

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

UNITED STATES OF AMERICA	:	
	:	
v.	:	Case No.: 21-cr-274 (RDM)
	:	
JOHNNY HARRIS,	:	
	:	
Defendant.	:	

**MOTION IN LIMINE TO EXCLUDE OFFICE OF
PROFESSIONAL RESPONSIBILITY INVESTIGATIONS**

The United States of America, by and through its attorney, the United States Attorney for the District of Columbia, hereby moves to exclude defense evidence or argument related to The Office of Professional Responsibility (OPR) investigations involving United Capitol Police Officer Juan A. Lopez (Officer Lopez) and Supervisory Special Agent Junior (SSA Junior) where the alleged violations were determined to be unfounded.

I. Background

The defendant Johnny Harris (Harris) is charged in this case with violating the following laws on January 6, 2021 during the Capitol riot: 1) 18 U.S.C. § 1752(a)(1)(Entering and Remaining in a Restricted Building or Grounds); 2) 18 U.S.C. § 1752(a)(2)(Disorderly and Disruptive Conduct in a Restricted Building or Grounds); 3) 40 U.S.C. § 5104(e)(2)(D) (Disorderly Conduct in a Capitol Building); and 4) 40 U.S.C. § 5104(e)(2)(G)(Parading, Demonstrating, or Picketing in a Capitol Building). At approximately 2:35 p.m., Officer Lopez and SSA Junior responded to the Upper West Terrace (UWT) emergency exit door where rioters were entering the Capitol Building. At approximately 2:45 p.m., Harris entered the Capitol Building through the UWT

emergency exit door. After entering the Capitol Building, Harris and other rioters proceeded to the Rotunda where they encountered law enforcement officers tasked with removing rioters from the Capitol Building. Officer Lopez was a member of the police line in the Rotunda.

The Government anticipates that Officer Lopez or SSA Junior, or both, will testify in its case-in-chief regarding illegal conduct that took place at the UWT emergency exit door and the Rotunda.

II. Officer Lopez and SSA Junior's OPR Investigations

OPR investigated Officer Lopez and SSA Junior's actions at the UWT emergency exit door. The investigation centered upon whether Officer Lopez, SSA Junior, and three other officers, violated USCP Directive 2053.013, Rules of Conduct, Category B: Performance of Duty, Rule B1, when rioters allegedly entered the Capitol Building through the UWT emergency exit door while these officers were present and the officers subsequently left this UWT door and responded to a "shots fired" call. See Exhibit 1, United States Capitol Police Report of Investigation – Officer Juan A. Lopez, at 1-2. and Exhibit 2, United States Capitol Police Report of Investigation – SSA Adam Junior, at 1-2.

OPR determined that the alleged misconduct was unfounded. With respect to Officer Lopez, OPR held as follows:

The OPR determined that the alleged acts of misconduct did not occur. Lopez took appropriate police action based on the circumstances he faced during this incident. Lopez and the officers involved, took the necessary precautions to ensure life safety. Communications was advised that a breach had occurred at the UWT Door and that a key was needed to resecure the door. Lopez and the officers involved in

this incident confronted the group of unauthorized individuals entering the building two different times. Lopez and the other officers maintained a tactical position to control the area before they responded to a call for “shots fired.”

See Exhibit 1 at 14.

OPR reached the same conclusion with respect to SSA Junior, specifically holding as follows:

The OPR determined that the alleged acts of misconduct did not occur. Junior took appropriate police action based on the circumstances he faced during this incident. Junior and the officers involved, took the necessary precautions to ensure life safety. Communications was advised that a breach had occurred at the UWT Door and that a key was needed to resecure the door. Junior and the officers involved in this incident confronted the group of unauthorized individuals entering the building two different times. Junior and the other officers maintained a tactical position to control and area and ultimately responded to a call for “shots fired.”

Exhibit 2 at 16.

IV. Argument

Only evidence that is relevant may be admitted at trial. See Fed. R. Evid. 402. And to be relevant, the evidence must have a “tendency to make the existence of [a] fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Fed. R. Evid. 401; see also *United States v. Sesay*, 313 F.3d 591, 599-600 (D.C. Cir. 2002). Even if the defendant can articulate some basis for believing that information is relevant to his defense, the Court “may exclude marginally relevant evidence and evidence posing

an undue risk of confusion of the issues without offending a defendant's constitutional rights.” *United States v. Alayeto*, 628 F.3d 917, 922 (7th Cir. 2010) (citing *Holmes v. South Carolina*, 547 U.S. 319, 326–27 (2006)). Thus, relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. Fed. R. Evid. 403. Finally, the introducing party carries the burden to establish both relevancy and admissibility under the evidentiary rules. *United States v. Oseguera Gonzalez*, 507 F. Supp. 3d 137, 147 (D.D.C. 2020).

For the reasons below, the Court should exclude as irrelevant under Rule 401 the subject OPR investigations. This evidence should also be independently excluded under Rule 403. Any attempt to shift the jury's attention to questions about the propriety of the officers' conduct rather than the charged offenses risks confusing the issues, wasting time, and unfairly prejudicing the jury. *See United States v. Akefe*, 2013 WL 4729174, at *6 (S.D.N.Y. Aug. 30, 5 2013) (“This Court precluded all cross-examination of the DEA agent on the subject matter of the OPR investigation, as the investigation had ultimately been found to be unsubstantiated.”), *aff'd*, 568 F. App'x 1 (2d Cir. 2014); *United States v. Solorzano*, 2017 WL 1316276, *Id.* at *2 (N.D. Tex. Apr. 10, 2017) (“while the events as perceived by Defendant [are] relevant, evidence of police procedure and whether such procedures were followed, whether in the form of expert testimony or otherwise, is not relevant or admissible under Federal Rules of Evidence 401, particularly since there is no indication that Defendant was aware of standard police procedures or protocol at the time.” (emphasis in original)). In *Solorzano*, the defendant sought to introduce evidence regarding police protocols to argue that law enforcement's “failure to follow proper police procedure caused Defendant to respond the way he did because he believed his vehicle was being burglarized.” *Id.* at *1. The argument to exclude the OPR investigations from evidence in the instant case is even

more compelling since the OPR investigation determined that Officer Lopez and SSA Junior did not commit the alleged rules violations.

Multiple courts have echoed this view when excluding evidence concerning a violation of police procedures. *See, e.g., United States v. Ruoco*, 765 F.2d 983, 995 (11th Cir. 1985) (finding the professional standard for an undercover arrest was not relevant to the defendant's subjective intent when the agent sought to apprehend him absent evidence that the defendant knew of such standard at the time); *United States v. Wilk*, 572 F.3d 1229, 1235 (11th Cir. 2009) (noting that "the evidence relevant to Wilk's self-defense claim was his perception of the officers' actions that morning, not whether the officers followed proper procedure in executing the search warrant"); *United States v. Swint*, 2012 WL 3962704, at *2 (D. Ariz. Sept. 11, 2012) ("Dr. Streed's opinion that the officer's actions constituted excessive force is not relevant because the issue in Defendant's self-defense claim is the reasonableness of his belief that his use of force was necessary, not whether the officers acted unreasonably or contrary to proper training and procedures."); *United States v. Korbe*, 2010 WL 4639042, at *5 (W.D. Pa. Nov. 8, 2010) ("the relevant evidence to Defendant's self-defense claim is her perception of the officers' actions that morning, not whether the officers followed proper procedure in executing the arrest warrant").

In sum, the jury's assessment of Harris' conduct depends on evidence concerning his knowledge and intent, not whether officers complied with a particular procedure. *See Alayeto*, 628 F.3d at 922, holding that evidence concerning the MPD's internal investigation also "pos[es] an undue risk of confusion of the issues" before the jury, in violation of Rule 403. Because the evidence regarding the subject internal investigation does not bear on the criminal charges in this case, they should be excluded under Rule 401 and Rule 403. The Court should also prohibit Harris' cross-examination on this subject matter.

CONCLUSION

For these reasons, the United States respectfully requests that this Court grant its motion in *limine*.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 28, 2022, I caused a copy of the foregoing motion to be served on counsel of record via electronic filing.

/s/ Will Widman

WILL N. WIDMAN

Trial Attorney