UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA	:	
	:	
v.	:	**Case No. 21-cr-35-EGS**
	:	
JACK WADE WHITTON,	:	
Defendant.	:	

UNITED STATES' OPPOSITION TO THE DEFENDANT'S MOTION TO ADOPT DISCOVERY MOTION FILED IN CASE NO. 21-CR-40-TNM

The United States of America, by and through its attorney, the United States Attorney for the District of Columbia, respectfully opposes Whitton's Motion to Adopt, Conform, and Supplement Motion to Compel Selective-Prosecution Discovery (ECF No. 149).

In his motion, Whitton summarily adopts a motion seeking discovery in support of a selective prosecution claim filed by a different defendant in a different case, *United States v. David Lee Judd*, 21-cr-40-TNM (D.D.C.), and to "enjoy the benefits" of any ruling in that case. Judge McFadden, however, recently denied this motion for discovery.[1] *See United States v. David Lee Judd*, 21-cr-40-TNM (D.D.C. Dec. 28, 2021) (ECF No. 203). Whitton's request to incorporate the *Judd* motion and any subsequent discovery ordered by Judge McFadden is therefore moot. The Court should accordingly deny Whitton's motion.

In the alternative, the Court should deny Whitton's motion on the merits. The defendant in *United States v. Mark Sahady*, No. 21-cr-134-CJN (D.D.C.) (ECF No. 29) filed an identical one-page motion seeking to adopt the *Judd* discovery motion. The government's opposition,

[1] Judge Nichols denied a similar motion for selective-prosecution discovery in *United States v. Garret Miller*, 1:21-cr-119-CJN (D.D.C. Dec. 21, 2021) (ECF No. 67).

which it attaches and incorporates here by reference, explains why this cursory adoption effort fails.[2]

In brief, the Supreme Court has imposed a "correspondingly rigorous standard for discovery in aid of such a [selective prosecution] claim." *United States v. Armstrong*, 517 U.S. 456, 468 (1996). The defendant must initially produce "some evidence tending to show the existence of the essential elements of" selective prosecution, which are: "discriminatory effect and discriminatory intent." *Ibid.* (citation omitted). The defendant's evidence must also be "credible"—something more than "personal conclusions based on anecdotal evidence." *Id.* at 470. "If either part of the test is failed," the defendant cannot "subject[] the Government to discovery." *Att'y Gen. of United States v. Irish People, Inc.*, 684 F.2d 928, 947 (D.C. Cir. 1982).

Whitton's attempt to satisfy *Armstrong*'s rigorous standard through a cursory adoption of the *Judd* motion fails.

First, the Oregon defendants cited in the *Judd* pleadings serve as improper "comparator[s]" because they and Whitton are not similarly situated. *United States v. Stone*, 394 F. Supp. 3d 1, 31 (D.D.C. 2019). The cited Oregon defendants—despite committing serious offenses—never entered the federal courthouse structure or impeded an official proceeding. Whitton and his co-defendants, by contrast, attacked police officers guarding the U.S. Capitol's lower-west-terrace entryway. Social-media and body-worn-camera footage captured Whitton as he stuck one officer with a crutch, grabbed the officer by his head and helmet, and dragged the officer down the stairs and into a mob—which beat the officer further. *See* Gov't Mot for Emergency Stay of Release

[2] Judge Nichols denied the defendant's adoption motion. *See* Minute Order, *United States v. Sahady*, No. 21-cr-134 (D.D.C. Jan. 6, 2022).

Order at 5-11 (ECF. No. 35). And Whitton's violent conduct occurred during an effort by the mob to enter the U.S. Capitol building where elected lawmakers and the Vice President were present and attempting to certify the results of the 2020 Presidential Election.

As Judge McFadden observed in *Judd*, individuals like Whitton "endangered hundreds of federal officials in the Capitol complex." *Judd*, *supra*, slip op. 10. "Members of Congress cowered under chairs while staffers blockaded themselves in offices, fearing physical attacks from the rioters." *Ibid.* "The action in Portland, though destructive and ominous, caused no similar threat to civilians." *Ibid.*

These situational differences represent "distinguishable legitimate prosecutorial factors that might justify making different prosecutorial decisions" in Whitton's case. *Branch Ministries v. Rossotti*, 211 F.3d 137, 145 (D.C. Cir. 2000) (quoting *United States v. Hastings*, 126 F.3d 310, 315 (4th Cir. 1997)); *see also Price v. U.S. Dep't of Justice*, 865 F.3d 676, 681 (D.C. Cir. 2017) (observing that a prosecutor may legitimately consider "concerns such as rehabilitation, allocation of criminal justice resources, the strength of the evidence against the defendant, and the extent of a defendant's cooperation" in plea negotiations) (brackets and citation omitted). This is precisely why the selective-prosecution discovery motion in *Judd* failed. *See Judd*, *supra*, slip op. 11 ("Given the important distinctions in the threats posed by the two riots, the Portland defendants are not similarly situated to Judd."); *see also Miller*, *supra*, slip. Op. 3 ("The circumstances between the riots in Portland and the uprising in the Nation's capital differ in kind and degree, and the Portland cases (and the government's prosecutorial decisions) are therefore not sufficiently similar to this case to support Miller's request for discovery.").

Second, because the defendant in *Judd* adduced no evidence that the government initiated the charges in response to his political views, he separately failed his burden on *Armstrong*'s second element. *See Judd*, slip. op. 11-12 n.9 (explaining Judd "fails the second prong" and that the government's prosecutorial actions "undermine Judd's theory that DOJ purposefully prosecuted him for his politics"). Whitton's motion in this case, by extension, likewise fails. The U.S. Attorney for the District of Columbia—as an officer of this Court—further represents that Whitton's political views plays no role in his office's charging decisions in this case.

Conclusion

Because Whitton's discovery request is moot, and because it fails to carry his burden under *Armstrong*, he is not entitled to discovery and his motion should be denied.

Respectfully submitted,

MATTHEW M. GRAVES
United States Attorney
D.C. Bar No. 481052

/s/ *Matthew Moeder*
Matthew Moeder
MO Bar No. 64036
Benet J. Kearney
NY Bar No. 4774048
Colleen D. Kukowski
DC Bar No. 1012458
Assistant United States Attorneys
555 4th Street, N.W.
Washington, D.C. 20530
(212) 637 2260 / (202) 252-2646 / (816) 426-4103
Benet.Kearney@usdoj.gov /
Colleen.Kukowski@usdoj.gov /
Matthew.Moeder@usdoj.gov

CERTIFICATE OF SERVICE

I hereby certify that on January 13, 2022 I caused a copy of the foregoing motion to be served on attorney of record via email and the Court's electronic filing system.

/s/ Matthew Moeder
Matthew Moeder
Assistant United States Attorney