

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

UNITED STATES OF AMERICA,	:	CASE NO. 1:23CR114
	:	
Plaintiff,	:	JUDGE ANA C. REYES
	:	
vs.	:	
	:	
KYLE MLYNAREK, et al.,	:	<u>MOTION IN LIMINE</u>
	:	
Defendant.	:	

Kyle Mlynarek, through counsel, submits the following motions in limine, which address evidentiary issues that are anticipated to arise during the trial of this case.

I. Factual background

The events at the Capitol on January 6, 2021 have generated an enormous amount of evidence, including surveillance footage and thousands of videos recorded by people on the scene that day.¹ There are, correspondingly, countless photographs and videos provided by the government in discovery that are not connected to Mr. Mlynarek at all. For instance, the complaint filed against Mr. Mlynarek states that "...around 2:00 p.m., individuals in the crowd forced entry into the U.S. Capitol, including by breaking windows and by assaulting members of the U.S. Capitol Police, as others in the crowd encouraged and assisted those acts." Dkt. No. 1-1 at 1. These are actions that Mr. Mlynarek is not alleged to have participated in and there is no evidence that he was among that group of people that initially broke windows to enter the Capitol.

¹ <https://www.latimes.com/politics/story/2022-03-11/hundreds-of-jan-6-defendants-wait-day-in-court-as-justice-department-processes-mountain-of-information>

The government also has video and photographic evidence that purport to show Mr. Mlynarek at the Capitol and to depict some of his alleged actions on January 6, 2021. Although some of the evidence the government is anticipated to use is police body camera, they also possess a YouTube Video entitled “Capitol Riots Raw Footage_***Journalistic Purposes Only.” Dkt. 1 at 16. This video has a watermark in the center of the frame which reads “@NIGROTIME2021.” The video allegedly depicts an interaction between Mr. Mlynarek and police officers. The government thus has at its disposal a large amount of evidence, the vast majority of which does not depict Mr. Mlynarek.

II. The Court should exclude from the trial any evidence about the wrongdoing of others that is not directly relevant to Mr. Mlynarek

Any evidence of the events of January 6, 2021 that does not involve Mr. Mlynarek should be excluded from this trial. The actions of other people at the Capitol are not relevant to the charges against Mr. Mlynarek. Fed. R. Evid. 401, 402. The fact that other people were committing bad acts at the Capitol on January 6, does not make it more likely that Mr. Mlynarek committed the offenses with which he is charged. The jury will not learn anything from video of other people smashing windows or assaulting police officers about Mr. Mlynarek’s own behavior and thus that evidence is not relevant to the facts at issue in this case.

Admitting the bad acts of other individuals would also be substantially more prejudicial than probative and would confuse the issues at stake in this case. Fed. R. Evid. 403. The government has video footage that depicts conduct that is more egregious than the accusations against Mr. Mlynarek and which would have a large emotional impact on the jury. This creates a high risk that the jury will attribute blame to Mr. Mlynarek for actions in which he played no part. The Court

should exclude this evidence to avoid the trial becoming about the actions of others rather than the alleged actions of Mr. Mlynarek

III. The Court should preclude the government from introducing video evidence absent a showing of the video’s authenticity

The Court should exclude the “@NIGROTIME2021” video unless the government lays a proper foundation as to its authenticity. Fed. R. Evid. 901 governs the authentication or identification of items of evidence. The government must produce a sufficient foundation demonstrating that the evidence “is what the proponent claims it is.” Fed. R. Evid. 901(a). “Authentication and identification are specialized aspects of relevancy that are necessary conditions precedent to admissibility. *United States v. Blackwell*, 694 F.2d 1325, 1330 (D.C.Cir. 1982).

The government is thus required to present sufficient evidence that the “@NIGROTIME2021” video is what it purports to be. At this time, the undersigned has not been provided any information to suggest that the government plans to elicit testimony from the person who recorded the video or that there is a witness who can testify that the events depicted in the video are true and accurate. The Court should exclude this video from evidence unless the government can authenticate it. Mr. Mlynarek also requests that the Court hear any testimony on the issue of authenticity outside the presence of the jury so that the video is not shown to the jury before its admissibility has been established. *See* Fed. R. Evid. 104(c)(3).

IV. The Court should preclude the government from using inflammatory rhetoric during the trial

The government should be precluded from argument that could “inflame the passions” of the jury. The law is clear that “...during closing arguments, prosecutors may not sensationalize the

facts or seek to turn jurors' perceived prejudices or favoritism against a defendant." *United States v. Khatallah*, 41 F.4th 608, 636 (D.C. Cir. 2022) (citing *United States v. Moore*, 651 F.3d 30, 51-52 (D.C. Cir. 2011)). The government is also forbidden from "...weaponize[ing] a jury's allegiance to their Nation or incit[ing] jurors to protect their community or act as its conscience. *Id.* (citing *United States v. Vega*, 826 F.3d 514, 525 (D.C. Cir. 2016)). The events of January 6, 2021 lend themselves to rhetoric that is inappropriate in the context of a criminal trial. It is not possible to come up with an exhaustive list of objections but the Court should preclude the prosecution from arguments such as the following: that Mr. Mlynarek was "attacking democracy", that his behavior was seditious or treasonous or that he was putting the juror's own rights as Americans in jeopardy. Such rhetoric would tend to inflame the jury's passions without shedding light on the actual factual issues in this case.

Similarly, the Court should preclude the government from referring to Mr. Mlynarek as an "insurrectionist." At least one court in this District has precluded the use of that term because it "...may tend to connect Defendant to other January 6 defendants charged with seditious conspiracy, a charge that Defendant, like the vast majority of other January 6 defendants, does not face." *United States v. Rhine*, 1:21-cr-687-RC, Dkt. 88 at 17. For those reasons, Mr. Mlynarek requests that the prosecution be ordered to refrain from using charged language that would unduly prejudice the jury against him.

V. Conclusion

For all the foregoing reasons, Mr. Mlynarek requests that these motions in limine be granted prior to the beginning of trial in this case.

Respectfully submitted,

STEPHEN C. NEWMAN
Federal Public Defender
Ohio Bar: 0051928

/s/ Darin Thompson
DARIN THOMPSON
Assistant Federal Public Defender
Ohio Bar: 0067093
Office of the Federal Public Defender
1660 West Second Street, Suite 750
Cleveland, OH 44113
(216) 522-4856 Fax:(216) 522-4321
E-mail: darin_thompson@fd.org