UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

UNITED STATES OF AMERICA,	)	
	)	
v.	)	
	)	CRIMINAL CASE NO. 1:11-CR-161-1
JOHNNY REID EDWARDS	)	
	)	
	)	

JOHN EDWARDS' MOTION TO CONTINUE

John Edwards, pursuant to 18 U.S.C. §3161(h)(7)(B), moves this Court: (1) to continue the trial of this matter currently scheduled for the January 2012 Criminal Term in Greensboro for a period of sixty (60) days and (2) to adjust as necessary the deadlines presently governing the filing of jury instructions and motions in limine should this case be continued. The ground for this Motion are that: (1) the Defendant has a medical issue set forth more fully in the sealed exhibit attached as **Exhibit A** to this Motion that will prevent a trial of this matter during the January 2012 Criminal Term; (2) the present time limit in this case, taken as a whole, is insufficient to permit counsel for the Defendant reasonable time for constitutionally effective preparation taking into account the exercise of due diligence that has occurred and will continue to occur; (3) this prosecution is unusual and complex based upon the existence of novel questions of law such that it is unreasonable to expect constitutionally adequate preparation for trial within the time available in light of discovery that has only recently been produced since the Court's scheduling order; and (4) the failure to grant a continuance would be likely to result in a miscarriage of justice. 18 U.S.C. §3161(h)(7)(B)(i), (ii) and (iv). Even with the

requested continuance, this case would come to trial in less time between indictment and trial than even less complicated cases in North Carolina federal courts.

In support of this Motion, the Defendant shows:

SUMMARY OF MOTION

On June 3, 2011, following a 34 month investigation where over 125 witnesses were interviewed by more than 50 Government agents throughout the country, the government indicted John Edwards on a novel legal theory, one that has never before been advanced against a candidate in a criminal case under the election laws. Between June 27 and August 12, the government produced over 400,000 documents. In August, the Defendant was required to prepare five separate motions to dismiss all or parts of the Indictment. After complete briefing, argument, and a ruling on these Motions, this Court, on October 27, 2011, set this matter for trial beginning January 30 in the January 2012 criminal term.

Since this trial date was set, the government has produced an additional 103,102 pages of material including more than 91,000 emails as well as 26 voicemails received by cooperating witnesses between 2007 and 2010. In addition, both the government and the Defendant are seeking relevant evidence presently held by the state courts of North Carolina and, as of the date of this Motion, have not yet received nor reviewed this evidence. The production of these additional and voluminous materials was not anticipated by the parties nor could have been reasonably known to the Court at the time this case was set for trial. Their production has made preparation of this complex case even more difficult. The defense is further awaiting the return of subpoenas they have

issued in this matter, returns which will require additional review. Counsel simply cannot review all of the materials which have been produced (or which will be obtained) and affirmatively prepare the defense in the time remaining until trial. At its bottom this Motion to Continue is based on a simple reality: It is impossible for defense counsel to prepare adequately or to provide constitutionally effective assistance of counsel in so short a period.

Finally, as set forth in the sealed exhibit, the Defendant has unexpectedly encountered a medical issue which makes the trial of this case in the January 2012 criminal term extraordinarily difficult. This medical issue cannot be resolved before the end of the January 2012 criminal term.

DISCOVERY PRODUCTION

1. As of the date of this Motion, the Defendant has received:

- 566,013 pages of discovery including 364,221 pages of campaign emails.
- 6,500 pages of telephone records.
- 33,225 pages of financial records accounting for several hundred thousand separate financial transactions.
- 5,900 pages of transcripts and interviews including 26 Grand Jury depositions and 180 witness interviews.

2. Since the date that the Court set this matter for trial in the January 2012 Criminal Term, the Defendant has received 103,102 pages of discovery including approximately 91,000 emails and 26 voice mail messages received by cooperating witnesses between 2007 and 2010. The most recent government production was received

just last week, on Tuesday, December 13. In particular, review of emails cannot occur electronically through the use of "search terms." Rather, email review requires review of all emails to establish context and significance.

3. Currently, the government and the Defendant are attempting to obtain relevant and non-privileged information held by the state courts of North Carolina, including information maintained by a cooperating witness on two separate computers. This information is believed to be potentially voluminous and is not expected to be produced until sometime in January 2012. The Defendant reasonably believes that some of the information presently held under orders of the courts of North Carolina will be exculpatory or impeaching. All of this material may not be provided and certainly not reviewed by the current date to begin trial.

4. In addition, on November 15, 2011, this Court permitted the Defendant to serve a subpoena on cooperating witnesses for the government for information not in the possession of the government. The Defendant has not yet received a return on this subpoena and, because some of the information sought may be subject to Protective Orders entered by the state courts of North Carolina, resort to those courts may be necessary. This matter is not expected to be resolved until sometime in January 2012.

5. By way of example, as to Andrew Young, who is anticipated to be a witness for the Government, there are 403 pages of Grand Jury testimony, 171 pages of interviews by federal agents and an additional 1,008 pages of drafts and proposals for a book that he wrote about his involvement in this case. These 1,582 pages of materials are in addition to materials which the Defendant reasonably expects to receive in January

2012. Further, more than 8,000 pages of materials from a civil case involving Andrew Young have been provided; many of these materials deal with issues which will be the subject of his expected testimony. These 9,500 pages of material must then be compared to one another and then cross-referenced on literally hundreds of topics to identify consistent and inconsistent statements.

6. Though he is a central witness to the government's case, Mr. Young will not be the only witness. Indeed, the government has informally projected that its case will take between two and three weeks of trial time, indicating that many witnesses will be called, each requiring similar efforts. For example, many of the witnesses who may either be called in the government's case or by the Defendant not only have corresponding interview reports and grand jury testimony, but also require a review of campaign emails and schedules for adequate preparation.

COMPARISON TO OTHER CASES

7. The complexity of both this case and the legal framework around it was well-demonstrated by the briefing on the election law issues and indictment defects that occurred in September and October 2011.

8. Given the legal complexity of this matter and the extraordinary volume of discovery that has occurred (and will continue to occur), this case has moved remarkably quickly. A survey of all of the reported white-collar criminal matters tried in North Carolina federal courts over the last three years reveals that this case is more complex (more motions and potential motions yet to come, novel factual issues applied to technical legal requirements with the added issues of background politics and personal

issues) and, yet, at present has proceeded to trial more quickly:

United States v. Rand, 2011 WL 4498866, 3:10-CR-182 (W.D.N.C., July 27, 2011)

- Rand, the defendant, was the head of accounting at a home construction company and was alleged to have overstated the company's financials by recognizing revenue for houses that had yet to be sold. He was also alleged to have engaged in "cookie jar accounting" where he allegedly adjusted company revenues and expenses based upon market expectations. Rand was also accused of destroying emails and lying to members of the audit committee with an eye toward tampering with their testimony. The time from indictment to trial was 14 months, and the trial lasted just 9 days.

United States v. Souder, 666 F. Supp.2d 534 (M.D.N.C. 2009)

- The defendants were alleged to have conspired to sell life insurance to members of a social club they ran. The defendants solicited and collected partially-completed insurance contracts from the members and then listed the club as a partial beneficiary of the proceeds. The 4 defendants were tried together, the time from indictment to trial was 11 months, and the trial lasted 14 days.

United States v. Sprouse, 2009 WL 1456569, 3:07-CR-211 (W.D.N.C., May 22, 2009)

- A number of defendants were alleged to have conspired to participate in 3 separate real estate schemes involving undisclosed kickbacks paid to investors from the builder, "flipping" homes at artificially inflated prices, and making false representations on loan applications stating that the homes were to be used as primary residences for the purchasers. The defendants were tried separately, the time from indictment to trial was 16 months, and Sprouse's single trial lasted just 8 days.

United States v. Woods, 2009 WL 1393065, 5:05-CR-131 (E.D.N.C., May 14, 2009)

- The defendants were alleged to have conspired to use fake identities to fill out fraudulent mortgage applications in order to defraud Ginnie Mae of approximately $1,000,000. The 2 defendants were tried together, the time from indictment to trial was just over 12 months, and the trial lasted just 5 days.

United States v. McDowell, 2010 WL 5056928, 3:07-CR-173 (W.D.N.C. December 6, 2010)

- The real estate promoter defendants were alleged to have solicited fake mortgage applications from victims falsifying material information such as the victims' income, employment history, and intention to use the homes as primary

residences. The defendants were tried separately, the time from indictment to trial was 11 months, and McDowell's trial lasted just 3 days.

9. By contrast, trial of this case (which is projected to last for four or more weeks), should it occur during the January 2012 term, would begin approximately 8 months after indictment. A continuance of 60 days, until April 2012, would mean that this complex and novel elections law case with more than 500,000 pages of discovery still will have been brought to trial within 10 months of indictment.

THE PRESENT TIME LIMIT IS INSUFFICIENT TO PERMIT THE DEFENDANT REASONABLE TIME WITHIN WHICH TO PREPARE

10. Due to both the massive amount of information collected by the government during its 3 year investigation, and the significant amount of information both recently received and which is expected to be received, counsel for the Defendant have not completed an organization and review of the discovery and do not anticipate being able to do so prior to the trial date of January 30, 2012.

11. The sheer volume of discovery requires hundreds of hours to not only read the material, but to organize and synthesize its content. For example, for the 91,000 campaign emails recently received, counsel would have to review approximately 1,600 emails per day—in addition to the other activities necessary for preparation such as conducting witness interviews and preparation of examinations—simply to review these emails a single time prior to the presently scheduled trial.

12. Moreover, in addition to the review of the materials produced by the government, the defense also needs to conduct an adequate investigation into the government's case. The government interviewed more than 125 witnesses over the

course of its investigation, and these interviews required more than 50 government agents working over a period of 34 months. Defense counsel cannot conduct an adequate investigation of these witnesses in addition to a review of the additional discovery over the time that remains until the start of this trial.

13. The defense represents to this Court that it cannot provide a constitutionally adequate defense under the circumstances noted. Requiring the Defendant to try his case at the January 2012 Criminal Term will be forcing him to do in 8 months what the government—utilizing its vast resources and the efforts of more than 50 agents—collected and reviewed over the course of 34 months. No person charged with a crime by the government, regardless of the resources at his or her disposal, could reasonably be expected to prepare a constitutionally adequate defense under these circumstances.

THE UNUSUAL AND COMPLEX NATURE OF THIS PROSECUTION, AND THE NOVEL THEORY ON WHICH IT IS PREMISED, MAKE THE PRESENT TIME LIMIT UNREASONABLE

14. The complexity of the discovery process, the volume of material collected by and produced by the government, the length of the investigation and the significant amount of resources utilized by the government in its investigation demonstrate that this is an unusual case.

15. The unusual nature of this case is further demonstrated by the Indictment itself. While to date the government has not yet voluntarily identified the "unidentified" and unnamed persons in the Indictment, the Indictment charges two separate conspiracies—one in which one of the unnamed co-conspirators is deceased and the other in which one of the unnamed co-conspirators is 101 years old. The Indictment alleges

substantive violations and acts in furtherance of the conspiracy that took place in several states and judicial districts and involved the flow of hundreds of thousands of dollars into numerous bank accounts that were then disbursed in ways that have yet to be adequately understood. As a result, forensic evaluation of literally hundreds of thousands of individual transactions and disbursements is being performed. This examination will be made more difficult by the fact that the central witness in this matter (who is alleged to have received every dollar that has been alleged as an illegal contribution in the Indictment) has not been charged with any crimes, is a cooperating witness with the government, and is openly hostile to the Defendant, making any interview prior to trial practically impossible.

16. The telephone logs in this case between and among witnesses comprise more than 6,000 pages of records. Each call must be identified as to both the caller and the recipient and then compared to the events that various witnesses claim occurred during that period of time to determine the truthfulness of that testimony. These calls must be evaluated within the context of several thousand pages of campaign schedules to determine where various witnesses were at the times alleged.

17. In addition, every count of the Indictment rests upon the notion that the payment by a third party to another third party of money that is not used for a campaign, does not flow through a campaign, and is not used for campaign activities, is nonetheless a "campaign contribution" within the meaning of the federal election laws. Put simply, the government alleges that monies that were given to a third-person, Andrew Young, for the purpose of caring for Rielle Hunter and moving her about the country, were

"campaign contributions" even though none of those monies were used by the John Edwards for President 2008 ("JEFP 2008") campaign, even though none of those monies were intended to be used by the JEFP 2008 campaign, and even though none of those monies were used for any recognized campaign activity such as hiring campaign workers, purchasing media time, or otherwise soliciting votes. This theory of criminal liability is unique in the history of election law prosecutions.

THE COURT'S FAILURE TO GRANT A CONTINUANCE WOULD RESULT IN THE MISCARRIAGE OF JUSTICE

18. Absent a continuance, Mr. Edwards' counsel will not be able to effectively use the evidence the government was obligated to provide him by the Due Process and Compulsory Process Clauses, and this, in turn, threatens Mr. Edwards' right to effective counsel and a fair trial. This is not hyperbole. Mr. Edwards' counsel are experienced trial lawyers and they are and have been working hard—long hours, late nights and weekends—and they have not made it their practice to seek unwarranted continuances. Not only do counsel have fewer resources than the government continues to use in this case (witness the number of attorneys and personnel who attend hearings), they are (as is the Court and government counsel) juggling other criminal case deadlines, some in cases much older than this one with pre-trial hearings and other proceedings. In light of these factors, it would be unfair if the case continued on its current schedule, resulting in essential defense tasks not getting done. *See United States v. Bryant,* 134 F.3d 364, 1998 U.S. App. LEXIS 1408, at *5-6 (4th Cir. 1998) (upholding a continuance upon a showing that circumstances "diminished significantly" counsel's ability to prepare for trial). It is a

basic principle that "insistence upon expeditiousness in the face of a justifiable request for delay can render the right to defend with counsel an empty formality." *Ungar v. Sarafile*, 376 U.S. 575, 589 (1964); *see also United States v. Myers*, 66 F.3d 1364, 1369-70 (4th Cir. 1995).

19. More than 500,000 pages of materials have been received by defense counsel; in addition, more material—perhaps a lot more material—is still to come. The failure to grant a continuance under circumstances (that have not reached that degree yet in this case) in which a large amount of discovery materials are yet to be produced or which have been produced close to trial can result in a violation of a defendant's rights to a fair trial and adequate defense. *Cf, United States v. Heron*, 564 F.3d 879, 882-83 (7th Cir. 2009); *United States v. Garner*, 507 F.3d 399, 408 (6th Cir. 2007) (same); *United States v. Verderame*, 51 F.3d 249, 252 (11th Cir. 1995) (same); *Gandy v. Alabama*, 569 F.2d 1318, 1321 (5th Cir. 1978) (same).

20. Finally, an unanticipated medical issue has arisen that will prevent the Defendant from participating in both the preparations leading to trial as presently scheduled, and likely parts of the trial itself. As set forth in the sealed exhibit, this medical issue will not be resolved prior to the presently scheduled trial date. Its resolution, however, is necessary for the Defendant to be able to participate fully and meaningfully in the preparation and trial of his case.

21. In light of the insufficient time that is presently available for a constitutionally adequate preparation of a defense, the unusual and complex nature of this prosecution in light of the voluminous discovery, and the medical issue that has

unexpectedly arisen, the failure to grant a reasonable continuance of this matter would result in a miscarriage of justice.

CONSULTATION WITH THE GOVERNMENT

The Defendant has consulted with the government concerning this Motion. The government has advised the Defendant that it opposes a continuance on the discovery and preparation reasons set forth in this Motion and takes no position on the necessity of a continuance based upon the medical issue set forth in **Exhibit A.**

CONCLUSION

For a case with this much discovery, this many issues, and such a novel theory of prosecution, a brief continuance is not an unreasonable request, especially when such a continuance will not cause prejudice to the Government. *See Bryant*, 1998 U.S. App. LEXIS 1408, at *5-6 (upholding the district court's grant of a continuance where the "ends of justice [were] served by the granting of such continuance [and where the continuance outweighed] the best interests of the public and the defendant in a speedy trial"). Accordingly, Mr. Edwards requests the Court to provide the necessary continuance in this case.

Dated: December 22, 2011

/s/ James P. Cooney III
James P. Cooney III, N.C. Bar No. 12140
jcooney@wcsr.com
WOMBLE CARLYLE SANDRIDGE & RICE, PLLC
One Wells Fargo Center
Suite 3500, 301 South College Street
Charlotte, NC 28202-6037
(704) 331-4980 (phone)
(704) 338-7838 (fax)

/s/ Abbe David Lowell
Abbe David Lowell, *pro hac vice*
ADLowell@Chadbourne.com
Christopher D. Man, *pro hac vice*
CMan@Chadbourne.com
CHADBOURNE & PARKE LLP
1200 New Hampshire Ave., NW
Washington, DC 20036
(202) 2974-5600 (phone)
(202) 974-5602 (fax)

CERTIFICATE OF SERVICE

I hereby certify that on December 22, 2011, I electronically filed the foregoing **Motion to Continue** with the Clerk of Court using the CM/ECF system, which will send notification of such filing to the following:

Brian Scott Meyers
U.S. Attorney's Office – EDNC
Terry Sanford Federal Building
310 New Bern Avenue, Suite 800
Raleigh, NC 27601-1461
Telephone: (919) 856-4530
Fax: (919) 856-4487
Email: brian.s.meyers@usdoj.gov

David V. Harbach
U.S. Department of Justice
Public Integrity Section
1400 New York Avenue, NW, Suite 1800
Washington, DC 20005
Telephone: (202) 262-7597
Fax: (202) 514-3003
Email: david.harbach@usdoj.gov

Jeffrey E. Tsai
U.S. Department of Justice
Public Integrity Section
1400 New York Avenue, N.W., Suite 1800
Washington, DC 20005
Telephone: (202) 307-0933
Fax: (202) 514-3003
Email: jeffrey.tsai@usdoj.gov

Robert J. Higdon
U.S. Attorney's Office – EDNC
Terry Sanford Federal Building
310 New Bern Avenue, Suite 800
Raleigh, NC 27601-1461
Telephone: (919) 856-4530
Fax: (919) 856-4487
Email: bobby.higdon@usdoj.gov

/s/ James P. Cooney III
James P. Cooney III (NCSB # 12140)
WOMBLE CARLYLE SANDRIDGE & RICE, PLLC
One Wells Fargo Center
Suite 3500, 301 South College Street
Charlotte, NC 28202
Telephone: (704) 331-4980
Email: jcooney@wcsr.com
Attorney for Defendant