

237 DAYS: COOPERATION IN CRIMINAL INVESTIGATIONS TAKES A LONG TIME

Earlier this week, I pointed out that the complaints about Merrick Garland's approach to the January 6 investigation simply don't account for how long competent investigations take. On Twitter, I noted that it took almost a full year after the Russian investigation was opened for George Papadopoulos to be arrested and another two months before he pled guilty, making 14 months for a simple false statements charge in a lightning fast investigation. With a purported cooperator like Mike Flynn, it took 15 months to plead guilty and another year for the cooperation, and that, again, was considered lightning fast (and was assisted by the criminal exposure Flynn had for secretly working for Turkey).

In the January 6 investigation, prosecutors got their first public cooperating witness on April 16, when Jon Schaffer entered into a cooperation agreement. Since then, four additional Oath Keepers (Graydon Young on June 23, Mark Grods on June 30, Caleb Berry on July 20, and Jason Dolan on September 15), Josiah Colt (on July 14), and Klete Keller (on September 29; and no, I have no clue against whom he'd be cooperating) also publicly entered into cooperation agreements. That's what DOJ has formally revealed, though there are several cases where the government clearly has gotten cooperation from other defendants, but hasn't shared that formally.

But even with cooperators, investigations take time. There are three recent developments that provide a sense of how time-consuming that is.

Jon Schaffer's still unresolved cooperation

As I previously noted, the four main Oath Keeper cooperators have a harmonized status deadline for December 17. I had been waiting to see whether Jon Schaffer, who has ties to the Oath Keepers and communications with whom were noticed to Oath Keeper defendants, would be put on that same reporting schedule.

He hasn't been.

In fact, a recent status report in his case suggests the main Oath Keeper conspiracy may *not* be the primary focus of his cooperation. That's because two details in it are totally inconsistent with the progress of the Oath Keeper case.

Multiple defendants charged in the case in which the Defendant is cooperating have been presented before the Court; several are in the process of exploring case resolutions and a trial date has yet to be set.

As Judge Mehta well knows, four of the Oath Keepers already have "explor[ed] case resolutions." And Mehta has set the first trial date for April 19, 2022.

So unless Schaffer's attorney is entirely in error, it seems there's some other multiple defendant case in which Schaffer is cooperating.

Swedish Scarf still at large?

Earlier this month, Gina Bisignano may have pushed the government to indict a conspiracy in which she's a key witness earlier than they might have.

On November 4, she filed a motion to modify her release conditions, to get out of home arrest so

she can try to salvage her salon business. In it, her lawyers revealed that back in July, Bisignano had entered into a sealed plea agreement.

10. On July 28, 2021, Defendant signed a plea agreement in the above captioned case UNDER SEAL.

11. On August 4, 2021, Defendant appeared before this Court and entered a guilty plea in the above captioned case, UNDER SEAL, to multiple counts of the indictment.

12. On September 16, 2021, a Zoom hearing was held before this Court, and Your Honor advised that you would entertain the Defendant's motion in three (3) weeks to see whether the Defendant had any infractions during that time.

The only reason to seal the plea would be to hide a cooperation component.

There has long been chatter about a conspiracy indictment against members of the Southern California anti-mask community that traveled to the insurrection together. In response to Amy Berman Jackson's questions about why Danny Rodriguez was not charged with three other defendants for assaulting Michael Fanone, prosecutors kept giving her vague answers for months, until they filed what must have been a sealed update on November 5. And a transcript of Rodriguez' FBI interview at least suggested that the FBI had spoken to Bisignano before Rodriguez' March 31 interview.

Is there any reason why Gina would tell us that you told her not to say anything to – about you being at the Capitol?

Videos of this interview, which are engaging TV, are here.

In mid-November, the government finally rolled

out the long-awaited conspiracy indictment, which was more narrowly tailored than originally expected, charging Rodriguez, his estranged friend Ed Badalian, and someone referred to in the online community as “Swedish Scarf,” but whose identity remains sealed. The indictment charges two objects of the conspiracy: to halt the vote count on January 6, but also to “mutilate or destroy photographs and videos taken by” Bisignano (who is referred to as Person One in the indictment).

But there’s still no sign of an arrest of Swedish Scarf.

That could mean several things, one of which is that he’s on the lam.

The minute order from Judge Carl Nichols granting Bisignano some but not all of the release conditions she requested revealed that the government opposition to that request, which was due on November 24 (and so after the indictment against Badalian was unsealed) remains sealed.

MINUTE ORDER. Upon review of the Defendant's 45 Second Motion to Modify Conditions of Release, it is ORDERED that Motion is GRANTED in PART and DENIED in PART. It is further ORDERED that the home confinement restriction is lifted, while all other pretrial restrictions, including location monitoring and curfew, shall remain in place. It is further ORDERED that Defendant's 34 First Motion to Modify Conditions of Release is DENIED as MOOT, and that the Government's 47 Motion to File Under Seal its Opposition to Defendant's Second Motion to Modify Conditions of Release is GRANTED. Signed by Judge Carl J. Nichols on November 30, 2021. (lccjn2) (Entered: 11/30/2021)

There’s something else going on with this case. What, it is not entirely clear.

That said, what the public record suggests is that Bisignano had at least one interview prior to March 31, she pled guilty in August, but it still took three more months to obtain the indictment against Badalian and Swedish scarf.

Indicting a cop for fun and probation

Meanwhile the sentencing memos (government, defense) for Jacob Hiles reveal that not all cooperation comes with a cooperation agreement.

As the government describes, Hiles’ actions on January 6 include a number of the factors that would normally lead them to ask for a sentence

including jail time: calls for revolution in advance, mockery of police efforts to defend the Capitol, and long boasts posted to Facebook after the fact.

But those Facebook posts play a key role in a more important prosecution, that of former Capitol Police Officer Michael Riley, who friended Hiles on Facebook before the insurrection and tried to protect him afterwards. After they first initiated contact, Riley warned Hiles to delete his posts, but he did not.

On January 7, 2021, a sworn U.S. Capitol police officer, Michael Angelo Riley, sent the defendant a private direct message on Facebook—the first message between the two, who had never met but shared an avid interest in fishing. The message stated as follows:

“Hey Jake, im a capitol police officer who agrees with your political stance. Take down the part about being in the building they are currently investigating and everyone who was in the building is going to be charged. Just looking out!”

Hiles responded to this message with a shorter version of the narratives posted on his public page and detailed above. He further stated, in part, “Investigate me however youd like and thank you for the heads up. . . . If what I did needs further investigation, I will gladly testify to this. There are some people who were violent. They attacked officers. They destroyed property. They should be fully prosecuted.”² In the course of an extended conversation that ensued between the two, Hiles also said, “I don’t think I did anything wrong at all yesterday and I am very sorry things turned out the way that they did. I dont like the way that a few bad apples in a

massive crowd are making the entire crowd be portrayed as violent terrorists,” and “I think when the fbi gets to investigating, they will find that these terroristic acts were committed in false flag attacks by leftists.”

The government’s investigation revealed that these communications between Riley and the defendant had been deleted by Riley, but not by the defendant, from whose Facebook account they were recovered. The communications included further corrupt conduct by Riley, as detailed in part in the Indictment, ECF No. 1, in United States v. Michael Angelo Riley, 21-CR-628 (ABJ). Indeed, according to Hiles, and consistent with the evidence recovered in the government’s investigation of Michael Riley, Hiles deleted no information in response to Riley’s suggestion that he do so.

And when FBI Agents interviewed Hiles after they arrested him on January 19, he told them enough about his contact with Riley such that they knew to look for those communications once they exploited his phone. That led to another interview and, ultimately, to the indictment of Riley.

Hiles further indicated that following the riot he had become friends with a Capitol police officer, although he did not at that time describe the content of then-Officer Riley’s initial contact. Later, a search of Hiles’ cell phone revealed a screenshot of the Facebook message detailed in the government’s Sentencing Memorandum from Riley to Hiles on January 7, 2021. Upon discovery of the message, the government requested through counsel that Hiles participate in a debrief with prosecutors and federal agents. Through counsel, Hiles

agreed to do so and appeared for the debrief (held virtually) within 24 hours, and with no promise of any benefit from or agreement of any kind with the government.³

After his initial interview, Hiles told Riley that the FBI had expressed an interest in their communications. That led Riley to delete his own Facebook communications with Hiles.

15. RILEY and Person 1 continued to exchange friendly messages until January 20, 2021. On that date, Person 1 sent RILEY Facebook direct messages regarding having turned himself in to the FBI, including telling RILEY, "The fbi was very curious that I ha been speaking to you if they havent already asked you about me they are gonna. They took my phone and downloaded everything." RILEY responded, "Thats fine".

16. On January 20, 2021, RILEY deleted all his Facebook direct messages to and from Person 1.

Because of this cooperation against Riley (and because he offered up that he had gone to insurrection with his cousin, James Horning, who was arrested on obstruction and trespassing charges a month later), the government recommended probation.

Indeed, without the defendant's significant, useful assistance to the government with respect to two felony prosecutions, the factors would require the government to recommend a sentence involving incarceration. Yet, upon consideration of the defendant's exceptional cooperation with the government, the scale tips in favor of probation.

Hiles is due to be sentenced on Monday.

Hiles' role in the prosecution of Riley is instructive for several reasons. First, these misdemeanants are not just defendants, but they are all witnesses to a crime. And some of them are going to provide important testimony without the formal trappings of a cooperation plea those indicted with felonies would have (even assuming those cooperation pleas were made public).

But the Hiles sentencing also gives a sense of the time necessarily involved. Riley's indictment reveals how long even simple cooperation prosecutions can take. While union protections and internal investigations probably delayed things somewhat, it still took over 235 days between when the FBI first learned of Hiles' communications with Riley and Riley's arrest.

That's for a cop. You can be sure it would take longer to indict those close to Donald Trump, even assuming the FBI has identified cooperators with useful testimony directly pertaining to those in Trump's orbit, rather than identified those once or twice removed from Trump's closest aides.

The government is getting more cooperation from January 6 defendants and witnesses than is publicly admitted. But that doesn't mean we'll see the fruit of such cooperation anytime soon.

Update, December 23: Adding the cooperation agreements for Gina Bisignano (August 4) and Matthew Greene (December 22).