UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA v. JAMES ALLEN MELS, Defendant.	Crim. Action No. 21CR184 (BAH)

MR. MELS'S OBJECTION TO PROPOSED GOVERNMENT EXHIBITS AND MOTION TO EXCLUDE

James Mels, through counsel, hereby objects to certain proposed government exhibits and respectfully moves the Court to exclude theses exhibit, namely, text messages he allegedly sent in December 2020. Mr. Mels submitted his objection to these text messages in his Reply to the Government's Response to his Motion for a Bill of Particulars. The Court has denied Mr. Mels's Motion for a Bill of Particulars on the merits and denied his request to exclude the text messages as untimely and irrelevant to the Motion for a Bill of Particulars. Minute Order, July 21, 2022. Not wishing to waive the objection to the messages on the merits, counsel hereby objects to the introduction of the messages and moves the Court to exclude them under Federal Rules of Evidence 401 and 403.[1]

[1] The government has not yet disclosed which of the text messages it will seek to introduce. Out of an abundance of caution, Mr. Mels objects to the introduction of all messages and reserves the right to object to specific messages once counsel is aware which messages the government seeks to introduce.

Background

In its Response to Mr. Mels's Motion for a Bill of Particulars, the government listed several messages allegedly captured from Mr. Mels's cell phone. ECF. No. 50 at 7. While the defense has not yet received the government's final exhibit list, based on the government's pleading, the defense assumes the government will seek to admit at least some of Mr. Mels's messages. The government should be precluded from doing so because the text messages are not relevant to Mr. Mel's intent and highly prejudicial. Specifically, in its Response, the government argues that the following messages are relevant to Mr. Mels's intent:

> Yep and the best us patriots can do is cut your heads off for treason? What do you think about that congress?
>
> So we're wondering if it's possible you can go to Washington DC a January 6 …
>
> Im goin to DC woo hoo[.]" The next day, the defendant—who goes by the nickname Jimmy—texted the same individual, Im brining my 30 30 Winchester. My dad calls me one shot Jimmy with that thing.
>
> Im honored to fight on the ground with you. Patriot. Please don't say Jimmy Mels too much... You put me on a pedestal and its unconformable. Im just a regular guy like you. Wanting to help people like minded to save this country from forgein and domestic terrorist. Tradors treasonous rat bastards sold out my taxpaying county."; and "Ohhhh I know that God is with us … Im just prepared to meet Him."
>
> James Mels: I leave for DC in 4 daze
>
> Individual: What??? DC what are you going there for???
>
> James Mels: Hangings? Execution? Gitmo? We the people are getting our country back from these treasonous rat bastards Corruption at the highest level.

> These are the patriots Im going with. Truth tellers. This guy is the Guru proof fraud was made... That's treason and if the people involved were government officials? Treason is punishable by death. We the people want the death penalty. For crimes against humanity.
>
> Mass arrests on the 5th (D5) my perdition treason in the highest order. It has to be this way. Gitmo for the lucky ones. We the people have to eradicate evil."
>
> Im going to DC in 4 daze. Once a veteran always a veteran. Defending this country from terrorists foreign or domestic. Till death do US part. Wwg1wga."1
>
> •Balls my friend balls. Im going to DC in 3 daze"; and (2) More balls... And We the People are going to hang them by their Balls
>
> Im going to DC in 3 daze"; (2) Just saying be carefull of whatyou hear watch and listen to. Fake news is real. […] But there are a lot lot of truth tellers. (Peacemakers) as the bible speaks of. Peacemakers are the sons of God. That where I stand tall. And will die for it. My country. My freedom. My rights in the Constitution of the United States of America. […]; (3) If I don't come back? Do your best to keep this. But don't use it before? Its my personal feelings and Im sharing them with you. I am in stable mind and I am Not suicidal. I am a Christian and I believe the Holy Spirit is telling me to write this to you now. So please honor this letter."

See Gov. Resp, ECF. No. 50 at 9.

ARGUMENT

i. The messages are not relevant to Mr. Mels's intent to commit the charged offense.

This is a straightforward case in which the government has charged violations of Section 1752. Specifically, the government alleges that Mr. Mels entered the Capitol through the Senate Wing doors, after the door had been breached. CCTV video captures him in the hallway, waving a small copy of the constitution around, and walking through the crypt. At no point does he assault officers or vandalize property. CCTV footage captures him leaving the Capitol approximately ten minutes

after he entered. Based on this limited conduct, Mr. Mels is not charged with obstruction of justice, assault on a police officer, seditious conspiracy, or insurrection. Instead, he is charged by information with, *inter alia*, knowingly entering a restricted building.

Evidence is relevant if it has any tendency to make a fact more or less probable than it would be without the evidence." Fed. R. Evid. 401(a). The above text messages are not relevant to Mr. Mels's intent to knowingly enter a restricted building or intent to disrupt business of congress—the intent required for Counts 1, 2, and 3. Instead, the messages are indicative of someone spouting off, rather than a clear expression of intent to do anything. There is nothing to suggest that these messages are anything other than unserious statements, empty threats or puffery, or an exaggeration to make a point. The probative value of these messages to the charged offenses is *de minimus*. Meanwhile, the prejudice these of messages will have cannot be overstated.

ii. The messages are highly inflammatory and will mislead and confuse the jury and unfairly prejudice Mr. Mels.

The unfair prejudice the effect these messages—replete with empty, exaggerated threats of violence and murder, spelling errors, and political messaging associated with right-wing media—cannot be overstated. Divorced from any context, these messages are likely to mislead the jury into speculating that Mr. Mels had a far more nefarious intent than what the government has charged. As such, there is a substantial risk that jurors would convict Mr. Mels even if they conclude that there is a reason to doubt that he knowingly entered a restricted building, engaged in disorderly and disruptive conduct, or intended to interfere with government business

as is charged. *See United States v. Blackwell*, 694 F.2d 1325, 1332 (D.C. Cir. 1982) (noting that picture showing that a felon possessed a firearm on a date other than the date on which he was accused of possessing a firearm could induce unfair prejudice in jury because he "had some guns in his possession since his conviction" and due to the nature of the pictures themselves.).

Evidence of expressions intent to use violence up to and including "cutting heads off," "execution," and "hanging by the balls," is extremely inflammatory. In weighing the prejudicial effect of these messages, the Court should weigh how inflammatory they are in the abstract. *See United States v. Burwell*, 642 F.3d 1062, 1068 (D.C. Cir. 2011) ("The fact that [the proffered evidence that defendant] forcibly stole a car from a grandfather and his two young grandchildren could have struck the jurors as particularly egregious. The district court should have considered this in its Rule 403 analysis. *Blackwell*, 694 F.2d at 1332 (D.C. Cir. 1982)(noting that the fact that picture showed felon defendant holding a firearm in a firing position added to the prejudicial effect of picture taken on a different date other than that reflected in the charge); McCormick on Evid. § 190.11 (8th ed.) ("In deciding whether the danger of unfair prejudice and the like substantially outweighs the incremental probative value, a variety of matters must be considered, including. . . the degree to which the evidence probably will rouse the jury to overmastering hostility."). Indeed, federal courts have long recognized that "severe prejudice can result from the use of death threat testimony," and accordingly, courts should "carefully limit[] that use to situations where there was a clear need for the prosecution to use such evidence."

United States v. Check, 582 F.2d 668, 685 (2d Cir. 1978) (commenting on government's use of "death threat" testimony in a drug conspiracy trial in anticipation of retrial, where witness had been permitted to testify that defendant said 'that if he had any problems with any anyone he wouldn't hesitate to shoot them.'").

Threat evidence is prone to "undue risk that the jury construe[s] the threat as evidence of [the defendant's] murderous propensity," and prone to "distract[ing] the jury from the issue in the case," and to "arous[ing] the jury's passions to a point where they would act irrationally in reaching a verdict," by "substitute[ing] the death threat evidence for consideration of the elements of the charged crimes." *United States v. Cummings*, 858 F.3d 763, 775–76 (2d Cir. 2017); *see also, e.g., United States v. Garces*, 133 F.3d 70, 76-77 (D.C. Cir. 1998) (noting with approval that the trial "judge was clearly aware of the potentially prejudicial nature of the witnesses' references to [defendant's uncharged threats with a gun that looked like the gun he was accused of possessing illegally], and indeed ruled them out"); *Ortiz-Sandoval v. Gomez*, 81 F.3d 891, 898 (9th Cir. 1996) ("The potential of unfair prejudice from the introduction of threats is 'severe.'") (quoting *Check*, 582 F.2d at 685-86); *United States v. McManaman*, 606 F.2d 919, 926 (10th Cir. 1979) (noting that evidence of threats against government agents or informers has been said to "suggest a jury decision on an improper basis that defendants were 'bad men'") (citing *United States v. Weir*, 575 F.2d 668, 671-72 (8th Cir. 1978); *United States v. Gonzalez*, 703 F.2d 1222, 1223-24 (11th Cir. 1983) ("Because the potential prejudice from death threats may be great,

the government must have an important purpose for introducing the evidence in order to satisfy the balancing test of Rule 403." (citing *Check*, 582 F.2d at 685)). Such evidence is particularly inflammatory when the threat is closely related to the charged offenses, as is the case here. *Cummings*, 858 F.3d at 775-76 (noting that similarity of death threat evidence to charged offense of shooting and killing two individuals "risked suggesting to the jury that it should convict Cummings of prior murders because he was willing to commit murder for expedience."). And evidence of a threat to do something much *worse* that the defendant is charged with doing, as is the case here, also is particularly prone to unfairly prejudicing the defendant insofar as it suggests that the defendant presents a higher threat or danger than even the information would suggest. *Cf. United States v. Mahdi*, 598 F.3d 883, 892 (D.C. Cir. 2010) (finding that evidence of uncharged incidents in which defendant had pulled a knife on two people, once while "playing," and another time during an argument, was not unduly prejudicial in part because the evidence "involved two relatively minor incidents which paled alongside the extreme violence of the acts of which Mahdi was indicted and convicted: shooting nine people . . . and stabbing and cudgeling two others"); *Burwell*, 632 F.3d at 1332 ("The prejudice resulting from the carjacking evidence is slight when compared to the evidence of the violent acts for which Appellants were indicted.").

Nor can a limiting instruction remove this unfair prejudice. The government suggests that the messages are evidence of intent. An instruction that the jury may only consider it as evidence of intent is akin to telling the jury that Mr. Mels intended

to commit murder, an act of terrorism, or insurrection—in what is essentially a case about whether he knowingly trespassed. As such, an instruction would only magnify the unfair prejudice inherent in the evidence.

In sum, Mr. Mels's messages in the month and days leading up to January 6 are not relevant. And even if the Court finds some relevance in the messages, the probative value is substantially outweighed by its prejudicial effect, and the Court should exclude it on that basis.

Respectfully Submitted,

A. J. KRAMER
FEDERAL PUBLIC DEFENDER

_____/s/_____
ELIZABETH A. MULLIN
UBONG AKPAN
Assistant Federal Public Defender
625 Indiana Avenue, N.W., Suite 550
Washington, D.C. 20004
(202) 208-7500