

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

UNITED STATES OF AMERICA :
 :
 v. : **Criminal Case No.**
 :
 DANIEL PAUL GRAY, : **1:21-cr-00495-ABJ**
 :
 Defendant :

**DEFENDANT’S MOTION IN LIMINE TO PRECLUDE GOVERNMENT’S
“RAINDROP THEORY” OF COLLECTIVE GUILT**

COMES NOW, Defendant Daniel Paul Gray (“Gray”), through the undersigned counsel, John M. Pierce, Esq., files this Motion in Limine to preclude evidence, discussion, or argument of the government’s “raindrop theory” that a Jan. 6th Defendant can be guilty of multiple federal crimes such as disorderly conduct or “picketing and parading” just for merely standing or walking inside the Capitol. This theory has no support in Supreme Court or Circuit Court case law and is wholly alien to due process of law.

According to the American criminal justice system, the Prosecution is required to prove each individual Defendant's guilt beyond a reasonable doubt first in order to find them guilty of a particular offense. Guilt of a crime cannot be freely transferable from one person to another. Therefore, one cannot accept proof that someone else committed a crime in order to impute or shift that culpability to another Defendant. Despite the well-known exception of a criminal conspiracy, the

Prosecution would still need to explicitly charge the Defendant with participating in a criminal conspiracy in order to shift the blame from one Defendant to numerous Defendants. One cannot simply infer that a conspiracy exists if the prosecutors do not assert one, and even then, prosecutors would also have to establish the elements of that specific defendant's choice to join and participate in the conspiracy. Other approaches like incitement or aiding and abetting are possible, but they also must be specifically alleged and specific rule and requirements would have to be satisfied as well. Other tactics, such as incitement or aiding and abetting, could be feasible, but they must still be properly alleged, and particular rules and requirements must also be met.

In general, collectivist or group criminal culpability is not permitted under American criminal law absent a charge that expressly allows it. We do not convict crowds or mobs or groups, nor do we do convict someone for merely being near a crowd or group. Even joining a mob or a crowd is not a felony in and of itself, unless the prosecution can demonstrate a deliberate conspiracy, as stated above. Yet, while it is possible for everyone in a group to be guilty on their own, this guilt must be proven specifically with regard to each particular individual and cannot be assumed just because other people are guilty nearby. Thus, being in the vicinity of a crime committed by someone else is not a crime and a Defendant cannot be found guilty merely as a result of being near or watching someone else committing

a crime.

There is no duty to leave a location simply because you see a crime being committed, albeit there may be other things going on, such as if police order an area to be vacated. For example, a person could stand near a bank while a robbery is taking place and film it on their phone; yet, even if the police determine that the area is unsafe and order everyone to leave, viewing or filming that crime is not a crime. During the events that transpired on January 6th, only a few hundred people out of the crowd of 10,000 committed violence against people and officers, damaged federal property with some even trying to break through the doors to the Senate and House chambers. However, in this instance, the security camera footage, which is the Government's own evidence, demonstrates with unambiguous clarity and accuracy that the majority of persons who intruded into the U.S. Capitol building clearly had no plans whatsoever, no sense of direction, and no commonality.¹ Crowds do not do things. Individuals do things.

On the contrary, Florida's controversial anti-riot law—framed identically to conceptual notions propounded by federal prosecutors in Jan. 6 cases—was quickly struck down by the first courts to address it. Whereas, in the wake of the

¹ See, Capitol Security camera video, produced by USAO as 7029 USCS 02 Rotunda Door Interior-2021-01-06_15h15min01s000ms.mp4 from USCP OPR Report 21-007, Exhibit 6 CCTV Recordings, from production DT_DocID: USCP-003-00000167, produced 11/18/2021, in Global Production DOJCB_008

George Floyd riots of 2020, Florida Governor Ron Desantis and the Florida legislature enacted HB 1, an “anti-riot” statute that was structured almost identically to match arguments of the United States in Jan. 6 cases. As a result, “Civil rights groups including the ACLU of Florida, the Dream Defenders and the Black Collective” immediately sued, alleging HB 1, because the law called "Combating Public Disorder," allegedly targets Black people specifically, infringes on Floridians' First Amendment rights and "deters and punishes peaceful protests." See [What to know about Florida's anti-riot law and the corresponding legal challenge - ABC News \(go.com\)](#).

The Florida “Combating Public Disorder” Act featured all the collective guilt liability notions that are now part of the government’s “raindrop theory” in the January 6th cases. See “Florida Adopts Nation's Toughest Restrictions On Protests,” NPR, April 19, 2021, <https://www.npr.org/2021/04/19/988791175/florida-adopts-nations-toughest-restrictions-on-protests>, (stating that Florida's governor has signed a law that he called the "strongest anti-rioting, pro-law enforcement measure in the country.” “It creates a new crime, "mob intimidation." And it requires that anyone arrested at a protest be denied bail until their first court appearance, likely making for overnight jail stays.”). Not long after service of the civil liberties lawsuit, U.S. District Judge Walker struck down the new law, pronouncing it fundamentally unconstitutional.

This is where things fall apart. Although both Governor DeSantis and Sheriff Williams argue that the phrase “willfully participate” is commonly understood, neither party offers an actual definition. Is it enough to stand passively near violence? What if you continue protesting when violence erupts? What if that protest merely involves standing with a sign while others fight around you? Does it depend on whether your sign expresses a message that is pro- or anti-law enforcement? What about filming the violence? What if you are in the process of leaving the disturbance and give a rioter a bottle of water to wash tear gas from their eyes?

The Governor would have this Court pencil in an exception for a person who merely “attend[s]” a violent demonstration but does not actively engage in violence or conduct that poses an imminent risk of injury or property damage. ECF No. 99 at 13. But the Governor offers no explanation or construction that limits when mere attendance becomes participation, except that a person must “intend to commit violence.” *Id.* But this ignores the plain text of the statute, which separates a person from an assembly of three or more persons sharing that intent. *See, The Dream Defenders, et al., v. Ron DeSantis*, 21-cv-191, ECF No. 137 (N.D. Fla. Sept. 9, 2021), Mark E. Walker, Chief United States District Judge at 53 (the court held injunction against anti-riot law in part because the legislation appeared to criminalize the defendant’s protest activities even if he did not participate in the violent acts of others).

The State of Florida appealed the District Court’s order.

Interestingly enough, the Biden Justice Department has joined the Plaintiffs as amicus curiae, arguing that there is a high probability that Desantis’ anti-riot law is, in fact, unconstitutional. *See Dream Defenders v. DeSantis*, No. 21-13489 (11th Cir. Feb. 3, 2023), Brief for the United States as Amicus Curiae at p. 7-8 (saying

“In defendants’ [State of Florida’s] view, the statute is properly limited to those who engage in or aid or abet violence because its two intent elements work together and both apply to the criminally accused. In plaintiffs’ [Dream Defenders, ACLU, etc.] view, the Legislature’s decision to add new phrasing to the common-law definition of “riot” indicates that [the new act] reaches more persons than its predecessor statute and sweeps in the constitutionally protected activity of nonviolent demonstrators who are part of an assembly that turns violent.”). The Biden Justice Department has suggested that, although the Florida “Combating Civil Disorder Act” should first undergo review in the Florida Supreme Court, the Act would likely fail such constitutional review and would also likely fail ultimate review before *federal* appellate courts. In any case, the U.S. Justice Department argues, the Act’s individual-liability-for-a-mob’s-behavior notions should continue to be enjoined. The case is currently still on pending before the 11th Circuit.

Sadly, in the context of January 6 cases, U.S. prosecutors (and a handful of U.S. district judges presiding in January 6 cases) have changed prior assessments of individual rights during social disorders based on political beliefs. Here, and only here, is the Government arguing that any person or citizen who dares to participate in a First-Amendment protest or demonstration is acting as an illegal “raindrop” and can therefore be convicted of crimes based upon the “flood” of others who commit crimes during a riot. Yet, during the context of the George

Floyd riots they were arguing against that law and contradictorily claiming it was unconstitutional. How can a law that applies to groups or mobs be unconstitutional in one situation but be which constitutional when applied to a similar situation involving groups or mobs if both resulted in destruction of public and private property and violence.

CONCLUSION

In conclusion, for all the reasons sated above, the Court should grant this motion by Defendant Gray and issue an order in limine:

- 1) Prohibiting and precluding the Government from telling or arguing to the jury that a person can be criminally liable for the crimes of a mob, for merely standing or peacefully assembling or walking in a location.
- 2) Prohibiting and precluding the Government from telling or arguing to the jury that a person can be convicted of the crimes alleged in this case by merely witnessing acts of others, or standing or walking in a given place.
- 3) Prohibiting and precluding the government from arguing that an individual who is merely present can be convicted as a “raindrop” amid a rainstorm of others who caused violence or disruption of events.

Dated: August 3rd, 2023

Respectfully submitted,

/s/ John Pierce

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CERTIFICATE OF SERVICE

I hereby certify that on August 3, 2023, I uploaded this document to the Court's ECF system, serving all parties of record.

/s/ John Pierce