UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA	:	
	:	
v.	:	**CASE NO. 1:23-CR-114 (ACR)**
	:	
KYLE ALAN MLYNAREK and	:	
RONALD MICHAEL BALHORN,	:	
	:	
Defendants.	:	

GOVERNMENT'S OPPOSITION TO
DEFENDANT MLYNAREK'S MOTIONS IN LIMINE

Defendant Kyle Alan Mlynarek has moved to exclude certain evidence and to preclude the use of certain words and phrases at trial. Such motions should be denied.

I. Video Not Involving Mlynarek

Mlynarek argues that any evidence that "does not involve [him] . . . should be excluded from this trial," as such evidence would be irrelevant or prejudicial. ECF No. 32 at 2 ("[1] The jury will not learn anything from video of other people smashing windows or assaulting police officers about Mr. Mlynarek's own behavior . . . . [2] 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.").

Most of the evidence the government plans to present will show the defendants, but some evidence will not. For instance, to prove its case, the government will show how the Capitol was closed to visitors that day, how protesters nevertheless breached the grounds' restricted perimeter, and how those protesters interfered with the certification of the 2020 election. Such evidence will not involve the specific defendants, but will prove several elements of the offenses for which they are charged. As it has done in many Capitol Breach cases, the government will

also present evidence about the overall events of that day, likely through an "overview" witness from the U.S. Capitol Police. The purpose is not to prejudice the jury, but to show how the individual defendants' actions contributed to a larger civil disorder that endangered officers and disrupted the 2020 presidential election's certification. As Judge Kollar-Kotelly observed, "Just as heavy rains cause a flood in a field, each individual raindrop itself contributes to that flood . . . . The same idea applies in these circumstances. Many rioters collectively disrupted Congressional proceedings, and each individual rioter contributed to that disruption." *United States v. Rivera*, 607 F. Supp. 3d 1, 9 (D.D.C. 2022). So it is here: the government must, and will, prove that some of the defendants' conduct occurred during a civil disorder that adversely affected commerce or a federally protected function. *See* 18 U.S.C. § 231(a)(3).

Even if this Court found these topics created some articulable risk of unfair prejudice or bias, a limiting instruction would be the appropriate remedy. The D.C. Circuit has consistently upheld the use of limiting instructions as a way of minimizing the residual risk of prejudice. *See, e.g.*, *United States v. Douglas*, 482 F.3d 591, 601 (D.C. Cir. 2007) (emphasizing the significance of the district court's instructions to jury on the permissible and impermissible uses of the evidence); *United States v. Pettiford*, 517 F.3d 584, 590 (D.C. Cir. 2008) (same); *United States v. Crowder*, 141 F.3d 1202, 1210 (D.C. Cir. 1998) (stating that mitigating instructions to jury enter into the Rule 403 balancing analysis). But at this stage, it would be premature to categorically exclude all the topics that the defendant has listed in his brief. "Rule 403 establishes a high barrier to justify the exclusion of evidence . . . ." *United States v. Lieu*, 963 F.3d 122, 128 (D.C. Cir. 2020). The defendants have not met this bar.

II. Authenticated Video

Mlynarek also argues that the government should be precluded from introducing evidence absent a showing of authenticity. ECF No. 32 at 3. Federal Rule of Evidence 901

requires that "the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is." Here, the Government will present testimony from one or more witnesses who will establish that the video fairly and accurately captures the scene on January 6 at the Capitol and that it depicts the Defendants. Rule 901 requires no more.

But, in his motion, Mlynarek suggests that Rule 901 does require something additional. He writes, "[a]t 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." ECF 32 at 3. To the extent Mlynarek suggests that the specific individual who recorded the video must testify as a condition precedent to admissibility, he is wrong.

To begin, authentication is predominantly a question for the jury. *See United States v. Safavian*, 435 F. Supp. 2d 36, 38 (D.D.C. 2006). While the Court must make an initial determination, the threshold for admissibility is "not high." *Id*.; *accord America v. Mills*, 654 F. Supp. 2d 28, 34 (D.D.C. 2009). At this stage, the "'burden of proof for authentication is slight,'" and the government "'need only demonstrate a rational basis for its claim that the evidence is what'" it is asserted to be. *Safavian*, 435 F. Supp. 2d at 38 (quoting *United States v. Reilly*, 33 F.3d 1396, 1404 (3d Cir. 1994), and *United States v. Coohey*, 11 F.3d 97, 99 (8th Cir. 1993)). The question for the Court is simply "whether the [government] has 'offered a foundation from which the jury could reasonably find that the evidence is what the [government] says it is.'" *Id*. (quoting 5 Federal Rules of Evidence Manual § 901.02[1], at 901-5-901-6). The Court must determine "only that there is sufficient evidence that the jury ultimately might" find the document to be authentic. *Id*. (emphasis in original); *accord United States v. Fluker*, 698 F.3d

988, 999 (7th Cir. 2012) ("Only a prima facie showing of genuineness is required; the task of deciding the evidence's true authenticity and probative value is left to the jury.").

Importantly, the Rule does not require any specific *form* of evidence that the proponent must offer to clear the low authentication bar. Instead, the Rule sets forth a non-exclusive list of examples of how this can be accomplished, which includes "testimony from a witness," "comparison with an authenticated specimen by . . . the trier of fact," and "distinctive characteristics." Rule 901(b)(1), (3), (4). Notably absent is a requirement that the proponent call any particular witness, and the defendant has provided no authority establishing that the government must call the videographer to establish authenticity. In fact, the opposite is true. Courts have ruled that a "photograph or video recording is typically authenticated by showing it is a fair and accurate representation of the scene depicted . . . . This foundation may, but need not be, supplied by the person taking the photograph or by a person who witnessed the event being recorded . . . . It may be supplied by other witness testimony, circumstantial evidence, content and location." *Donias v. Fisher*, No. 16-CV-2674, 2020 WL 2792982, at *9 (E.D. Cal. May 29, 2020); *see also United States v. Blackwell*, 694 F.2d 1325, 1330 (D.C. Cir. 1982) (police officer present during search and seizure of photograph properly authenticated photograph).

III. Prohibited Words

Finally, Mlynarek argues that the government should be prohibited from using certain words or phrases, including, "attacking democracy," "seditious," "treasonous," "putting the juror's own rights as Americans in jeopardy," and "insurrectionist." Mlynarek also asks that the government more generally be "refrain[ed] from using charged language that would unduly prejudice the jury against him." ECF No. 32 at 4.

Evidence or language is unfairly prejudicial if it has "an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one." *United*

States v. Sanford Ltd., 878 F. Supp. 2d 137, 143 (quoting Fed. R. Evid. 403, advisory committee's note). However, Rule 403 does not require the government "to sanitize its case, to deflate its witnesses' testimony or to tell its story in a monotone." *United States v. Gartmon*, 146 F.3d 1015, 1021 (D.C. Cir. 1998). By their very nature, criminal charges involve an accusation that someone has wronged another person or has wronged society. Thus "[t]he United States Attorney . . . may prosecute with earnestness and vigor—indeed, he should do so." *United States v. Berger*, 295 U.S. 78, 88 (1935). "[T]he law permits the prosecution considerable latitude to strike 'hard blows' based on the evidence and all reasonable inferences therefrom." *United States v. Rude*, 88 F.3d 1538, 1548 (9th Cir. 1996) (quoting *United States v. Baker*, 10 F.3d 1374, 1415 (9th Cir. 1993)). When a prosecutor's comments fairly characterize the offense, fairly characterize the defendant's conduct, and represent fair inferences from the evidence, they are not improper. *Cf. Rude*, 88 F.3d at 1548 (the use of words like victim, deceit, outlandish, gibberish, charlatan, and scam was not improper); *Guam v. Torre*, 68 F.3d 1177, 1180 (9th Cir. 1995) ("[T]here is no rule [of evidence or ethics] requiring the prosecutor to use a euphemism for [a crime] or preface it by the word 'alleged.'").

A general prohibition on "charged language," ECF No. 32 at 4, is premature and impossible to interpret: the government cannot know what the defense might consider "charged." Courts in this district have thus repeatedly denied similar motions. *See, e.g.*, Memorandum and Order, *United States v. Vincent Gillespie*, 1:22-CR-60 (D.D.C. Nov. 30, 2022), ECF No. 43 (Howell, C.J.); Minute Order, *United States v. Alford*, 1:21-CR-263 (D.D.C. Sept. 9, 2022), ECF No. 83 (Chutkan, J.).

As to the specific words Mlynarek mentions, the government does not plan to accuse the defendants of sedition, treason, or insurrection: these are separate crimes for which the

defendants have not been charged. The government may, however, describe the defendants' and other rioters' actions for what they were, namely an attack on our democracy. Such language is not prejudicial, because it simply describes what courts have recognized the attack on January 6, 2021 to be. *See, e.g.*, *United States v. Mostofsky*, 1:21-CR-138 (Boasberg, J.), Sent. Tr. at 40-41, May 6, 2022 (describing the riot as an "attack," describing the Capitol as "overrun," and describing Mostofsky and other rioters as engaged in "an attempt to undermine [our] system of government."); *United States v. Languerand*, 1:21-CR-353 (Bates, J.), Sent. Tr. at 33-34, January 26, 2022 ("the effort undertaken by those who stormed the Capitol . . . involved an unprecedented and, quite frankly, deplorable attack on our democratic institutions, on the sacred ground of the United States Capitol building, and on the law enforcement officers who were bravely defending the Capitol and those democratic values against the mob of which the defendant was a part.").

IV. Conclusion

At trial, the government will work with defense counsel to present evidence that is relevant, authenticated, and accurate. For this reason, Mlynarek's motions in limine should be denied.

Respectfully submitted,

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