UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA	:	
	:	
v.	:	
	:	**Case No. 21-CR-00244(CKK)**
ANTHONY GRIFFITH,	:	
	:	
Defendant.	:	

DEFENDANT'S REPLY IN SUPPORT OF MOTION FOR RELEASE PENDING APPEAL

Defendant Anthony Griffith hereby replies to the Government's Response in opposition to his Motion for Release Pending Appeal (hereafter "Gov. Opp.").

I. Legal Standards for Release Pending Appeal

"[A] substantial question is a 'close' question or one that very well could be decided the other way." *United States v. Perholtz*, 836 F.2d 554, 555 (D.C. Cir. 1987). Although a "substantial question" must be more than merely non-frivolous, *id.*, it is not Defendant's burden for present purposes to persuade this Court that it erred. *See United States v. Quinn*, 416 F. Supp. 2d 133, 136 (D.D.C. 2006) (granting release pending appeal despite having been unpersuaded by defendant's arguments on the questions). Furthermore, the Government's response does not dispute that, if the statutory criteria are satisfied, release pending appeal is mandatory rather than discretionary. *Id.* at 137 (citing 18 U.S.C. §3143(b)(1)(B)).

II. Defendant Has Satisfied His Burden Under Section 3143.

A. The Questions For Appeal Can Result in a Reduced Sentence That Would Be Less Than the Expected Duration of Appeal.

The Government's contention that Defendant has not identified substantial questions because they are directed at Counts 2 and 3 mischaracterizes his argument. *See* Gov. Opp. at 5. Although the Opposition quotes Defendant's concession that his convictions on Counts 4 and 5 could remain intact (*id.*), the Opposition initially omits the vital remainder of that paragraph in Defendant's brief. Counts 4 and 5 "are class B misdemeanors for which the sentencing guidelines do not apply. … This may warrant a sentence of less than 6 months …." Def. Mem., ECF No. 159-1, at 12. Indeed, January 6 cases involving convictions on class B misdemeanors alone have commonly resulted in sentences of probation rather than incarceration or in periods of incarceration much less than the statutory maximum of six months.

The Government's contention that the Court made a finding at sentencing that the six-month sentences would have been imposed on Mr. Griffith even with respect to Counts 4 and 5 "independent of any rulings on sentencing guidelines issues" (Gov. Opp. at 7) is not supported by the record. These statements by the Court occurred in the context of analyzing which guidelines provisions would be

taken into account for Counts 2 and 3.[1] It certainly does not follow that the Court would have deviated from the prevailing norm of probation (only) in analogous Class B misdemeanor cases if Defendant had not been convicted of Class A misdemeanors to which the guidelines applied. Thus, Defendant is presenting questions whose resolution can result "in a reduced sentence to a term of imprisonment less than the total of the time already served plus the expected duration of the appeal process." *United States v. Green*, 1998 WL 796118, at *1 (10th Cir. Nov. 17, 1998).

B. Questions Concerning the Court's Rulings With Respect to Evidence Relating to the Operational Plan Are Substantial.

The contention that the Court did not limit Defendant's efforts to introduce potentially exculpatory evidence about the Operational Plan is without merit. *See* Gov. Opp. at 7-8. The Government evidently has forgotten its own arguments in the response it filed to Defendant's Trial Brief on Relevancy. *See* ECF No. 133 (responding to ECF No. 132). In that response, the Government averred that the prosecution team had "made diligent inquiries with the United States Capitol Police ('USCP') to determine whether a permit was approved for the 'Donald, You're Fired March on DC,' " but that based on their review, USCP had

[1] The Government's contention refers to the discussion at sentencing about whether Sentencing Guideline §2B2.3 should apply to Counts 2 and 3, rather than §2A2.4. *See* Minute Order of Sept. 1, 2023. The Court's statement that it would select six months as the sentence under either guideline section was not relevant to the Class B misdemeanor counts to which the sentencing guidelines do not apply.

determined no such permit was issued. *Id*. at 1. That alone demonstrates the exculpatory and material nature of the information sought to be introduced by Defendant at trial in the Operational Plan. If no such permit existed, it certainly contradicts the document Defendant sought to introduce. There are many lines of inquiry Defendant could have followed. Why did such a plan exist with such a significant error? Was it every corrected? Was this document, dated just a day before the events of January 6, 2021, a reflection of a policy at USCP to allow anti-Trump supporters access while denying others access to the steps of the Capitol that day? Was there a plan to allow counter-protestors the same access to this area?

At trial, the USCP General Counsel, Mr. Tad Dibase, testified that he was aware of the plan, that it was used by him in the performance of his duties, and that he had seen it prior to January 6, 2021. In limiting Defendant to questions only about approved permits, the Court hindered his ability to inquire into the Operational Plan widely used for preparing for the events of January 6. Moreover, accepting the unsupported government proffer, rather than allowing Defendant to raise this issue, deprived Defendant of the right to confront and cross examine the evidence used against him. He was denied the ability to use the Operational Plan as evidence of the actual published plan in effect that day. If there were errors in that plan that is not for Mr. Griffith to say. The Government could have called witnesses to say exactly what they proffered but never had to prove—that no such

permit existed, if in fact, that were the case. It was not Defendant's burden to show this. Had the Court not limited Defendant by its ruling, then he would have been afforded his constitutional right to cross examine the witnesses in this case and get to the truth. A thorough cross examination could have explored whether there was actually a permit issued to this group and if there was none, why was it listed as a "currently permitted event" on the document. Moreover, cross examination would have allowed Defendant the ability to explore the effect any misinformation had actions taken by USCP on January 6, 2021, to override the restricted area and allow a group to gather within the restricted area. These issues plainly gave rise to factual disputes for which the Court should have allowed more evidence to be received and for the Government to present evidence to refute the clear language of the Operational Plan that Defendant sought to admit.

Among other things, curtailing the soliciting and admission of evidence about the Operational Plan directly affected Defendant's ability to impeach Captain Baboulis's testimony about permitted access inside the restricted area, and any other USCP witness who claimed members of the public would not be permitted inside the restricted area on January 6 without subjecting themselves to security screenings and the like. The Operational Plan was the best evidence of what the USCP planned for with regards to permitted events on the grounds and just because the government claims it now that it was a mistaken document does

not make it inadmissible, it just makes it inconvenient to the government's case. That alone makes it important for Defendant to address.

If, in fact, as the government claimed, the official Operational Plan was incorrect, that would be for rebuttal by the government. It should not have been used as a basis for denying Defendant's ability to present this *Brady* information in the first place. The Operational Plan clearly stated that a permit had been issued for the "Donald You're Fired March on DC" to gather on the steps of the Capitol on January 6, 2021, at noon. Mr. Griffith also gathered on the steps of the Capitol that day and to the extent that the government was prepared to allow individuals to do just that, without tickets or passing through security, the Operational Plan was relevant and admissible to go to the state of mind by USCP in enforcing such a perimeter and should have been admitted.

C. The Question Concerning the Variance From the Indictment Is Substantial.

While arguing that the variance between the evidence at trial and the Indictment's allegation that both the Vice President and Vice President-elect were at the Capitol had no significance, the opposition brief is silent regarding the Government's practice in many January 6 cases to amend charging documents to remove that conjunctive allegation. Why would prosecutors take such actions if the variance between the grand jury's charges and the trial evidence were, in fact, immaterial as the Government now argues? While Defendant concedes that

charging elements of the indictment in the conjunctive is permissible, in this case the government chose, by failing to amend the indictment here, to move forward with proof that both Vice President Pence and Vice President Elect Harris were "temporarily visiting" the Capitol on January 6, 2021—something the prosecutors knew to be factually unsupportable. Mr. Griffith's due process rights were violated by having a grand jury return an indictment based upon this knowingly false basis and then for the government to proceed under an amended, narrower set of facts, that were not presented to that grand jury. The factual assertion regarding Vice President-elect Harris was false and the government knew this, yet sought an indictment that implicated her safety at the Capitol that day in order to obtain an indictment. In a city overwhelming populated by partisan supporters of the Vice President-elect, the impact of mentioning her for purposes of influencing criminal charges cannot be understated.

Mr. Griffith's appeal will challenge the denial of his Rule 33(a) motion which requested the vacatur of his charges when "the interest of justice so requires." *United States v. Wheeler*, 753 F. 3d 200, 208 (D.C. Cir. 2014) (granting a new trial "is warranted only in those limited circumstances where a serious miscarriage of justice may have occurred.") In this case, the Government's use of knowingly false information to obtain an indictment and then later alleging such false information to be a minor "factual error" but continuing to proceed to trial

under this error is the type of miscarriage of justice for which a Rule33(a) remedy is appropriate.

D. Questions Concerning Whether the Court's Findings Are Supported by Evidence in This Case's Record Are Substantial.

Contrary to the Government's responses, there are substantial questions concerning whether the Findings of Fact concerning Defendant lack any foundation in the evidentiary record of this case—including concerns whether those findings were influenced by or wholly rooted in the Court's awareness of evidence introduced in other proceedings that Mr. Griffith had no opportunity to confront.

The first example the Government discussed is illustrative: the finding that Defendant shouted "open the door," thus signifying a state of mind purportedly relevant to finding him guilty. The Government had to concede that the only evidence about Mr. Griffith's behavior at the relevant time is a video with no sound. Gov. Opp. at 13. Nonetheless, the Government claims that a finding of fact *about the words spoken* is supported by the record because that finding refers to Defendant being "seen" to say them. But the complete unreliability of depending on the movement of mouths to infer actual words spoken is demonstrated by the fact that putative lip reading is a staple of 21st century comedy. *See* Bad Lip

Reading (YouTube channel).[2] In this case, however, a groundless finding that Defendant spoke certain words is no laughing matter and served as a basis for his conviction.

At the same time, the Government did not address at all another aspect of Defendant's anticipated appeal: indications that findings of fact entered to justify conviction in this case appear to have been influenced by the Court's substantial engagement with evidence, as factfinder or presiding officer, in numerous other January 6 cases.[3] If Defendant's conviction stemmed even in part from the influence of evidence in other proceedings, which Mr. Griffith had no opportunity to confront, serious constitutional issues are presented. As evidence of this, the Court found facts, not at all presented in Mr. Griffith's case, to be relevant to his finding of guilt. For example, in the May 16, 2023, Findings of Fact and Conclusions of Law, the Court found that "[f]or some period of time after 1:00 p.m. and before 2:42 p.m., MPD deployed chemical spray (pepper spray or something similar) to disperse the insurrectionists who had yet to join the portion of the riot that had captured the Upper West Terrace, ultimately to little effect." ECF No. 142 at 5. Yet, Mr. Griffith's trial evidence showed no such activity on the

[2] *E.g.*, "State of the Union 2023 – A Bid Lip Reading (published May 9, 2023, available at https://www.youtube.com/watch?v=iz19y9a9bsQ); "NFL 2023: A Decade of NFL Bad Lip Reading" (published Mar. 31, 2023, available at https://www.youtube.com/watch?v=kCqN4xdkrbY).

[3] The risk that knowledge gained by a lawyer in one setting will be brought to bear, even unconsciously, is another setting is recognized in many legal contexts.

Upper West Terrace at the time of his arrival or at any time he was present on the Upper West Terrace. Indeed, the Court noted that Mr. Griffith may have seen someone suffering from the effects of some sort of spray, however it was never established who deployed that spray or where that individual may have been when sprayed, or that Mr. Griffith even saw that person that day. It was only that in one video, seen for the first time by Mr. Griffith at trial, that he agreed that the person on that video appeared to be wiping some sort of chemical spray out of his eyes. Mr. Griffith may have passed by the individual but to say he saw them sprayed or even saw them at the time recovering from spray was not established. As another example, the Court's stated that "[w]hen rioters entered the Capitol, they were met with a loud PA system urging Capitol visitors and staff to take shelter due to an incursion into the Capitol." *Id*. Again, this was never introduced in Mr. Griffith's trial. In fact, video and audio evidence presented at trial positively demonstrated no such PA system was in effect or could be heard on any video exhibit pertaining to Mr. Griffith.

The Court's Findings of Fact characterized Mr. Griffith's observations of video evidence, heard for the first time when the government played it for him at trial, and imputed that video evidence as Mr. Griffith's observations on January 6, 2021. There is a big difference between him saying he heard it on the video exhibit and saying that he heard or saw those things during the events of January 6. No

link, through either proximity or knowledge, was ever made between how he could have possibly seen or heard what some stranger captured on video. Mr. Griffith never "admitted observation" of chemical spray being deployed, an earsplitting alarm, or broken glass that day. *Id*. These are findings, not based on the evidence as to Mr. Griffith, but made by the Court in order to find Mr. Griffith knew he should not have entered the Capitol. They are not based not upon Mr. Griffith's experiences that day, his testimony at trial or his recollection of events. Perhaps in other cases this Court has heard people admit to seeing broken glass on the floor, hearing "ear piercing" alarms and PA systems and seeing chemical spray being deployed on the upper west terrace. In Mr. Griffith's case, there was no evidence submitted to this effect, yet it formed the basis for Mr. Griffith's conviction and knowledge that he was not lawfully allowed to be where he was.

E. Defendant Is Not a Flight or Safety Risk.

Finally, the Government asserted that the motion could be denied on the basis that Section 3143(b)(1)(A)'s criteria are not satisfied. The Government's characterization of Defendant's trial testimony and engagement with probation services before sentencing miss the mark. In fact, Mr. Griffith easily satisfies the requirement of showing that he is neither a flight risk nor a danger to the community pending appeal. There is no dispute that Defendant has complied with the conditions of his release on bond since his initial appearance before the Court

in March 2021. *See* Minute Order of Mar. 9, 2021; ECF No. 15 (Conditions of Release). Moreover, the Court has sentenced Defendant to serve six-month concurrent terms for his misdemeanor convictions. If the Court of Appeals were to affirm the conviction and sentences, it would be wholly irrational to fail to surrender because the potential consequences of such failure are worse than Defendant's sentence. *See* 18 U.S.C. § 3146(b)(1)(A)(iv). Given his circumstances and his behavior throughout this proceeding, there is no reason to suspect that Mr. Griffith would expose himself to that risk by flight.

Conclusion

For the foregoing reasons, Defendant's motion should be granted.

Respectfully Submitted,

By: Nicole Cubbage

/s/ Nicole Cubbage
Nicole Cubbage
DC Bar No. 999203
712 H. Street N.E., Unit 570
Washington, D.C. 20002
703-209-4546
cubbagelaw@gmail.com
Attorney for Mr. Griffith

/s/ Kira Anne West
Kira Anne West, Esq.
DC Bar No. 993523
712 H. Street N.E., Unit 509
Washington, D.C. 20002
(202)-236-2042
kiraannewest@gmail.com
Attorney for Mr. Griffith

Certificate of Service

I certify that a copy of the forgoing was filed electronically for all parties of record on this 22nd day of September 2023.

/s/ Nicole Cubbage
Nicole Cubbage
Attorney for Mr. Griffith