

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

UNITED STATES OF AMERICA :
 : **Case No: 21-cr-421-JDB**
 v. :
 :
 JOHN MARON NASSIF, :
 :
 :
 Defendant. :

**GOVERNMENT’S OMNIBUS RESPONSE
TO DEFENDANT’S MOTIONS IN LIMINE**

The United States, by and through its attorney, the United States Attorney for the District of Columbia, hereby submits this response to Defendant John Maron Nassif’s (hereinafter, “Defendant Nassif”) Motions in Limine. Defendant Nassif filed motions in limine to (1) Preclude Reference to Offenses as Misdemeanors (ECF No. 45); (2) Preclude Use of Prejudicial Terminology (ECF No. 46); and (3) Preclude Government Arguments for Vicarious Criminal Liability (ECF No. 47).

The Court should deny these motions. As to the first motion, the Government does not intend to use the word “misdemeanor” at trial and will instruct its witnesses not to do so, but if it inadvertently does use this word, there should be no sanction imposed. Defendant Nassif’s second motion should be denied on the grounds that the terms are accurate and their connotations are relevant to the charges and not unduly prejudicial. As to the third motion regarding Vicarious Criminal Liability, the conduct of people who were near Nassif in the Capitol is relevant to explain how his conduct was disorderly and disruptive, and to prove his motive and mens rea.

FACTUAL BACKGROUND

On January 6, 2021, a joint session of the United States Congress convened at the United States Capitol at approximately 1:00 p.m. to certify the vote count of the Electoral College of the

2020 Presidential Election, which had taken place on November 3, 2020. Temporary and permanent barricades were in place around the exterior of the U.S. Capitol building, and U.S. Capitol Police were present and attempting to keep the crowd that had gathered outside away from the Capitol building and the proceedings underway inside.

Shortly after 2:00 p.m., individuals in the crowd forced entry into the U.S. Capitol, including by breaking windows and by assaulting members of the U.S. Capitol Police, as others in the crowd encouraged and assisted those acts. Shortly thereafter, at approximately 2:20 p.m. members of the United States House of Representatives and United States Senate, including the President of the Senate, Vice President Mike Pence, were instructed to—and did—evacuate the chambers. Accordingly, the joint session of the United States Congress was effectively suspended until shortly after 8:00 p.m. Vice President Pence remained in the United States Capitol from the time he was evacuated from the Senate Chamber until the sessions resumed.

On January 9, 2021, the FBI received a tip that John Maron Nassif of Florida posted pictures and video of himself inside the Capitol building on January 6th. On January 11, 2021, the FBI received another tip of Nassif's presence inside the Capitol on January 6, 2021. FBI Agents separately interviewed both tipsters, who each identified Nassif in photographs taken from closed-circuit surveillance video from inside the Capitol. Capitol surveillance video and video from others at the Capitol on January 6, 2021 show Nassif chanting outside the East Rotunda doors around 3:00 p.m. while others in the crowd confront officers attempting to secure the East Rotunda doors. At approximately 3:13/3:14 p.m., Nassif entered the Capitol through the East Rotunda doors with a large crowd protesting and seeking to disrupt the certification of the of the Electoral College vote for the 2020 Presidential Election. Officers in the area prohibited Nassif's and others' further entry

into the building, turning Nassif back as he approached the Rotunda itself. Nassif exited the Capitol at 3:23 p.m.

PROCEDURAL BACKGROUND

On April 29, 2021, Nassif was charged by complaint. On June 22, 2021, the government filed an Information, charging Nassif with four offenses: entering and remaining in a restricted building or ground, in violation of 18 U.S.C. § 1752(a)(1) (Count One); disorderly and disruptive conduct in a restricted building or grounds, in violation of 18 U.S.C. § 1752(a)(2) (Count Two); disorderly conduct in a Capitol building, in violation of 40 U.S.C. § 5104(e)(2)(D) (Count Three); and parading, demonstrating, or picketing in a Capitol building, in violation of 40 U.S.C. § 5104(e)(2)(G) (Count Four). ECF No. 12.

On October 24, 2022, Defendant Nassif filed three motions in limine. ECF Nos. 45-47.

ARGUMENT

I. Defendant Nassif's Motion to Preclude Reference to Offenses as Misdemeanors Should be Denied

Defendant Nassif request “an order that the parties may not, and must instruct their witnesses not to, refer to any of the charged offenses as a ‘misdemeanors’ in the jury’s presence” on the basis that “the jury’s factfinding [could] be clouded by a belief that its verdict will not carry serious consequences.” ECF No. 45, p. 1.

As an initial matter, the government does not plan to use the word “misdemeanors” during trial and will instruct its witnesses not to use that word. The government agrees that this matter is serious, and, as it has argued throughout its effort to prosecute offenses committed at the United States Capitol on January 6, 2021, misdemeanor offenses committed that day were not minor crimes. Courts in this District have agreed. *See, e.g., United States v. Blake Austin Reed*, 1:21-cr-00204-03 (BAH), Tr. 4/14/2022 at 75-76 (“This is a trespass offense. But even for defendants like

this one, who didn't engage in overt direct violence . . . this was not a garden variety episode of unlawful entry This defendant . . . was successful, actually, in overwhelming law enforcement to such an extent that Congress had to stop its proceedings and ensure[e] the peaceful transition of power in this democracy" (statement of Chief Judge Howell); *United States v. Thomas Fee*, 1:21-cr-00131 (JDB), Tr. 04/01/2022 at 17 ("The defendant was an active participant in a mob assault on our core democratic values and our cherished institution. And that assault was intended by many and by the mob at large in general to interfere with an important democratic process[] of this country. I cannot ignore that, cannot pull this misdemeanor out of that context.") (statement of Judge Bates); *United States v. Zachary and Kelsey Wilson*, Tr. 1/27/2022 at 60-61 ("[Y]ou all made the decision to do something that contributed to a transition of power that ultimately was marred by violence, destruction, and death . . . And some [people] were certainly far more culpable than both of you are, but . . . anybody that was in the Capitol building that day contributed to a very sad and terrible day.") (statement of Judge Mehta). Accordingly, the government does not intend to refer to the charges as misdemeanors at trial.

However, as a factual matter, Defendant Nassif is charged with four misdemeanors. If an attorney or witness inadvertently uses that word, the defendant should not benefit from a truthful utterance, and there should be no sanction imposed. Both parties understand that they may not argue to the jury about the potential punishment that the defendant will face upon conviction. *See* Redbook 2.505 (instruction on punishment). It is speculation that the jury would hear the word "misdemeanor" and think "this isn't serious."¹ At most, the inadvertent use of the word "misdemeanor" would support a curative instruction that the jury is not to consider punishment.

¹ In any event, such an assumption would be wrong. Nassif faces a maximum of three years of incarceration if convicted of all counts, and the government has consistently argued that for *any* case arising out of the January 6 riot, several of the factors delineated in 18 U.S.C. § 3553(a) support a sentence of incarceration.

But the need for a curative instruction will depend heavily on context, and the Court can decide whether to give one if this issue arises at trial.

II. Defendant Nassif's Motion to Preclude Use of 'Prejudicial Terminology' Should be Denied

Defendant Nassif seeks “an order that the government may not, and must instruct its witnesses not to, use inflammatory, value- laden, or legally conclusory words to describe either (1) events at or near the Capitol Building on January 6, 2021, or (2) persons who participated in or were present for those events.” ECF No, 46, p. 1. The example of such terminology given by Defendant Nassif includes words such as “riot,” “rioter,” “trespass,” and “disorderly conduct.” *Id.*

Defendant Nassif's request to restrict the Government's presentation of evidence and to preclude the accurate description of the events of that day should be denied because it runs afoul of the high burden set by Fed. R. Evid. 403. “The general rule if 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*, --- F.3d ---, 2022 WL 715238, at *2 (D.D.C. Mar. 10, 2022). 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.

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 Defendant's requested relief. Evidence is subject to the balancing test of Federal Rule of Evidence 403, which renders it inadmissible only if the prejudicial effect of admitting the evidence “substantially outweighs” its probative value. *United States v. Miller*, 895 F.2d 1431, 1436 (D.C. Cir. 1990). Furthermore, it is not enough that the evidence is simply prejudicial; the prejudice must be “unfair.” *United States v. Cassell*, 292 F.3d 788, 796 (D.C. Cir. 2002) (quoting *Dollar v. Long Mfg, N.C., Inc.*, 561 F.2d 613, 618 (5th

Cir. 1977) for the proposition that “[v]irtually all evidence is prejudicial or it isn’t material. The prejudice must be “unfair.”); *United States v. Pettiford*, 517 F.3d 584, 590 (D.C. Cir. 2008) (“[T]he Rule focuses on the danger of *unfair* prejudice, and gives the court discretion to exclude evidence only if that danger *substantially* outweigh[s] the evidence’s probative value.”) (citations and punctuation omitted) (emphasis in original). “Rule 403 establishes a high barrier to justify the exclusion of evidence..” *United States v. Lieu*, 963 F.3d 122, 128 (D.C. Cir. 2020).

A. The Descriptors Accurately Describe the Events of January 6 and the Federal Rules of Evidence Do Not Preclude Them.

What took place at the Capitol on January 6, 2021, may be properly described as a riot, breach, assault, or insurrection. Thousands of people forced their way into the Capitol building during the constitutionally mandated process of certifying the Electoral College votes, threatened the peaceful transfer of power after the 2020 presidential election, injured more than one hundred law enforcement officers, and caused more than two million dollars in damage and loss. This was not a protest. *See United States v. Paul Hodgkins*, 21-cr-188-RDM, Tr. at 46 (“I don’t think that any plausible argument can be made defending what happened in the Capitol on January 6th as the exercise of First Amendment rights.”) (statement of Judge Moss).

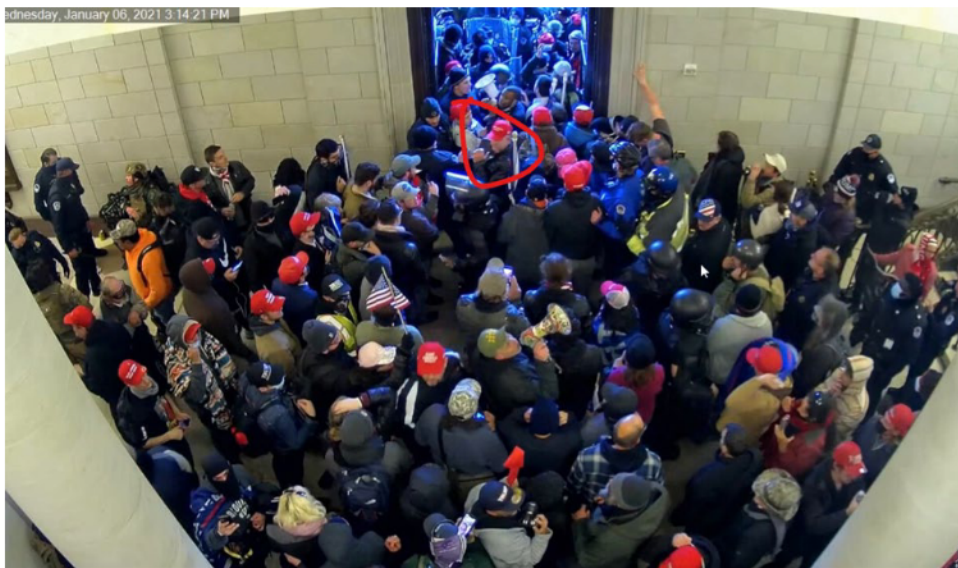
Defendant Nassif is charged with entering and remaining in a restricted building or ground, in violation of 18 U.S.C. § 1752(a)(1); disorderly and disruptive conduct in a restricted building or grounds, in violation of 18 U.S.C. § 1752(a)(2); disorderly conduct in a Capitol building, in violation of 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). ECF No. 12.

Defendant Nassif’s conduct took place in the context of a large and violent riot that relied on numbers to overwhelm police, breach the Capitol, and disrupt the proceedings. But for his actions alongside so many others, the riot likely would have failed impede and disrupt the orderly

conduct of Government business or official functions on that day. *See United States v. Matthew Mazzocco*, 1:21-cr-00054 (TSC), 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 the defendant’s actions will necessarily be placed before them. And that context was a riot. Defendant Nassif provides no legal authority in support of his broad claim that witnesses and government prosecutors must only describe these events using certain words.

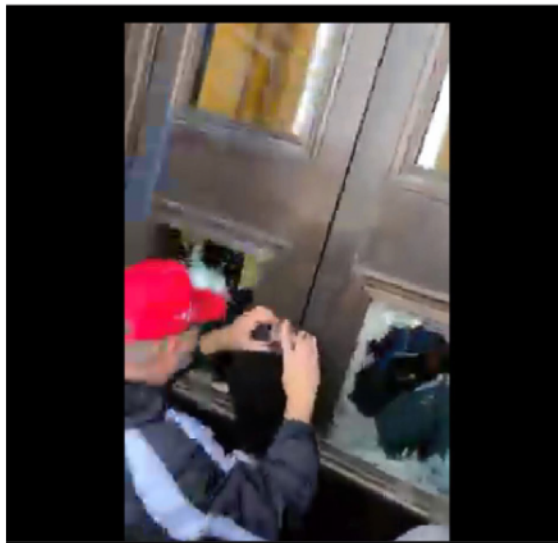
Terms describing the riot or mob are relevant and Defendant Nassif does not meet the high burden of barring the government from using certain terms under Fed. R. Evid. 403. While Defendant Nassif argues that “Words like ‘rioter’ and ‘insurrection’ emphasize group culpability and distract from the proper question of individual culpability,” such terms accurately describe Defendant Nassif’s actions on that day and/or the consequences of his actions in disrupting and impeding the orderly conduct of Government business or official functions. See 18 U.S.C. § 1752(a)(2). Defendant Nassif will be held responsible for his actions, but he cannot hide from the accurate description of the mob of which he was a part to provide the jury with a complete picture of his actions and their consequences at the Capitol that day. For example, at approximately 2:25 p.m., the East Rotunda Door through which the defendant gained entry was breached by rioters. CCTV footage from the Capitol shows that, at approximately 3:09 p.m., officers managed to briefly close the doors, which showed broken glass in the doors’ windows. Approximately two minutes later, a rioter pushed his/her way out of the door, at which point rioters began forcing their way in and out. Defendant Nassif likely observed this from outside. At approximately 3:13 p.m., the same footage shows the defendant (circled in red, below) pushing his way in along with officers

in riot gear. The area then was flooded with people pushing officers and civilians in every direction, with the number of rioters far outnumbering the number of officers.



The defendant spent about ten minutes in the area in and near the Rotunda before exiting the building at approximately 3:23 p.m.

In addition, before the doors were again breached and he entered the Capitol, the defendant recorded a video showing what was happening outside the door. This video, which lasted one minute and 33 seconds, was posted to the defendant's Facebook account, and obtained pursuant to a search warrant. In the video, it is clear that the Rotunda doors are closed and the windows are broken, as depicted below.



During the course of the video, various rioters can be heard shouting things such as “You’re going to jail ,, You’re gonna need a f*ckin’ army to remove us ... Why the f*ck can’t we get in?” and “This is our house .. we pay for this sh*t.” The defendant then began a chant of “Who’s house, our house?” Finally, when the Rotunda doors are again breached and opened, the alarms going off inside the Capitol can be heard. Based on Defendant Nassif’s actions and those of the individuals around him, words such as “riot,” rioter,” “disorderly conduct,” etc. are accurate and highly relevant descriptions of the events.

Any unfair prejudice in using these terms can be mitigated by a limiting instruction.. 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).

Thus, because the actions of other rioters are relevant and not unduly prejudicial and any prejudice can be addressed through an appropriate limiting instruction, Defendant Nassif's motion to preclude the Government from using certain terms should be denied.

III. Defendant's Motion to Preclude 'Government Arguments for Vicarious Criminal Liability' Should be Denied

As a general matter, the government agrees that Nassif is not liable for the conduct of people around him in the Capitol building on January 6, 2021.² But from there, Nassif incorrectly "expects that the government will suggest the jury may consider other persons' conduct to find that the actus reus elements of Mr. Nassif's charges are satisfied." (ECF No. 47 at 1.) This is not what the government has argued in its prior pleadings, nor what it will argue at trial. Rather, the government believes that the conduct of people who were near Nassif in the Capitol is relevant to explain how his conduct was disorderly and disruptive, and to prove his motive and mens rea. Nassif's argument to the contrary mischaracterizes the government's position.

A. The Conduct of Other Rioters is Relevant to Proving Nassif's Disorderly and Disruptive Conduct

Counts Two and Three of the Information charge the defendant with committing disorderly and disruptive conduct. 18 U.S.C. § 1752(a)(2); 40 U.S.C. § 5104(e)(2)(D). Both crimes require proof of disorderly and disruptive conduct: with the intent to impede or disrupt government

² Nassif could face criminal liability, of course, for any acts that he aided or abetted. 18 U.S.C. § 2. While Nassif notes that "the government has not charged a conspiracy, nor aiding and abetting" (ECF No. 47 at 3), accomplice liability is always at issue, whether or not pled in the indictment or information. *United States v. Lam Kwong-Wah*, 924 F.2d 298, 302 (D.C. Cir. 1991) ("an indictment need not specifically include an aiding and abetting charge because, whether specified or not, the federal statute creating liability for aiding and abetting . . . is considered embodied in full in every federal indictment") (internal quotations omitted).

business (Count Two) or an orderly session of Congress (Count Three). (ECF No. 12). Further, Count Two carries the additional requirement that the conduct “in fact, impedes or disrupts the orderly conduct of Government business or official functions.” 18 U.S.C. § 1752(a)(2) (emphasis added). In this case, context matters.

To prove that the defendant’s conduct was disorderly and disruptive, and that the defendant’s conduct in fact impeded or disrupted Congress, the government will present testimony from U.S. Capitol Police (USCP) and/or Metropolitan Police Department (MPD) officers. USCP officers will explain that the Capitol building was closed to the public on January 6, 2021. No member of the mob was authorized to be in the Capitol, no member of the mob submitted to security checks, and the USCP assessed every member of the mob to be an active threat. Given a variety of factors, including the size of the crowd and the existence of multiple breach points, Congress was forced to recess. Congress could not resume its business until the entire mob was cleared. Nassif was in the building, and USCP and MPD officers had to expel him (and others) before Congress could return from recess. In that way, his conduct was in fact disruptive. And proof of this requires evidence of the conduct of other rioters. As Judge Kollar-Kotelly explained in another January 6 case:

The following metaphor is helpful in expressing what the statute [18 U.S.C. §1752(a)(2)] *does* require. Just as heavy rains cause a flood in a field, each individual raindrop itself contributes to that flood. Only when all of the floodwaters subside is order restored to the field. The same idea applies in these circumstances. Many rioters collectively disrupted Congressional proceedings, and each individual rioter contributed to that disruption. Because Rivera’s presence and conduct in part caused the continued interruption to Congressional proceedings, the Court concludes that Rivera in fact impeded or disrupted the orderly conduct of Government business and official functions.

Accordingly, relevant and fair to describe the actions of other rioters to contextualize those of Defendant Nassif.

B. The Conduct of Other Rioters, Where Nassif Could Have Observed It (or Where He Discussed It) is Relevant to Proving His Mens Rea and Motive

The conduct of other rioters is relevant for another purpose. Where other rioters near Nassif did something that he could have observed, or where Nassif talked or wrote about the conduct of other rioters, their conduct is probative of his mens rea and motive. It is neither novel nor controversial to see other people's behavior as probative of Nassif's state of mind. Indeed, in other trials arising out of the January 6, 2021 riot at the Capitol, the government has made similar arguments about the relationship between the conduct of nearby rioters and other defendants' states of mind. *E.g.*, *Rivera*, Tr. 6/15/2022 at 198 (Closing Argument) ("Mr. Rivera was part of a huge collective of people who disrupted Congress and the staff as they worked. . . . He heard people chanting outside the building. 'Whose house? Our house.' He heard those same chants when he entered the building as well. He watched rioters confront law enforcement on the west front plaza and fight to fend off the mobs on the northwest stairs.") As detailed above, these facts in *Rivera* are similar to Defendant Nassif's actions in this case.

To be sure, the defense may argue—if the evidence supports it—that Nassif failed to see, hear, or understand what was happening around him. But the defense should not be able to convert this argument into a legal principle which treats the events happening around Nassif as irrelevant. Context matters. The behavior of other rioters, together with other evidence, will establish Nassif's intent and motive when he joined them in breaching the Capitol and remaining inside.

CONCLUSION

For the reasons set forth above, the court should deny Defendant Nassif's motions in limine.

Respectfully submitted,

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