UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,	)	
v.	)	Case No. 1:21-cr-92
COUY GRIFFIN,	)	**District Judge Trevor N. McFadden**
Defendant.	)	

DEFENDANT GRIFFIN'S REPLY TO THE GOVERNMENT'S OPPOSITION TO HIS MOTION TO COMPEL PRODUCTION OF *BRADY* COMPILATION EVIDENCE; NOTICE THAT GRIFFIN OPPOSES FURTHER SPEEDY TRIAL ACT CONTINUANCES

Defendant Griffin, through his counsel, makes this filing in response to the government's (1) opposition to Griffin's Motion to Compel Production of *Brady* Compilation Evidence, ECF No. 51; and (2) reply to Griffin's response to the government's Motion to Continue and to Exclude Time under the Speedy Trial Act (STA). ECF No. 52.

Griffin's motion to compel production of compiled *Brady* material should be granted as the government did not file any response within 14 days of service and therefore conceded the motion. LCrR 47(b). The three-page opposition filed by the government 21 days after service of Griffin's motion lacks merit. The government's pending motion to exclude time under the STA should be denied. Griffin may not be placed in the "intolerable" situation where he must "surrender" his Sixth Amendment and STA speedy trial rights in order to "assert" his Fifth Amendment right to *Brady* material, and vice versa. *Simmons v. United States*, 390 U.S. 377, 394 (1968) (holding criminal defendant may not be given Sophie's choice between constitutional rights). If the government cannot meet its discovery obligations by the time of trial, the proper

procedure is for the government to argue that the Amended Information, which will be dismissed at the 70-day mark under the STA, should not be dismissed with prejudice. § 3162(a)(2).

Argument

I. Griffin's motion to compel should be granted because the government defaulted

Griffin filed his motion to compel the production of compiled *Brady* evidence on August 12. ECF No. 48. The government's opposition memorandum was due August 26. LCrR 47(b). Yet the government did not file one until September 2. ECF No. 51. Accordingly, the Court should treat Griffin's motion as conceded. LCrR 47(b) ("If such a memorandum is not filed within the prescribed time, the Court may treat the motion as conceded."). That is particularly true here, where this 7-month-old misdemeanor case has been marked by continuous government requests for extensions of time, due to the perceived need to federally charge over 600 defendants simultaneously.

Default or not, Griffin's motion should be granted because the government's untimely opposition lacks merit. The motion noted that the government represented to the Court on August 9 that:

> Although [**the government is] aware that we possess some information that the defense may view as supportive of arguments that law enforcement authorized defendants (including [Griffin]) to enter the restricted grounds**, e.g., images of officers hugging or fist-bumping rioters, posing for photos with rioters, moving bike racks, we are not in a position to state whether we have identified all such information. **Pursuant to *Brady* and its progeny**, **we are required to make available the voluminous data that may contain any similar information for [Griffin] to review**.

ECF No. 48 (quoting ECF No. 44, p. 12) (emboldening added).

In response, the government says Griffin "wrongly assumes that the government has compiled certain information that the defense may view as supportive of arguments that law enforcement authorized defendants (including Defendant) to enter the restricted grounds but is

waiting to turn such information over to the defense until it has identified *all* information that may be exculpatory. . . [W]e are not holding back arguably exculpatory materials we have already identified." ECF No. 51, p. 2.

The Court may be able to reconcile the government's two statements but Griffin cannot. If the government is "aware" that it "possesses some information" that Griffin specifically "may view as supportive of arguments that law enforcement authorized" him to "enter the restricted grounds," ECF No. 44, p. 12, it has identified it. If the government has identified such materials, they should have been produced already. LCrR 5.1(a). *See also United States v. Ohiri*, 133 F. App'x 555, 562 (10th Cir. 2005) ("By holding in [*United States v. Ruiz*, 536 U.S. 622 (2002)] that the government committed no due process violation by requiring a defendant to waive her right to impeachment evidence before indictment in order to accept a fast-track plea, the Supreme Court did not imply that the government may avoid the consequence of a *Brady* violation if the defendant accepts an eleventh-hour plea agreement while ignorant of withheld exculpatory evidence in the government's possession."); *McCann v. Mangialardi*, 337 F.3d 782, 788 (7th Cir. 2003) (noting that "given th[e significant distinction between impeachment information and exculpatory evidence of actual innocence], it is highly likely that the Supreme Court would find a violation of the Due Process Clause if prosecutors or other relevant government actors have knowledge of a criminal defendant's factual innocence but fail to disclose such information to a defendant before he enters into a guilty plea");*United States v. Nelson*, 979 F. Supp. 2d 123,135-36 (D.D.C. 2013) ("Because the prosecution suppressed exculpatory evidence before Nelson pled guilty, Nelson's due process rights were violated to his prejudice and his guilty plea was not voluntary and knowing.").

In any case, the materials should be produced now and on a rolling basis. Quibbling over the word "compiling" does not change that.

The government adds that, in the week beginning September 5, Griffin "can expect to receive a production of U.S. Capitol Police Office of Professional Responsibility files. . . and a production of Metropolitan Police Department excessive force investigations shortly thereafter." ECF No. 51, p. 3. As the Court will notice, those materials are not the same as the ones referenced in the government's above-quoted August 9 representation.[1] USCP OPR files and MPD excessive force investigations are not "images of officers hugging or fist-bumping rioters, posing for photos with rioters, moving bike racks," which the government represented on August 9 it had already identified. ECF No. 44, p. 12. The government's late opposition does not explain how excessive force investigations are somehow what the government previously meant by "arguments that law enforcement authorized defendants (including [Griffin]) to enter the restricted grounds." *Id*.

In sum, the government has offered no explanation for why it has identified evidence supporting "arguments that law enforcement authorized defendants (including [Griffin]) to enter the restricted grounds" but cannot immediately produce it or even provide a production timeline. The Court should order the government to begin producing those materials now. LCrR 5.1(a).

II. The Court should deny the pending STA continuance motion

On August 9, the Court decided to hold the government's STA continuance motion in abeyance. It declined to retroactively exclude time between July 2 (when the Court entered an order denying Griffin's motion to dismiss, § 3161(h)(1)(D)) and August 9, a period of 37

[1] In any case, as of the filing of this reply, the government has not produced any USCP OPR files and/or MPD excessive force investigations.

calendar days. However, because Griffin indicated that he was then considering a plea offer, the Court excluded time between August 9 and September 20. Having been charged seven months ago and because he will not accept the government's offer, Griffin opposes any further STA continuances beyond September 20. The Amended Information should be dismissed if he is not brought to trial by October 25. § 3161(c)(1); § 3162(a)(2).

The government's ends-of-justice continuance argument is that it cannot comply with its *Brady* obligations in time for an October trial. ECF No. 44, p. 4 ("[I]t is the government's commitment to ensuring that all arguably exculpatory materials are produced in a comprehensive, accessible, and useable format that, in the main, underlies the government request to toll the STA."). That may be so. But the proper response to that reality is not to compel a criminal defendant to choose between his constitutional and statutory rights to a speedy trial and his constitutional right to receive from the government exculpatory materials. *Simmons*, 390 U.S. at 394 (criminal defendant may not be placed in the "intolerable [situation in which] one constitutional right [must] be surrendered in order to assert another").

Analogous to this situation is the issue of in what contexts a defendant may knowingly and voluntarily waive his right to a fair trial by pleading guilty to an offense absent prior *Brady* disclosures by the government. In *United States v. Ruiz*, 536 U.S. 622, 633 (2002), the Supreme Court held that the government was not required to disclose material impeachment evidence prior to entering a plea agreement with a criminal defendant. However, *Ruiz* was limited to impeachment evidence. A defendant may "knowingly" and "voluntarily" waive his right to a trial absent that type of evidence because "[i]t is particularly difficult to characterize impeachment information as critical information of which the defendant must always be aware prior to pleading guilty given the random way in which such information may, or may not, help a

particular defendant." *Id.* at 630. The Court contrasted that type of information with evidence "establishing the factual innocence of the defendant," which the plea agreement in that case committed to producing to the defendant, if known by the government. *Id.* at 625. The Supreme Court has not considered whether *Ruiz*'s waiver rule applies to exculpatory material but, as noted above, some courts, including in this district, have held that it does not. *Ohiri*, 133 F. App'x at 562; *Mangialardi*, 337 F.3d at 788; *Nelson*, 979 F. Supp. 2d at 135-36.

So too in the situation where a defendant is forced either to waive his right to a speedy trial or to waive his right to as-yet-unknown potentially exculpatory *Brady* material. ECF No. 44, p. 12 (Government brief: "Pursuant to *Brady* and its progeny, we are required to make available the voluminous data that may contain any similar information for [Griffin] to review"). To avoid unconstitutionally compelling Griffin to make that choice, there is only one proper procedure. The government may request a continuance of the trial date in order to comply with its *Brady* obligations but without excluding time under the STA. After the 70-day mark, the STA will require the Court to dismiss the Amended Information. § 3162(a)(2). The government may then make its arguments as to why the information should not be dismissed with prejudice. *Id.*

It must be kept in mind that responsibility for the constitutional trade-off posed by the government lies with it far more than with Griffin. Griffin did not compel the government to indict over 600 defendants at the same time, a number that will apparently breach 1,000 before the government is done. Despite enjoying a five-year statute of limitations period, the government elected to overwhelm the court system with defendants by charging them all at once—and all in federal court. Many of the protesters committed crimes that traditionally belong in the federal system (such as assaults on federal law enforcement at the Capitol or

destruction of federal property), but dozens to hundreds of them committed alleged protest-related offenses that the government has historically handled through the "post-and-forfeiture" procedure in D.C., where an arrestee pays a fine and is dismissed. The January 6 docket bottleneck is a policy choice, not some inevitability out of the government's hands, like the intrinsic factual complexity of a crime in a particular case. That choice's trade-offs are *the government*'s, not Griffin's.

For all the foregoing reasons, the Court should deny the government's STA continuance motion. The government appears to be representing that it will not be able to comply with its *Brady* obligations by October 25. In that case, the government should file a motion to continue any trial date beyond that point but without excluding time under the STA. After the Amended Information is dismissed at the 70-day mark, the government may then make arguments as to why it should not be dismissed with prejudice. § 3162(a)(2).

Dated: September 7, 2021

Respectfully submitted,

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Certificate of Service

I hereby certify that on the 7th day of September, 2021, I filed the foregoing response with the Clerk of Court using the CM/ECF system, which will send a notification of such filing (NEF) to the following CM/ECF user(s):

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And I hereby certify that I have mailed the document by United States mail, first class postage prepaid, to the following non-CM/ECF participant(s), addressed as follows: [none].

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