UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, v. ANTHONY GRIFFITH, SR. Defendant.	Criminal Action No. 21-244-2 (CKK)

MEMORANDUM OPINION AND ORDER
(September 27, 2023)

Pending before this Court is Defendant Anthony Griffith's [159] Emergency Motion for Release Pending Appeal ("Def.'s Mot.") and [159-1] Memorandum in support thereof (Def.'s Mem."); the Government's [163] Opposition to Defendant's Motion ("Govt. Opp'n"); and Defendant's [167] Reply to the Government's Opposition ("Def.'s Reply"). Upon review of the pleadings, the relevant legal authorities, and the record as a whole, this Court **DENIES** Defendant Anthony Griffith's Motion for Release Pending Appeal.

I. BACKGROUND

At the conclusion of a five-day bench trial, Mr. Griffith was convicted by this Court of one count of Entering and Remaining in a Restricted Building or Grounds, in violation of 18 U.S.C. § 1752(a)(1) [Count Two of the Indictment]; one count of Disorderly and Disruptive Conduct in a Restricted Building or Grounds, in violation of 18 U.S.C. § 1752(a)(2) [Count Three]; one count of Disorderly Conduct in a Capitol Building, in violation of 40 U.S.C. § 5104(e)(2)(D) [Count Four]; and one count of Parading, Demonstrating, or Picketing in a Capitol Building, in violation of 40 U.S.C. § 5104(e)(2)(G) [Count Five]. *See* Judgment and Verdict, ECF No. 144; *see also* Findings of Fact and Conclusions of Law ("Findings of Fact"), ECF No. 142, which are

incorporated by reference herein. Defendant was sentenced to a period of six months incarceration on each count, to run concurrently on all, and a twelve month term of supervised release as to counts 2 and 3, to run concurrently. The Court has recommended that Defendant not report to the Bureau of Prisons ("BOP") before September 29, 2023. *See* Judgment, ECF No. 161, at 3.

Mr. Griffith moves now for release from custody pending his appeal to the Court of Appeals for the District of Columbia Circuit ("Court of Appeals") filed on September 22, 2023. See Transmission of Notice of Appeal, ECF No. 166. The Government opposes Defendant's request for release pending appeal, on grounds that Defendant "has not shown that his appeal raises a substantial question of law or fact likely to result in reversal or even a reduced sentence." Govt. Opp'n, ECF No. 163, at 1 (internal quotation marks omitted). Defendant's Motion has been fully briefed and is ripe for resolution by this Court.[1]

II. LEGAL STANDARD

"[A] person who has been found guilty of an offense and sentenced to a term of imprisonment, and who has filed an appeal" shall be "detained, unless [the Court] finds by clear and convincing evidence that the person is not likely to flee or pose a danger to the safety of any other person or the community if released" and further, that "the appeal is not for the purpose of delay and raises a substantial question of law or fact likely to result in (i) reversal, (ii) an order for a new trial, (iii) a sentence that does not include a term of imprisonment, or (iv) 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." 18 U.S.C. § 3143(b)(1)(A)&(B); *United States v. Zimny*, 857 F.3d 97, 100-101 (1st Cir. 2017) (discussing the likelihood prong). The defendant bears the burden of satisfying

[1] In an exercise of its discretion, the Court finds that holding oral argument in this action would not be of assistance in rendering a decision. *See* LCrR 47(f).

these statutory elements. *See Morrison v. United States,* 486 U.S. 1306, 1306-07 (1988).

The United States District Court for the District of Columbia Circuit ("D.C. Circuit") has defined a "substantial question" as "a close question or one that very well could be decided the other way." *United States v. Perholtz*, 836 F.2d 554, 555-56 (D.C. Cir. 1987) (internal quotation marks omitted). The standard is one that is "more demanding" than one that merely requires the issue to be "fairly debatable" or "not frivolous." *United States v. Libby*, 498 F. Supp. 2d 1, 4 & n.5 (D.D.C. 2007). Substantiality "requires a two-part inquiry: (1) Does the appeal raise a substantial question? (2) If so, would the resolution of that question in the defendant's favor be likely to lead to reversal?" *Perholtz*, 836 F.2d at 555.

III. ANALYSIS

Defendant asserts that release is appropriate because Mr. Griffith is not a flight or safety risk; his appeal raises substantial questions and is not brought for purpose of delay; and resolution of questions on appeal in his favor would likely result in reversal and/or a reduced sentence. Def.'s Mem., ECF No. 159-1, at 4-5. The Government proffers in turn that, first, "the issues [Defendant] intends to raise on appeal are directed to only two of the four counts of conviction and have no bearing on Counts Four and Five," and second, Mr. Griffith "fails to meet his burden with respect to th[e] additional requirements in any event" as none of the questions raised by him are "substantial" or "close," and therefore they are "not likely to lead to reversal or a reduced sentence." Govt. Opp'n, ECF No. 163, at 5. The Court begins its analysis of Defendant's Motion with consideration of whether or not Mr. Griffith poses a risk of flight or safety risk.

A. Risk of Flight or Safety Risk

In his Motion, Defendant asserts that he is not a flight or safety risk because "Mr. Griffith has been released on conditions and a personal recognizance bond since his initial appearance in

this case, which required findings that he will appear as required and not endanger anyone." Def.'s Mem., ECF No. 159-1, at 5; *see* 18 U.S.C. § 3142(b). The Government contends that this "conclusory" statement by Defendant is insufficient to satisfy his burden of demonstrating "by clear and convincing evidence" that he is neither a flight risk nor a danger to the community. Govt. Opp'n, ECF No. 163, at 14. In his Reply, Defendant elaborates a bit more and proffers that he "easily satisfies the requirement of showing that he is neither a flight risk nor a danger to the community pending appeal" as there is "no dispute that [he] has complied with the conditions of his release on bond since his initial appearance before the Court in March 2021." Def.'s Reply, ECF No. 167, at 11. Furthermore, he notes that if his sentence is affirmed on appeal, "it would be wholly irrational [for him to] to fail to surrender because the potential consequences of such failure are worse than Defendant's sentence." *Id.* at 12 (citation omitted).

The Court notes that Mr. Griffith was released on his personal recognizance from the date of his first appearance in this Court; he has a history of complying with his conditions of release, and this Court permitted Defendant to remain out on conditions of release and to voluntarily surrender to the BOP at a later date. *See* Transcript of September 1, 2023 Sentencing, ECF No. 164, at 52 (noting that defendant "has been compliant consistently with pretrial conditions [;] [h]e has no criminal history . . .[and] an extraordinarily strong work history.") Accordingly, the Court is satisfied that Defendant is not a danger to the community or a risk of flight. The Court next addresses whether resolution in Defendant's favor would result in a reversal and/or a reduced imprisonment sentence that would likely expire before the appeal concludes.

B. Would Resolution in Defendant's Favor Result in a Reduced Sentence?

As a preliminary matter, the Government argues that the Court need not analyze the Defendant's challenges to his sentence on Counts 2 and 3, as they will not impact his sentence on

Counts 4 and 5, for which he was sentenced to concurrent terms of imprisonment. More specifically, "even if [Defendant] were to prevail in the Court of Appeals on the issues enumerated in his Motion, he would still be subject to two concurrent terms of imprisonment — both of which are equal to the entire term of imprisonment currently imposed." Govt. Opp'n, ECF No. 163, at 5. A defendant sentenced to prison terms on multiple counts of conviction "cannot be released unless the appeal raises a substantial question likely to result in reversal of all counts on which imprisonment is imposed." *Perholtz*, 836 F.2d at 557; *see e.g. United States v. Dale*, 223 F.2d 181, 183 (7th Cir. 1955) ("As the sentences imposed [were] to run concurrently the burden was upon petitioner to show error as to each count."); *United States v. Bayko*, 774 F.2d 516, 522 (1st Cir. 1985) ("All agree that the provision breaks down into two distinct requirements: (1) that the appeal raise a substantial question of law or fact and (2) that if that substantial question is determined favorable to defendant on appeal, that decision is likely to result in reversal or an order for a new trial of all counts on which imprisonment has been imposed.")

Defendant acknowledges that he is challenging only Counts 2 and 3, but he contends that it he were to prevail and his convictions on these two counts were reversed, because the remaining two counts involve Class B misdemeanors, his re-sentencing "may warrant a sentence of less than 6 months." Def.'s Mem., ECF No. 159-1, at 12. Defendant notes that other defendants with similar conduct and history "were more often sentenced to probation than to incarceration." *Id.* (citing cases from only one Judge in this District Court).

The Government attempts to rebut Defendant's contention by pointing out that "the Court specifically made an alternative finding at sentencing that it would have imposed the same sentence on Griffith pursuant to the § 3553(a) factors independent of any rulings on sentencing guidelines issues." Govt. Opp'n, ECF No. 163, at 7. Defendant proffers however, and this Court agrees, that

the Court's statements "occurred in the context of analyzing which guidelines provisions would be taken into account for Counts 2 and 3." Def.'s Reply, ECF No. 167, at 2-3; *see* Sent. Tr., ECF No. 164, at 8-12 (containing discussion of the two guideline provisions and the Court's ruling, which overruled Defendant's objection regarding application of guideline 2A2.4(a) as opposed to guideline 2B2.3); *see id.* at 67-68 (In response to a question by the Government as to whether the Court would "be willing to make an alternative ruling" that it would "impose the same sentence under the Section 3553 (a) factors regardless of [the] rulings on the guidelines that have been objected to today," the Court indicated that it would make such an alternative finding) (emphasis added).

Defendant asserts that it "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." Def.'s Reply, ECF No. 167 at 3. Defendant's conclusory statement fails however to demonstrate any reason why – even if Counts 2 and 3 were overturned – this Court would alter its sentence on Counts 4 and 5 when it imposed the statutory maximum of six months on both counts. Defendant lacks support for his proposition that the appeal would result in a reversal or reduced sentence on Counts 4 and 5, thereby leaving standing a concurrent sentence of six months on both counts. Although this is one ground for denying the instant Motion, the Court will examine also whether substantial questions are raised by the Defendant's appeal, as this argument was addressed by both parties in their briefs.

C. Are Substantial Questions Raised by the Appeal?

Mr. Griffith enumerates several bases for his appeal that allegedly raise "substantial questions," namely: (1) the Court's denial of his motion to admit evidence of the Capitol Police

Operational Plan dated January 5, 2021, *see* Def.'s Mem., ECF No. 159-1, at 5-9; (2) the Court's denial of his Motion to Dismiss Counts Two and Three of the Indictment based on language in the indictment that the "United States Capitol and its grounds" were restricted due to the presence of "Vice President [Pence] and Vice President-elect [Harris]" who were visiting at the time of Defendant's entry into the area, *see id.* at 9-10; and (3) Defendant's assertion that this Court "reached findings of fact stemming from information not admitted in evidence in Defendant's case." *See id.* at 10-11. These points will be addressed in turn below.

1. Failure to Admit Evidence of Capitol Police Operational Plan

Defendant asserts that this Court excluded the Capitol Police Operational Plan dated January 5, 2021 ("Operational Plan"), which Defendant alleges "was used to prepare for the events on the following day and was relied upon by members of the Capitol Police, government legal counsel, and others to establish and enforce the restricted perimeter for the operational period that included January 6, 2021." Def.'s Mem., ECF No. 169-1, at 5. Defendant notes that the Operational Plan was excluded from evidence and questioning on grounds that "Defendant did not establish a foundation for treating that document as a business record and was required to do so to introduce evidence about its contents." *Id.* at 6; Fed. R. Evid. 803(6). Defendant argues that the Court's exclusion of the Operational Plan "kept Mr. Griffith from presenting exculpatory and relevant evidence about the lack of restriction for at least one event that day with a purported permit to gather on the steps of the Capitol during the time period that [he] was alleged to have been on the grounds." *Id.* at 8.

As a preliminary matter, the Court notes that Defendant's argument regarding this issue is generalized and contains no references to the record in this case, and in fact, the record herein contradicts Defendant's argument. Defendant orally moved *in limine* for the inclusion of

testimony from a United States Capitol Police witness as to restrictions on public access to the grounds of the United States Capitol on January 6, 2021, and the Government objected on alleged lack of relevancy. Thereafter, the parties briefed the relevancy of potential testimony of witnesses subpoenaed by Defendant to testify about the Operational Plan. *See generally* Defendant's Trial Brief on Relevancy, ECF No. 132, and the Government's Response thereto, ECF No. 133. Ultimately, the Court permitted Defendant to "call a United States Capitol Police employee to testify as to the number of permits granted for public demonstration on Capitol Grounds on January 6, 2021, the nature of those permits, and whether the events permitted ever occurred." *Id.; see* March 15, 2023 Order, ECF No. 135, at 2 (granting Defendant's oral motion *in limine)*.

In that Order, the Court explained that Defendant had "identified a Capitol Police "operational plan" dated January 5, 2021, that appears to list a demonstration permitted to occur on the Capitol steps on January 6, 2021" and the Court noted that "Defense counsel [was] focused on th[at] one alleged permit." March 15, 2023 Order, ECF No. 135, at 1. The Government asserts therefore, and this Court agrees, that because this Court granted the relief sought in the Defendant's motion *in limine*, "the defendant cannot meet his burden to show his appeal of the Court's Order gives rise to [a] "substantial question" on appeal likely to result in reversal or a new trial." Govt. Opp'n, ECF No. 153, at 8.

Furthermore, the Government explains that subsequent to the issuance of that Order, Mr. Griffith called United States Capitol Police employees as witnesses at trial, and he "had a fulsome opportunity to question those witnesses about whether any permit authorizing a demonstration on the Capitol steps for January 6, 2021, had in fact been issued." *Id.* According to the Government, "[n]either witness [called by Defendant] had any knowledge of any such permit, or of any authorized and permitted demonstration on the Capitol steps on January 6, 2021." *Id.* In his Reply,

Defendant proffers that "[i]f no such permit existed, it certainly contradicts the document Defendant sought to introduce." Def.'s Reply, ECF No. 167, at 4. But the Government asserts, and this Court agrees, that Defendant's "disappointment with [the witness] testimony does not create a cognizable basis for an appeal, let alone give rise to a "substantial question" that is likely to result in reversal." Govt. Opp'n, ECF No. 163, at 9.

Defendant alleges however that he was not allowed to question a witness about "exculpatory information detailed in the Operational Plan" that would have "expose[d]" the witness's "lack of credibility." Def.'s Mem., ECF No. 159-1, at 8; Def.'s Reply, ECF No. 167, at 5. The Government rebuts this allegation by pointing out that Defendant "did in fact call[ ] such witnesses at trial and asked about their knowledge concerning the Operational Plan and any permits authorizing demonstrations on the Capitol steps within the restricted area around the U.S. Capitol on January 6, 2021." Govt. Opp'n, ECF No. 163, at 9.[2] Moreover, Defendant "does not point to a single instance in which he was precluded from asking a witness about the Operational Plan or permits[.]" *Id.* Accordingly, this failure to support his argument also demonstrates Defendant's inability to show a "substantial question" that would warrant the relief he has requested in his instant Motion.

Finally, Defendant contends that there is "at least a substantial question on appeal whether the legal or factual premises of the Court's decision to exclude the Operational Plan was erroneous and prejudicial to Defendant [b]ecause the Operational Plan was relevant and exculpatory for purposes of notice and states of mind regardless of the truth of the matters asserted therein" and

[2] Defendant notes that "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." Def.'s Reply, ECF No. 167, at 4.

accordingly, no foundation for a hearsay exception was needed. Def.'s Mem., ECF No. 159-1, at 6-7; Fed. R. Evid. 801. The Government responds to this argument by noting accurately that "Griffith fails to provide a single citation to the record to support his claim that he sought to introduce the Operational Plan for something other than the truth of its contents." Govt. Opp'n, ECF No. 163, at 9. Accordingly, Defendant's contention now does not demonstrate the existence of a "substantial question."

The Government responds also to Defendant's argument that the map attached to the Operational Plan "show[ed] a different restricted perimeter than the one presented by [a] government witness," and that the Court's rulings precluded him from exploring the "differences between the two maps[.]" Govt. Opp'n, ECF No. 163, at 10 (quoting Def.'s Mem., ECF No. 159-1, at 7). The Government asserts that the map attached to the Operational Plan was admitted into evidence at trial, Trial Transcript 604-605, and as such, Defendant "could have asked witnesses about any alleged differences between the maps" but Defendant does not reference anywhere in the record where he did ask but was precluded from doing so. Govt. Opp'n, ECF No. 163, at 10. Accordingly, Defendant's argument in this regard fails to demonstrate a "substantial question." The Government raises two other arguments regarding the map. First, because Defendant "stipulated to the parameters and location of the restricted area perimeter shown in Government Exhibit 102 and the fact that the restricted area was closed to members of the public on January 8, 2021; *see* Stipulation of the Parties [Govt. Ex. 15], ECF No. 127, at 4-5, there is no "substantial question." Second, even assuming *arguendo* that the Operational Plan supported Defendant's claim that the restricted area around the grounds of the Capitol building differed in a material way from the restricted area depicted in Govt. Ex. 102, this would still fail to raise a "substantial question." Govt. Opp'n, ECF No. 163, at 11. That is because Defendant's convictions pursuant

to 18 U.S.C. § 1752(a)(1) and (a)(2) are supported not only by Defendant's entry onto the U.S. Capitol grounds but primarily his entry into the U.S. Capitol building "regardless of the precise parameters of the restricted area around the Capitol grounds in effect on January 6, 2021." *Id.*[3]

Upon review and analysis of the parties' arguments pertaining to the Operational Plan and any map(s) therein, the Court finds that Defendant has failed to demonstrate that there is a "substantial question" likely to result in reversal on appeal regarding this issue.

2. Language in the Indictment

Mr. Griffith moved to dismiss two counts of the Indictment based upon language in his Indictment that the "United States Capitol and its grounds" were restricted due to the presence of "Vice President [Pence] and Vice President-elect [Harris]" who were visiting at the time of Defendant's entry into the area. *See* Motion to Dismiss Counts Two and Three of the Indictment ECF No. 104, at 2-3. This Court held that while the allegation in the Indictment "may be incorrect," *see* Memorandum Opinion, ECF No. 140, at 2, the defect did not warrant a new trial pursuant to Fed. R. Crim. P. 29 or 33(a), *id.* at 6, and a challenge under Rule 12 was untimely. *Id.* at 3. Defendant is moving the Court of Appeals to reverse his conviction on grounds that this ruling "improperly denied him fundamental due process" because the Government sought conviction "on offenses that are different than those alleged by the grand jury in the Indictment." Def.'s Mem., ECF No. 159-1, at 9. Defendant alleges that "the fact the government has sought to remedy this error in other cases with superseding charging documents further support Mr. Griffith's interpretation of the fatal error created in his case." Def.'s Mem., ECF No. 159-1, at 10 & n.2 (referencing a superseding information in another case involving a similarly situated defendant and acknowledging that the Government did not strike the relevant language from the

[3] Defendant's [167] Reply does not mention the map(s).

Indictment or file a superseding Indictment in this case).[4]

The Government asserts that Defendant's claim regarding the variance from the Indictment is without merit and contrary to law. "[A]s the Supreme Court has repeatedly held, the government is entitled to prove criminal acts in the disjunctive, notwithstanding that the indictment charges them in the conjunctive." *United States v. Coughlin*, 610 F.3d 89, 106-107 (D.C. Cir. 2010) (citing *Griffin v. United States*, 502 U.S. 54, 56-60 (1991)); *see also Turner v. United States*, 396 U.S. 398, 420-421 (1970) ("[W]hen a jury returns a guilty verdict on an indictment charging several acts in the conjunctive . . . the verdict stands if the evidence is sufficient with respect to any one of the acts charged.")[5] In his Reply, Defendant "concedes that charging elements of the indictment in the conjunctive is permissible," but Defendant continues to contest the Government's failure to amend the indictment, which allegedly violated Mr. Griffith's due process rights because "a grand jury return[ed] an indictment based upon this knowingly false basis and then . . . the government . . . proceed[ed] under an amended, narrower set of facts." Def.'s Reply, ECF No. 167, at 7.

Defendant's Reply misses the mark. In this case, the Indictment contained two factual grounds supporting that the U.S. Capitol building and grounds were restricted within the meaning of 18 U.S.C. § 1752(a) – the presence of Vice President Pence and the presence of Vice President-elect Harris. The parties stipulated to then-Vice President's presence at the Capital on January 6. *See* Stipulation of the Parties, ECF No. 127, at 5 (stating that the Capitol building and grounds were a "posted, cordoned off, or otherwise restricted area where the Vice President and members of his immediate family were and would be temporarily visiting"). Accordingly, that stipulation

[4] The Government does not address why the Indictment in this case was not amended or superseded.

[5] In his Reply, Defendant does not address specifically these cases or proffer any contrary case law.

satisfies the Government's burden as to that element. The Government submits, and this Court agrees, that "there is no due process issue" where the Government "relied upon a sufficient but narrower set of facts to establish the requisite elements." Govt. Opp'n, ECF No. 163, at 12; *see* Memorandum Opinion, ECF No. 140, at 6 (quoting *Coughlin*).

Upon review and analysis of the parties' arguments pertaining to the alleged variance in the Indictment, the Court finds that Defendant has failed to demonstrate that there is a "substantial question" likely to result in reversal on appeal regarding this issue.

3. This Court's Findings of Fact

Defendant contends that this Court "reached findings of fact stemming from information not admitted in evidence in Defendant's case," and as support thereof, Defendant notes that [unspecified] "[p]ortions of the findings of fact recorded by the Court in this case" mirror findings entered by the Court in other cases. Def.'s Mem., ECF No. 159-1, at 11. As a preliminary matter, the Court notes that Defendant references other cases involving criminal defendants who entered the U.S. Capitol grounds and/or building on January 6, 2021, and accordingly, common sense dictates that there will be overlapping findings of fact in these cases, and the Court may take judicial notice of findings of fact from other judicial opinions.

More specifically, in this case, in the Findings of Fact, ECF No. 142, at 2, the Court stated that:

> Pursuant to the parties [127] joint stipulation, the Court restates a number of background facts that it has found over the course of three prior bench trials, mainly predicated on the testimony of Inspector Lanella Hawa of the United States Secret Police ("Secret Service") and Captain Carneysha Mendoza of the Capitol Police in *United States v. Rivera*, Crim A. No. 21-060 (CKK) (D.D.C.)

Defendant claims however that the sufficiency of the evidence is at issue here, and further, that this implicates the Confrontation Clause. In support of his claim, Defendant challenges a few

specific findings of fact that he alleges "are not supported by evidence admitted in the record." Def.'s Mem., ECF No. 159-1, at 11. More specifically, Defendant challenges this Court's Findings of Fact, ECF No. 142, at 7 (finding that Defendant shouted "Open the door," and that there was a "piercing alarm," and discussing Govt. Ex. 403); at 8 (finding that Defendant stepped over broken furniture "directly in front of him" upon entering); at 10 (finding that the Defendant saw a line of officers deploying chemical spray against rioters, and that he saw and stepped over broken glass, and saw a pile of destroyed furniture directly after entering the Senate Wing Doors). *See* Def.'s Mem., ECF No. 159-1, at 11 n.3. The Court notes that none of these challenged findings are dispositive regarding Defendant's conviction; rather, the Government presented sufficient evidence to support the conviction on Counts 2 through 5, and the Court considered these findings as background information with regard to its sentencing decision.

Moreover, in its Opposition, the Government addresses each of these specific challenges, as follows:

> To start, Griffith misleadingly claims that the Court's Findings include the "finding [that] Defendant *shouted* 'Open the door' . . . [based on] video exhibit Gov. Ex. 403 with no audio." Memorandum 11 n.3 (emphasis added). In fact, the Court's Findings state, "At approximately 2:38 PM, and contrary to Defendant's testimony, Defendant can be *seen* shouting at a police officer inside the window, 'Open the door.'" ECF Dkt. 142, citing Gov. Ex. 403 (emphasis added). Government Exhibit 403 is surveillance video from the Capitol; while it has no audio, the video clearly shows Griffith shouting "Open the door" at officers guarding the building. The video provides a sufficient evidentiary basis in the record for the Court's actual factual finding.
>
> Griffith's other examples fare no better. He claims that there is no evidentiary support for "piercing alarms" inside the Capitol building, but in Government Exhibits 316, 505, and 507 (among others) such alarms are clearly audible. Griffith claims that there is no evidence to show that he stepped over broken furniture "directly in front of him" after entering the Capitol building through the Senate Wing Door, but Government Exhibit 507 shows him confronting a pile of broken furniture directly in front of him in the room he accessed through the Senate Wing Door. Likewise, Griffith claims that there was no evidence that he saw officers deploying chemical spray against rioters, but Special Agent Pratt testified at trial that Griffith told her and her fellow agent during an interview that he had observed Capitol police in the area of the Capitol building firing tear gas, pepper spray,

> and percussive rounds into the crowd. Trial Transcript 324-325. Finally, Griffith contends that there is no evidence that he saw and stepped over broken glass, but Government Exhibit 404 shows that he (and several other rioters) saw and stepped over broken glass on the floor just outside the door to the Parliamentarian's office.

Govt. Opp'n, ECF No. 163, at 14.

The Government's citations to exhibits and testimony demonstrate that there is a sufficient evidentiary basis for each of the Court's findings challenged by the defendant in his motion for relief pursuant to § 3143(b)(1). Defendant's Reply does not address the Government's response regarding specific Findings of Fact challenged in its Motion. Instead, Defendant counters that "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." Def.'s Reply, ECF No. 167, at 9. In support of this allegation, Defendant cites to one sentence from the Findings of Fact: "For some period of time after 1:00 p.m. and before 2:42 p.m., MPD deployed chemical spray (pepper spray of 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.

The Court notes first that the Government did not directly address this generalized "aspect" of Defendant's anticipated appeal [mentioning "indications" that findings of fact "appear to have been influenced . . . "] because this was not presented in his Motion, but rather noted in his Reply. The Court notes further that while Judges in this District (including the undersigned) have handled numerous cases involving Defendants who were involved in the January 6, 2021 riots at the U.S. Capitol, each case is considered individually.

Second, with regard to the Finding of Fact relied upon by Mr. Griffith, Defendant appears to misunderstand the evidentiary record before the Court at the time the case was submitted for a

verdict. As noted previously herein, included within the parties' stipulation and admitted into evidence was the testimony of Capitol Police Captain Carneysha Mendoza. Captain Mendoza testified, *inter alia*, that police were battling rioters at the West Terrace of the Capitol in the early afternoon, including at approximately 2:45 PM. Gov.'s Ex. 006 at 82. Also admitted into evidence was a photo taken by Defendant himself capturing members of the Metropolitan Police Department battling rioters with chemical spray during the early afternoon. This evidentiary record more than supports the Court's general finding that MPD did, in fact "deploy chemical spray (pepper spray or something similar) to disperse insurrectionists . . . [on the] Upper West Terrace" for a period of time between "1:00 PM and 2:42 PM." And in fact, the entirety of the Court's findings were predicated upon the exhibits and stipulated testimony entered into evidence.

Upon review and analysis of the parties' arguments pertaining to the Findings of Fact (and the bases for the Findings specifically contested by Defendant), the Court finds that Defendant has failed to demonstrate that there is a "substantial question" likely to result in reversal on appeal regarding this issue. Accordingly, it is this 27th day of September, 2023,

ORDERED that Defendant's [159] Emergency Motion for Release Pending Appeal is DENIED.

/s/
COLLEEN KOLLAR-KOTELLY
UNITED STATES DISTRICT JUDGE