UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES	)	
v.	)	Criminal No. 21-cr-259 (TSC)
MARK K. PONDER	)	

PRETRIAL CONFERENCE ORDER[1]

A Pretrial Conference will be held at **10:00 a.m.** on **December 20, 2021**, in Courtroom 9. Trial is hereby set to begin on **January 3, 2022**, at **9:30 a.m.**, in Courtroom 9. Motions *in limine* are due **November 8, 2021**. Responses to motions *in limine* are due **November 22, 2021**; replies will not be permitted without leave of court.

Prior to the pretrial conference, counsel for the United States and counsel for the Defendant shall meet and confer for the purpose of preparing the Joint Pretrial Statement. The parties are directed to confer in good faith, and counsel for the United States shall file a Joint Pretrial Statement not later than **noon** on **November 22, 2021**. Prior to submitting the Joint Pretrial Statement, the parties must discuss and attempt to resolve all objections. **Separate Pretrial Statements will be stricken, *sua sponte*.**

Counsel for the United States must file the Joint Pretrial Statement (including proposed voir dire questions, proposed jury instructions, and proposed verdict form) electronically via ECF, and submit physical and electronic Microsoft Word courtesy copies to chambers. The Joint Pretrial Statement shall be double-spaced, in 12-point Times New Roman font, in Microsoft Word format, with margins of no less than one (1) inch. Two courtesy hard copies of the Joint Pretrial Statement (including

[1] Failure to comply with the requirements and deadlines established in this Pretrial Order may result in sanctions including, but not limited to, fines payable to the Clerk of the Court, a court order striking untimely or non-compliant pretrial submissions and pleadings, dismissal of claims/defenses, and/or public admonishment of counsel.

proposed voir dire questions, proposed jury instructions, and proposed verdict form) shall be delivered to **Tim Bradley,** 202-354-3162, Courtroom Deputy, not later than **3 p.m.** on **November 22, 2021**, in separate three ring binders, with each section separated by labeled tab dividers. The electronic Microsoft Word copy shall be e-mailed to chambers not later than **5:00 p.m.** on **November 22, 2021. Counsel may obtain the chambers' email address from** Tim Bradley and shall refrain from using the address for any other purpose, **unless directed to do so by the court.**

A. The Joint Pretrial Statement must include the following:[2]

1. **Parties and Counsel:** List names, addresses, and telephone numbers of all counsel on whose behalf the Joint Pretrial Statement is filed. List names of lead counsel who intend to try the case. List the full legal name of the Defendant.

2. **Nature of the Case:** Provide a brief and neutral statement describing the nature of the case for the Court to read to prospective jurors. This statement should be brief, clear, and non-argumentative so that it is appropriate for reading to the jury.

3. **Undisputed Issues/Stipulations:** List all issues not in dispute or facts to which the parties have stipulated.

4. **Witness Schedule:** List the name of each witness that may be called by a party, including rebuttal witnesses. Opinion witnesses shall be designated by an asterisk.

   Each party shall indicate whether any witnesses will testify through an interpreter and, if so, shall indicate in which language the witness shall testify.

5. **Exhibits:**

   List and describe each exhibit to be offered in evidence, including (if possible) rebuttal exhibits, with each exhibit identified by number, title, and date (if applicable). Counsel must use the Exhibit List form found on Judge Chutkan's webpage.

   No exhibit will be admitted at trial unless it is listed on the Joint Pretrial Statement. Each listed exhibit will be presumed authentic and admissible at trial unless a written objection specifying the specific basis of the objection is made in the Joint Pretrial Statement. **If there are objections to an exhibit listed in the Joint Pretrial Statement, the exhibit shall be produced at the time the Joint Pretrial Statement is submitted. Two copies**

[2] **If the parties have no statement or submission concerning any one of the items required in Section A (e.g., if the parties have not stipulated to any facts), the Joint Pretrial Statement shall so indicate.**

of the challenged exhibits shall be submitted to the court in separate three ring binders with appropriate tabs. Objections that are not disclosed in the Joint Pretrial Statement, except those pursuant to Fed. R. Evid. 402 and 403, shall be deemed waived, unless such failure to timely object is excused by the court for good cause shown.

The court expects most objections to exhibits to be cured by discussion between the parties, and the parties should stipulate to the admissibility of as many exhibits as possible.

a. **Examination by Opposing Party:** Except where beyond the party's control or where otherwise impractical, each party shall make exhibits available for inspection and copying for the opposing party.

b. **Marking:** Each party that anticipates offering more than five (5) exhibits as substantive evidence shall pre-mark such exhibits in advance of trial, using exhibit labels and lists available from the Clerk of the Court. The court will provide up to 100 labels; if a party needs more labels, that party must use labels of the same type as those supplied by the court. The court urges counsel to be judicious in determining which documents actually are relevant to necessary elements of the case.

c. **Authentication of Exhibits:** Counsel requiring authentication of an opponent's exhibit must notify offering counsel in writing within 10 business days after the exhibit is identified and made available for examination. Failure to do so shall be deemed an admission of authenticity.

d. **Exhibit Binders:** Before trial, the parties shall provide the court with two exhibit binders containing all exhibits that will be used at trial. At trial, the parties shall have an additional clean, unmarked copy of any exhibit to be shown to a witness, and an additional clean, unmarked copy for the display if the exhibit is to be admitted.

6. **Demonstrative/Physical/Videotape Evidence:** Describe all demonstrative, physical and/or videotape evidence that will be used at trial. Such evidence listed in the Joint Pretrial Statement shall be deemed potentially admissible at trial, unless an objection is made in the Joint Pretrial Statement, along with the specific basis for the objection and supporting legal authority.

7. **Pending Motions:** List all pending motions, including motions *in limine*, and indicate the title and filing date.

8. **Proposed voir dire questions** that indicate

   a. the voir dire questions on which the parties agree; and
   b. the voir dire questions on which the parties disagree, with specific objections noted below each disputed question and supporting legal authority (if any);

c. The objecting party shall specifically identify the objectionable portion of the voir dire question, along with the basis of the objection and citations to supporting legal authority

9. **Proposed Jury Instructions:** List all proposed jury instructions, followed by the text of each proposed instruction, as well as the specific source and citation for the proposed instructions (e.g., Modern Federal Jury Instructions (Criminal) § 3.03: Defendant's Connection to the Conspiracy (2016)) or, for modified or new instructions, specific supporting legal authority. Any variations or alterations of standard jury instructions shall be so noted and the proposed instructions shall be formatted so that each individual instruction begins a new page. Additionally, the parties shall indicate

   a. the instructions on which the parties agree; and
   b. the instructions on which the parties disagree, with specific objections noted below each disputed instruction and supporting legal authority (if any);

   The objecting party shall specifically identify the objectionable portion of the instruction, along with the basis of the objection and citations to supporting legal authority.

   Attached to this Order is a list of the general jury instructions used by the court. To the extent the parties propose changes, they shall include the court's instruction, along with any proposed changes in redlined form.

10. **Verdict form: The parties shall prepare a proposed verdict form**, that includes proposed special interrogatories (if any). The proposed form shall also include a date and signature line for the jury foreperson.

    Any party that objects to the proposed verdict form shall specifically identify the objectionable portion of the form, along with the basis of the objection and citations to supporting legal authority. Objections to the verdict form shall be accompanied by a proposed alternative form.

11. **Special Matters:** The parties shall identify any special considerations for trial, such as accommodations for persons with disabilities, or any other pertinent matters about which the court should be aware.

12. **Estimated Length of Trial:** List the number of days estimated for trial and set forth any scheduling problems with witnesses.

B. Administrative Matters

1. The court will utilize the Jury Evidence Recording System (JERS) to provide the jury with electronic access to the evidence in this case during their deliberations. The parties are directed to contact courtroom deputy Tim Bradley for more information on the use of

JERS.

2. In the event of a conviction, all sentencing motions and sentencing memoranda must be filed no later than ten business days before the date of sentencing.

3. The parties shall familiarize themselves with Chief Judge Howell's Standing Order on court wide COVID-19 protocols.[3] The court will issue an order prior to the pretrial conference and/or trial if additional precautions become necessary.

Date: July 29, 2021

Tanya S. Chutkan
TANYA S. CHUTKAN
United States District Judge

[3] This order appears on the court's website: https://www.dcd.uscourts.gov/.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA	:	
	:	
v.	:	**Criminal No. 21-cr-0259 (TSC)**
	:	
MARK K. PONDER,	:	
	:	
Defendant.	:	

PRELIMINARY JURY INSTRUCTIONS

Members of the Jury, now that you have been sworn, I want to give you some brief information about how this trial will work and some important legal rules. I will give you more detailed instructions at the end of the trial after you have heard all the evidence and before you start your deliberations.

My function is to conduct this trial in an orderly, fair, and efficient manner; to rule on questions of law; and to instruct you on the law that applies in this case. It is your duty to accept the law as I instruct you. You should consider all the instructions as a whole. You may not ignore or refuse to follow any of them.

Your function, as the jury, is to determine what the facts are in this case. You are the sole judges of the facts. While it is my responsibility to decide what is admitted as evidence during the trial, you alone decide what weight, if any, to give to that evidence. You alone decide the credibility or believability of the witnesses.

You should determine the facts without prejudice, fear, sympathy, or favoritism. You should not be improperly influenced by anyone's race, ethnic origin, or gender. Decide the case solely from a fair consideration of the evidence.

You may not take anything I may have said or done as indicating how I think you should decide this case. If you believe that I have expressed or indicated any such opinion, you should ignore it. The verdict in this case is your sole and exclusive responsibility.

When you took your seat, you probably noticed that each of you had a notebook and pencil waiting for you. That is because I allow jurors to take notes during trial if they wish. Whether you take notes or not is entirely up to you. Some people find that taking notes helps them remember testimony and evidence; others find it distracts them from listening to the witnesses. Your notes, if you decide to take them, are only an aid to your memory; they are not evidence. Those jurors who do not take notes should rely on their own memory of the evidence. Similarly, if any reference by me or the attorneys to the evidence is different from your own memory of the evidence, it is your memory that should control during your deliberations.

Whenever there is a recess during trial or we break for the day, please leave your notebook and pen in the envelope on your seat. They will be left there during short recesses, when I remain on the bench, or when the courtroom is locked, and

they will be collected during overnight recesses and given to Mr. Tim Bradley, the courtroom deputy clerk, for safe-keeping. When it is time for you to deliberate, you will be allowed to take your notebooks with you to the jury room. At the end of the trial, after you deliver your verdict, your notebooks will be collected, and the pages with notes will be torn out and destroyed. No one, not even me, will ever look at your notes, so you should feel free to write whatever you wish.

You must pay careful attention to the testimony of all of the witnesses because you will not be given any transcripts or summaries of the testimony during your deliberations. You will have to rely entirely on your memory and your notes if you choose to take any.

You have probably noticed that fourteen of you are sitting here today. Only twelve of you will retire to deliberate in this matter. Before any of you even entered the courtroom, we randomly selected the alternates' seats. I will not disclose who the alternate jurors are until the end of my final instructions just before you begin your deliberations. As any seat might turn out to be an alternate's seat, it is important that each of you think of yourselves as regular jurors during this trial, and that all of you give this case your fullest and most serious attention.

I will now explain some legal terminology, including the burden of proof.

The United States represents the prosecution, and the United States' lawyers are known as Assistant United States Attorneys or AUSAs. They are the federal

prosecutors and are also sometimes referred to as "the government." When I mention the "government," I am referring to Assistant United States Attorney Jocelyn P. Bond. The Defendant is Mark K. Ponder. When I mention the defendant or the defense, I am referring either to the defendant Mark Ponder or to his attorney, Joseph R. Conte.

Mr. Ponder has been indicted for a federal crime, which means that a grand jury determined that there is probable cause to believe that the crime was committed and that Mr. Ponder committed it. But the grand jury does not determine guilt or innocence: that is your role.

The government has the burden of proving a defendant guilty beyond a reasonable doubt. In civil cases, it is only necessary to prove that a fact is more likely true than not, or, in some cases, that its truth is highly probable. In criminal cases such as this one, the government's proof must be more powerful than that. It must be beyond a reasonable doubt. Reasonable doubt, as the name implies, is a doubt based on reason—a doubt for which you have a reason based upon the evidence or lack of evidence in the case. If, after careful, honest, and impartial consideration of all the evidence, you cannot say that you are firmly convinced of the defendant's guilt, then you have a reasonable doubt.

Reasonable doubt is the kind of doubt that would cause a reasonable person, after careful and thoughtful reflection, to hesitate to act in the graver or more

important matters in life. However, it is not an imaginary doubt, nor a doubt based on speculation or guesswork; it is a doubt based on reason. The government is not required to prove guilt beyond all doubt, or to a mathematical or scientific certainty. Its burden is to prove guilt beyond a reasonable doubt.

Mr. Ponder has pleaded not guilty to the all charges in the indictment. Every defendant in a criminal case is presumed to be innocent. This presumption of innocence remains with the defendant throughout the trial unless and until the government has proven he is guilty beyond a reasonable doubt. This burden never shifts throughout the trial. The law does not require the defendant to prove his innocence or to produce any evidence at all. If you find that the government has proven beyond a reasonable doubt every element of the offense with which the defendant is charged, it is your duty to find the defendant guilty of that offense. On the other hand, if you find the government has failed to prove any element of the offense beyond a reasonable doubt concerning the defendant, it is your duty to find the defendant not guilty of that offense.

There are two types of evidence from which you may determine what the facts are in this case—direct evidence and circumstantial evidence. When a witness, such as an eyewitness, asserts actual knowledge of a fact, that witness's testimony is direct evidence. On the other hand, evidence of facts and

circumstances from which reasonable inferences may be drawn is circumstantial evidence.

Let me give you an example. Assume a person looked out a window and saw that snow was falling. If he later testified in court about what he had seen, his testimony would be direct evidence that snow was falling at the time he saw it happen. Assume, however, that he looked out a window and saw no snow on the ground, and then went to sleep and saw snow on the ground after he woke up. His testimony about what he had seen would be circumstantial evidence that it had snowed while he was asleep.

The law says that both direct and circumstantial evidence are acceptable as a means of proving a fact. The law does not favor one form of evidence over another. It is for you to decide how much weight to give to any particular evidence, whether it is direct or circumstantial. You are permitted to give equal weight to both. Circumstantial evidence does not require a greater degree of certainty than direct evidence. In reaching a verdict in this case, you should consider all of the evidence presented, both direct and circumstantial.

The weight of the evidence is not necessarily determined by the number of witnesses testifying for each side. Rather, you should consider all the facts and circumstances in evidence to determine which of the witnesses you believe. You might find that the testimony of a smaller number of witnesses on one side is more

believable than the testimony of a greater number of witnesses on the other side or you might find the opposite. In other words, whether there is evidence beyond a reasonable doubt depends on the quality, and not the quantity, of evidence. In other words, merely having a greater number of witnesses or documents bearing on a certain version of the facts does not necessarily constitute evidence beyond a reasonable doubt.

Our system of justice requires that you decide the facts of this case in an impartial manner. You must not be influenced by bias, sympathy, prejudice, or public opinion. It is a violation of your sworn duty to base your verdict upon anything other than the evidence in the case. In reaching a just verdict, you must consider the United States and the Defendant as equals. All persons, including individuals and government entities, stand equal before the law and are to be treated as equals in this court. In other words, the fact that the prosecutor is the United States must not affect your decision.

Similarly, a police officer's or law enforcement official's testimony should be evaluated by you just as any other evidence in the case. In evaluating the officer's credibility, you should use the same guidelines that you apply to the testimony of any witness. In no event should you give either greater or lesser weight to the testimony of any witness merely because he is a police officer or law enforcement official.

One of the questions you were asked when we were selecting this jury was whether the nature of the charges themselves would affect your ability to reach a fair and impartial verdict. We asked you that question because you must not allow the nature of a charge to affect your verdict. You must consider only the evidence that has been presented in this case in reaching a fair and impartial verdict.

As I mentioned, you must decide this case based solely on the evidence presented here in this courtroom. This means that during the trial you must not conduct any independent investigation or research about this case. For example, you cannot use the internet to research the facts or the law or the people involved in the case. Research includes something even as simple or seemingly as harmless as getting a definition of a legal term over the internet or from a dictionary.

I want to explain why you should not conduct your own investigation or research. All parties have a right to have the case decided only on evidence and legal rules that they know about and to which they have a chance to respond. Relying on information you get outside this courtroom would be unfair because the parties would not have a chance to refute, correct, or explain it. Unfortunately, information that we get over the internet or from other sources may be incomplete or misleading or just plain wrong. It is up to you to decide whether to credit any evidence presented in court, and only the evidence presented in court may be

considered. If evidence or legal information has not been presented in court, you cannot rely on it.

You are not permitted to discuss this case with anyone until you begin your deliberations after I give you final instructions. This means that, until the case is submitted to you, you may not talk about it with family members, friends, or even your fellow jurors. You should not communicate about the case by any means—in person, over the phone, or using the internet, including emailing, texting, blogging, or using social media such as Facebook or Twitter. The only communication you should have is with the jury as a whole once your deliberations begin. This is because we want you to keep an open mind and not make any decisions until you've heard all the evidence and talked with your fellow jurors as a group.

When we take our first recess or when you leave the courthouse today, you may call home or work and tell them you have been selected for a jury and how long it will last. Your friends and family members will undoubtedly ask what kind of case you're sitting on. You may tell them it is a criminal case, but nothing else. When the case is over, you may discuss any part of it with anyone, if you wish to do so.

Although it is a natural human tendency to talk to people with whom you may come into contact, you must not talk to any of the parties, their attorneys, or any witnesses in this case while serving on this jury. If, during the trial, you

encounter anyone connected with the case outside the courtroom, you should avoid having any conversation with them, overhearing their conversation, or having any contact with them at all. For example, if you find yourself in a courthouse hallway, elevator, or any other location where the case is being discussed by attorneys, parties, witnesses, or anyone else, you should immediately leave the area to avoid hearing such discussions. If you do overhear a discussion about the case, you should report that to me as soon as you can. Finally, if you see any of the attorneys or witnesses involved in the case and they turn and walk away from you, they are not being rude; they are merely following the same instruction.

It is unlikely, but if someone tries to talk or otherwise communicate with you about the case, you should refuse to do so and immediately let me know by writing a note and giving it to Mr. Bradley. Do not tell the other jurors; just Mr. Bradley, and I'll bring you in to discuss it outside the hearing of the other jurors. Similarly, if during the trial you unexpectedly realize that you know anyone involved in the case or something about the facts, you should raise your hand immediately and ask to speak with me.

In some cases, although not necessarily this one, there may be reports in the newspaper or on the radio, social media or television concerning the case while the trial is going on. If there should be such media coverage in this case, you may be tempted to read, listen to, or watch it. You must not read, listen to, or watch such

reports because, as I explained before, you must decide this case solely on the evidence presented in this courtroom.

If you are exposed to any press coverage about the case, you must tell me about it immediately by informing Mr. Bradley. Again, you should not tell any of your fellow jurors or anyone else. You should tell only me or Mr. Bradley and I will then briefly discuss it with you out of the presence of the other jurors.

Now I will briefly describe what this case is about, some procedures we will use, and some of the rules of law that will be important. This criminal case involves the following statutes:

- Assaulting, Resisting, or Impeding Certain Officers Using a Dangerous Weapon in violation of 18 U.S.C. §§ 111(a)(1) and (b);
- Civil Disorder in violation of 18 U.S.C. § 231(a)(3);
- Obstruction of an Official Proceeding and Aiding and Abetting in violation of 18 U.S.C. § 1512(c)(2);
- 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);
- 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)(1) and (b)(1)(A);
- 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);
- Disorderly Conduct in a Capitol Building in violation of 40 U.S.C. § 5104(e)(2)(D); and
- Engaging in an Act of Physical Violence in the Capitol Grounds or

Buildings in violation of 40 U.S.C. § 5104(e)(2)(F).

The trial begins with each side having a chance to make opening statements. The defendant may make an opening statement immediately after the government's opening statement or he may wait until the beginning of the defendant's case, or he may choose not to make an opening statement at all. The opening statements of the lawyers are not evidence, and they are not supposed to be arguments of the facts or the law. They simply are statements of what the lawyers expect the evidence to be, and they are intended to help you understand the evidence which will be introduced.

After the opening statements, the United States' lawyers will present witnesses and evidence in support of the criminal charges against the Defendant, and the defense lawyers may cross-examine the witnesses. Then, the Defendant may present witnesses and evidence, and the government's lawyers may cross-examine them. After the government presents its evidence, the defendant may present evidence, but he is not required to do so. The law does not require a defendant to prove his innocence or to produce any evidence. After that, it is possible—but not always necessary—that a party may present evidence in rebuttal to that offered by an opposing party.

During the trial, the lawyers may occasionally object to questions, exhibits, and statements. You must not hold such objections against the lawyer who makes

them or the party the lawyer represents. It is the lawyers' responsibility to object to evidence that they believe is not admissible.

When you hear that I have "overruled" an objection, it means only that the law permits you to consider the evidence. It is still up to you to decide how much weight, if any, the evidence is entitled to. When I "sustain" an objection, it means only that the law does not permit you to consider the evidence. Therefore, you should ignore the evidence or ignore the question and you must not speculate as to what the answer to the question would have been. If a question is asked and answered before I am able to rule on the objection, and I then rule that the answer should be stricken, you should ignore both the question and the answer and they should play no part in your deliberations. Sometimes a lawyer's question suggests the existence of a fact, but the lawyer's question alone is not evidence. It is the witness's testimony that is evidence.

You may sometimes hear a lawyer ask a question which contains an assertion of fact—for example, "the car was going 90 miles an hour, wasn't it, Ms. Witness?" Please remember that no matter how sure or confident the lawyer sounds when stating the question, the assertion of fact made by the lawyer in her question is not evidence; only what the witness says in the answer is evidence. So, if the witness says "no," there's no evidence the car was going 90 miles an hour—

even though the lawyer said so, there is only evidence to that effect if the witness says "yes."

Now at the beginning of the jury selection process you were introduced to the lawyers and parties in person, and other witnesses were identified to you only by name. I want to emphasize to you that if, at any time during this trial, you suddenly think that you recognize or might know any witness, lawyer, someone who is mentioned in the testimony or evidence, or anyone else connected with this case in any way, you should not tell any other member of the jury. However, you should immediately let Mr. Bradley know about it as soon as you realize it or, if it happens while the testimony is occurring, you should raise your hand immediately so that I can have you come to the bench and we can discuss it out of the presence of the other jurors.

After all the evidence is presented, each party will have a chance to make closing arguments. The statements of the lawyers in their closing arguments, just as in their questions and their opening statements, are not evidence in this case. The closing arguments are solely intended to help you understand the evidence, and what each party claims the evidence shows.

Finally, at the end of all of the evidence and the arguments for both sides, I will instruct you on the rules of law which you are to apply in your deliberations when you retire to consider your verdict. Your verdict must be unanimous.

You will spend most of your time during this trial either in the courtroom or in the jury room. I urge you not leave any valuables in the jury room—purses, wallets or anything of value. Keep your valuables with you. Thank you for your attention and your patience.