions, based upon the nature of the evidence that may be used by the government, and the methods used to acquire it.” (Dkt. No. 182 at 3.)

Critically, that discovery is still forthcoming and the court has excused the government's delay in its production. Further, these defense statements and candidness with the court are significant because several additional intervening factors have now brought to light the prudent necessity of a revised motion schedule: the initial deadline for the first round of pretrial motions was first conceived by defense counsel, back on March 7, 2016 (*See* ¶8 above.¹¹); it was before the superseding indictment; it was before

¹¹ The original deadline was proposed as April 28, 2016.

the issue of transfer to Nevada; and it was before the court's "complexity" designation over the combined objection of the defendants.

In this context, and for the reasons argued above, insistence upon the pretrial motion schedule, in the face of a justifiable request for delay, would be a violation of both due process and effective assistance of counsel.

IV. Alternatively, Ammon Bundy Moves for Severance, and For Immediate Trial Without Further Pretext or Delay.

In the coming weeks, if the court grants this continuance, Mr. Bundy presently intends to bring several other motions for relief to accomplish fair proceedings and the meaningful opportunity to prepare for a fair trial. However, if there is to be a fair trial, the first step is to continue the April 27, 2016 motion deadline.

Defendant Ammon Bundy sits in prison with many of his protest colleagues, unable to effectively litigate in a pretrial context without this simple 30-day continuance, while the government delays, has obtained continuances for more than six months past the initial Speedy Trial Act guarantees, with its expansive resources and purported discovery. Somehow Mr. Bundy is also expected under these conditions to defend the Malheur protest and the defensive protest he made of his family – in Nevada. Thus, if the court will not grant this continuance, Mr. Bundy moves alternatively to sever and for an immediate trial date pursuant to Rule 14 of the Federal Rules of Criminal Procedure.

The joinder of Mr. Bundy to the present offenses and defendants and the corresponding framework set by the court is working a severe prejudice to Mr. Bundy. Pursuant to this alternative remedy of severance, and absolutely conditioned upon a new immediate trial date, Mr. Bundy seeks to waive all further right to the government's additional purported discovery materials, and demands the production of any of his

statements the government intends to use against him at trial. The trial should begin for Mr. Bundy within the next 30 days.

It has reportedly been estimated that it will take approximately \$400,000 to \$1,500,000 per court-appointed defendant to provide a defense that is constitutionally minimally adequate depending on the trial date and other expected or anticipated complications. That means that realistically, the government's exaggerated, hyperbolic and politically motivated prosecution of peaceful protesters could take about \$27,000,000 to **defend** all 27 defendants, which does not include the attendant prosecution costs. Thus, if the court cannot see fit to accord the defense – even a fraction of the deference and accommodation it has shown to the government - it makes sense to try the leader first, before moving forward with the rest.

Mr. Bundy has been advised of his rights, and the consequences of this alternative relief. As he did in the beginning of this case, Mr. Bundy desires to be responsible for his constitutionally and statutorily justified actions, for the protest, and to defend what he undertook based upon a firm reliance in his convictions, his actions, his intentions, and his conduct. Mr. Bundy understands that the other political protesters' attorneys object to him severing and having an expedited trial. However, this request by no means is to abandon the common cause of those defendants, as his actions in offering to plea to the original complaint – a charge that he was innocent of – in order to effectuate a total dismissal of all the defendants and allow Ammon Bundy to stand alone to illustrate the justifiable nature of this peaceful protest. He was willing to sacrifice his broader interests and risk his liberty for his fellow protesters then, and stands ready now to go to an immediate trial now, as his right to a speedy trial entitles him. His initial offer was

rejected at great expense to American taxpayers over what the Nevada case has been referred to in open court as essentially a “glorified criminal trespass charge.”

In moving forward with this expedited trial, Mr. Bundy further hopes that his acquittal at trial will illustrate and make plain how unjust, inappropriate and misguided it has been for the government to prosecute his fellow protestors with absurdly trumped up charges – for doing only what was within their personal and well-established legal rights as American citizens to do.

A function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it **induces a condition of unrest**, creates dissatisfaction with conditions as they are, **or even stirs people to anger**. Speech is often **provocative** and challenging. It may strike at prejudices and **preconceptions** and have profound **unsettling effects** as it presses for acceptance of an idea. That is why freedom of speech * * * is * * * protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil **that rises far above public inconvenience, annoyance, or unrest**. * * * There is no room under our Constitution for a more restrictive view.

Edwards v. S. Carolina, 372 U.S. 229, 237-38 (1963)(Emphasis added).

Respectfully submitted this 27^h day of April, 2016.

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