UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA	:	
	:	**Case No. 21-cr-495 (ABJ)**
v.	:	
	:	
DANIEL GRAY,	:	
	:	
Defendant.	:	

GOVERNMENT'S RESPONSE TO DEFENDANT'S
MOTION TO COMPEL DISCOVERY UNDER RULE 16 AND BRADY V. MARYLAND

The United States, by and through undersigned counsel, respectfully requests that the Court deny Defendant Daniel Gray's motion to compel discovery, Dkt. No. 53 ("Mot."). As explained in this response, all of the discovery identified in defense's motion to compel is either immaterial, outside of the possession, custody, or control of the prosecution team, is duplicative of already provided discovery, or falls outside the scope of Rule 16.

I. FACTUAL BACKGROUND

On December 1, 2021, the grand jury returned a nine-count superseding indictment charging Gray with Civil Disorder, in violation of 18 U.S.C. § 231(a)(3) (Count One); Obstruction of an Official Proceeding and Aiding and Abetting, in violation of 18 U.S.C. §§ 1512(c)(2) and 2 (Count Two); Assaulting, Resisting, or Impeding Certain Officers, in violation of 18 U.S.C. § 111(a)(1) (Count Three); Entering and Remaining in a Restricted Building or Grounds, in violation of 18 U.S.C. § 1752(a)(1) (Count Four); Disorderly and Disruptive Conduct in a Restricted Building or Grounds, in violation of 18 U.S.C. § 1752(a)(2) (Count Five); Engaging in Physical Violence in a Restricted Building or Grounds, in violation of 18 U.S.C. § 1752(a)(4) (Count Six); Disorderly Conduct in a Capitol Building, in violation of 40 U.S.C. § 5104(e)(2)(D)

(Count Seven); Act of Physical Violence in the Capitol Grounds or Buildings, in violation of 40 U.S.C. § 5104(e)(2)(F) (Count Eight); and Parading, Demonstrating, or Picketing in a Capitol Building, in violation of 40 U.S.C. § 5104(e)(2)(G) (Count Nine). Dkt. No. 25. These charges arise from Gray's conduct on January 6, 2021, when he is alleged to have participated as part of a mob that breached the U.S. Capitol (the "Capitol Breach") by entering the United States Capitol building (a restricted area), where he remained for approximately thirty-three minutes.

Gray was arraigned on December 6, 2021. A trial is scheduled to commence on January 18, 2023.

The government has provided defense counsel with substantial case-specific discovery including clips of body-worn-camera footage and Capitol surveillance footage depicting the defendant inside and outside the U.S. Capitol on January 6, 2021; the Federal Bureau of Investigation's ("FBI") investigative case file specific to Defendant Gray; and copies of arrest and search warrants with accompanying affidavits and returns. The government is working with Defendant Gray to provide the result from the search of his device, obtained pursuant to a court-authorized search warrant, and will return his device once a stipulation is signed.

The defendant also has access to the materials provided in global discovery. The government has provided 21 global disclosures. To assist Gray in reviewing discovery, the government produced global discovery in folders with indexes. The materials provided in global discovery are contained within two databases, Relativity and Evidence.com, which are searchable. In addition, the government has arranged multiple opportunities for defense counsel and an investigator to walk through the crime scene.

The government is committed to ensuring that all arguably exculpatory materials are produced in a comprehensive, accessible, and useable format to Defendant Gray.

II. LEGAL STANDARD

Defendants seek to compel evidence under Rule 16 of the Federal Rules of Criminal Procedure and under *Brady*. "The government's *Brady* obligations are separate and distinct from its obligations under Rule 16 of the Federal Rules of Criminal Procedure . . . ." *United States v. Flynn*, 411 F. Supp. 3d 15, 28 (D.D.C. 2019).

Under *Brady* and its progeny, the government has "an affirmative duty to disclose exculpatory evidence to the defense, even if no request has been made by the accused." *United States v. Borda*, 848 F.3d 1044, 1066 (D.C. Cir. 2017). In *Brady*, the United States Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady v. Maryland*, 373 U.S. 83, 87 (1963). "Impeachment evidence, . . . as well as exculpatory evidence, falls within the *Brady* rule." *United States v. Badley*, 473 U.S. 667, 676 (1985).

Federal Rule of Criminal Procedure 16, on the other hand, mandates the disclosure of any evidence that is material to the preparation of a defense. *Flynn*, 411 F. Supp. 3d at 28. Under Rule 16, the government must produce documents and objects, including "photograph books, papers, documents, data, photographs, tangible objects, buildings or places, or copies or portions of any of these items," so long as two requirements are met. Fed. R. Crim. P. 16(a)(1)(E).

First, documents and objects enumerated in the rule must be "within the government's possession, custody, or control." *Id.* This means within the prosecutor's direct control or "maintained by other components of the government which are 'closely aligned with the prosecution.'" *United States v. Libby*, 429 F. Supp. 2d 1, 6 (D.D.C. 2006) (quoting *United States v. Brooks*, 966 F.2d 1500, 1503 (D.C. Cir. 1992)). This limitation ensures that courts do not adopt

a "monolithic view of government that would condemn the prosecution of criminal cases to a state of paralysis." *United States v. Avellino*, 136 F.3d 249, 255 (2d Cir. 1998) (applying a narrow view of government control of materials in the *Brady* context) (internal quotation and citation omitted). Tangential investigation of a matter by another arm of the federal government does not automatically place records from that investigation into the control of the prosecution team. *See, e.g.*, *United States v. Chalmers*, 410 F. Supp. 2d 278, 289–90 (S.D.N.Y. 2006) (declining to incorporate several agencies outside of the Department of Justice into the prosecution team for Rule 16 purposes).

Second, documents enumerated in the rule must be: (1) material to preparing the defense; (2) intended to be used in the government's case-in-chief at trial; or (3) obtained from or belonging to the defendant. Fed. R. Crim. P. 16(a)(1)(E). To prove materiality under the first factor, defendant must make a preliminary showing that the information sought is in fact material by demonstrating that the document or object would "enable[] the defendant significantly to alter the quantum of proof in his favor." *United States v. Graham*, 83 F.3d 1466, 1474 (D.C. Cir. 1996). The defense must also show that the discovery sought would refute the government's case in chief. *United States v. Armstrong*, 517 U.S. 456, 463 (1996); *United States v. Rashed*, 234 F.3d 1280, 1285 (D.C. Cir. 2000). The document or object must bear more than "some abstract relationship to the issues in the case." *Libby*, 429 F. Supp. 2d at 7.

Courts impose such limits on defendants because the rule does not require a "broad and blind fishing expedition among [items] possessed by the Government on the chance that something impeaching might turn up." *Jencks v. United States*, 353 U.S. 657, 667 (1957) (quoting *Gordon v. United States*, 344 U.S. 414, 419 (1953)). Moreover, Rule 16 does not convey an entitlement to discovery that is duplicative of documents and objects already provided. *See e.g.*, *United States v.*

Sutton, No. CR 21-0598-1 (PLF), 2022 WL 3134449, at *6 (D.D.C. Aug. 5, 2022); *United States v. Abu-Jihaad*, No. 3:07CR57 (MRK), 2008 WL 346121, at *5 (D. Conn. Feb. 4, 2008).

III. DISCUSSION

Defendant Gray moves to compel the disclosure of (A) any records related to threat assessments by law enforcement for January 6; (B) any U.S. Capitol Police records advising Congress to recess and evacuate; and (C) any records reflecting the exact location of barricades at the time of Gray's criminal conduct. These requests are either underdeveloped, immaterial, or concern information that has already been provided. The Court should therefore deny the motion.

A. Gray's request for records related to threats and security arrangements is undeveloped and the requested records are immaterial.

After requesting records related to threats and security arrangements on the first page of the motion, Gray's sole analysis in support of the request is a single sentence on page eight of the motion. Mot. at 1, 8. That is insufficiently developed to warrant consideration. *Cf. Barot v. Embassy of Zambia*, 773 F. App'x 6, 6 (D.C. Cir. 2019) ("The court declines to consider the other cursory arguments raised by appellant regarding this claim."); *SEC v. Banner Fund Int'l*, 211 F.3d 602, 613, (D.C. Cir. 2000) (noting that the court may disregard "asserted but unanalyzed" arguments); *Cement Kiln Recycling Coal. v. EPA*, 255 F.3d 855, 869 (D.C. Cir. 2001) ("A litigant does not properly raise an issue by addressing it in a cursory fashion with only bare-bones arguments." (internal quotation marks and citations omitted)).

In any event, the information that Gray seeks is immaterial and irrelevant. The government would not use the records in its case-in-chief, nor would they be obtained from or belong to Gray. As a result, the defense must show that these communications are "material to preparing the defense." Fed. R. Crim. P. 16(a)(1)(E). But Gray does not advance any arguments that such records

would be material to his defense. Nor is it apparent how such records could be relevant, let alone material, to any issue at trial.[1]

In *United States v. Apodaca*, Chief Judge Howell extensively outlined the application of the materiality prong when reviewing a defendant's motion to compel. In *Apodaca*, the government obtained a significant number of wiretap intercepts between the defendant and numerous other co-conspirators. 287 F. Supp. 3d 21, 36–37 (D.D.C. 2017). Although the government already provided the intercepts involving the defendant, the defendant also sought all intercepts between only the co-conspirators based on a "vague need for potentially exculpatory evidence" in those messages. *Id.* at 40. Specifically, the defendant argued that his lack of participation in those messages would show he did not participate in the conspiracy. *Id.* Defendant moved to compel the production of those communications. In denying the motion to compel, Chief Judge Howell noted that defendant's request constituted a "burdensome fishing expedition," and held that the defendant's "absence from certain pertinent intercepts of co-conspirators does little to rebut the inculpatory evidence contained in the . . . intercepts the government seeks to use at trial." *Id.* at 39–40. The interpretation of Rule 16 in *Apodaca* appropriately tailored the government's discovery obligations to only materials that address the government's case at trial.

B. Discovery related to other potential causes of the certification delay on January 6 is immaterial because it does not tend to exculpate Gray.

Defendant Gray's motion seeks to compel production of discovery related to "the actual reason(s)" Congress recessed. Mot. at 9–10 (speculating about the importance of alleged pipe bombs). Gray argues that the government has the burden to prove that Gray, himself, was "*the reason* for Congress' recess decision." Mot. at 9 (emphasis in original). Thus, Gray argues,

[1] As described above, the defense has been provided with voluminous discovery in two searchable databases. The government has already disclosed several documents that generally fit within the defendant's broad request.

evidence that other causes, beyond his actions, which may have also disrupted the congressional proceeding, is exculpatory, relevant, and material. Gray is wrong, and he fails to establish that the requested information is relevant—let alone favorable and material—in this case.

Even if evidence existed tending to show that other events caused a disruption to congressional business, that evidence is not necessarily material. Under 18 U.S.C. § 1752(a)(2), the government must prove that a defendant's disorderly or disruptive conduct occurs "when, or so that, such conduct, in fact, impedes or disrupts the orderly conduct of Government business or official functions." Although but-for causation is sometimes required, duplicative causation applies when, as here, multiple independently sufficient causes exist. *See Burrage v. United States*, 571 U.S. 204, 214–15 (2014); CAUSATION, Black's Law Dictionary (11th ed. 2019). Duplicative causation is the relevant standard for § 1752 because of the nature of protests generally and the facts specific to the Capitol riots on January 6, 2021.

In *United States v. Rivera*, No. 21-cr-060 (CKK), 2022 WL 2187851 (D.D.C. June 17, 2022), Judge Kollar-Kotelly directly addressed the question of causation as it relates to the January 6 cases. The defendant there argued that he did not "in fact" cause the certification delay "because both Houses of Congress had recessed by the time he had entered the Capitol itself." *Id.* at *6. Judge Kollar-Kotelly rejected this argument because the evidence at trial showed that "even the presence of one unauthorized person in the Capitol is reason to suspend Congressional proceedings." *Id.* She concluded that the government was not required to prove that the defendant was the but-for cause of the delay, because doing so would require "read[ing] terms into statutory provisions that are not there." *Id.* That interpretation made sense because Section 1752(a)(2) was "aimed at protests involving several people who collectively disrupt proceedings but where no individual person's presence or actions would *alone* disrupt proceedings." *Id.* at *6 n.15.

Applying the duplicative causation standard here, Rule 16 applies only to discovery related to the delay caused by Gray's own conduct. The government has already produced that evidence. This case presents the question of whether Gray, by entering the Capitol building on January 6, disrupted Congress's certification of the presidential election results. The government anticipates that the evidence at trial will be nearly identical to the evidence in *Rivera*, which showed that a single unauthorized person would have caused a delay. *Id.* at *6. As a result, Gray's entry into the Capitol was one of thousands of independently sufficient causes in delaying the certification. Even if Gray could identify through discovery or otherwise any number of additional causes to the delay, the discovery would do nothing to rebut the inculpatory evidence already provided to the defense.

Further, Count Two charges Gray with corruptly obstructing, influencing, or impeding an "official proceeding," – *i.e.*, Congress's certification of the Electoral College vote on January 6, 2021 – in violation of 18 U.S.C. § 1512(c)(2). Congress could not reconvene while rioters were at the Capitol; Gray's presence in the Capitol impeded the official proceeding, regardless of Gray's location at the time Congress initially recessed.

Therefore, the discovery sought in request (B) is not material because it does not refute the government's case in chief. Moreover, it is not *Brady* material, because it is not favorable to defendant.

C. The government has already produced evidence of barriers around the Capitol grounds on January 6.

Finally, Gray seeks to compel the production of "locations of barricades and 'restricted area' signs at exact time of Gray's arrival." Mot. at 15. Specifically, he seeks to compel the production of evidence relate to the status of barriers around the Capitol grounds, as well as evidence relating to certain security decisions that were made on or around January 6. For example, defendant seeks "any and all photographs, video recordings, witnesses, discussions in police radio

recordings, etc., of exactly where any signs were visible to the crowds ***at the time that*** Defendant Gray arrived at the vicinity of the U.S. Capitol building." Mot. at 17.

The requested records are duplicative of the surveillance footage from the Capitol grounds, which have already been produced. To the extent that the defendant seeks additional information relating to "the state of the signs" and other barriers at particular times throughout the day, that evidence can be gleaned from review of the video footage already produced.[2] And to the extent the defendant seeks work product regarding the government's interpretation of when bike racks were torn down by rioters, for example, they are not entitled to that information. *See Flynn*, 411 F. Supp. 3d at 29 ("Under Rule 16(a)(2), [a defendant] may not examine Government work product in connection with his case.") (quoting *United States v. Armstrong*, 517 U.S. 456, 463 (1996)). As such, the additional discovery sought in request (C) would be duplicative of evidence that the government has already provided.

[2] Defendant Gray's motion also seeks discovery regarding a "Massive Web of Unindicted Operators" who were "shown in videos removing barricades, moving bike racks, and rolling up wire mesh fencing." Mot. at 17-18. The government is not aware of any person who was acting on behalf of any government agency as an "agent provocateur" – that is, as a person who committed or acted to entice another person to commit an illegal or rash act – with respect to January 6, 2021.

IV. CONCLUSION

For the above-stated reasons, the United States asks that the Court deny Defendant Gray's motion to compel.

Respectfully submitted,

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