UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, Plaintiff, v. ERIK HERRERA Defendant.	Case No. 1:21-CR-00619-BAH

ERIK HERRERA'S REPLY IN SUPPORT OF HIS MOTIONS IN LIMINE

I. INTRODUCTION

Mr. Herrera moved to exclude (1) the social media post from Instagram depicting a person, alleged to be Mr. Herrera, in the Senate Parliamentarian's Office on January 6, 2021, (2) any general evidence, including testimony, videos, photos, or other exhibits of the events of January 6, 2021, at the United States Capitol, the ellipse, and area surrounding both locations, (3) any evidence the government seeks to admit pursuant to Federal Rule of Evidence 404(b), and (4) any evidence the government offers pursuant to 902(11). See ECF No. 37. The government filed their opposition focusing primarily on Mr. Herrera's first and second motions in limine. ECF No. 41. The government's opposition is without merit and Mr. Herrera's motions in limine should be granted.

II. THE COURT SHOULD EXCLUDE THE SOCIAL MEDIA POST FROM INSTAGRAM DEPICTING A PERSON, ALLEGED TO BE MR. HERRERA, IN THE SENATE PARLIAMENTARIAN'S OFFICE ON JANUARY 6, 2021, AND THE GOVERNMENT'S ARGUMENTS TO THE CONTARY LACK MERIT.

In their opposition the government argues this Instagram post is (1) relevant under FRE 401, (2) not bared by FRE 403, and in a footnote seems to argue (3) not bared by FRE 801 pursuant to exceptions found in FRE 803(1), (2), and (3). ECF No. 41 at 5-8, n.1. The government is

mistaken on all points. Further, the government fails to directly address the argument related to FREs 602 and 901.

A. Despite the Government's Arguments to the Contrary This Instagram Post Should be Excluded under FRE 401 and 402.

This Instagram post is not relevant and thus inadmissible. The government's argument is somewhat scattered but the government seems to argue the Instagram post at issue is relevant (1) as direct evidence Mr. Herrera acted corruptly as it relates to the 1512(c)(2) count, (2) as evidence that he had knowledge he was not lawfully permitted inside the capitol or the Senate Parliamentarian's Office, (3) as evidence that he had wrongful intentions, (4) as evidence he was actually in the capitol as it relates to the 1752(a)(2) charge and 5104(e)(2)(G) charge[1], (5) as evidence he engaged in disruptive conduct as related to the 5104(e)(2)(D) charge, and (6) as evidence he intended to disrupt the orderly conduct of government business or official functions as related to the 1752(a)(2) charge. ECF No. 41 at 5-7. These arguments all lack support and merit.

The government states the Instagram post "is direct evidence that the Defendant acted "corruptly" as it pertains to the 1512(c)(2) count" but tellingly fails to explain *how* it does that. *Id.* at 6. The government then goes on to state the post "shows that the Defendant had knowledge that he was not lawfully permitted inside the Capitol and by extension the Senate Parliamentarian's Office, but again, tellingly fails to explain *how*. *Id.* The government then turns to the caption that reads "reclaiming Aztlan because I love America. Querer es Poder!" and states this "shows that his intentions were wrongful in that he would not have to 'reclaim' something that had not been taken," but fails to expound upon how this, in any way, demonstrates wrongfulness as relevant here. *Id.* at 6-7. Certainly, it is sometime wrong to reclaim something that was taken, but the

[1] To the extent the government intends to use this evidence to demonstrate Mr. Herrera was in the capitol, Mr. Herrera still moves to exclude under FRE 401. Further, because the government has other, less prejudicial evidence that could be used to establish this, the post should be excluded under FRE 403. *Old Chief v. United States*, 519 U.S. 172, 184-85 (1997); *see also United States v. Layton*, 767 F.2d 549, 555 (9th Cir. 1985) (stating the availability of alternative evidence that can establish the same fact but without potential prejudice or confusion, is a factor to be evaluated in the balance).

government surely is not attempting to suggest Mr. Herrera was attempting to reclaim Aztlan, a mythical Aztec homeland, by allegedly standing in the Senate Parliamentarian's office holding a seemingly random stack of papers, as a part of an alleged "mob" originating from a rally in support of former President Trump. The post does not demonstrate wrongfulness and is irrelevant.

The government goes on to assert that the alleged grabbing of the seemingly random stack of papers "shows the Defendant engaged in 'disruptive conduct…with the intent to impede, disrupt or disturb the orderly conduct of a session of Congress'" but yet again fails to discuss *how* such alleged conduct constitutes disruptive conduct or shows an attempt to disrupt or disturb the orderly conduct of a session of Congress. ECF No. 40 at 7. The post does not demonstrate disruption or intent and is irrelevant.

B. Despite the Government's Arguments to the Contrary This Instagram Post Should be Excluded Under FRE 403.

The government's argument here is similarly difficult to decern and faulty. After noting the post and caption are "one of the most directly relevant pieces of evidence in this case" it goes on to side step the prejudicial concerns noted in Mr. Herrera's motions in limine and simply states "the United States seeks to introduce this evidence for the reasons set for above as it directly demonstrates an act that is part of the charged offense performed contemporaneously with the charged crime, not to confuse the jury or facilitate improper inferences about the circumstances of the photo." ECF No. 41 at 8. A major issue with the government's position is that it looks only at what they indent to use the evidence for. But the issue here is not that the government intends to use the evidence to confuse or prejudice the jury but that there is an inherent risk that this evidence will confuse or prejudice the jury—a risk that substantially outweighs the probative value of the evidence.

C. This Instagram Post Should be Excluded under FRE 801 and 802.

The government argues in a single footnote that "pursuant to Fed. R. Evid. 803, such evidence would be excluded by the hearsay rule" and then cites to Fed. R. Evid. 803(1), (2), and (3). ECF No. 41 at n. 1. At first blush it appears the government is conceding that the post should

be excluded by the hearsay rule. However, the citation to FRE 803 indicates the government may believe the post falls within three exceptions to the hearsay rule.

FRE 803(1) provides an exception for present sense impressions, which is "[a] statement describing or explaining an event or condition, made while or immediately after the declarant perceived it." Fed. R. Evid. 803(1). The trouble with this argument is that the government provides no information of when this post was posted, thus leaving the Court unable to determine if it was made "while or immediately after the declarant perceived it." Further still, the government fails to explain how the statement is a present sense impression—what is being perceived and how is the statement memorializing it? A question unanswered by the government's footnote.

FRE 803(2) provides an exception for an excited utterance, which is "[a] statement relating to a startling event or condition, made while the declarant was under the stress of excitement that it caused." It is unclear from the governments opposition how this post could constitute an excited utterance. The government provides no information as to what the startling event or condition was or whether the alleged declarant was still under that stress of excitement of this event when the statement was made.

FRE 803(3) provides an exception for a declarant's then-existing mental, emotional, or physical condition, which is "[a] statement of the declarant's then-existing state of mind (such as motive, intent, or plan) or emotional, sensory, or physical condition (such as mental feeling, pain, or bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the validity or terms of the declarant's will." The government again does not expound as to how this post constitutes a then-existing mental, emotional, or physical condition.

Because this post is hearsay as defined by FRE 801 it should be excluded pursuant to FRE 802. *See* Fed. R. Evid. 801 and 802.

III. THE COURT SHOULD EXCLUDE ANY GENERAL EVIDENCE, INCLUDING TESTIMONY, VIDEOS, PHOTOS, OR OTHER EXHIBITS OF THE EVENTS OF JANUARY 6, 2021, AT THE UNITED STATES CAPITOL, THE ECLIPSE, AND AREA SURROUNDING BOTH LOCATIONS AND THE GOVERNMENTS ARGUMENTS TO THE CONTRARY ARE UNAVAILING.

The government first argues that this motion in limine is overbroad. Specifically, the government notes "[t]he Defendant's motion does not refer to any specific evidence along these lines, or provide any concrete examples, thus a motion to exclude all general evidence of this kind is vague and overbroad." ECF No. 41 at 9. The reason "the Defendant's motion does not refer to any specific evidence along these lines" is because to date the government has not produced a draft exhibit or witness list. As the government concedes Mr. Herrera has only received "an outline of areas of interest discussing the type of witnesses the United States may call at trial, as well as the types of exhibits it may introduce – in *general terms*." *Id.* (emphasis added). The government points to the fact that "the United States has produced the discovery in this case, including global discovery productions, and the Defendant has access to specific pieces of evidence it can specifically object to." *Id.* The discovery in this case, including the global discovery, is composed of at least, hundreds of gigabytes of data including documents, photos, and videos. Indeed Mr. Herrera's discovery alone, including global discovery, totals approximately 295 gigabytes with over 4300 files. Rather than filing what would amount to an unwieldy number of motions in limine related to these thousands of files, and because Mr. Herrera did not have the benefit of an exhibit or witness list, he has asked this Court for an evidentiary barrier limiting the evidence that may be introduced to that related to his alleged conduct—a reasonable request under the present circumstances.

A. Despite the Government's Argument to the Contrary, General Evidence of the Events of January 6, 2021, should be Excluded under FRE 401 and 402.

The government asserts such general evidence is relevant as "intrinsic evidence" and as evidence of aiding and abetting. ECF No. 41 at 10-12. The government is wrong on both counts. The evidence is neither relevant intrinsic evidence nor relevant to demonstrate aiding and abetting.

The government listed out the following types of evidence they will seek to introduce, without specific reference to any individual piece of evidence: evidence that shows the "official proceeding" of a Joint Session of Congress on January 6th, evidence showing that the larger areas of the U.S. Capitol, and the Capitol grounds were "restricted areas" as they pertain to the criminal statutes at issue, and evidence showing the Defendant's points of entry/exit inside and around the Capitol and the violence that took place (including those that were witnessed by the Defendant) in and around those areas. *Id.* at 10. It is possible that some of these pieces of evidence could survive the evidentiary barrier Mr. Herrera asks this Court to impose, but it currently unknown as we are uncertain what evidence the government may seek to admit at this time. However, certain pieces of evidence, including a "video montage" as well as evidence of alleged violence unrelated to Mr. Herrera and his alleged conduct would not. This evidence is not relevant as either instinct evidence or to prove aiding and abetting—because it is wholly unrelated to Mr. Herrera's actually conduct. Simply asserting an aiding and abetting theory does not open the flood gates of relevant evidence, especially when the government has made no demonstration of a nexus between Mr. Herrera and any conduct he allegedly aided and abetted.

This evidence is not relevant, and the Court should impose the evidentiary barrier preventing such evidence from being admitted.

B. General Evidence of the Events of January 6, 2021, should be Excluded Under FRE 403.

The government fails to address Mr. Herrera's FRE 403 argument related to general evidence of the events of January 6, 2021. As such, Mr. Herrera reasserts that even if such evidence were deemed relevant under FRE 401, this Court should exclude such evidence under FRE 403. Such evidence is untethered from the alleged conduct of Mr. Herrera that forms the basis for the indictment and would impermissibly inflame the passions of the jury and provide a skewed perspective of Mr. Herrera's actual alleged conduct. Because the introduction of general evidence of the events of January 6, 2021, is substantially more prejudicial than probative the Court should bar its introduction.

IV. THE COURT SHOULD EXCLUDE ANY EVIDENCE THE GOVERNMENT SEEKS TO ADMIT PURSUANT TO FEDERAL RULE OF EVIDENCE 404(b).

The government asserts that they have not identified any evidence that would fall under Rule 404(b) but reserves the opportunity to introduce such evidence if it is discovered later during its preparation for trial. ECF No. 41 at 18. Mr. Herrera reasserts his motion in limine and request that all 404(b) evidence be excluded as no notice has been provided at this time.

V. THE COURT SHOULD EXCLUDE ANY EVIDENCE THE GOVERNMENT OFFERS PURSUANT TO 902(11) BECAUSE REASONABLE NOTICE HAS NOT BEEN PROVIDED AND THE GOVERNEMNT SINGLE SENTENCE IN OPPOSISION IS WITHOUT MERIT.

The government attempts to address Mr. Herrera's objection to evidence offered by the government pursuant to FRE 902(11) in a single sentence on page 18 of their opposition. The government asserts "[a]long the same lines, if stipulations cannot be met, the Government intends to make certifications available for inspection pursuant to Fed. R. Evid. 902(11) before trial." ECF No. 41 at 18. This sentence makes clear the government misunderstands this motion in limine.

Federal rule of evidence 902(11) requires "[b]efore the trial or hearing, the proponent must give an adverse party reasonable written notice of the intent to offer the record — and must make the record and certification available for inspection — so that the party has a fair opportunity to challenge them." Fed. R. Evid. 902(11). This is a two-part requirement, first the government must give "reasonable written notice of the intent to offer the record" and second must "make the record and certification available for inspection." *Id.* When Mr. Herrera filed these motions in limine and to this date the government has not complied with either step. The government has provided no written notice of its intent to offer any certified record pursuant to FRE 902(11) and no certified record has been made available for Mr. Herrera to inspect. In their sentence the government refers to stipulations—however, to date no stipulations have been provided to Mr. Herrera for review or discussion.

This failure to provide such notice, deprives Mr. Herrera the ability to inspect or have fair opportunity to challenge such records. This is because, any subsequent challenge would have to occur after the motions in limine date set by this Court. In their sentence the government notes

that "if stipulations cannot be met, the Government intends to make certification available for inspection." ECF No. 41 at 18. This seems to imply that the government has some certifications in their possession related to some evidence. If this implication is true and the government does have such certifications in their possession it begs the question, why have they not provided notice to the Mr. Herrera of their intent to use such certification as mandated by FRE 902(11). As no notice has been provided, all evidence relying on certifications made pursuant to 902(11) should be excluded.

Respectfully submitted,

DATED: July 8, 2022

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