

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA            )  
  )  
                  v.                            )     No. 1:21-cr-00186-CRC  
  )  
DAVID A. BLAIR,                         )  
  )  
                  Defendant.                )

GOVERNMENT'S MOTION FOR CONTINUANCE OF TRIAL DATE AND TOLLING OF  
SPEEDY TRIAL ACT TIME

The United States of America, by and through the United States Attorney for the District of Columbia, hereby moves to continue the trial date in this matter, currently but tentatively set for January 26, 2022, to sometime in May, June or July 2022, and to toll time under the Speedy Trial Act until the new trial date. The government submits that under 18 U.S.C. § 3161(h)(7)(B)(iv) of the Speedy Trial Act, failure to grant such a continuance and the corresponding tolling would unreasonably deny the government continuity of counsel and would deny the attorney for the government reasonable time necessary for effective preparation.

Introduction and Background

The Indictment

On March 5, 2021, defendant David A. Blair was charged in a nine-count indictment (ECF doc. #8) with assault, with a dangerous weapon, upon a Metropolitan Police Department (D.C.) officer assisting a U.S. government officer, in violation of 18

U.S.C. § 111(a)(1), (b); obstructing, impeding and interfering with a police officer during a civil disturbance, in violation of 18 U.S.C. § 231(a)(3); aiding and abetting the obstruction of a congressional proceeding, in violation of 18 U.S.C. §§ 2 and 1512(c)(2); entering and remaining on restricted grounds, with a deadly or dangerous weapon, in violation of 18 U.S.C. § 1752(a)(1), (b)(1)(A); disorderly and disruptive conduct on restricted grounds, with a deadly or dangerous weapon, in violation of 18 U.S.C. § 1752(a)(2), (b)(1)(A); engaging in physical violence on restricted grounds, with a deadly or dangerous weapon, in violation of 18 U.S.C. § 1752(a)(4), (b)(1)(A); unlawful possession of a dangerous weapon on Capitol grounds, in violation of 40 U.S.C. § 5104(e)(1)(A)(i); disorderly conduct on Capitol grounds, in violation of 40 U.S.C. § 5104(e)(2)(D); and engaging in physical violence on Capitol grounds, in violation of 40 U.S.C. § 5104(e)(2)(F). The charges all relate to the defendant's conduct, on January 6, 2021, when he and hundreds of others unlawfully entered the grounds of the Capitol and attacked and fought with law enforcement officers, in an effort to prevent Congress's certification of the 2020 Electoral College vote. He has pled not guilty.

The Defendant's Arrest On January 6 And Charge In Superior Court

The defendant was arrested on the Capitol grounds on the evening of January 6 and released on a citation that required him to appear in D.C. Superior Court the following day. On January 7, 2021, he appeared as required and was arraigned on a one-count information charging him with (misdemeanor) assault on a police officer, in violation of D.C. Code § 22-405(b). He pled not guilty to the information and was released on his own recognizance, with the sole condition that he stay out of the District of Columbia, other than to attend court proceedings and to meet with his attorney. He was provided notice to appear back in court on June 10, 2021.

Pre-indictment Proceedings In District Court And Dismissal Of Superior Court Case

On February 9, 2021, the defendant was charged in District Court in a six-count complaint (ECF doc. #1), consisting of charges that would later be included in the indictment against him, and an arrest warrant was issued. The warrant was executed and returned on February 17, 2021 (ECF doc. #7). The defendant appeared in court on that date and was released on his own recognizance, with the conditions that he report weekly to the Pretrial Services Agency via telephone and that he not possess weapons (ECF doc. #6).

On March 11, 2021, the Superior Court case was dismissed at the request of the government.

Government Staffing Of The Cases Against The Defendant

While the Superior Court case was pending, the assigned prosecutor was Assistant U.S. Attorney Paul Courtney. AUSA Courtney, however, has had no involvement in the District Court case against the defendant. He also was not involved in the prosecution of the defendant during the time between the filing of the District Court complaint, on February 9, 2021, and the dismissal of the Superior Court case about a month later.

The undersigned prosecutor's involvement in this prosecution, and that of then-AUSA Puja Bhatia, began on or shortly before January 18, 2021. On October 27, 2021, the Court granted Ms. Bhatia's motion to withdraw from the case, which was due to Ms. Bhatia's impending departure from the Department of Justice. As represented in that motion, Ms. Bhatia is no longer employed by DOJ.

There have been no other prosecutors assigned to the District Court case against the defendant other than former AUSA Bhatia and the undersigned AUSA.<sup>1</sup>

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<sup>1</sup>AUSA Elizabeth Kelley covered one status hearing for the government when undersigned government counsel was unavailable.

Post-arraignment Proceedings

Following the defendant's arraignment on the indictment, on March 31, 2021, there have been a number of status hearings in which the parties apprised the Court of the progress in providing discovery to the defense and plea negotiations. The defendant has remained on release throughout this time period.

At a status hearing on October 4, 2021, the defendant rejected the government's formal plea offer. At the next status hearing, on October 26, 2021, the Court, over the government's objection, set a "tentative" trial date in this case for January 26, 2022. The government based its objection on the unavailability of undersigned government counsel to appear for a trial starting on that date, as undersigned counsel had out-of-town vacation plans starting soon thereafter.<sup>2</sup> The government advised the Court that the soonest undersigned counsel could be available for trial, due to planned vacation and other trials, was in May 2022.

More specifically, undersigned counsel for the government has been in trial since October 28, 2021, and has a three-week murder trial in Superior Court beginning on November 29, 2021. Undersigned counsel also has a three-week murder trial scheduled to begin on March 7, 2021.

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<sup>2</sup>Undersigned counsel will be out of town and on leave from February 3 to 8, 2022.

Since the October 26 status hearing, the defense has filed a motion to dismiss the indictment and an amended motion to dismiss the indictment, both of which raise complicated legal issues.

Argument

1. The Court Should Grant A Continuance To Assure Continuity Of Government Counsel.

The need to maintain "continuity of counsel," whether for the government or the defense, is a basis for a court to grant a continuance and toll the generally strict time limits established by the Speedy Trial Act. Specifically, the act provides:

The following periods of delay shall be excluded in computing the time within which the trial of any such offense must commence:

. . .

(7) (A) 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. . . .

(B) The factors, among others, which a judge shall consider in determining whether to grant a continuance under subparagraph (A) of this paragraph in any case are as follows:

. . .

(iv) Whether the failure to grant such a continuance in a case which, taken as a whole, is not so unusual or so complex as to fall within clause (ii), would deny the defendant reasonable time to obtain counsel, **would unreasonably deny the defendant or the Government continuity of counsel**, or would deny counsel for the defendant or the attorney for the Government the reasonable time necessary for effective preparation, taking into account the exercise of due diligence.

18 U.S.C. § 3161(h) (emphasis added).

In this case, as set out above, there is no currently employed prosecutor, other than the undersigned, who has worked on this case for any significant period of time.

Moreover, while there are of course other prosecutions pending in which individuals are charged in this District with offenses relating to the January 6 attack on the Capitol, several aspects of this case make it very different than the others. First, the confrontation between the defendant and the law enforcement officer that forms the basis for the charges occurred at 5:47 p.m., on the West Lawn of the Capitol grounds. In most, if not all, of the other January 6 attack prosecutions, the confrontations occurred very close to or inside the Capitol building itself, and earlier in the afternoon.

In addition, the defendant's confrontation did not involve other attackers confronting law enforcement at the same time in

the same area. Thus, not only are there no co-defendants charged with this defendant, there are no other Capitol attack cases where the same evidence will essentially be used, at least insofar as the confrontation itself is concerned.

For example, there are multiple cases involving attacks that occurred around 2 to 2:30 p.m. on the lower West Terrace. Those cases involve a significant overlap of evidence, such that an AUSA assigned to one such case could relatively easily take over another such case.

That is not the situation with the case against defendant Blair.

And third, the defendant in this case suffered significant injuries himself when police, including the complainant officer assault victim, restrained him and took him into custody. The government is not aware of any other Capitol attack case where the accused was injured by the complainant. There is no other AUSA who has prepared a Capitol riot case for trial involving such evidence.

Given that the undersigned counsel is not available for trial on January 26, the government submits it would be unreasonable, and unfair to the government, for this case to proceed to trial on that date with another prosecutor.



2. The Court Should Grant A Trial Continuance To Allow The Government Reasonable Time For Effective Preparation.

The statutory provision set out above also permits the Court to grant a continuance, and toll the Speedy Trial Act, where failure to do so "would deny . . . the attorney for the Government the reasonable time necessary for effective preparation, taking into account the exercise of due diligence."

It was on October 26, 2021, that the Court set this matter for trial, at least tentatively, on January 26, 2022. While that is a three-month span it includes the Thanksgiving, Christmas and New Year's holiday periods when it will be especially difficult for the government to meet with, and prepare, witnesses to testify at trial. It is also a period when undersigned counsel is prosecuting two homicide trials, each expected to last approximately three weeks.<sup>3</sup> It would therefore be very difficult for undersigned counsel to help another prosecutor to prepare this case for trial.

Moreover, as mentioned above, no Capitol riot case has yet gone to trial. Even more significantly, no such case is scheduled for trial prior to January 26. Thus, while there is certainly some overlap in the evidence to be presented in these cases--e.g., the existence of a civil disturbance in and around

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<sup>3</sup>The first of these, U.S. v. Christopher Green, 1:19-cr-00019-RDM (D.D.C.), started on October 28, 2021. The government's case in chief resumes tomorrow, November 17, 2021. The second, U.S. v. Tony McClam, 2019 CF1 009634 (D.C. Super. Ct.), is scheduled to start November 29, 2021.

the Capitol on January 6, the presence of the Vice President on the Capitol grounds on that date, the occurrence of a congressional proceeding on that date--there has not been a case where that evidence has yet been fully developed for courtroom presentation.

Finally, as mentioned above, the defense recently filed a motion and an amended motion to dismiss the indictment in this case. Notwithstanding the titles to those motions, the motions also include a motion to sever one of the counts in the indictment. Both motions raise significant factual and legal issues, including whether the flagpole alleged to be the dangerous or deadly weapon in several of the counts statutorily qualifies as such a weapon; whether there was in fact an ongoing civil disturbance, for purposes of the charge under 18 U.S.C. § 231(a)(3), at the time the defendant committed that offense; whether the congressional certification of the 2020 Electoral College vote is an "official proceeding" for purposes of the charge under 18 U.S.C. § 1512(c)(2); and whether the offense set out in that provision is unconstitutionally vague.

Significantly, the motions' attack on the charges under section 1512(c)(2) is the subject of ongoing motions litigation in multiple other Capitol riot cases. Oral arguments on those motions in those other case have often lasted over two hours and

the judges considering the motions have routinely ordered supplemental briefing.

In short, even though the filing of these motions has now tolled the running of the Speedy Trial Act clock, the government cannot, even with the exercise of due diligence, respond to these motions and effectively prepare for a trial starting on January 26.

Conclusion

For the reasons set forth above, and for any additional reasons the government might offer at a hearing on this motion, the Court should find that the ends of justice outweigh the interests of the public and the defendant in a speedy trial, and should therefore grant the trial continuance requested by the government.

A proposed Order is attached.

Respectfully submitted,

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