In the United States District Court
For the District of Columbia

United States	)	
	)	
v.	)	**Case no. 1:21-CR-00263-TSC**
	)	
Russell D. Alford	)	

Mr. Alford's Reply to Response to
Objections to Certain Government Exhibits

Mr. Russell D. Alford, by and through counsel, respectfully submits this reply to the government's response to his Objections to Certain Government Exhibits. (Docs. 67, 70.)

I. There is no "one size fits all" basis to admit all of the government's proposed Facebook exhibits.

a. The exhibits are not admissible en masse under to show "intent" or "motive" and any individual or combined exhibits admitted for this purpose must comport with Rule 403

Mr. Alford objected to 25 exhibits[1] the government pulled from a subpoena return of his Facebook account activity. (Doc. 67.) In response, the government largely demurred on responding to each individual exhibit objection, instead asserting a global theory of admissibility that virtually all of its exhibits are relevant to proving intent or motive.

The problem for the government is that many of the Facebook exhibits are not direct evidence of his supposed intent. Some may very well be, such as Mr. Alford's communication with his riding companion about traveling to Washington,

[1] Mr. Alford requested redactions to two additional exhibits, nos. 335 and 336. (Doc. 67 at 11-12.) It appears that the government is amenable to that request. (Doc. 70 at 8.)

D.C.—and Mr. Alford did not, and does not, raise a pretrial objection to such exhibits. Others, though, are strictly about Mr. Alford's political observations in the days following the 2020 Presidential Election, weeks before the former President even announced his January 6, 2021, rally. And some exhibits are more problematic than others; for example, as noted in Mr. Alford's objections, certain exhibits are so lacking in context that there is a significant risk of confusing or misleading the jury. (*See* Doc. 67 at 2.)

But the government appears to assert that it is entitled to enter all 37 Facebook exhibits—including the ones to which Mr. Alford specifically objects—to service its goal of "presenting a focused account of Alford's reaction to the election, which is central to his intent on January 6, 2021." (Doc. 70 at 2.)

The government is certainly within its rights to argue, and this Court might find, that some of these exhibits are relevant for that reason. But such a determination must be made on a case-by-case basis, as no two exhibits are the same. Even if the government is right that some exhibits are directly probative of Mr. Alford's purported intent or motive, some exhibits will fail to pass Rule 403 muster. For example, a paragraph of text Mr. Alford re-posted that discusses how the U.S. Supreme Court might ultimately have to decide the 2020 election necessarily requires a different Rule 403 analysis than a Facebook messenger conversation where Mr. Alford sends photographs of his firearms and makes political statements. And even for exhibits that the Court might find individually

admissible and nonprejudicial, the prejudice stemming from an unduly cumulative number of such exhibits is a critical consideration as well.

While in one breath minimizing the prejudicial impact of some of its exhibits, the government in the next breath reveals its intent to argue Mr. Alford posted "messages of resistance to the [Biden] administration, including by violence." (Doc. 70 at 3.) But there will be no evidence at trial that Mr. Alford acted violently, threatened violence, or even so much as raised his voice during the events of January 6. The government's attempt to put this evidence before the jury elegantly illustrates the reason Rule 403 exists. As noted in one of the cases the government cited in its response, "Rule 403 is concerned with some adverse effect beyond tending to prove that the act or issue that justified its admission." *United States v. Mostafa Kamel Mostafa*, 16 F. Supp. 3d 236, 258 (S.D.N.Y. 2014). Where, as here, there are other sources of evidence the government can utilize to prove intent, it is inappropriate to use evidence that has "an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one." Advisory Cmte. Notes, Fed. R. Evid. 403. *See also United States v. Wilkins*, 538 F. Supp. 3d 49, 66 (D.D.C. 2021) (quoting *Old Chief v. United States*, 519 U.S. 172, 184 (1997)) (probity "may be calculated by comparing evidentiary alternatives," and the "availability of other means of proof may ... be an appropriate factor[.]".)

Finally, the government asserts that other courts "have allowed the admission of similar evidence" in January 6 cases, and cites *United States v.*

Rivera.[2] (Doc. 70 at 4.) But that comparison is not apt. What the government claims was "similar evidence" in the *Rivera* matter was admitted *by stipulation*. *See Rivera*, 1:21-cr-0060-CKK, Tr. 06/14/2022 at 108. And, one exhibit at issue there was defendant Rivera's post that conveyed, in sum and substance, his decision to be in Washington, D.C. on January 6, 2021.[3] Another was a post where Mr. Rivera said he had a great time at the Capitol that day.[4] Still another was a post of a photograph of Mr. Rivera at the Capitol.[5] Another exhibit appeared to mock House Speaker Nancy Pelosi and U.S. Rep. Eric Swalwell.[6] With the possible exception of the last of these exhibits—all of which were stipulated to and admitted without objection—none are similar to those to which Mr. Alford has objected. And because of the stipulation, none required a judicial ruling on admissibility.

b. None of the Facebook exhibits are admissible under Fed. R. Evid. 404(b)

In arguing for admission of the Facebook exhibits, the government cites three cases for the proposition that "[s]tatements made before the commission of a crime, which are probative of motive to commit the crime, generally are not excludable under Rule 403—even when incendiary." (Doc. 70 at 4.) Each case, however,

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[2] The government also cites *United States v. Anthony Robert Williams*, 1:21-cr-00377-BAH, Tr. 06/27/2022 at 92, 97, 101-33. (Doc. 70 at 4.) Defense counsel promptly attempted to secure this transcript, but has not been received it as of this filing.

[3] The full exhibit read as follows: "It's official, your boy is going to DC on the 6th. Time to find a way to pay for my trip, but I'm not missing this. Patriot the [expletive deleted] up America." *Rivera*, 1:21-cr-0060-CKK, Tr. 06/14/2022 at 110.

[4] *See id.* at 155.

[5] *See id.* at 156.

[6] *See id.* at 155-56.

concerns evidence admitted under Rule 404(b). It is unclear whether the government was attempting to indicate a theory that its exhibits should come in under this rule. But no evidence should be admitted against Mr. Alford under Rule 404(b) because the government not only did not give notice of its intent to offer such evidence by the July 27, 2022, deadline,[7] but also affirmatively communicated to the undersigned counsel that there would be no such evidence.

Rule 404(b)(3)(A)'s notice requirement directs the government to "provide reasonable notice of any such evidence that the prosecutor intends to offer at trial, so that the defendant has a fair opportunity to meet it." In addition to reasonable notice, the government is required to "articulate" the "permitted purpose for which the prosecutor intends to offer the evidence and the reasoning that supports the purpose." Rule 404(b)(3)(B). The government must do so in writing, before trial, absent good cause shown for noncompliance. Rule 404(b)(3)(C). As none of this was done here, no evidence should be admitted against Mr. Alford under Rule 404(b).

c. Mr. Alford's objection to government's Exhibit 301

Mr. Alford objected to an exhibit showing that he was invited to a Jan. 6, 2021, event entitled "Storm the steps of the government," noting the lack of evidence that Mr. Alford accepted or even saw the event invitation. (Doc. 67 at 10-11.) The government responds that the "event" invitation is probative of his "motive" and "relevant to his knowledge that others would also be participating in

[7] On May 25, 2022, this Court adopted the parties' jointly-submitted Pretrial Scheduling Order. (Doc. 48.) In pertinent part, the Court's order directed that "[n]ot later than July 27, 2022, the government shall provide notice of evidence it intends to offer pursuant to Fed. R. Evid. 404(b)." (*Id.* at 1.)

the activity alongside him." (Doc. 70 at 7.) But with no hint that Mr. Alford ever saw it, the invitation reflects only the mental state of an unknown user at an unknown time.

Mr. Alford maintains his objection.

II. The government should not be permitted to introduce otherwise irrelevant portions of Metropolitan Police Department officers' body-worn camera footage to further its "collective action" theory of prosecution.

Mr. Alford previously objected to admission of three Metropolitan Police Department officers' body worn camera (BWC) recordings without being excerpted in relevant part to footage that either depicts Mr. Alford, or events that he could directly perceive. (Doc. 67 at 1-2.) The government responds that "it does not intend to admit into evidence or to play the entirety of any officer's body-worn camera video." (Doc. 70 at 8.) As indicated previously, Mr. Alford recognizes that some portions of the BWC footage are relevant and admissible. Should the government wish to specify the particular portions of these recordings, Mr. Alford stands ready to review them and attempt to resolve any objections pretrial.

The government also reveals, though, its intention to admit unspecified portions of the footage that it deems necessary to further its apparent "collective action" theory of prosecution. (*See* Doc. 70 at 8-9). It asserts that footage of events outside Mr. Alford's perception may be necessary to contextualize the officers' experience on January 6th, including their "stress and fatigue." (*Id.* at 9.) Such footage, the government explains, will "underscore a core part of the government's

case: that individuals who were "otherwise 'peaceful'" "contributed to a mob that was disorderly and disruptive *collectively*") (emphasis in original).

As detailed in Mr. Alford's Motion in Limine to Preclude Government Arguments for Vicarious Liability (Doc. 75), this theory of liability is contrary to the law, and the government may not rely on it to support an argument for the admissibility of any particular item of evidence. But even if that theory *were* legally supportable, it would not make officers' stress and fatigue relevant to any charged element.

III. If admitted, the third-party video recordings should be excerpted and redacted.

Mr. Alford objected to government's Exhibits 111 and 112, videos respectively uploaded to the internet third parties both known and unknown. (Doc. 67 at 12-14.) Among other problematic issues, Mr. Alford noted that both videos had clearly been edited, including but not limited to the addition of superimposed graphics and misleading images. (*Id.* at 13.) He further emphasized that the exhibits were cumulative of other footage—from the Capitol's internal recording system and Mr. Alford's own phone—of unquestioned provenance and stipulated authenticity at trial. (*Id*. at 12.)

The government responds that it should be able to admit what it wants to admit from these internet videos. Regarding Exhibit 111, the government asserts that the 7-plus minute video "shows, generally, what conditions were like at the door through which Alford entered the Capitol, at around the time he entered." (Doc. 70 at 9.) This is despite the fact that Mr. Alford does not appear on camera,

emerging from *inside* the building, until approximately time stamp 4:19. Even assuming that the footage is a true and accurate chronological reflection of the day's events—something that the government cannot possibly verify, given that it does not know who filmed and/or edited and/or uploaded the footage—it begins after Mr. Alford has already entered, and runs for more than four minutes before he comes into frame and as he walks to the door. These serious authentication issues aside, it is entirely speculative to claim that the conditions at the time of this video track with those at the time Mr. Alford entered the building roughly ten minutes earlier. To the extent the Court permits the introduction of this exhibit, only the time stamps 4:19 through 6:40, which depict Mr. Alford, should be admitted.

Government's Exhibit 112, a video filmed and uploaded by John Sullivan, has a far longer runtime, about 90 minutes. As with its response to the BWC objections, the government discloses for the first time that it only intends to play a portion of this exhibit. (Doc. 70 at 10.) Unlike the BWC exhibits, though, here the government reveals the general portions it intends to play, beginning with the fatal shooting of Ashli Babbitt and ending with footage showing Mr. Alford as Mr. Sullivan and Mr. Alford are both near the building's exit. (*Id.*) This would be roughly the final 15 minutes of footage from this lengthy video.

There is no legitimate basis for the jury to be shown the footage of Ms. Babbit being shot to death. One struggles to find a more textbook example of a Rule 403 violation within the confines of a January 6th case than to show one of the more notorious events of that regrettable day in the trial of a defendant who had no

involvement with it. If the government truly wants nothing more, as it indicates in its response, than to give "necessary context" (Doc. 70 at 10) to other statements discussing Ms. Babbit's shooting in Exhibit 112 itself and in Mr. Alford's later Facebook posts on the subject, there are other avenues—equally adequate but far less incendiary—to put the fact of the shooting before the jury. For one, the government could simply elicit testimony from its case agent regarding the time and place Ms. Babbit was shot. But, regardless, that footage should not be admitted.

To the extent the Court permits the government to utilize any of Exhibit 112, it should be limited to time stamps 1:27:06 to 1:28:03, which capture the entirety of Mr. Alford's appearance on the footage, and the moments before and after.

IV. Conclusion.

For all of these reasons, and those detailed in the underlying Motion to Exclude Certain Government Exhibits, Mr. Alford respectfully asks this Honorable Court to enter an order granting the requested relief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 30, 2022, I electronically filed the foregoing via this Court's CM/ECF system, which will send notice of such filing to all counsel of record.

Respectfully submitted,

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