

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

**MOTION *IN LIMINE* REGARDING AUTHENTICATION
OF CERTAIN VIDEO, PHOTO, AND SOCIAL MEDIA EVIDENCE**

The government hereby moves *in limine* regarding the authentication of photo and video evidence under Federal Rules of Evidence 104, 901, and 902. The government has provided Defendants with photos and videos it plans to introduce at trial, but if no agreement regarding this evidence can be reached, the government seeks a pretrial ruling from the Court finding that the categories of photo and video evidence detailed herein may be properly authenticated and admitted using the methods outlined below, assuming sufficient foundation is laid at trial regarding authenticity. Except for video evidence from the Senate Recording Studio, which is self-authenticating under Federal Rule of Evidence 902, the government does not, in this motion, seek a ruling that any particular exhibits are authentic or admissible.

BACKGROUND

Much of the riot at, and attack on, the United States Capitol Building was recorded on video: on surveillance footage captured by mounted U.S. Capitol Police (“USCP”) cameras; by body-worn cameras affixed to Metropolitan Police Department (“MPD”) officers; and by cameras and cellphones carried by journalists and rioters. The government’s case-in-chief at trial will rely in part on USCP and MPD camera footage to prove the defendant’s specific conduct and the larger context in which it took place. Should the defense not stipulate to the authenticity of these two

types of footage, the government will call appropriate USCP and MPD witnesses at trial. But the government also intends to introduce footage from videos taken by other rioters or by journalists, which FBI agents obtained via either open sources or searches of other defendants' devices. For this type of video evidence, the government seeks a pretrial ruling on authenticity.

LEGAL PRINCIPLES

I. Authenticity.

Under Federal Rule of Evidence 901(a), “[t]o satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is.” Rule 901(b) provides a non-exhaustive list of examples of evidence that satisfies this requirement, including comparisons to authenticated specimen, and examining the “appearance, contents, substance, internal patterns, or other distinctive characteristics of the item, taken together with all the circumstances.” FRE 901(b)(3), (4).

Establishing an item’s authenticity is not “a particularly high hurdle.” *United States v. Ortiz*, 966 F.2d 707, 716 (1st Cir. 1992); *see also United States v. Vidacak*, 553 F.3d 344, 349 (4th Cir. 2009) (“The burden to authenticate under Rule 901 is not high”); *Link v. Mercedes-Benz of N. Am., Inc.*, 788 F.2d 918, 927 (3d Cir. 1986) (“The burden of proof for authentication is slight.”); *United States v. Hassanshahi*, 195 F. Supp. 3d 35, 48 (D.D.C. 2016) (“The threshold for the Court’s determination of authenticity is not high, ... and the proponent’s burden of proof for authentication is slight[.]”) (citation and quotation marks omitted).

Rule 901 “requires only a prima facie showing of genuineness” for the evidence to be admissible. *United States v. Harvey*, 117 F.3d 1044, 1049 (7th Cir. 1997). Stated differently, “[t]he standard the district court must apply in evaluating a document’s authenticity is whether there is

enough support in the record to warrant a reasonable person in determining that the evidence is what it purports to be.” *United States v. Blanchard*, 867 F.3d 1, 6 (1st Cir. 2017). After clearing that low hurdle, the evidence should *first* be admitted, to *subsequently* allow the fact finder to make the ultimate decisions regarding authenticity and probative value. *See Vidacak*, 553 F.3d at 349 (“The district court’s role is to serve as gatekeeper in assessing whether the proponent has offered a satisfactory foundation from which the jury could reasonably find that the evidence is authentic.”); *United States v. Belfast*, 611 F.3d 783, 819 (11th Cir. 2010) (“Once that *prima facie* case is established, the evidence is admitted and the ultimate question of authenticity is decided by the jury.”).

To make out a *prima facie* showing of authenticity, “circumstantial evidence of authenticity can be sufficient.” *United States v. Bruner*, 657 F.2d 1278, 1284 (D.C. Cir. 1981).¹ Establishing authenticity of photographic evidence does not require testimony from a witness who was physically present and observing the scene at the time it was captured by the camera. *United States v. Rembert*, 863 F.2d 1023, 1027 (D.C. Cir. 1988). And, importantly, the party seeking to admit evidence need not “rule out all possibilities inconsistent with authenticity, or to prove beyond any doubt that the evidence is what it purports to be.” *United States v. Holmquist*, 36 F.3d 154, 168 (1st Cir. 1994). Nor is government required to establish that the proffered evidence has not been altered or staged. *United States v. Broomfield*, 591 F. App’x 847, 852 (11th Cir. 2014) (finding

¹ In deciding preliminary questions about the admissibility of these photos and videos, “[t]he court is not bound by evidence rules, except those on privilege,” (FRE 104(a)), and may rely upon hearsay or otherwise inadmissible evidence in establishing the authenticity. *See, e.g., United States v. White*, 116 F.3d 903, 914 (D.C. Cir. 1997).

sufficient evidence of authenticity even though “there was no testimony establishing that the recording equipment was reliable or that the video was not altered or staged”).²

Indeed, questions concerning possible alterations go to the weight the fact finder should give the evidence, not to its authenticity. *United States v. Safavian*, 435 F. Supp. 2d 36, 41 (D.D.C. 2006) (arguments that earlier emails included in an email chain may have been altered before being forwarded are “more appropriately directed to the weight the jury should give the evidence, not to its authenticity”). The government must only “demonstrate that, as a matter of reasonable probability, possibilities of misidentification and adulteration have been eliminated.” *United States v. Celis*, 608 F.3d 818, 842 (D.C. Cir. 2010) (quoting *United States v. Stewart*, 104 F.3d 1377, 1383 (D.C. Cir. 1997)); *see also, e.g., United States v. Bowens*, 938 F.3d 790, 794-95 (6th Cir. 2019) (explaining that while “[a]nyone *could have* used the defendants’ Facebook accounts, just as the pictures *could have* depicted the men smoking tobacco cigars, and ‘getting high’ *could have* been a reference to skydiving,” there was sufficient circumstantial evidence “for the jury to infer that the accounts belonged to the defendants, and that the defendants were the authors of the posts [which were] about using marijuana” (emphasis added)).

II. Admissibility.

In deciding preliminary questions about the admissibility of photos and videos, “[t]he court is not bound by evidence rules, except those on privilege.” Fed. R. Evid. 104(a). In other words, the government may rely upon otherwise inadmissible evidence in establishing the authenticity of the photo and video evidence described in this motion. *See, e.g., United States v. White*, 116 F.3d

² As a side note, the Eleventh Circuit also held that the factors articulated in *United States v. Biggins*, 551 F.2d 64, 66 (5th Cir. 1977), are inapplicable in criminal cases where the government finds a video on YouTube, holding that if the *Biggins* factors applied, “the prosecution could seldom, if ever, authenticate a video that it did not create.” *Broomfield*, 591 F. App’x at 852.

903, 914 (D.C. Cir. 1997). Of course, even with a pretrial ruling that evidence is authentic, and thus admissible, the government must introduce sufficient evidence at trial from which a reasonable fact-finder could reach the same conclusion regarding authenticity. *See, e.g., United States v. Gammal*, 831 F. App'x 539, 542 n.6 (2d Cir. 2020) (unpublished) (“Insofar as the District Court relied on non-public information to make its preliminary determination, it did not err because it did not do so in lieu of the presentation of sufficient authenticating public evidence later at trial.”); *United States v. Puttick*, 288 Fed. App'x 242, 246 (6th Cir. 2008) (unpublished) (“It is permissible for the judge to make a preliminary determination as to authentication, admit the evidence conditionally under Rule 104(b), and then allow the jurors to be the final arbiters of whether it was actually authenticated.”); *United States v. Branch*, 970 F.2d 1368, 1371 (4th Cir. 1992) (“Thus, even though the district court may have ruled during an in camera proceeding that the proponent had presented sufficient evidence to support a finding that a tape recording was authentic, evidence that would support this same ruling must be presented again, to the jury, before the tape recording may be admitted.”).

III. FRE 902 and FRE 901(b)(3) – Comparison with A Known Specimen.

Federal Rule of Evidence 902 provides that certain materials, including materials accompanied by a proper certification and materials pulled from found on a government public websites, are self-authenticating. Fed. R. Evid. 902(5), (11), (13).

Another method for authentication is by comparison: “Authentication by comparison is routine.” *Valve Corp. v. Ironburg Inventions Ltd.*, 8 F.4th 1364, 1371 (Fed. Cir. 2021). For example, photos and videos of a scene can be authenticated by comparison with previously admitted exhibits that show the same scene from other angles. *See United States v. Hoyt*, 946 F.2d 127 (D.C. Cir. 1991) (“[W]e will assume without deciding that the photograph was sufficiently

authenticated by comparison with previously admitted Government Exhibit 11, which showed the door from another angle.”); *Diaz v. County of Ventura*, 512 F. Supp. 3d 1030, 1035 (C.D. Cal. 2021) (“Here, the videos can be authenticated through other evidence on the record—namely, other video and photographic evidence of the incident that Green provides.”); *State v. Haight-Gyuro*, 186 P.3d 33, 38 (Ariz. Ct. App. 2008) (finding video sufficiently authenticated by comparison with separately authenticated photographs); 5 Weinstein’s Federal Evidence § 901.03 (“When authentication of an item of evidence is accomplished by comparison with a specimen, the specimen itself must be proved to be authentic [...] Nor does it matter what type of evidence the specimen consists of; the requirements for authenticating all types of specimens ... are the same: prima facie proof that they are what their proponent claims them to be.”).

ARGUMENT

The government’s evidence will show that all the videos and photos described herein fairly and accurately depict events at the Capitol which are relevant to an issue of consequence in Gray’s trial. While admission of USCP, House and Senate Recording Studio, and MPD video footage should be noncontroversial, the following discussion will address the evidentiary basis for authentication of all the videos the government intends to offer at trial, including those “official” sources. The bulk of the discussion focuses on authentication of videos from other sources—“third-party” videos—the distinctive events and characteristics visible in those videos, and the corroboration of the authenticity of those videos found from other pieces of evidence.

Notably, in other January 6 trials in this district, the court found similar “open-source” evidence to be authentic by comparison under Rule 901(b)(3), including when defense counsel herein conceded the issue in *United States v. Thomas*, 1:21-cr-0052-DLF (ECF No. 45, to which

no response was filed) (granted in March 21, 2023 Minute Order).³ *See also United States v. Rodean*, 1:21-cr-57-TNM, Dkt. 50 (D.D.C. Apr. 20, 2022); *United States v. Seefried, et al.*, 1:21-cr-287-TNM, Dkt. 56 (D.D.C. May 20, 2022). In both *Rodean* and *Seefried*, the court compared screenshots of video from a known source (USCP CCTV), which showed the Senate Wing Door from the inside facing out, with screenshots of video footage taken by an unspecified rioter showing the Senate Wing Door from the outside looking in. *See, e.g., Rodean*, Dkt. 50 at 2. The court noted similar objects depicted in both sets of screenshots: doors of a building flanked by windows, a crowd of rioters near the windows, and a wooden beam sticking through a shattered window. *Id.* The court found these similarities sufficient and granted the government's pretrial motion to find the video taken by the unspecified rioter to be authentic. *Id.* at 6.

I. House and Senate Recording Studio Videos and the Official Proceeding Compilation.

The government intends to introduce video evidence of the Joint Session of Congress that assembled on January 6, 2021 to declare the winner of the 2020 presidential election by reviewing and certifying the Electoral College ballots. Specifically, the United States Senate has an affiliated entity called the Senate Recording Studio that contemporaneously records Senate proceedings and distributes those recordings to the public. The Recording Studio is comprised of Senate TV, Hearing Rooms, and a Studio function. Senate TV is comprised of eight cameras which record activity occurring on the Senate floor. This footage is also broadcast through the Cable-Satellite Public Affairs Network (CSPAN). The Senate Studio can also capture contemporaneous footage

³ However, Attorney Pierce later reversed course when he submitted objections to the Government's exhibit list, a submission the Court found "did not reflect a good-faith effort to comply with the Court's orders" because "[t]he defendant [] objected to every exhibit, with little or no explanation, including those to which the Court ha[d] already made a preliminary finding of admissibility with no previous objection from the defense, see Dkt. 45." *See id.* (May 11, 2023 Minute Order).

of the House of Representative proceedings, used for broadcast, when there are joint sessions of Congress.

The Senate Recording Studio recorded the proceedings relating to the Electoral College Certification on January 6, 2021, up to the point when the rioters breached the Capitol Building itself and the Senate was forced into recess. After the rioters were cleared from the Capitol building, the Senate Recording Studio continued recording the Electoral College Certification process once the joint session resumed. The Senate Recording Studio also recorded rioters who were present on the Senate floor during the recess. *See* <https://www.senate.gov/floor/>, last accessed Nov. 7, 2022. The Senate Recording Studio recorded at least three events relevant to this trial: Vice President Michael Pence gaveling the session to order and reading from Senate Congressional Resolution 1 and 3 U.S.C. § 17 in conjunction with the official proceeding of the Electoral College Certification; the Senate being gaveled into recess, and resulting evacuation of the Senate Floor Chamber, after rioters breached the building; and the Joint Session of Congress reconvening to finish the Electoral College Certification hours later, after the rioters were cleared from the U.S. Capitol.

The United States Senate uses the Senate Recording Studio to contemporaneously record Senate proceedings and distribute those recordings to the public. *See* <https://www.senate.gov/floor/>, last accessed Nov. 6, 2022 (publicly available archived recordings of Senate Recording Studio). The Senate Recording Studio recorded the proceedings relating to the Electoral College Certification on January 6, 2021, up to the point when the rioters breached the building and forced the proceedings into recess. *See id.*, proceedings for January 6, 2021. Subsequently, the Senate Recording Studio recorded the Electoral College Certification proceedings after the rioters were cleared from the Capitol Building and the session resumed. *Id.*

The Congressional videos from the Senate Recording Studio are self-authenticating and should be admitted on that basis. Federal Rule of Evidence 902 governs the authentication of evidence that is “self-authenticating.” Thus, pursuant to Rule 902, the government hereby gives notice of its intent to offer the records and submits that the videos are self-authenticating under Rule 902(11) and (13). *See* Certification of Diego Torres, attached as Exhibit 1.

The video footage is also self-authenticating under Federal Rule of Evidence 902(5). The video feed from which the clips are taken are available on the Senate.gov website. *See* <https://www.senate.gov/floor/>, last accessed Nov. 7, 2022. Moreover, the certification of Diego Torres from the Senate Recording Studio establishes the video as an official publication. It is well established that materials found on a government public website are self-authenticating under Federal Rule of Evidence 902(5). *See Williams v. Long*, 585 F. Supp. 2d 679 (D. Md. 2008). *See also Singletary v. Howard Univ.*, No. 1:17-cv-01198, 2018 U.S. Dist. LEXIS 164945, 2018 WL 4623569 (D.D.C., Sept. 26, 2018), *MMA Consultants 1, Inc. v. Republic of Peru*, 245 F. Supp. 3d 486 (S.D.N.Y. 2017) (Congressional transcripts self-authenticating under Rule 902(5)).⁴

II. USCP CCTV, Body-Worn Camera, and Open-Source Crime-Scene Videos.

Here, the government anticipates offering video clips from USCP mounted cameras and MPD body worn cameras, as well as from other sources. Some of these other sources include reporters who were present in the Capitol on January 6, 2021, defendant Gray, himself, defendant’s fellow rioters, or other members of the crowd. Many of the videos were obtained through open-source means and are publicly available; others were obtained by agents from searches of other January 6 defendants’ devices. Gray’s own videos, such as those from Instagram, were obtained

⁴ The government may also offer similar evidence from the House Recording Studio. *See* Certification of Douglas Massengale, attached as Exhibit 2. The government submits that the same principles would support the authentication of any such evidence.

through tips sent to the FBI, and through legally obtained search warrants. Such evidence satisfies the requirements of Fed. R. Evid. 902(11), (13) (certified documents) and 901(b)(4), which allows authentication by way of “the appearance, contents, substance, internal patterns, or other distinctive characteristics of the item, taken together with all the circumstances.” It also accords with the requirements of Rule 901(b)(9), which allows authentication by “[e]vidence describing a process or system and showing that it produces an accurate result.”

For any such videos, the government will establish authenticity by calling the appropriate witness to satisfy Rule 901(b), then by asking the jury to compare those exhibits with other authenticated exhibits, in particular, to USCP and MPD camera footage. Fed. R. Evid. 901(3). This footage will confirm that such videos are what they purport to be: recordings of the same events, captured from slightly different perspectives, and in some cases depicting events and sounds that were not captured by the USCP or MPD cameras.

The government expects that the FBI case agent witness will testify as follows: he has been investigating January 6 Capitol riot-related cases since shortly after January 6, 2021; he has reviewed hours of video footage recorded by USCP CCTV cameras, MPD body worn cameras, journalists, and rioters; and he is personally familiar with the locations depicted in those videos from being physically present at the Capitol January 6, 2021 because he and his colleagues from the FBI’s Washington Field Office were summoned as reinforcements due to the emergency at the Capitol; USCP or MPD officers may testify likewise. This testimony will assist the Court and the jury in identifying similarities between USCP and MPD videos and the other non-government and/or open-source videos offered by prosecution.

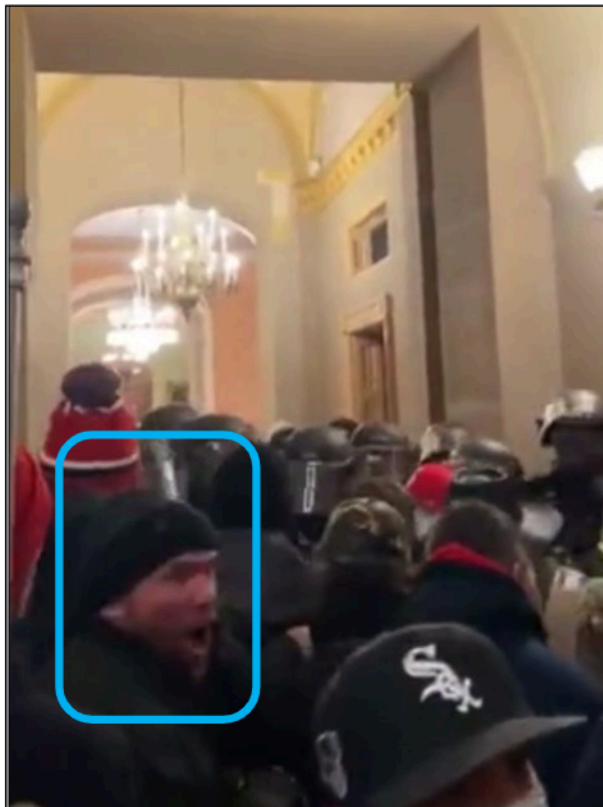
For example, these witnesses will testify about body worn camera footage of MPD officers inside the United States Capitol building, including in the Senate Hallway, which is identifiable in

the screenshots by the large chandeliers hanging from the ceiling. A few screenshots from a three-to-five minute span from those body worn cameras are below, which show, at a minimum, the defendant taunting and physically resisting law enforcement officers' efforts to prevent the mob from advancing further down the Senate Hallway:





The case agent and/or MPD officer(s) will further testify that video obtained from open sources, such as YouTube, show the same incident and time period, but from the other vantage point, where the rioters were standing:



The case agent or MPD officer can identify regarding (a) common architectural and grounds features, such as the chandeliers in the Senate Hallway, to establish that both videos depict the same areas on restricted Capitol grounds or in the Building, (b) common clothing items, to establish that both videos show the same people, particularly the defendant, and (c) common

gestures and movements to establish that both videos show the same moment when rioters, including the defendant, physically resisted the officers' efforts to control the mob.

The Government will also seek to introduce video from defendant's own Instagram account, which were obtained through tips to the FBI and through legally obtained search warrants. The government will authenticate the photos and videos from Gray's Instagram account through the case agent, who will testify that the records were received from Instagram with an accompanying certificate of authenticity, which establishes their authenticity as business records. One such video, below, for example, was obtained through tips and through a search warrant; the case agent will testify that it came from an Instagram page registered to the defendant, that the appearance of the individual depicted in the video is consistent with his appearance in other videos from the Instagram account and from other evidence taken on January 6, that the video was posted in or around January 7, 2021, and that it appears to be filmed in a DC-area airport, as Gray prepared to fly home from Washington, D.C.

The agent will also testify that in the video, Gray is heard admitting to his criminal conduct on January 6, such as when he states as follows: "we literally pushed them [the police] from the front steps of the Capitol ALL the way back . . . ALL the fuckin' way back to the back of the Capitol . . . all the Senators fucked off, they all ran away . . . we pushed [the police] all the way from the very very front to the back door of the Capitol . . . pushing them down a staircase . . .!"



In some instances, the government may simply authenticate a video or photograph from these sources just by establishing the video or photograph’s contents as fair and accurate, as with open-source video. In each instance, as exemplified above, the case agent will be able to point out similarities sufficient to satisfy the low *prima facie* showing required for this Court to admit the offered photos and videos into evidence and allow the jury to make the final factual determinations about their authenticity. *See Vidacak*, 553 F.3d at 349; *Belfast*, 611 F.3d at 819. As with all admitted evidence, it will then be up to the jury, as the finder of fact, to determine how much weight to give this evidence.⁵

⁵ Alternatively, the Court may find the agent’s testimony establishes the authenticity of the proffered photos and videos due to their “appearance, contents, substance, internal patterns, or other distinctive characteristics ... taken together with all the circumstances.” FRE 901(b)(4).

CONCLUSION

For the foregoing reasons, the government respectfully requests that this Court find the grant this Motion.

Respectfully submitted,

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