UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA	:	
v.	:	
	:	**CASE NO. 21-cr-690 (RCL)**
PHILIP SEAN GRILLO,	:	
Defendant.	:	

GOVERNMENT'S RESPONSE TO DEFENDANT'S
MOTIONS IN LIMINE TO PRECLUDE EVIDENCE

The United States, by and through its attorney, the United States Attorney for the District of Columbia, hereby submits this response to Defendant Phillip Sean Grillo's Motion in Limine to preclude the United States from (1) introducing a 22-minute compilation video as well as general evidence of the events of January 6, 2021, (2) using certain "prejudicial" language, and (3) introducing any other statements of the Defendant that have not yet been identified (Def. Motion, ECF No. 58).

The Defendant filed this motion nearly three weeks after the Court's deadline for the filing of motions (*see* Minute Entry 12/07/2022, setting deadline for motions as 1/31/2023), and the motion should be denied on this basis.

Additionally, the motion should be denied because (1) the Government's compilation video is relevant, not unduly prejudicial and appropriate limiting instructions are available as needed; (2) the terms that the Defendant seeks to preclude accurately reflect the Defendant's criminal behavior on January 6 and are permitted by the Federal Rules of Evidence; and (3) any statements discovered by the Government in its ongoing investigation will be provided to the Defendant with

sufficient time to prepare for trial, and the Defendant likely already has access to any such statements in global discovery. Accordingly, the Court should deny the Defendant's motion.

FACTUAL BACKGROUND

For a general background on the events of January 6, 2021, at the U.S. Capitol, the Government refers the Court to the Statement of Offense filed in this case at ECF No. 1.

Defendant Grillo's Conduct on January 6, 2021

On January 6, 2021, the Defendant, who had traveled from his home in New York, attended former President Trump's "Stop the Steal" rally at the Ellipse in Washington, D.C. Grillo went to the Capitol and approached the building from the West side, where he saw police officers trying to prevent rioters from entering the building and rioters being violent toward the police. Grillo made his way through the crowd and past police officers to the Senate Wing Door, where he climbed into the U.S. Capitol through a broken window at or about 2:20 p.m.

Once inside the building, Grillo can be seen holding a megaphone in his hand. Grillo made his way with other individuals to the Rotunda. Grillo can be seen on a video recorded by a third party stating, "I'm here to stop the steal!" He subsequently attempted to exit the Rotunda and gain entry to a separate room that contained doors leading outside, where more protestors were gathered. The crowd's movement was blocked by three Capitol Police officers trying to stop them. Eventually the crowd, including Grillo, moved past the officers and towards the Rotunda's exterior entryway doors. Grillo was among the first few individuals to get past the officers.

Grillo and a crowd of other individuals approached the exterior entryway doors, which were barricaded with benches. The glass windows of the doors were broken. Protestors outdoors were attempting to enter and were clearly visible through the door's windows. Grillo and the crowd gathered at the closed doors while the same three U.S. Capitol Police officers attempted to

prevent them from opening the exterior doors. Grillo moved directly in front of the officers. The crowd pushed against the officers and against the doors, forcing them open and allowing individuals outside to gain entry to the Capitol. Grillo was standing towards the middle of the crowd and not making direct contact with the officers.

Once the doors were opened, allowing more protestors inside the building, Grillo briefly went through the doors only to re-enter the Capitol moments later and remain inside the Capitol. Inside the Capitol, he appeared to smoke marijuana with other rioters. At 3:06, he can be seen leaving the Capitol for the second time through the East Rotunda Doors. On the steps in front of the East Rotunda Doors, Grillo filmed himself on his cellphone, exclaiming "We did it! We fucking did it! We stormed the Capitol!"

PROCEDURAL BACKGROUND

For this conduct, the Defendant has been charged, via superseding indictment that was filed on November 22, 2021, with Obstruction of an Official Proceeding, in violation of 18 U.S.C. § 1512(c)(2), and 2; Entering and Remaining in a Restricted Building and Grounds, in violation of 18 U.S.C. § 1752(a)(1); Disorderly and Disruptive Conduct in a Restricted Building or Grounds, in violation of 18 U.S.C. § 1752(a)(2); Disorderly Conduct in a Capitol Building, in violation of 40 U.S.C. § 5104(e)(2)(D); and Parading, Demonstrating, or Picketing in a Capitol Building, in violation of 40 U.S.C. § 5104(e)(2)(G).

This case is set for trial, which has been scheduled for April 19, 2023. The Defendant seeks to exclude pretrial a compilation video, which has been used in other January 6 cases, but has not been identified yet as an exhibit that the United States will seek to introduce in this case. (As explained in further detail below, the United States is currently preparing for trial and is organizing/determining what exhibits it will introduce). Nonetheless, the Defendant's argument

asserts that such a compilation video, which depicts the general evidence of the events of the Capitol that day, is unfairly prejudicial and would mislead and confuse the jury. (See, Def. Motion at 4-6). The Defendant also seeks to preclude the government and any government exhibits or witnesses from referring to the Defendant and his actions on January 6 at trial as "rioters," "attackers," "insurrectionists," "mob," or other similar terms, asserting such terms are irrelevant under Rule 401 and inflammatory, resulting in unfair prejudice under Rule 403. (*See* Def. Motion at 7-8.) The Defendant further seeks to preclude additional evidence, including statements from the Defendant that have not yet been identified. Each of the Defendant's arguments lack merit, and requests to preclude this evidence should be denied.

ARGUMENT

Evidence is relevant if "it has any tendency to make a fact more or less probable than it would be without the evidence; and the fact is of consequence in determining the action." Fed. R. Evid. 401. "The general rule is that relevant evidence is admissible," *United States v. Foster*, 986 F.2d 541, 545 (D.C. Cir. 1993), a "liberal" standard, *United States v. Moore*, No. 18-cr-198, 2022 WL 715238, at *2 (D.D.C. Mar. 10, 2022). Additionally, 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). Neither Rule 401 nor 403 supports the Defendant's requested relief.

I. General Evidence of the Events of January 6 and the Actions of Other Rioters at the Capitol, which is Included in the Government's Compilation Video, is Relevant

Defendant Grillo argues that the Court should exclude a 22-minute video montage "capturing surveillance of thousands of other individuals on the Capitol Grounds and inside the Capitol building on January 6, 2021." The video depicts general evidence of the events of January

6, 2021, including the conduct of other rioters, and the Defendant asserts that this video "depict[s] violence and activities that Ms. Grillo was not involved in" and that such conduct is unrelated to the direct and specific alleged conduct of Defendant Grillo. Defendant Grillo's argument ignores the nature of these crimes as a collective action. It was the mob's collective action that disrupted Congress, and the Defendant's knowledge of the collective riot bears on his *mens rea* for each of the charged offenses.

The Government does not anticipate focusing its evidentiary presentation on areas of the Capitol the Defendant did not go. However, to show the overall riot, its effects, the full context of the Defendant's actions, and why the certification of the Electoral College vote was suspended, the government will need to present evidence to show the actions of other rioters in other areas of the Capitol building and grounds. None of the rioters were authorized to enter the Capitol. Law enforcement officer witnesses will explain that, in expelling rioters, they could not distinguish between those rioters who were overtly violent and those who were not; everyone had to leave. This is because law enforcement could not predict who would act violently; any member of the crowd might be a threat to them. Indeed, throughout the day, individual officers found their attention divided by the need to monitor the whole crowd, rather than focusing on a specific individual. But for the Defendant's actions alongside so many others, the riot likely would have failed to delay the certification vote. *See United States v. Mazzocco*, No. 21-cr-54, Tr. 10/4/2021 at 25 ("A mob isn't a mob without the numbers. The people who were committing those violent acts did so because they had the safety of numbers.") (statement of Judge Chutkan). While a jury will judge the Defendant based on his own actions, the context of his actions will necessarily be placed before them—that context was a riot.

Certain actions of other rioters at multiple areas of the Capitol are relevant to elements of the crimes with which Grillo is charged. First, to prove Count One, Obstruction of an Official Proceeding and Aiding and Abetting, in violation of 18 U.S.C. § 1512(c)(2) and 2, the government must establish that there was an "official proceeding" and the fact that it was disrupted. The official proceeding was the certification of the Electoral College vote, and, as with other Counts, proving this charge requires presenting evidence involving the actions of other rioters at all locations of the Capitol building and grounds. Moreover, Count One includes the alternative theory of aiding and abetting, pursuant to 18 U.S.C. § 2. Therefore, the conduct of other rioters is extremely relevant.

Furthermore, the government's use of any potential summary witnesses or evidence to this effect would permissibly "help the jury organize and evaluate evidence which is factually complex and fragmentally revealed in the testimony of a multitude of witnesses throughout the trial." *See United States v. Lemire*, 720 F.2d 1327, 1348 (D.C. Cir. 1983). Any such aspects of the government's case would need to be "accurate and nonprejudicial[,]" *United States v. Fahnbulleh*, 752 F.3d 470, 479 (D.C. Cir. 2014), and require "a sufficient foundation[,]" *United States v. Mitchell*, 816 F.3d 865, 877 (D.C. Cir. 2016). Within this framework, Defendant Grillo cannot substantiate his contention that the United States should be precluded from presenting this information.

Undersigned counsel is unaware of any judge in this district who has disallowed this exhibit in these cases. However, even if this Court found the actions of other rioters were prejudicial, 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); *Pettiford*, 517 F.3d at 590 (same); *Crowder II*, 141 F.3d at 1210 (stating that mitigating instructions to jury enter into the Rule 403 balancing analysis). Indeed, the relevant balancing test takes into account the probative nature of the sought-after evidence. Here, the probative value of showing the collective riot is extremely high, and thus, any meaningful prejudicial effect cannot outweigh such inherent value in any event.

Because the actions of other rioters are relevant and not unduly prejudicial and because any prejudice can be addressed through an appropriate limiting instruction, the compilation video, which depicts the full context of the riot, is admissible evidence.

II. The Descriptors the Defendant Seeks to Preclude Accurately Describe the Events of January 6, and the Federal Rules of Evidence Do Not Preclude Them

Defendant Grillo argues that the Court should bar terms like "insurrection," "attackers," "rioters," and "mob," and other language the Defendant argues is inflammatory. The Defendant argues that such terms are unfairly prejudicial because "these terms only serve the purpose of invoking emotional responses from the jury." (*See* Def. Motion at 5-6.) 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). By their very nature, criminal charges involve an accusation that someone has wronged another person or has wronged society. Accordingly, such charges arouse emotion—and there is nothing improper about that. Indeed, while cautioning against prosecutorial misconduct in *United States v. Berger*, the Supreme Court simultaneously recognized that "[t]he United States Attorney . . . may prosecute with earnestness and vigor—indeed, he should do so." *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.'").

Here, the government should not be required to dilute its language and step gingerly around the Defendant's crimes. Contrary to his insinuations, what took place on January 6, 2021, was, in fact, a riot involving rioters, and an attack on the United States Capitol, the government of the United States, and American democracy. These characterizations are not embellishments nor improper. After carefully considering the facts of other January 6 cases, many members of this District, including this Court, have recognized the riot as just such an attack. *See*, *e.g.*, *United States v. Mostofsky*, 1:21-cr-138 (JEB), 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. Rubenacker*, 1:21-cr-193 (BAH), Sent. Tr. at 147–48, May 26, 2022 (describing the defendant as "part of this vanguard of people storming the Capitol Building" as part of the initial breach, and finding that his conduct "succeeded, at least for a period of time, in disrupting the proceedings of Congress to certify the 2020 presidential election"); *United States v. Languerand*, 1:21-cr-353 (JDB), Sent. Tr. at 33–34, January 26, 2022 ("[T]he 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."). None of this language is hyperbole; rather, these findings used vivid and violent language because they described a visceral and violent event. So, too, will prosecutors need to use appropriate language—and not euphemisms—to describe the nature and gravity of the Defendant's conduct. Moreover, as described above, Defendant Grillo himself claimed to have "stormed the Capitol."

III. The Government Has Provided the Defendant with Evidence it Plans to Introduce at Trial, but New Material May be Discovered

The Defendant's third request is to preclude the United States from introducing any alleged statements of Grillo or additional evidence it has not previously disclosed. The investigation into the January 6, 2021 riot at the U.S. Capitol is perhaps the largest investigation in U.S. history, involving thousands of subjects. In addition to the case-specific discovery that has been provided to the Defendant, as of January 24, 2023, over 4.89 million files (7.23 terabytes of information) have been provided to the defense Relativity workspace. These files include (but are not limited to) the results of searches of 750 digital devices and 409 Stored Communications Act accounts; 4,500 FBI FD-302s and related attachments (FD-302s generally consist of memoranda of interviews and other investigative steps); 352 digital recordings of subject interviews; and 129,021 (redacted or anonymous) tips. Over 30,000 files that include body-worn and hand-held camera footage from five law enforcement agencies and surveillance-camera footage from three law enforcement agencies have been shared to the defense evidence.com video repositories. For context, the files provided amount to over nine terabytes of information and would take at least

361 days to view continuously. This information is accessible to the defense and has been since early in the case.

In short, the United States continues to review and process this evidence. As this Court knows, it is not uncommon for prosecutors to find and use additional evidence, to include additional statements made by a defendant, when preparing for trial. Regardless, this is not a case where the discovery of evidence has been delayed, and we are still more than a month away from the date of trial, currently scheduled for April 19, 2023. If the United States discovers additional evidence, it will promptly notify the defense within a sufficient time period before trial, so that the Defendant may make whatever adjustments are necessary for his own trial preparation and avoid any alleged prejudicial effects.

Overall, there remains ample time for both the defense and the United States to prepare for trial in this case. Accordingly, the Defendant's request to preclude the United States from continuing to investigate this case and from introducing any additional evidence it has not yet identified should be denied.

CONCLUSION

Defendant Phillip Sean Grillo's Motion in Limine to preclude evidence should be denied in the entirety. The motion should be denied on the grounds it was filed three weeks after the deadline set by the Court for pre-trial motions. Additionally, the motion should be denied because (1) the Government's compilation video is relevant, not unduly prejudicial and can be subject to an appropriate limiting instruction if needed; (2) the terms that the Defendant seeks to preclude accurately reflect the Defendant's criminal behavior on January 6 and are permitted by the Federal Rules of Evidence; and (3) any statements discovered by the Government in its ongoing

investigation will be provided to the Defendant with sufficient time to prepare for trial, and the Defendant likely already has access to any such statements in global discovery.

Respectfully submitted,

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