

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

UNITED STATES)	
)	
v.)	1:21-cr-38
)	
BARNETT)	
_____)	

MOTION IN LIMINE

Defendant, by and through counsel, submits this *motion in limine* to exclude the testimony of Emily Berret for the Government.

BACKGROUND

The Government filed a Superseding Indictment on December 22, 2023, just days before Christmas and trial, including a new felony charge. When pressed by the Court as to how to justify a new indictment this late in the game and to explain how the defense was not prejudiced by this late filing, the Government responded by explaining that the new indictment was based exclusively on an interaction between Mr. Barnett and a Metropolitan Police officer that occurred in the Rotunda *after Mr. Barnett had already exited Speaker Pelosi’s office*. After revealing the basis for the charge, the government argued that the defense was not prejudiced because the defense was already in possession of the evidence for the new charge. Based on this shocking revelation - namely, that Mr. Barnett was not being charged based on any conduct in Speaker Pelosi’s office - the Court denied the defense’s motion for a continuance.

At the same pretrial conference, the Government submitted its proposed list of witnesses that it intends to present at trial. Towards the top of the list is Emily Berret, a former staff member of Congresswoman Pelosi. When asked by the Court about the relevance, an attorney

for the Government said “she has a lot to say.” When pressed for specifics, the Government responded that Ms. Berret was at the “proceeding” that Mr. Barnett is accused of “obstructing.” The Government also intends to establish that the government desk that Mr. Barnett famously put his feet on assigned to her, and presumably, that the single envelope that the Government accuses Mr. Barnett of stealing was on Ms. Berret’s desk. There is no evidence and the Government does not submit that Ms. Berret interacted with Mr. Barnett on January 6 or ever, or that she was in the office or the Rotunda during the incident that underlies the charges in the Indictment.

LEGAL STANDARD

In evaluating the admissibility of proffered evidence on a pretrial motion *in limine* the court must assess whether the evidence is relevant and, if so, whether it is admissible, pursuant to Federal Rules of Evidence 401 and 402. “[T]he burden is on the introducing party to establish relevancy,” *Dowling v. United States*, 493 U.S. 342, 351 n. 3 (1990), as well as admissibility. Even relevant evidence may be deemed inadmissible and subject to exclusion on multiple grounds, including that “its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.” Fed. R. Evid. 403. “Assessing the probative value of [the proffered evidence] and weighing any factors counseling against admissibility is a matter first for the district court’s sound judgment under Rules 401 and 403.” *Sprint/United Mgmt. Co. v. Mendelsohn*, 552 U.S. 379, 384 (2008) (quoting *United States v. Abel*, 469 U.S. 45, 54 (1984)). “This is particularly true with respect to Rule 403.” *Id.* Under Rule 403, the court must “engage in on-the-spot balancing of probative value and prejudice and ... exclude even factually relevant evidence when it fails the balancing test.” *United States v.*

Moore, 651 F.3d 30, 63 (D.C.Cir.2011) (internal quotation marks omitted). This balancing test is “fact-based and depends on many factors, including how closely related the evidence is to the plaintiff’s circumstances and theory of the case.” *Nuskey v. Hochberg*, 723 F.Supp.2d 229, 233 (D.D.C. 2010) (quoting *Sprint/United Mgmt. Co.*, 552 U.S. at 387–88, 128 S.Ct. 1140). Importantly, “unfair prejudice within [the Rule 403] context means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one.” *United States v. Ring*, 706 F.3d 460, 472 (D.C.Cir. 2013) (quoting Fed. R. Evid. 403 advisory committee’s notes).

Depending upon the nature of the evidentiary issue presented in a pretrial motion *in limine*, the court must also assess whether a ruling is appropriate in advance of trial or, instead, should be deferred until trial “ ‘[when] decisions can be better informed by the context, foundation, and relevance of the contested evidence within the framework of the trial as a whole.’ ” *Herbert v. Architect of the Capitol*, 920 F.Supp.2d 33, 38 (D.D.C.2013) (quoting *Casares v. Bernal*, 790 F.Supp.2d 769, 775 (N.D.Ill.2011)) (alteration in original). The timing of a decision on the admissibility of contested evidence is a matter within a trial judge’s discretion. *Banks*, 958 F.Supp.2d at 81–82, 2013 WL 3936207, at *2, 2013 U.S. Dist. LEXIS 107212, at *6; *Barnes v. District of Columbia*, 924 F.Supp.2d 74, 78–79 (D.D.C.2013) (“The trial judge’s discretion extends not only to the substantive evidentiary ruling, but also to the threshold question of whether a motion in limine presents an evidentiary issue that is appropriate for ruling in advance of trial.”); *Graves v. District of Columbia*, 850 F.Supp.2d 6, 11 (D.D.C.2011).

ARGUMENT

Ms. Berret’s testimony has no probative value.

The testimony of Ms. Berret will unfairly prejudice the defendant in a way that outweighs any probative value. The term “unfair prejudice” speaks to the capacity of some concededly relevant evidence to lure the factfinder into declaring guilt on a ground different from proof specific to the offense charged.

Ms. Berret’s testimony adds nothing towards the Government’s burden of proof. Any testimony that the Government hopes to elicit from Ms. Berret about the “official proceeding” can just as easily be introduced through the dozens of exhibits about the activities in the chambers of Congress on January 6th, including pictures of the alleged proceeding and detailed explanations about the nature of the alleged proceeding. The Government witness list also includes a “former assistant parliamentarian,” who is presumably more than capable of testifying to any information about the “official proceeding,” and with greater knowledge, scope and depth, than Congresswoman Pelosi’s former staffer.

Likewise, there is nothing about Congresswoman Pelosi’s office that she can testify about that is not apparent from the many pictures of the office that were submitted as Government exhibits. There is nothing that speaks to the charges against Mr. Barnett that Ms. Berret can testify to, even if he happened to sit at a desk that she may have also sat at on other occasions. She was not at her desk when Mr. Barnett was there. She was not in the office when Mr. Barnett was there. She has no more information about Mr. Barnett’s presence in the office than anyone who saw the picture of Mr. Barnett on television. Even if she did, the Government intends to bring a Metropolitan Police Officer who was actually in the office at the time of the underlying incident, and actually encountered Mr. Barnett while he was in the office. Her testimony will be redundant if the description of the office from pictures can readily come from the testimony of the Metropolitan Police Officer.

Ms. Berret was not in the Rotunda while Mr. Barnett was there. She did not encounter Mr. Barnett on that day or ever. Accordingly, Ms. Berret's testimony adds nothing and is completely unnecessary.

Ms. Berret's testimony is unfairly prejudicial.

Not only is there no apparent probative value to Ms. Berret's testimony, but the potential for unfair prejudice is great. "The term 'unfair prejudice' ... speaks to the capacity of some concededly relevant evidence to lure the factfinder into declaring guilt on a ground different from proof specific to the offense charged." *Old Chief v. United States*, 519 U.S. 172, 180 (1997). The Committee Notes to Rule 403 explain, "'[u]nfair prejudice' within its context means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one." Advisory Committee's Note, Fed. Rule Evid. 403.

Undoubtedly, Ms. Berret was frightened by the events of January 6. Accordingly, it is likely she will testify to some of the things she saw that day and perhaps some of the feelings that she had. As she did not encounter Mr. Barnett on that day or ever, whatever she experienced had nothing to do with Mr. Barnett and her experience or feelings on that day are irrelevant, but worse, they may "lure the factfinder into declaring guilt on a ground different from proof specific to the offense charged" in that the jury may be lured to punish Mr. Barnett as a scapegoat because they want to punish some unknown rioters who may have scared Ms. Berret. There is a substantial likelihood that Ms. Berret's experience and feelings about January 6 may creep into her testimony. Those experiences and feelings are irrelevant to the trial of Mr. Barnett, and given the potential for unfair prejudice coupled with the absence of probative value, the testimony should be excluded.

Further, her testimony may confuse the jury. Mr. Barnett is not being charged because he put his feet on the desk that Ms. Berret sometimes sits at. However outraged Ms. Berret may have been that Mr. Barnett sat at her desk, it adds nothing to the Government's burden of proof. However, it may confuse the jury because if Ms. Berret testifies hysterically about the fact that Mr. Barnett sat at her desk, the jury may be confused into believing that somehow sitting at her desk was the conduct for which he was charged, rather than the alleged conduct in the Rotunda. This confusion of the jury is also a form of unfair prejudice and another reason her testimony should be excluded.

CONCLUSION

For the foregoing reasons, the Government should not be permitted to present the testimony of Ms. Barnett, and she should be excluded as a witness.

Dated: January 8, 2023
Washington, D.C.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify on this 8th day of January 2023, a copy of the foregoing was served upon all parties as forwarded through the Electronic Case Filing (ECF) System.

/s/ Jonathan Gross, Esq
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