UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA	:	
	:	**CASE NO.: 1:21-CR-599 (RBW)**
v.	:	
	:	
THOMAS HARLEN SMITH	:	
	:	
Defendant.	:	

GOVERNMENT'S OPPOSITION TO DEFENDANT'S MOTION IN LIMINE TO PRECLUDE USE OF CERTAIN LANGUAGE AND GENERAL EVIDENCE FROM THE CAPITOL PRIOR TO DEFENDANT'S ARRIVAL

The United States of America, by and through its attorney, the United States Attorney for the District of Columbia, respectfully submits this opposition to Defendant Smith's Motion in Limine to exclude terminology such as "riot," "rioter," "insurrection," "insurrectionist," "mob," "trespass," "disorderly conduct," "picketing," "breach," "extremist," "antigovernment," and "demonstrating," and similar terms to describe the events that occurred at the Capitol on January 6, 2021. ECF 57 at 1. Additionally, Defendant Smith moves in limine to exclude any general evidence that depict events occurring at the Capitol prior to his arrival and in areas where he did not go. ECF 57 at 1. In essence, Defendant Smith asks that the Court prevent the government from using language that accurately establishes and describes the defendant's crimes and from introducing evidence that provides context to the defendant's crimes. The material Defendant Smith seeks to exclude fairly describes the riot, rioters, and his own conduct, and the Court should deny his motion.

BACKGROUND

On January 6, 2021, a Joint Session of the United States House of Representatives and the United States Senate convened to certify the vote of the Electoral College of the 2020 U.S. Presidential Election. While the certification process was proceeding, a large crowd gathered

outside the United States Capitol, entered the restricted grounds, and forced entry into the Capitol building. As a result, the Joint Session and the entire official proceeding of the Congress was halted until law enforcement was able to clear the Capitol of hundreds of unlawful occupants and ensure the safety of elected officials.

Defendants Thomas Smith and Donnie Wren, cousins, traveled together to Washington, D.C. to attend former President Trump's rally on January 6, 2021. After the rally, Defendants Smith and Wren walked from the rally to the United States Capitol. They entered Capitol grounds and joined in the riot.

Wren and Smith were in the Lower West Terrace Tunnel area at around 3:00 p.m. They made their way to the Tunnel entrance. Wren remained at the mouth of the Tunnel while Smith, carrying a flag attached to a flagpole, entered the Tunnel and approached the police line standing guard at the doors leading into the Capitol building. Moments later, Smith jammed the flagpole like a spear, trying to stab at one of the glass windowpanes within the first set of Tunnel doors.

Less than an hour later, at approximately 3:50 p.m., Smith and Wren made their way to the Upper West Terrace, where they stood directly in front of the police line, walking back and forth and waving flags for approximately 10 minutes. A physical conflict began between the police and the crowd of rioters at approximately 4:21 p.m. Smith and Wren participated in this conflict, pushing back against the officers' riot shields for approximately 25 seconds. Smith turned his back to the officers then used his body weight to push into a police riot shield.

Following the physical confrontation with the police line, Smith charged into a crowd of rioters to kick an officer's backside, then darted out of the crowd. Moments later, Smith threw a metal stick or pole at the police line. The metal stick or pole hit an officer in the head, causing the officer to stagger backwards. Smith then retreated into the crowd of rioters.

Smith and Wren left the Upper West Terrace area at approximately 4:30 p.m. and began their departure from the Capitol grounds.

Based on his actions on January 6, 2021, Smith was charged with Civil Disorder, in violation of 18 U.S.C. § 231(a)(3) (Counts One and Two); Obstruction of an Official Proceeding and Aiding and Abetting, in violation of 18 U.S.C. §§ 1512(c)(2), 2 (Count Three); Assaulting, Resisting, or Impeding Certain Officers, in violation of 18 U.S.C. § 111(a)(1) (Counts Four and Five); Assaulting, Resisting, or Impeding Certain Officers Using a Dangerous Weapon, in violation of 18 U.S.C. § 111(a)(1) and (b) (Count Six); Entering and Remaining in a Restricted Building or Grounds with a Deadly or Dangerous Weapon, in violation of 18 U.S.C. § 1752(a)(1) and (b)(1)(A) (Count Ten); Disorderly and Disruptive Conduct in a Restricted Building or Grounds with a Deadly or Dangerous Weapon, in violation of 18 U.S.C. § 1752(a)(2) and (b)(1)(A) (Count Eleven); Engaging in Physical Violence in a Restricted Building or Grounds with a Deadly or Dangerous Weapon, in violation of 18 U.S.C. § 1752(a)(4) and (b)(1)(A) (Count Twelve); and Disorderly Conduct in a Capitol Building, in violation of 40 U.S.C. § 5104(e)(2)(D) (Count Thirteen). ECF No. 71.

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). Rule 401, 402 and 403 do not support Defendant Smiths' requested relief.

I. The descriptors accurately describe the events of January 6, 2021, and the Federal Rules of Evidence do not preclude them.

Defendant Smith argues that the Court should bar terms like "insurrection," "attack," "riot," "rioters," or "mobs". ECF 57 at 1, 3. Defendant Smith argues these words/phrases "carry a high risk of unfair prejudice and confusion" for the jurors. ECF 57 at 3. 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 the defendant's 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. Indeed, after carefully considering the facts of other January 6 cases, many other members of 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."). *See also Trump v. Thompson*, 20 F.4th 10 (D.C. Cir. 2021) (using the terms "insurrection," "riot," "rioters," "attack," and "mob" throughout the opinion); *United States v Munchel*, 991 F.3d 1273 (D.C. Cir. 2021) (using the terms "insurrection," "riot," "rioters," and "mob" throughout the opinion); *United States v. Bledsoe*, No. 21-cr-204 (BAH), 2022 WL 3594628, at *2 (D.D.C. Aug. 22, 2022) (describing "The January 6, 2021 attack on the Capitol" and referring to the "mob," "riot," and "rioters"); *United States v. Ballenger*, No. 21-cr-719 (JEB), 2022 WL 16533872 (D.D.C. Oct 28, 2022) (referring to the

January 6, 2021 "insurrection" and "attack"); *United States v. Grider*, No. 21-cr-22 (CKK), 2022 WL 3016775 (D.D.C. July 29, 2022) (referring to January 6, 2021 as an "insurrection" and "riot" committed by "rioters" and a "mob"); *United States v. Reffitt*, No. 21-cr-32 (DLF), 2022 WL 1404247 (D.D.C. May 4, 2022) (referring to January 6, 2021 "insurrection" committed by "rioters" and a "mob"); *United States v. Bingert*, No. 21-cr-91 (RCL), 2022 WL 1659163 (D.D.C. May 25, 2022) (referring to January 6, 2021 as an "insurrection" and "riot" committed by "rioters" and a "mob"). 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 Smith's conduct.

As Chief Judge Howell stated, "the terms also overlap with elements of the charged offenses, which the government must prove at trial. For example, obstructing, impeding, or interfering with law enforcement duties incident to and during a civil disorder of many hundreds of people, or a mob, is a violent public disorder, or a riot. Knowingly engaging in physical violence against any person or property using physical force is an assault, or an attack. Obstructing, influencing, or impeding an official government proceeding with the intent to disrupt an electoral vote is a revolt against an established government, or an insurrection. While these terms could trigger emotional responses in some individuals, the mere use of these terms does not, at this stage, signal prejudice that substantially outweighs their probative value. Thus, muzzling the government and witnesses from employing commonly used words and phrases to describe the events of January 6, 2021, is impractical and does not amount to unfair prejudice in violation of Federal Rule of Evidence 403." *United States v. Gillespie*, 22-cr-60 (BAH) (Nov. 30, 2022, ECF 43 at 6-7).

Smith further argues that the government and its witnesses should be precluded from using words like "trespass," "disorderly conduct," and "demonstrating" during the presentation of witness testimony. ECF No. 57 at 4. Here, the defendant's concern is not an appeal to the jury's emotions, but that such terminology amounts to an improper legal conclusion. But the defendant cites no meaningful support for his argument. *United States ex rel. Mossey v. Pal-Tech, Inc.*, 231 F. Supp. 2d 94 (D.D.C. 2002), is a civil case in which Judge Friedman refused to allow testimony by an expert because (1) the plaintiff's expert report failed to comply with Fed. R. Civ. P. 26(a)(2)(B) and (2) the report "contain[ed] nothing more than legal opinions and unsubstantiated assessments of evidence." *Mossey*, 231 F. Supp. 2d at 98. In that case, it was apparent that the expert had no scientific or technical expertise that would help the jury, but rather the plaintiff sought to use him solely to explain legal concepts that would intrude upon the Court's obligation to instruct the jury. *Id*. That is a far cry from the situation in this case, where police officers might explain that rioters were trespassing because no one was authorized to enter the Capitol on January 6, 2021, or that the presence of the crowd was disruptive because police had to clear the entire crowd before Congress could resume its business. Indeed, the federal rules do not prohibit such testimony. *See* Fed. R. Evid. 704(a) ("An opinion is not objectionable just because it embraces an ultimate issue.").

II. General evidence of the events of January 6 and the actions of other rioters at the Capitol is relevant.

A. Defendant Smith's motion should be denied as overly broad.

Defendant Smith seeks to preclude the government from introducing evidence of any conduct other than Smith's. He argues any such evidence is irrelevant because Defendant Smith was "neither involved nor had personal knowledge" of any actions taken "prior to the Mr. Smith arriving at the Capitol" or in areas of the Capitol where he was not present. ECF 57 at 2. The

motion does not refer to any specific evidence or provide any concrete examples, and a motion to exclude *all evidence of or references to the conduct of others* is exceptionally vague and overbroad. In light of the lack of specific evidence identified and the overly broad nature of the request, the motion in limine should be denied. *Fakhoury v. O'reilly*, No. 16-13323, 2022 WL 909347, at *6 (E.D. Mich. Mar. 28, 2022) ("A court is well within its discretion to deny a motion *in limine* that fails to identify the evidence with particularity or to present arguments with specificity") (emphasis added; internal quotations omitted); *Ctr. Hill Cts. Condo. Ass'n, Inc. v. Rockhill Ins. Co.*, No. 19-CV-80111, 2020 WL 496065, at *2 (S.D. Fla. Jan. 30, 2020) ("The Court concludes that this motion *in limine* is overbroad in that it 'lacks the necessary specificity with respect to the evidence to be excluded'"); *In re Homestore.com, Inc.*, No. CV 01-11115 RSWL CWX, 2011 WL 291176, at *2 (C.D. Cal. Jan. 25, 2011) ("The Court finds Plaintiff's request as over-broad and vague, and therefore inappropriate for review at the motion *in limine* stage"); *Colton Crane Co., LLC v. Terex Cranes Wilmington, Inc.*, No. CV 08-8525PSGPJWX, 2010 WL 2035800, at *1 (C.D. Cal. May 19, 2010) ("motions *in limine* should rarely seek to exclude broad categories of evidence, as the court is almost always better situated to rule on evidentiary issues in their factual context during trial") (citing *Sperberg v. Goodyear Tire & Rubber Co.,* 519 F.2d 708, 712 (6th Cir.1975) ("A better practice is to deal with questions of admissibility of evidence as they arise")).

B. Even if Defendant Smith was unaware of some of the conduct of others as it was occurring, evidence of such conduct is still relevant to several counts with which he is charged.

Regardless of whether Defendant Smith was aware of all other conduct by all other rioters on January 6, 2021, evidence of conduct by other rioters is nonetheless relevant to proving the offenses that Smith committed. It is unclear what specific evidence Defendant Smith seeks to have the Court exclude. However, there are a number of exhibits the Government intends to introduce

in its case in chief which and which prominently feature the conduct of others and do not focus on on Defendant Smith's conduct. For instance, the government intends to introduce evidence through a U.S. Capitol Police Officer familiar with the Capitol Police procedures leading up to January 6, 2021, including the security cameras put in place. From the videos recorded by those cameras on January 6, 2021, the government has developed a comprehensive exhibit covering the events of the day. This video montage shows that, as the certification proceeding at the Capitol began, a large crowd gathered outside the U.S. Capitol. Officers with the United States Capitol Police and the Metropolitan Police Department attempted to keep the crowd away from the building, but the crowd broke through several barriers on the West front just before 1:00 pm. Another crowd gathered on the East Plaza of the building, encroaching on the area where the motorcade that brought Vice President Pence to the Capitol was located. Shortly before 2:00 pm, the crowd on the West Front broke into the scaffolding, which was set up to construct the inauguration state. At 2:13 pm, individuals in the crowd forced entry into the U.S. Capitol building itself on the West side near the Senate. In response to this intrusion, representatives, senators and Vice President Pence evacuated their respective chambers around 2:20 pm. For the next two hours, rioters flooded the building and the grounds, while police attempted to clear them out. The police finally cleared the Lower West Terrace of the Capitol at approximately 5:10 pm.

To convict him, the jury must find that Defendant Smith committed each offense with which he is specifically charged. It is not enough for the government to show that he was simply present near others who committed crimes across the Capitol building and grounds. But Defendant Smith's argument ignores the nature of these crimes as a collective action. It was the rioting mob's collective action that disrupted Congress.

Evidence of the official proceeding, and its disruption, the actions of rioters in multiple areas of the Capitol, and the response of Capitol Police and other law enforcement officers, is relevant to the elements of the crimes with which Defendant Smith is charged. First, to prove Counts One and Two, Civil Disorder, in violation of 18 U.S.C. § 231(a)(3), the government must necessarily prove that a civil disorder happened, which requires evidence of conduct committed by others. Second, to prove Count Three, 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; to prove the disruption of this proceeding, the government must present evidence about the actions of other rioters at locations throughout the Capitol building and grounds. Moreover, Count Three includes the alternative theory of aiding and abetting, pursuant to 18 U.S.C. § 2. As another Court previously observed, "The government may argue that a wide range of actions—including actions that happened after the joint session had been suspended in light of the rioting mob that had entered the Capitol—'obstructed, influenced, or impeded' the joint session. *United States v. Brock*, No. CR 21-140 (JDB), 2022 WL 3910549, at *3 (D.D.C. Aug. 31, 2022). Therefore, the conduct of other rioters is both relevant and admissible.

Likewise, to prove Count Eleven, the government must prove that the defendant engaged in "disorderly or disruptive conduct" in a restricted area "when … such conduct, in fact, impedes or disrupts the orderly conduct of Government business or official functions." 18 U.S.C. § 1752(a)(2). The video montage exhibit establishes how and when the disruption occurred.

The probative value of the montage is even higher in a case such as this, where the defendant participated in disorderly and disruptive acts, and acts of physical violence, at several

different locations. In any event, while the government does not anticipate focusing its evidentiary presentation on areas of the Capitol where Smith did not go, in order to show the overall riot, its effects, the context of Smith'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 various other areas of the Capitol building and grounds. None of the rioters were authorized to enter the Capitol or its restricted grounds, and law enforcement officer witnesses will explain that before the Congressional proceeding could resume, all rioters had to be expelled. The size of the crowd, and the number of breaches, made it difficult to restore order; but for Smith'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 Defendant Smith based on his own actions, the context of his actions—an ongoing riot—is highly relevant to their evaluation of those actions.

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 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).

Finally, even if this Court found the actions of other rioters to be prejudicial, the appropriate remedy is a limiting instruction, not exclusion. 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 the jury on the permissible and impermissible uses of the evidence); *Pettiford,* 517 F.3d 584, 590 (D.C. Cir. 2008) (same); *Crowder II*, 141 F.3d 1202, 1210 (D.C. Cir. 1998) (stating that mitigating instructions to jury enter into the Rule 403 balancing analysis).

Because the actions of other rioters are relevant and not unduly prejudicial, and because any prejudice can be addressed through an appropriate limiting instruction, admission of general riot evidence—like the video montage—is warranted and appropriate.

CONCLUSION

For the reasons stated above, Defendant Smith's motion should be denied.

Respectfully submitted,

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