UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA	:	
	:	**Criminal No. 21-mj-245**
v.	:	
	:	
PHILIP S. GRILLO,	:	
	:	
Defendant.	:	

UNITED STATES' UNOPPOSED MOTION TO CONTINUE SEPTEMBER 27, 2021 STATUS HEARING AND TO EXCLUDE TIME UNDER THE SPEEDY TRIAL ACT

The United States of America, by and through the United States Attorney for the District of Columbia, hereby moves this Court to continue the September 27, 2021, status hearing scheduled for 1:00 p.m. before Magistrate Judge Faruqui, exclude the time within which a trial must commence under the Speedy Trial Act, 18 U.S.C. § 3161 *et seq.* (hereinafter, "the STA"), and set a status hearing in approximately 60 days. In support of its motion,[1] the government states as follows:

FACTUAL BACKGROUND

The defendant traveled from Queens, New York to be present in Washington, D.C. on January 6, 2021. That day, the defendant participated in the attack on the United States Capitol (hereinafter, "the Capitol Breach"). He entered the Capitol building through a broken window at approximately 2:20 p.m. while holding a megaphone. While inside, the defendant moved past the location where police officers had been guarding a doorway just outside of the Rotunda to the area near the Columbus doors. The defendant was part of the crowd that ultimately pushed at the Columbus doors – which were being guarded by officers – until they opened, allowing more

[1] The factual assertions about the status of discovery and evidence collection beyond Defendant Grillo's case are correct as of September 7, 2021.

rioters to enter the Capitol from outside. In a post-arrest interview with law enforcement officials, the defendant admitted to going in and out of the Capitol but said he did not think he had done anything illegal and denied pushing past officers.

PROCEDURAL BACKGROUND

On February 22, 2021, the defendant was arrested and charged via complaint with offenses related to crimes that occurred at the United States Capitol on January 6, 2021. Specifically, the complaint charged the defendant with violating 18 U.S.C. § 1752(a)(1) and (2) (Unlawful Entry on Restricted Buildings or Grounds); 40 U.S.C. § 5104(e)(2)(D) and (G) (Violent Entry and Disorderly Conduct on Capitol Grounds); and 18 U.S.C. § 1512(c)(2) (Obstruction of a Proceeding Before Congress). The defendant had an initial appearance in the District of Columbia on March 12, 2021.

The government has provided informal discovery to the defendant but is still working to provide the formal initial discovery production through its fast-track process. Separately, however, the government is in possession of a broad array of discoverable material among which may be interspersed arguably exculpatory material. These documents include, for example, thousands of hours of video footage from multiple sources (*e.g.*, Capitol surveillance footage, body-worn-camera footage, results of searches of devices and Stored Communications Act accounts, digital media tips, Parler video, and news footage); hundreds of thousands of investigative documents including but not limited to interviews of tipsters, witnesses, investigation subjects, defendants, and members of law enforcement; and financial, travel, and communications records. The government has filed three memoranda that jointly describe the unprecedented volume of information collected as a result of its investigation of the January 6 riot and its ongoing and

diligent efforts to produce discovery from these voluminous materials (the "Discovery Status Memoranda"). *See* ECF Nos. 15, 19, 20, incorporated herein by reference.

The government has also been working to extend a plea offer to the defendant and anticipates doing so soon.

Counsel for the defendant indicates that the defendant does not oppose this motion. Furthermore, Defendant Grillo has been advised of his rights under the Speedy Trial Act and agrees to exclude from the Speedy Trial Act calculation September 27, 2021, until the next status hearing date. The parties agree that setting this future date would best serve the interests and ends of justice and outweighs the interests of the public and the defendant in a speedy trial.

ARGUMENT

For the reasons described below, the United States seeks to continue this matter to permit it to extend a plea offer in this case and to continue its collection, review, cataloging, and production of discoverable materials pursuant to Federal Rule of Criminal Procedure 16(a) and the *Brady*[2] doctrine. Although we have been diligent in our efforts to comply with unprecedented discovery obligations, given the nature and volume of material, our disclosure activities are not yet complete. Accordingly, the government requests that the Court set a status hearing in sixty days to monitor the government's progress in fulfilling its discovery obligations and assess the status of the case. If the parties are unable to reach a plea agreement, the government will seek to indict the defendant. If, at the next status hearing, the government needs additional time to complete its discovery obligations or defense counsel needs additional time to

[2] *Brady v. Maryland*, 373 U.S. 83 (1963).

complete its review of the discovery, the Court may then entertain any requests for an additional ends-of-justice continuance.[3]

Our need for reasonable time to address unprecedented complex discovery obligations warrants the requested continuance and exclusion of time under the STA. In fact, much longer continuances have been granted in cases involving far less complexity in terms of the volume and nature of data.

I. The Government's Approach to Discovery is Intended to Ensure that All Arguably Exculpatory Materials are Produced in a Comprehensive, Accessible, and Useable Format.

The Capitol Breach involved thousands of individuals inside and outside of the Capitol, many of whom overwhelmed and assaulted law enforcement officers. According to a Washington Post analysis of the events, the mob on the west side eventually grew to at least 9,400 people, outnumbering officers by more than 58 to one. *See* *https://www.washingtonpost.com/investigations/interactive/2021/dc-police-records-capitol-riot/?itid=sf_visual-forensics*. As these individuals attacked the Capitol, members of Congress, including the Vice President in his capacity as President of the Senate, worked to certify the

[3] The ongoing pandemic may also serve as a basis to toll the STA. In recognition of the current high rate of transmission of the Delta variant in the District of Columbia, Chief Judge Howell issued Standing Order 21-47 on August 25, 2021, limiting the number of jury trials that may be conducted at one time until at least October 31, 2021. Chief Judge Howell found that "for those cases that cannot be tried consistent with those health and safety protocols and limitations, the additional time period from August 31, 2021 through October 31, 2021 is excluded under the Speedy Trial Act as the ends of justice served by the continuances to protect public health and safety and the fair rights of a defendant outweigh the best interest of the public and any defendant's right to a speedy trial, pursuant to 18 U.S.C. 3161(h)(7)(A)." As set forth in Standing Orders Nos. 20-9, 20-19, 20-29, 20-62, 20-68, 20-89, 20-93 and 21-10, the Court previously found that due to the exigent circumstances created by the COVID-19 pandemic, the period from March 17, 2020 through August 31, 2021, would be excluded in criminal cases under the STA.

Electoral College vote of the 2020 Presidential Election until doing so became unsafe due to the breach of the Capitol.

While it may be tempting to view many of the charged cases as individual matters with straightforward discovery, the reality is that these cases are bound by interrelated facts and shared evidence. Each defendant's conduct was enabled because of the collective efforts of the mob. Thus, within the thousands of hours of video footage depicting the conduct of other rioters or law enforcement officials, or the hundreds of interviews with rioters and law enforcement officials, *inter alia*, there may be information that is also arguably relevant to potential defenses. For example, some defendants have requested any information that arguably shows law enforcement officers authorizing the entry of alleged rioters. Other defendants have suggested that the crowd was peaceful and that acts of violence have been exaggerated or mischaracterized by the government. Given the volume of material, and because "[d]efendants are in a better position to determine what evidence [disclosed by the government] they believe is exculpatory and will help in their defense," *United States v. Meek*, No. 19-cr-00378-JMS-MJD, 2021 WL 1049773 *5 (S.D. Ind. 2021), the government intends to provide all defendants with all data that may contain information that is arguably material to their defenses, and in a manner that will facilitate the search, retrieval, sorting, and management of that information.

Since January, the government has worked diligently to obtain, organize, review, and make accessible voluminous data. As elaborated in the Discovery Status Memoranda, performing the required tasks correctly and comprehensively takes time. We are using Relativity as a platform to manage, review, and share documents. Before documents are loaded to our Relativity workspace, we must ensure that we have the password for protected documents, that the documents were provided in a format that will open, and that we remove irrelevant software

and system files that would only cloud the workspace and confuse reviewers. Once the documents are loaded, we must deduplicate them so that they are not analyzed or reproduced multiple times. We must also review documents to identify items that must be excluded or redacted. These processes are necessary to avoid production of unorganized data dumps, unreadable files, and unusable databases, or a failure of the government to take adequate steps to prevent both victims' and defendants' private information from being shared with hundreds of defendants.[4]

The processing and production of thousands of hours of digital evidence is also complex and time-consuming. As elaborated in the Discovery Status Memoranda, we are using evidence.com as a platform to manage, review, and share digital media evidence. On September 3, 2021, the government amended its contract with Axon Enterprise, Inc. ("Axon"), to fund a defense environment or "instance" of evidence.com administered by the Federal Public Defender for the District of Columbia. Other than body-worn-camera footage, digital evidence must first be transmitted to our vendor from law enforcement for ingestion into our instance of evidence.com. The act of transmitting terabytes of digital information can take weeks. Such

[4] Under our plan, document productions from Relativity will be made on a rolling basis, and we are prioritizing the processing and production of documents that have been requested by Capitol Breach defendants. Ultimately, we will also make any documents we produce available to a defense Relativity workspace. This will allow Capitol Breach defense teams to leverage Relativity's search and analytics capabilities to search the voluminous documents for information they believe may be material to their individual cases. We recently produced U.S. Capitol Police ("USCP") reports related to allegations of misconduct by law enforcement in connection with the events of January 6, 2021. Shortly, we will produce Metropolitan Police Department use-of-force investigation files.

information may then require additional processing, *e.g.*, conversion from a proprietary format, before it can be ingested into evidence.com.[5]

The government's approach to the production of voluminous discovery in the Capitol Breach cases is consistent with the *Recommendations for Electronically Stored Information (ESI) Discovery Production* developed by the Department of Justice and Administrative Office of the U.S. Courts Joint Working Group on Electronic Technology in the Criminal Justice System.[6] It is also the generally accepted approach in cases involving voluminous information. Notably, every circuit to address the issue has concluded that, where the government has provided discovery in a useable format, and absent bad faith such as padding the file with extraneous materials or purposefully hiding exculpatory material within voluminous materials, the government has satisfied its *Brady* obligations. *See United States v. Tang Yuk*, 885 F.3d 57, 86 (2d Cir. 2018) (the "government's duty to disclose generally does not include a duty to direct a defendant to exculpatory evidence within a larger mass of disclosed evidence") (cleaned up); *United States v. Stanford*, 805 F.3d 557, 572 (5th Cir. 2015) ("We have previously rejected such 'open file' *Brady* claims where the government provided the defense with an electronic and searchable database of records, absent some showing that the government acted in bad faith or used the file to obscure exculpatory material.").[7] The rare cases where courts have

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[5] Under our plan, as such material is organized, we will share it to the defense instance of evidence.com on a rolling basis. We are now technologically ready to share body-worn-camera footage from its instance to the defense instance and are finalizing the logistics of doing so. As of September 7, 2021, our vendor has received the majority of USCP surveillance footage, and we are in the process of creating tags to organize the footage to facilitate its review by defendants, e.g., identifying cameras by location.

[6] *See https://www.justice.gov/archives/dag/page/file/913236/download.*

[7] *See also United States v. Gray*, 648 F.3d 562, 567 (7th Cir. 2011) ("The government is not obliged to sift fastidiously through millions of pages (whether paper or electronic). . . [and] is under no duty to direct a defendant to exculpatory evidence [of which it is unaware] within a

required the government to identify *Brady* within previously produced discovery are the exceptions to this widely observed rule. For example, in *United States v. Saffarinia*, 424 F. Supp. 3d 46 (D.D.C. 2020), in which the court ordered the government to identify any known *Brady* material within its prior productions that involved over a million records and defense counsel was working "*pro bono* with time constraints and limited financial resources," the court acknowledged that "persuasive authority has articulated a 'general rule' that 'the government is under no duty to direct a defendant to exculpatory evidence within a larger mass of disclosed evidence.'" *Id.* at 84 n.15 (quoting *Skilling*, 554 F.3d at 576).

II. An Ends-of Justice Tolling of the Speedy Trial Act is Warranted.

Given the due diligence the government has applied and continues to apply to meet its discovery obligations, as set forth above and in its Discovery Status Memoranda and elaborated upon in prior hearings, the government has established that the requested ends-of-justice continuance is warranted under the STA.

The STA requires the district court to "exclude" from "the time within which . . . the trial . . . must commence":

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larger mass of disclosed evidence.") (cleaned up); *Rhoades v. Henry*, 638 F.3d 1027, 1039 (9th Cir. 2011) (rejecting *Brady* claim on the ground that the defendant "points to no authority requiring the prosecution to single out a particular segment of a videotape, and we decline to impose one"); *United States v. Warshak*, 631 F.3d 266, 297 (6th Cir. 2010) ("As a general rule, the government is under no duty to direct a defendant to exculpatory evidence within a larger mass of disclosed evidence"); *United States v. Skilling*, 554 F.3d 529, 576 (5th Cir. 2009) (same), *aff'd in part, vacated in part, remanded*, 561 U.S. 358 (2010); *United States v. Pelullo*, 399 F.3d 197, 212 (3d Cir. 2005) ("*Brady* and its progeny . . . impose no additional duty on the prosecution team members to ferret out any potentially defense-favorable information from materials that are so disclosed."); *United States v. Jordan*, 316 F.3d 1215, 1253-54 (11th Cir. 2003) (defendant's demand that the government "identify all of the *Brady* and *Giglio* material in its possession," "went far beyond" what the law requires); *United States v. Yi*, 791 F. App'x 437, 438 (4th Cir. 2020) ("We reject as without merit Yi's argument that fulfillment of the Government's obligation under *Brady* requires it to identify exculpatory material.").

> Any period of delay resulting from a continuance granted by any judge on his own motion or at the request of the defendant or his counsel or at the request of the attorney for the Government, if the judge granted such continuance on the basis of his findings that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial. No such period of delay resulting from a continuance granted by the court in accordance with this paragraph shall be excludable under this subsection unless the court sets forth, in the record of the case, either orally or in writing, its reasons for finding that the ends of justice served by the granting of such continuance outweigh the best interests of the public and the defendant in a speedy trial.

18 U.S.C.A. § 3161(h)(7)(A).

As the Supreme Court has observed, the STA "recognizes that criminal cases vary widely and that there are valid reasons for greater delay in particular cases." *Zedner v. United States*, 547 U.S. 489, 497 (2006). "Much of the Act's flexibility is furnished by § 3161(h)([7]), which governs ends-of-justice continuances." *Id.* at 498. "Congress clearly meant to give district judges a measure of flexibility in accommodating unusual, complex, and difficult cases." *Id.* at 508. Congress recognized "that the many sound grounds for granting ends-of-justice continuances could not be rigidly structured." *Id.*

Although the "substantive balancing underlying the decision" to grant an ends-of-justice continuance is "entrusted to the district court's sound discretion," *United States v. Rice*, 746 F.3d 1074, 1078 (D.C. Cir. 2014), the requirement of express findings imposes "procedural strictness" on the court. *Zedner*, 547 U.S. at 509 (2006). Those findings "must indicate [the court] 'seriously weighed the benefits of granting the continuance against the strong public and private interests served by speedy trials.'" *Rice*, 746 F.3d at 1078 (quoting *United States v. Bryant*, 523 F.3d 349, 361 (D.C. Cir. 2008)).

The need for a reasonable period of time to address discovery obligations is among the well-recognized reasons that justify an ends-of-justice continuance. The courts have repeatedly upheld, against defense challenges, discovery-based continuances involving far less complexity

and far less data than exists in the Capitol Breach cases. *See, e.g., United States v. Bikundi*, 926 F.3d 761, 777-79 (D.C. Cir. 2019) (upholding ends-of-justice continuances totaling 18 months in a two co-defendant health care fraud and money laundering conspiracy case, in part because the District Court found a need to "permit defense counsel and the government time to both produce discovery and review discovery").[8]

[8] *See also United States v. Bell*, 925 F.3d 362, 374 (7th Cir. 2019) (upholding two-month ends-of-justice continuance in firearm possession case, over defendant's objection, where five days before trial a superseding indictment with four new counts was returned, "1,000 pages of new discovery materials and eight hours of recordings" were provided, and the government stated that "it needed more than five days to prepare to try [the defendant] on the new counts"); *United States v. Vernon*, 593 F. App'x 883, 886 (11th Cir. 2014) (District court did not abuse its broad discretion in case involving conspiracy to commit wire and mail fraud by granting two ends-of-justice continuances due to voluminous discovery); *United States v. Gordon*, 710 F.3d 1124, 1157-58 (10th Cir. 2013) (upholding ends-of-justice continuance of ten months and twenty-four days in case involving violation of federal securities laws, where discovery included "documents detailing the hundreds financial transactions that formed the basis for the charges" and "hundreds and thousands of documents that needs to be catalogued and separated, so that the parties could identify the relevant ones") (cleaned up); *United States v. O'Connor*, 656 F.3d 630, 640 (7th Cir. 2011) (upholding ends-of-justice continuances totaling five months and twenty days based on, *inter alia*, "the complexity of the case, the magnitude of the discovery, and the attorneys' schedules"); *United States v. Lewis*, 611 F.3d 1172, 1177-78 (9th Cir. 2010) (upholding ninety-day ends-of-justice continuance in case involving international conspiracy to smuggle protected wildlife into the United States, where defendant's case was joined with several co-defendants, and there were on-going investigations, voluminous discovery, a large number of counts, and potential witnesses from other countries).

CONCLUSION

For the reasons described above, the United States respectfully requests that the Court grant its motion to continue the status hearing set for September 27, 2021, for approximately 60 days. Both parties are available on December 2, 2021, to the extent the Court is amenable to that date.

Respectfully submitted,

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