

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA :
 :
 v. : CASE NO. 21-cr-263 (TSC)
 :
 RUSSELL DEAN ALFORD, :
 :
 Defendant. :

**REPLY TO THE RESPONSE: MOTION IN LIMINE REGARDING
AUTHENTICATION OF VIDEO AND OTHER EVIDENCE**

The United States of America, by and through its attorney, the United States Attorney for the District of Columbia, hereby submits the following reply to the response to the government’s motion *in limine* regarding the authentication of video, photographic, and documentary evidence at trial. The United States of America respectfully requests that the Court conclude that the identified photographic and video evidence is properly authenticated under Federal Rules of Evidence 104, 901, and 902, and is admissible.

As a preliminary matter, police officers who were present during the events depicted on the third-party videos can authenticate those videos. *See United States v. Blackwell*, 694 F.2d 1325, 1330 (D.C. Cir. 1982) (police officer present during search and seizure of photograph properly authenticated photograph), *see also Taylor v. Sullivan*, No. 2:18-cv-0637-MCE-EFB P, 2019 U.S. Dist. LEXIS 73008, 2019 WL 1923193 (E.D. CA, Apr. 30, 2019) (“the evidentiary foundation ‘may, but need not be, supplied by the person taking the photograph or by a person who witnessed the event being recorded.’”). Since the submission of its motion in limine, the government has located such officers and expects that they will be able to authenticate the videos during testimony. But the government maintains that the third-party video may also be authenticated by reference to distinctive characteristics with videos that is indisputably authentic: USCP surveillance footage

and MPD body-worn camera footage. Fed. R. Evid 901(b)(4)

The two third-party videos offered have sufficient indicia of authenticity to meet the standards required by Federal Rule of Evidence 901(a). *See United States v. Hassanshahi*, 195 F. Supp. 3d 35, 48 (D.D.C. 2016). Indeed, defendant acknowledges that “both videos contain some ‘distinctive characteristics they share in common with other video’ that is concededly authentic.” ECF No. 63, pg. 5. Defendant further acknowledges that “To the extent the third-party videos’ depictions of persons and events are consistent with authenticated videos, there is no reason to doubt those depictions authenticity.” *Id.*

Defendant claims, without authority or example, that “there is no way to know which contents of the videos are authentic recordings from January 6 and which might have been mapped onto an original recording, or somehow enhanced, or recorded at other times or places and spliced in among other clips.” The answer lies in the video clips themselves. Those videos are consistent in every respect to the numerous other video evidence that is unchallenged. A review of the videos themselves makes clear that although there may a short gap in one video, nothing has been added or manipulated. In fact, the portion that depicts the Upper House door shortly before, during, and after Alford leaves makes clear that it has not been altered in any way. It is consistent in every respect to the other unchallenged video. Moreover, simply because a video may be incomplete or edited, does not mean it is not authentic. *See United States ex rel. Landis v. Tailwind Sports Corp.*, 191 F. Supp. 3d 40, 41 (D.D.C. 2016), *citing United States v. Damrah*, 412 F.3d 618, 628, (6th Cir. 2005), *Asociación de Periodistas de Puerto Rico v. Mueller*, 680 F.3d 70 (1st Cir. 2012).¹ And even if they were edited, such edits go to the weight, not admissibility.

¹ The *Tailwind Sports Corp.* Court further noted that “Authorities amply bear out this distinction.

Numerous courts have dealt with the specific issue of authenticating videos downloaded from social media sites and found such videos to be properly authenticated under Rule 901. *See United States v. Broomfield*, 591 Fed. Appx. 847 (11th Cir. 2014), *United States v. Farrad*, 895 F.3d 859 (6th Cir. 2018), *United States v. Washington*, Case No. 16-cr-477, 2017 U.S. Dist. LEXIS 136220 (N.D. Ill., Aug. 21, 2017), *Carucel Invs., L.P. v. Novatel Wireless, Inc.*, Case No.: 16-cv-118-H-KSC, 2017 U.S. Dist. LEXIS 50855 (S.D. CA, Apr. 3, 2017), *United States v. Pettway*, 1:12-cr-103 (TJM), 2018 U.S. Dist. LEXIS 176848 (W.D. N.Y., Oct. 15, 2018), *People v Franzese*, 154 A.D.3d 706 (N.Y. App. 2017), *State v. Spivey*, 2020 Tenn. Crim. App. LEXIS 74 (Tenn. App. 2020).

In *United States v. Broomfield*, 591 Fed. Appx. 847 (11th Cir. 2014), the court held that there was sufficient evidence to support the district court's determination that a video clip depicting defendant in possession of a firearm was properly authenticated, under Fed. R. Evid. 901. In that case, an FBI special agent testified that while investigating the defendant for suspected violations of federal firearms laws, he saw a YouTube video of the defendant, whom the agent recognized from a previous traffic stop. The agent testified that he made an exact copy of the video, which the government presented as its Exhibit 1. The defendant objected that the

As a leading Evidence treatise has explained, objections that a video or film 'has been edited and is therefore Misleading' are to be 'resolved pursuant to Rule 403.' 2 McCormick on Evidence § 216 (7th ed.). *United States v. Damrah*, 334 F. Supp. 2d 967 (S.D. Ohio 2004), exemplifies this approach. In that case, the defendant argued that video tapes had not been sufficiently authenticated because they were 'edited and spliced' and 'may have therefore been misleading.' *Id.* at 984. Regardless of whether deletions and rearrangements rendered the finished product misleading, the Court was 'satisfied that the videos fairly depict the actual events that took place.' *Id.* In short, 'the tapes fairly and accurately (although perhaps not completely) depict the events they purport to depict, editing and splicing not to the contrary.'" *Tailwind Sports Corp.*, 191 F. Supp. 3d at 41.

video was not properly authenticated, but the trial court overruled the objection and admitted the video. In upholding the admission of the YouTube video downloaded (actually copied) by the special agent, the Eleventh Circuit held:

Before an item of evidence may be admitted, Federal Rule of Evidence 901(a) requires it to be authenticated with evidence “sufficient to support a finding that the item is what the proponent claims it is.” Fed. R. Evid. 901(a). Proper authentication requires only that the proponent of the evidence make out a prima facie case that the proffered evidence is what it purports to be. *United States v. Belfast*, 611 F.3d 783, 819 (11th Cir. 2010).

Evidence may be authenticated by its “appearance, contents, substance, internal patterns, or other distinctive characteristics . . . taken together with all the circumstances.” Fed. R. Evid. 901(b)(4). Authentication may be established “solely through the use of circumstantial evidence.” *United States v. Smith*, 918 F.2d 1501, 1510 (11th Cir. 1990). Once such a showing has been made, the court may admit the evidence, and the ultimate question of its reliability is reserved for the fact finder. *Belfast*, 611 F.3d at 819.

Thus, the question before us is whether there is any competent evidence to support the district court’s determination that the government made out a prima facie case that this YouTube video is what the government purports it to be—a video of Broomfield in possession of a firearm. We conclude that there is ample evidence in the record that the video depicted Broomfield in possession of a firearm. The government’s evidence identified the individual in the video as Broomfield, established where and approximately when the video was recorded, and then identified the specific rifle and ammunition depicted in the video. Because authentication may occur solely through the use of circumstantial evidence, the government met its burden of presenting a prima facie case that the video depicted Broomfield in possession of a firearm.

Id., at 847.

The holding in *United States v. Washington* is similar. In *Washington*, the government sought to admit a YouTube video based upon the testimony of a law-enforcement officer who watched the video. The defendant objected and argued that the government could not authenticate the video because its proffered witness (1) was not present for the recording; (2) cannot testify about the circumstances under which it was filmed, such as where or when it was recorded; and (3) lacks personal knowledge about who operated the camera to film the video, what

camera he or she used, or whether the video was altered after filming. *Washington*, 2017 U.S. Dist. LEXIS 136220 *6. The district court overruled the objection, and admitted the video, concluding:

Starting with the law enforcement officer, Defendant told officers during his post-arrest interview that he had been in a music video recorded about a month before his arrest in which guns were featured. According to the Government, a law enforcement witness will testify that he saw this video on YouTube, and Defendant and the gun appear in the video. At the time of this opinion, a copy of this video can still be found on YouTube. Taken together, this direct and circumstantial evidence is sufficient to satisfy the prima facie showing of genuineness required for admissibility under Rule 901.

Id. The evidence of authenticity in this case far exceeds that in *Broomfield* or *Washington*. Here, not only does Alford acknowledge his presence at and in the Capitol, but the same scene is depicted in his own cell phone video, whose authenticity is not questioned. Further, both the third-party video and the Alford cell phone video's authenticity is corroborated by the USCP CCTV video as well as relevant MPD BWC video.

Additionally, defendant states that the third-party video is cumulative and "counsel cannot say exactly why the government wants to present these videos, but presumably the purpose is not simply to prove facts that are clear from other videos." Quite simply, the third-party video shows additional information, or provides an additional perspective, that will be useful to the jury. For example, the USCP CCTV video is silent. The third-party video reveals that, during the events captured on CCTV, a loud piercing alarm was continuously sounding at the door that the defendant used to enter and leave the Capitol. The video further demonstrates that Alford, instead of leaving the Capitol Building as rioters were forced out by law-enforcement, positioned himself in the corner of his doorway, where he could unlawfully remain in the building—and where he would have heard this piercing alarm as he did so. The third-party video shows that members of the mob

threatened police officers and, in some cases, committed violence against them, and these threats and violence occurred close enough for the defendant to observe them. The John Sullivan video shows the violence immediately outside the Upper House doors through which defendant entered. The events occurring just outside the door are not depicted in the CCTV or BWC video. In short, the third-party videos are not needlessly cumulative, but serve a valuable purpose: they show events that would have made it obvious to the defendant, as he entered the Capitol and remained inside, that it was unlawful for him to do so.

WHEREFORE, the government respectfully requests that this Court grant the motion for a pre-trial determination that the aforementioned exhibits are authentic under the Federal Rules of Evidence and admissible at trial.

Respectfully submitted,

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