UNITED STATES DISTRICT COURT
DISTRICT OF DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,

v. CAUSE NUMBER 21-cr-28

MICHAEL GREENE,

Defendant

DEFENDANT MICHAEL GREENE'S
OMNIBUS PRETRIAL MOTION

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, MICHAEL GREENE, the Defendant in the above styled and numbered cause, pursuant to the Federal Rules of Criminal Procedure, and files this Omnibus Pretrial Motion, requesting and pleading the following:

I. PRECLUDE OUT-OF-COURT STATEMENTS

-1-

The Government's argument for the Defendant being involved in a conspiracy rest entirely on a handful of inferential text message communications, not one of which actually identifies the Defendant as a member of the Oath Keepers in any capacity or any plan to stop the certification of the electoral college vote on January 6, 2021. Defendant was hired to provide security and close executive protection from time to time and did not engage in Oath Keeper group chats regarding plans to obstruct the events on January 6.

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The Confrontation Clause prohibits admission of testimonial hearsay in criminal cases unless the declarant is unavailable and the defendant has been afforded a prior opportunity for

cross-examination. *Crawford v. Washington*, 541 U.S. 36, 68-69 (2004). "The Confrontation Clause of the Sixth Amendment provides a criminal defendant with the right 'to be confronted with the witnesses against him,' including the right to cross-examine those witnesses." *United States v. Straker*, 800 F.3d 570, 595 (D.C. Cir. 2015) (quoting U.S. Const. Amend. VI).

A statement is not hearsay if it is the party's own statement. Fed. R. Evid. 801(d)(2)(A). Similarly, adoptive statements or adoptive admissions are not hearsay if it meets the two criteria: (1) "the statement must be such an innocent defendant would normally be induced to respond;" and (2) "there must be sufficient foundational facts from which the jury could infer that the defendant 'heard, understood, and acquiesced in the statement." *United States v. Joshi,* 896 F.2d 1303 (11th Cir. 1990). To be admissible, such statements must also be relevant under Federal Rule of Evidence 401. Furthermore, the statement's probative value must outweigh its prejudicial value as outlined in Rule 403 of the Federal Rules of Evidence.

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Some of the statements the Government plans to use are from the online meeting site for the "Oath Keepers National Call". Supposedly, during this meeting, "Rhodes outlined a plan to stop the lawful transfer of presidential power, including preparations for the use of force, and urged those listening to participate." *See* ECF No. 684, p. 9. Additionally, Defendant is alleged to have joined the Leadership Signal chat and other GoToMeetings. *Id.* p. 14. The Government also tends to use a text message Greene sent to an acquaintance stating "Storming the capital," along with a photograph, and Greene's phone calls. *Id.*, p. 22.

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Some of the statements the Government tends to use pre-date the alleged conspiracies in this action. These statements are not relevant to the criminal conduct alleged and should be

excluded under Fed. R. Evid. 401 as they do not tend to make the alleged fact at issue more or less probable. In the alternative, these statements should be excluded because their prejudice outweighs any probative value under Fed. R. Evid. 403.

Furthermore, the statements the Government seeks to admit are not admissible against alleged co-conspirators. The Government is required to show that the statement is made by a person who is a co-conspirator and is in furtherance of the conspiracy by a preponderance of the evidence. *United States v. Gatlin*, 96 F.3d Independent evidence of the conspiracy, apart from the statement, is an additional requirement. ." *Id.* (citing *United States v. Beckham*, 968 F.2d 47, 50-51 (D.C. Cir. 1992)). The Government has not provided this independent evidence in regards to the Defendant, and thus the statements should be excluded.

II. NAME CALLING OF DEFENDANT OR OATH KEEPERS

The Defendant requests the Court to instruct the Government and witnesses not to engage in any name-calling of the Defendant and/or the Oath Keepers organization, pursuant to Fed. R. Evid. 403: "anti-government," "militia," "organized militia," "extremists," "extremism," "racist," "racism," "white supremacism," "white supremacist," "white nationalism," and/or "white nationalist." Additionally, we request the Government from refraining from calling Defendant an Oath Keeper, as testimony elicited at Rhodes' trial through Mr. Greene confirms Mr. Greene was not a Member of the Oath Keepers. *United States v. Rhodes*, No. 22-cr-15 (APM) (D.C.C. 2022). To the contrary, Mr. Greene, a Licensed Security Contractor, was hired by the Oath Keepers' organization to provide security and close protection detail for certain executives, VIPS, speakers, and even organizers at various rallies/events. Thus, the Government and witnesses should refer to the Defendant only by his Christian and surname, the "Defendant" or the "Accused."

-1-

Stewart Rhodes is the founder of the Oath Keepers, an organization that has described itself as a "non-partisan association of current formerly serving military, police, and first responders, who pledge to fulfill the oath all military and police take to defend the Constitution against all enemies, foreign and domestic." *Oath Keepers: Guardians of the Republic*, Library of Congress: Web Archive, https://www.loc.gov/item/lcwaN0003728/. The group is not a militia. *See, e.g., Our Story*, Oath Keepers Utah, https://oathkeepersutah.com/. The government itself has acknowledged this in its indictment against Oath Keepers. *United States v. Rhodes*, 22-cr-15-APM (D.D.C. 2022), ECF No.167, p. 3 ("[T]he Oath Keepers [is] a large but loosely organized collection of individuals, some of whom are associated with militias.") Yet, the government has indicated its intent to introduce testimony that the Oath Keepers are part of the militia movement, anti-government, and extremists. Likewise, some of the discovery in this case uses highly prejudicial, false descriptors such as "racist," "white supremacist," and "white nationalist" when referring to the Oath Keepers.

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Federal courts have wide discretion to exclude relevant evidence on grounds of unfair prejudice or confusion. *See* Fed. R. Evid. 403. Consequently, courts routinely preclude the use of certain terms at trial when parties or witnesses refer to a criminal defendant. See *United States v. Carr*, 2016 U.S. Dist. LEXIS 64822, at *2 (D. Nev. 2016) (precluding government from using the word "gang" to describe motorcycle group at trial); *United States v. King*, 2022 WL 227242, at *7 (D. Colo. 2022) (precluding government from referring to defendant as "terrorist"); *United States v. Asuncion*, 2017 WL 11530424, at *1 (E.D. Wash. 2017) (precluding law enforcement witnesses from using the term "violent offender" when referencing the defendant).

Testimony or evidence referring to the Defendant or Oath Keepers as antigovernment,

extremists, racists, etc. would attach derogatory and satirically unflattering labels to the Defendant, and prejudice what already promises to be an emotionally charged trial. For instance, the descriptor "antigovernment" could stir particularly negative feelings among District of Columbia jurors, many of whom work for, or adjacent to, the government. Likewise, the word "extremist" undoubtedly invokes images of the worst form of criminal activity. These terms would create bias against the Defendant before the jury which would prevent him from obtaining a fair trial in violation of the Fifth and Fourteenth Amendments of the United States Constitution. Preclusion of these terms would also guard against juror confusion.

This substantial risk of harm far outweighs any probative value of such descriptors. Even if the labels were correct, they would do little to nothing to answer the question of whether the defendants committed the acts alleged in the indictment. Allowing the government and/or its witnesses to use these terms would serve only to inflame and confuse the jury—risking a conviction based not on the actions of the defendants, but on what the jury perceives to be their divisive ideology, future dangerousness, or some other inappropriate basis. Accordingly each of theses terms should be excluded pursuant to Fed. R. Evid. 403. *See Old Chief v. United States*, 519 U.S. 172, 182-85 (1997).

III. EXTRINSIC ACTS

Defendant moves this Honorable Court to order the prosecuting attorneys and the government witnesses not to mention, allude to, or refer to, in any manner, any extrinsic acts, prior convictions, alleged violations of the law or other crimes, wrongs or acts generally alleged to have been committed by Defendant in the presence of the jury until a hearing has been held outside the presence of the jury to determine the admissibility of such items. Said extrinsic acts, and any prior convictions of alleged violations of the law include, but are not limited to:

1. Any alleged acts of criminal wrongdoing by the Defendant not alleged in the indictment.
2. Any alleged prior convictions for any criminal offense until such alleged prior conviction is shown to be admissible in this trial.
3. Any alleged involvement in any offense not alleged in the indictment.
4. Any reference to any Defendant or the actions alleged in this indictment being subject to any investigation by any other law enforcement agency.

Relevant evidence makes the fact at issue more probable or less probable. Fed. R. Evid. 401. Rule 403 of the Federal Rules of Evidence limits admissibility to only that evidence that is relevant. Rule 404 adds additional requirements that character evidence and toher crimes, wrongs, or acts evidence be excluded. This evidence cannot be used to show that a person acted in "conformity therewith." Fed. R. Evid. 404. This evidence has a tendency to be unfairly prejudicial, confuse the issues or mislead the jury, waste time, or cause undue delay. For these reasons, extrinsic evidence should be excluded.

IV. MATTERS NOT WITHIN PERSONAL KNOWLEDGE OF A WITNESS

Defendant respectfully requests this honorable Court to instruct the Government's witnesses or require the prosecution to instruct its witnesses not to provide testimony on any matter about which the witness does not have personal knowledge until such time as a hearing has been conducted out of the hearing of the jury to determine the admissibility of any such testimony. This motion is intended to include, but not be limited to a witness' testimony as to the intent, thoughts, or state of mind of another; the results of scientific tests by a witness not an expert; the content of scientific treatises by a person not an expert; the reliability or meaning of scientific tests by a person not qualified as an expert; and hearsay not subject to an exception.

Section 18.602 of the Code of Federal Regulations states that a witness may not testify to

a matter unless that witness has personal knowledge of it. Federal Rule of Evidence 602 states that evidence must be introduced sufficient to support a finding that the witness has personal knowledge of the matter. Thus, any matter not within the witnesses personal knowledge, including testimony as to intent, thoughts, or state of mind of another, should be excluded.

The Defendant further requests that this Court instruct the prosecution to advise the Court prior to eliciting any such testimony in order for the Court to excuse the jury and conduct a hearing outside the presence of the jury, without the necessity of counsel for the Defendant having to object to said testimony and request that the hearing be held outside the presence of the jury.

V. TRIAL CONDUCT

The Defendant would respectfully request this Court to instruct the Government that in the trial of this cause the prosecution be instructed to refrain from the following acts:

(1) Possession of weapons such as revolvers or other firearms within the courtroom either on the person of the prosecutor or inside a briefcase or such other item.

(2) Display any type of law enforcement badge or any other similar items that tend to associate the lawyers for the government with any law enforcement agency.

(3) Asking leading questions of prosecution witnesses on direct examination. A leading question is defined as a question which puts words into a witness' mouth to be echoed back, on which instructs the witness how to answer, or one which suggests to the witness the desired answer.

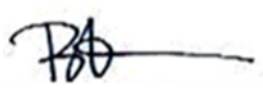
(4) Engaging in the practice of making side-bar remarks. "Side-bar" remarks describe remarks of counsel that are neither questions to a witness nor an appropriate address to the court.

(5) Making improper objections that signal the desired response from the witness. For example, the statement "Objection, unless he knows" is not an objection reasonably calculated to notify the Court of a Violation of the Federal Rules of Evidence.

(6) Making improper objections relating to impeachment by prior inconsistent statement. Federal Rule of Evidence 613 specifically provides that the prior inconsistent statement need not be shown to the witness. Any attempt, in the presence of the jury, to suggest that "fairness" requires that the witness be allowed to inspect the writing prior to impeachment is in violation of Rule 613.

WHEREFORE, PREMISES CONSIDERED, the Defendant Michael Greene respectfully prays this Honorable Court grant this motion.

Respectfully Submitted,



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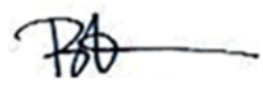
CERTIFICATE OF SERVICE

On the 16th day of December 2022, I filed the foregoing document electronically with the Clerk of the Court for the United States District Court for the District of Columbia by using the Court's CM/ECF system, which will provide electronic service on all counsel of record.



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