

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

UNITED STATES OF AMERICA	:	
	:	
v.	:	Criminal No. 21-CR-119
	:	
GARRET MILLER,	:	
	:	
Defendant.	:	

**UNITED STATES' UNOPPOSED MOTION TO EXCLUDE
TIME UNDER THE SPEEDY TRIAL ACT**

The United States of America hereby files this motion to clarify the record and further moves this Court to exclude time from June 29 to August 30, 2021, under the Speedy Trial Act, 18 U.S.C. § 3161 *et seq.*, in the interests of justice.

As an initial matter, the time period from June 24, 2021, when the defense filed a substantive pre-trial motion on alleged selective prosecution (ECF No. 32), through the disposition of the motion or a hearing on it is automatically excluded by operation of law, *see id.* § 3161(h)(1)(D). The same is true for the time period following defendant's Motion to Dismiss (ECF. No. 34) that was filed on June 28, 2021. Therefore, time has been tolling in this case since June 24, 2021, by operation of law.

In the alternative, the Court must also exclude time from June 29 (the date of the last hearing) to August 30, 2021 (the date of the next scheduled hearing), because the ends of justice are served by granting such a continuance, *see id.* § 3161(h)(7)(A), (B)(i), (ii), and (iv).¹

¹ According to the most recent Minute Order in this case, dated June 29, 2021, the Court ordered the Speedy Trial Act tolled "from 6/29/2021 to after motions have been briefed." As detailed *infra*, the briefing concluded on July 27, 2021, when defense counsel notified the Court by email that he would not file a reply brief to his selective prosecution motion (ECF No. 32). In the interest of clarity, the government is requesting tolling from June 29, 2021, which is the date of the last hearing—though the time from June 29, 2021 to July 27, 2021, has already been tolled by

The defense does not oppose this motion. In support of its motion, the government states as follows:

FACTUAL BACKGROUND

The grand jury charged Garret Miller with two counts of civil disorder, in violation of 18 U.S.C. § 231(a)(3); one count of obstructing an official proceeding, in violation of 18 U.S.C. § 1512(c)(2) and (2); one count of assaulting, resisting, or impeding a federal officer, in violation of 18 U.S.C. § 111(a)(1); two counts of making interstate threats to injure, in violation of 18 U.S.C. § 875(c); one count of entering and remaining in a restricted building or grounds, in violation of 18 U.S.C. § 1752(a)(1); one count of disorderly and disruptive conduct, in violation of 18 U.S.C. § 1752(a)(2); one count of impeding ingress and egress in a restricted building or grounds, in violation of 18 U.S.C. § 1752(a)(3); and three misdemeanor offenses under 40 U.S.C. § 5104(e)(2). Doc. 20, at 1-6. These charges implicate Miller's conduct at the U.S. Capitol on January 6, 2021 and in the following days.²

On January 6, a joint session of Congress convened to certify the votes of the Electoral College for the 2020 Presidential Election, which had taken place on November 3, 2020. At 1:30 p.m., the House and Senate adjourned to their respective chambers to resolve an objection. Vice President Michael Pence, as the President of the Senate, presided over the joint session and, later, the Senate proceedings.

As the House and Senate proceedings continued, a large crowd gathered outside the U.S. Capitol. Officers with the United States Capitol Police ("USCP") and the Metropolitan Police

the Court.

² The government's opposition to Miller's motion to revoke his detention order contains a detailed recitation of his alleged conduct. See ECF No. 16, at 3-6.

Department (“MPD”) attempted to keep the crowd away from the building. Shortly after 2:00 p.m., individuals in the crowd forced entry into the U.S. Capitol by, among other things, breaking windows and by assaulting both USCP and MPD officers as others in the crowd encouraged and assisted those acts. In response to this intrusion, representatives, senators, and Vice President Pence evacuated their respective chambers around 2:20 p.m.

Surveillance video from inside the Capitol shows Miller entering the building at 2:43 p.m. by pushing past officers who were trying to keep rioters from entering. When asked in a Facebook chat, “[W]ere you in the building?,” Miller admitted, “Yah . . . we charged . . . We where [sic] going in . . . No matter what . . . Decided before the trump speech . . . I charged the back gates myself with an anti masker.”

Body-worn MPD camera video shows Miller inside the Capitol Rotunda at 3:07 p.m. A large crowd had formed and officers attempted to control it. Miller went to the police line at the front of the crowd and refused to move. When officers attempted to push him back, Miller fell to the ground but quickly got up and again refused to move. He yelled, “Hooah! Hooah!” at the officers. He then got into a fighting stance with one of his legs in front of the other and yelled, “OOOH! OW! OW! OW!” Officers eventually pushed him back.

The same day, Miller posted threatening messages on Twitter directed at Congresswoman Alexandria Ocasio-Cortez. In subsequent days, he posted messages on Instagram and Facebook threatening to kill a USCP officer. Miller also sent a photograph of himself with another unidentified individual inside the Capitol Rotunda to another Facebook user. After seeing the photograph, the user commented, “bro, you got in?! Nice!” to which Miller replied, “[J]ust wanted to incriminate myself a little lol.”

Law enforcement arrested Miller at his Dallas, Texas home in late January 2021. In ordering the defendant detained, the magistrate judge found “clear and convincing evidence that [Miller is] a danger.” Doc. 14-1, at 107 (Tr. 106:3-4). The judge specifically cited Miller’s “intrusion into the Capitol” and “threats to the Capitol Police officer,” *id.* at 106 (Tr. 105:20-23), and expressed concern that “[Miller was] going to assassinate [the officer],” *ibid.* (Tr. 106:13). The judge further observed that Miller “had numerous firearms,” “cross-bows,” “knives,” and “ropes.” *Id.* at 107-108 (Tr. 106:24, 107:1-2).

This Court subsequently denied Miller’s motion to revoke the magistrate judge’s detention order. The Court agreed that “Miller poses a danger to the community,” citing his “disregard for violence occurring around the Capitol, [his] failure to follow police orders that day, his decision to resist officers, his threats against Congresswoman Oc[a]sio-Cortez and most importantly his specifically-formulated and articulated plans to track and potentially kill a U.S. Capitol police officer.” 4/1/21 Hr’g Tr. 20:8-15. It characterized the totality of Miller’s conduct as “forward-looking” and his threats as “well-documented.” *Id.* at 19:10, 20.

PROCEDURAL HISTORY

On April 1, 2021, Miller was arraigned on a 12-count indictment.³ Since then, the government has been providing discovery materials to defense counsel related to this case. Specifically, on April 19, 2021, the government provided initial discovery which consisted of MPD body-worn camera videos, USCP CCTV videos, detention hearing exhibits, photographs, and social media evidence. The government later provided grand jury materials on April 23, 2021. On May 3, 2021, the government provided another round of initial discovery which

³ Miller was arraigned on a superseding indictment on May 26, 2021.

included more USCP CCTV videos, an FBI-created timeline, and third-party videos. On August 4, 2021, the government produced most of Miller's FBI file to the defense. Those materials included TIES reports, search warrants, photographs, USCP CCTV, MPD body-worn camera videos, witness interview summaries, jail call recordings, and social media evidence, among other things. The government has also arranged for defense counsel to tour the Capitol building.

In the meantime, the parties attempted to negotiate a plea agreement, which ultimately ended unsuccessfully when Miller rejected the government's plea offer at a hearing on June 9, 2021. Thereafter, Miller filed two pre-trial motions on June 24 and June 28, 2021: Motion for Discovery and for an Evidentiary Hearing in Support of Defendant's Claim of Selective Prosecution as It Relates to Counts One, Two, and Four of the Superseding Indictment and Motion to Dismiss Count Three of the Superseding Indictment for Failure to State an Offense. At the last hearing on June 29, 2021, this Court ordered the government to respond to the selective prosecution motion on July 22, 2021 and the motion to dismiss on July 12, 2021. The Court also ordered time under the Speedy Trial Act to toll "from 6/29/2021 to after motions have been briefed." Minute Order, dated 6/29/2021.

Subsequently, the government filed its oppositions on July 9, 2021 and July 22, 2021, respectively. On July 27, 2021, defense counsel notified the Court by email that he would not be filing a reply to the selective prosecution motion, thus ending the motions briefing period. The Court has not ruled on either motion nor has a hearing been set. There is a status hearing scheduled on August 30, 2021.

ARGUMENT

As a general matter, pursuant to the Speedy Trial Act, in any case in which a plea of not

guilty is entered the trial of a defendant charged in an indictment with the commission of an offense must commence within seventy days from the filing date (and making public) of the indictment, or from the date the defendant has appeared before a judicial officer of the court in which such charge is pending, whichever date last occurs. 18 U.S.C. § 3161(c)(1). Section 3161(h) of the Speedy Trial Act, however, sets forth certain periods of delay which are excluded from the computation of time within which a trial must commence. Two periods of exclusion are relevant here.

A. The time since the filing of the pretrial motion on June 24, 2021 is automatically excluded.

Pursuant to subsection (h)(1)(D), “[d]elay resulting from any pretrial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion” is by operation of law automatically excluded. As the Supreme Court has recognized, “[s]ubparagraph D does not subject all pretrial motion-related delay to automatic exclusion,” but “it renders automatically excludable . . . the delay that occurs ‘*from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of the motion.*’” *Bloate v. United States*, 559 U.S. 196, 206 (2010) (emphasis in original). The Court further found that “the provision communicates Congress’ judgment that delay resulting from pretrial motions is automatically excludable, *i.e.*, excludable without district court findings, *only* from the time a motion is filed through the hearing or disposition point specified in the subparagraph, and that other periods of pretrial motion-related delay are excludable only when accompanied by district court findings.” *Id.* (emphasis in original); *see also United States v. Tinklenberg*, 563 U.S. 647, 655 (2011) (holding “when read in context and in light of the statute’s structure and purpose, we think it clear that Congress intended subparagraph (D) to apply automatically”).

Here, Miller filed two substantive pre-trial motions – one on June 24, 2021, and one on June 28, 2021. The Court has not scheduled these motions for a hearing or issued dispositive rulings. This period – from June 24 until the future date where the Court resolves these motions – reflects “the time actually consumed by consideration of [Miller’s] pretrial motion[s],” *Tinklenberg*, 563 U.S. at 656, and is thus automatically excluded under the Act “without district court findings,” *Bloate*, 559 U.S. at 203.

B. The Court must exclude time in the interests of justice.

In the alternative, pursuant to subsection (h)(7)(A), the Court may exclude:

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.

18 U.S.C. § 3161(h)(7)(A). This provision requires the Court to set forth its reasons for finding that any ends-of-justice continuance is warranted. *Id.* Subsection (h)(7)(B) sets forth a non-exhaustive list factors that the Court must consider in determining whether to grant an ends-of-justice continuance, including:

- (i) Whether the failure to grant such a continuance in the proceeding would be likely to make a continuation of such proceeding impossible, or result in a miscarriage of justice.
- (ii) Whether the case is so unusual or so complex, due to the number of defendants, the nature of the prosecution, or the existence of novel questions of fact or law, that it is unreasonable to expect adequate preparation for pretrial proceedings or for the trial itself within the time limits established by this section.
- ...
- (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)(7)(B)(i)(ii) and (iv). Importantly, “[i]n setting forth the statutory factors that justify a continuance under subsection (h)(7), Congress twice recognized the importance of adequate pretrial preparation time.” *Bloate*, 559 U.S. at 197 (citing §3161(h)(7)(B)(ii), (B)(iv)).

An interests of justice finding is within the discretion of the Court. *See, e.g., United States v. Rojas-Contreras*, 474 U.S. 231, 236 (1985); *United States v. Hernandez*, 862 F.2d 17, 24 n.3 (2d Cir. 1988). “The substantive balancing underlying the decision to grant such a continuance is entrusted to the district court’s sound discretion.” *United States v. Rice*, 746 F.3d 1074 (D.C. Cir. 2014).

In this case, an ends-of-justice continuance is warranted under 18 U.S.C. § 3161(h)(7)(A) based on the factors described in 18 U.S.C. § 3161(h)(7)(B)(i)(ii) and (iv). The investigation and prosecution of the Capitol Attack will likely be one of the largest in American history, both in terms of the number of defendants prosecuted and the nature and volume of the evidence. Over 300 individuals have been charged in connection with the Capitol Attack. The investigation continues and the government expects that at least one hundred additional individuals will be charged. While most of the cases have been brought against individual defendants, the government is also investigating conspiratorial activity that occurred prior to and on January 6, 2021. The spectrum of crimes charged and under investigation in connection with the Capitol Attack includes (but is not limited to) trespass, engaging in disruptive or violent conduct in the Capitol or on Capitol grounds, destruction of government property, theft of government property, assaults on federal and local police officers, firearms offenses, civil disorder, obstruction of an

official proceeding, possession and use of destructive devices, and conspiracy.

Defendants charged and under investigation come from throughout the United States, and a combined total of over 900 search warrants have been executed in almost all fifty states and the District of Columbia. Multiple law enforcement agencies were involved in the response to the Capitol Attack, which included officers and agents from U.S. Capitol Police, the District of Columbia Metropolitan Police Department, the Federal Bureau of Investigation, the Department of Homeland Security, the Bureau of Alcohol, Tobacco, Firearms and Explosives, the United States Secret Service, the United States Park Police, the Virginia State Police, the Arlington County Police Department, the Prince William County Police Department, the Maryland State Police, the Montgomery County Police Department, the Prince George's County Police Department, and the New Jersey State Police. Documents and evidence accumulated in the Capitol Attack investigation thus far include: (a) more than 15,000 hours of surveillance and body-worn camera footage from multiple law enforcement agencies; (b) approximately 1,600 electronic devices; (c) the results of hundreds of searches of electronic communication providers; (d) over 210,000 tips, of which a substantial portion include video, photo and social media; and (e) over 80,000 reports and 93,000 attachments related to law enforcement interviews of suspects and witnesses and other investigative steps. As the Capitol Attack investigation is still on-going, the number of defendants charged and the volume of potentially discoverable materials will only continue to grow. In short, even in cases involving a single defendant, the volume of discoverable materials is likely to be significant.

The need for reasonable time to organize, produce, and review voluminous discovery is among multiple pretrial preparation grounds that Courts of Appeals have routinely held sufficient

to grant continuances and exclude the time under the Speedy Trial Act. *See, e.g., United States v. Bikundi*, 926 F.3d 761, 777-78 (D.C. Cir. 2019) (upholding ends-of-justice continuances totaling 18 months in 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”); *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”)(internal quotation marks omitted); *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); *United States v. O’Connor*, 656 F.3d 630, 640 (7th Cir. 2011) (upholding

ends-of-justice continuances totaling five months and twenty days in wire fraud case that began with eight charged defendants and ended with a single defendant exercising the right to trial, based on “the complexity of the case, the magnitude of the discovery, and the attorneys’ schedules”).

Here, while the government has provided Miller with considerable discovery, it continues to identify additional materials that may be relevant to this case, including videos taken by other defendants. The complexity of this case as it relates to hundreds of other cases cannot be overstated. The ends of justice are served by granting this request for a continuance, which outweighs the best interest of the public and the defendant in a speedy trial.

WHEREFORE, the government requests a clarification of the record that time under the Speedy Trial Act is automatically excluded from June 24, 2021 to any hearing or disposition on the pretrial motions filed by the defense. In the alternative, the government respectfully requests that this Court exclude the time from June 29 to August 30, 2021 under the Speedy Trial Act, 18 U.S.C. § 3161 *et seq.*, on the basis that the ends of justice are served by taking such action.

Respectfully submitted,

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