IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,	:	
	:	
Plaintiff,	:	CASE NO. 21-CR-161 RBW
	:	
v.	:	
	:	
DUSTIN BYRON THOMPSON,	:	
	:	
Defendant.	:	

REPLY IN SUPPORT OF TESTIMONY OF DONALD J. TRUMP, ET AL,

Defendant Dustin Byron Thompson, through undersigned counsel, respectfully submits the following Reply pursuant to the Court's Pre-Trial Scheduling Order filed on January 27, 2022.

Respectfully submitted,

/s/ Samuel H. Shamansky
SAMUEL H. SHAMANSKY CO., L.P.A.

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Counsel for Defendant

Full Text

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA UNITED STATES OF AMERICA,:: Plaintiff,: CASE NO. 21-CR-161 RBW: v.:: DUSTIN BYRON THOMPSON,:: Defendant.: REPLY IN SUPPORT OF TESTIMONY OF DONALD J. TRUMP, ET AL, Defendant Dustin Byron Thompson, through undersigned counsel, respectfully submits the following reply pursuant to the Court's Pre-Trial Scheduling Order filed on January 27, 2022. Respectfully submitted, /s/ Samuel H. Shamansky_____ SAMUEL H. SHAMANSKY CO., L.P.A. Samuel H. Shamansky (OH0048) 523 South Third Street Columbus, Ohio 43215 P: (614) 242-3939 F: (614) 242-3999 shamanskyco@gmail.com Counsel for Defendant **REPLY** In its Pre-Trial Scheduling Order, the Court directed Defendant to provide an explanation as to the admissibility of certain witnesses' anticipated testimony. That explanation was provided on February 4, 2022, in Defendant's Brief in Support of Testimony of Donald J. Trump, et al. (Doc. 53). The government filed its Response on February 18, 2022, in which it claimed that (1) the affirmative defenses associated with public authority are unavailable to Defendant, and (2) the testimony of Defendant's anticipated witnesses would be "confusing and inevitably inaccurate," and therefore inadmissible under Fed. Evid. R. 403. These arguments lack factual and legal merit. Public Authority Defense The Sixth Amendment to the United States Constitution guarantees all criminal defendants the right to have compulsory process for obtaining witnesses in their favor. As recognized by the Supreme Court of the Untied States, The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law. Washington v. Texas, 388 U.S. 14, 19, 87 S.Ct. 1920 (1967). While the government sets forth a lengthy explanation as to why it believes certain branches of the public authority defense may not be applicable at trial, it eventually acknowledges that "former President Trump's or Mr. Giuliani's1 January 6 statements could be relevant to intent 1 The government's Response "assumes," incorrectly, that the remaining witnesses have been subpoenaed to provide testimony about non-public statements and actions. The basis for the government's assumption is unclear, given that all of Defendant's putative witnesses provided public statements. Defendant anticipates questioning all witnesses both about their public statements and the circumstances under which they were made. 2 for some of Thompson's pending charges." (Doc. 59, p. 16). At the very least, this concession demonstrates that the witnesses' statements may provide Defendant with a defense "for some" of the indicted offenses. This evidence is clearly relevant and admissible. Fed. Evid. R. 402 ("Relevant evidence is admissible [unless otherwise provided.]") As a corollary, Defendant must be provided the opportunity to present witnesses who not only have knowledge of the statements, but who actually made the statements and have knowledge of the circumstances under which they were uttered.2 Footnote 2 of the Court's Pre-Trial Scheduling Order recognizes this Constitutional imperative, indicating that if evidence of the putative witnesses "is admissible, then it will be left to counsel's and defendant Thompson's discretion as to the manner in which the evidence should be submitted to the factfinder." (Doc. 51, fn. 2). Fed. Evid. R. 403 As a final refuge, the government asserts that any testimony from Defendant's witnesses concerning their statements would present a "risk" of being "confusing and inevitably inaccurate," and concludes that such evidence must be held inadmissible. (Doc. 59, p.17). By way of example, the government asserts (with shockingly little analysis and without any citation to any legal authority) that Rule 403 would prevent a witness from providing testimony concerning a prior statement if a video recording of their statement was available. With respect, Fed. Evid. R. 403 provides no such blanket prohibition. First, the government's Response fails to recognize that a witness who made a statement may have additional relevant knowledge concerning the circumstances under which the statement was made; circumstances which are not readily discernable from the fixed perspective of a 2 Notably, the Court previously recognized that, if evidence of the putative witnesses "is admissible, then it will be left to counsel's and defendant Thompson's discretion as to the manner in which the evidence should be submitted to the factfinder." 3 recording device at a given moment in time. Second, the Response fails to acknowledge the probative value of testimony concerning the extensive misinformation campaign conceived and utilized by former President Trump and the other putative witnesses prior to January 6, 2021. Third, and finally, while relevant evidence may be, but is not required to be, excluded under Rule 403, this limitation only applies if the probative value of the evidence is substantially outweighed by a danger of "unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." In other words, the putative witnesses' testimony must do more than create a "risk" of unfair prejudice or confusion,3 that risk must also substantially outweigh its probative value. The government's Response not only fails to establish that any risk of prejudice or confusion will "substantially outweigh" the probative value of the putative witnesses' testimony, it also fails to establish any risk at all. At most, the government predicates its argument on an entirely unsupported and speculative belief that the witnesses might not have perfect recall of their precise words. This assertion, even if true, is simply insufficient to demonstrate a substantial danger of unfair prejudice or confusion that would in any way outweigh the testimony's probative value. CONCLUSION While Defendant may ultimately be prohibited from asserting one or more affirmative defenses at trial, those potential circumstances do not vitiate his constitutional right to present witnesses with potentially exculpatory knowledge and evidence. The government has directly acknowledged that the statements of Defendant's witnesses may be relevant for exactly that purpose. Under these circumstances, Defendant respectfully submits that any limitation on his right to compel the attendance and testimony of the putative witnesses would be in direct 3 The standard argued by the government. 4 contravention of his constitutional rights. As such, Defendant respectfully moves the Court to permit the issuance and enforcement of his subpoenas. Respectfully submitted, /s/ Samuel H. Shamansky_____ SAMUEL H. SHAMANSKY CO., L.P.A. Samuel H. Shamansky (OH0048) 523 South Third Street Columbus, Ohio 43215 P: (614) 242-3939 F: (614) 242-3999 shamanskyco@gmail.com Counsel for Defendant CERTIFICATE OF SERVICE The undersigned hereby certifies that a copy of the foregoing was filed with the Clerk of Court for the United States District Court for the District of Columbia using the CM/ECF system, which will send notification of the filing to Assistant United States Attorneys William Dreher, 700 Stewart Street, Suite 5220, Seattle, WA

for some of Thompson's pending charges." (Doc. 59, p. 16).

At the very least, this concession demonstrates that the witnesses' statements may provide Defendant with a defense "for some" of the indicted offenses. This evidence is clearly relevant and admissible. Fed. Evid. R. 402 ("Relevant evidence is admissible [unless otherwise provided.]") As a corollary, Defendant must be provided the opportunity to present witnesses who not only have knowledge of the statements, but who actually made the statements and have knowledge of the circumstances under which they were uttered.[2] Footnote 2 of the Court's Pre-Trial Scheduling Order recognizes this Constitutional imperative, indicating that if evidence of the putative witnesses "is admissible, then it will be left to counsel's and defendant Thompson's discretion as to the manner in which the evidence should be submitted to the factfinder." (Doc. 51, fn. 2).

Fed. Evid. R. 403

As a final refuge, the government asserts that any testimony from Defendant's witnesses concerning their statements would present a "risk" of being "confusing and inevitably inaccurate," and concludes that such evidence must be held inadmissible. (Doc. 59, p.17). By way of example, the government asserts (with shockingly little analysis and without any citation to any legal authority) that Rule 403 would prevent a witness from providing testimony concerning a prior statement if a video recording of their statement was available. With respect, Fed. Evid. R. 403 provides no such blanket prohibition.

First, the government's Response fails to recognize that a witness who made a statement may have additional relevant knowledge concerning the circumstances under which the statement was made; circumstances which are not readily discernable from the fixed perspective of a

[2] Notably, the Court previously recognized that, if evidence of the putative witnesses "is admissible, then it will be left to counsel's and defendant Thompson's discretion as to the manner in which the evidence should be submitted to the factfinder."

recording device at a given moment in time. Second, the Response fails to acknowledge the probative value of testimony concerning the extensive misinformation campaign conceived and utilized by former President Trump and the other putative witnesses prior to January 6, 2021. Third, and finally, while relevant evidence may be, but is not required to be, excluded under Rule 403, this limitation only applies if the probative value of the evidence is *substantially outweighed* by a danger of "unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence."

In other words, the putative witnesses' testimony must do more than create a "risk" of unfair prejudice or confusion,[3] that risk must also substantially outweigh its probative value. The government's Response not only fails to establish that any risk of prejudice or confusion will "substantially outweigh" the probative value of the putative witnesses' testimony, it also fails to establish any risk at all. At most, the government predicates its argument on an entirely unsupported and speculative belief that the witnesses might not have perfect recall of their precise words. This assertion, even if true, is simply insufficient to demonstrate a substantial danger of unfair prejudice or confusion that would in any way outweigh the testimony's probative value.

CONCLUSION

While Defendant may ultimately be prohibited from asserting one or more affirmative defenses at trial, those potential circumstances do not vitiate his constitutional right to present witnesses with potentially exculpatory knowledge and evidence. The government has directly acknowledged that the statements of Defendant's witnesses may be relevant for exactly that purpose. Under these circumstances, Defendant respectfully submits that any limitation on his right to compel the attendance and testimony of the putative witnesses would be in direct

[3] The standard argued by the government.

contravention of his constitutional rights. As such, Defendant respectfully moves the Court to permit the issuance and enforcement of his subpoenas.

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Counsel for Defendant

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was filed with the Clerk of Court for the United States District Court for the District of Columbia using the CM/ECF system, which will send notification of the filing to Assistant United States Attorneys William Dreher, 700 Stewart Street, Suite 5220, Seattle, WA 98101, and Jennifer M. Rozzoni, 203 3rd Street, Suite 900, Albuquerque, NM 87102, on February 25, 2022. An additional copy has been delivered via electronic mail.

/s/ Samuel H. Shamansky
SAMUEL H. SHAMANSKY