UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA	:	
	:	
v.	:	**Case No. 21-cr-134 (CJN)**
	:	
MARK SAHADY	:	
	:	
Defendant.	:	

GOVERNMENT'S OPPOSITION TO DEFENDANT'S MOTION FOR RELIEF IN SUPPORT OF HIS SELECTIVE PROSECTION CLAIM

The government respectfully opposes Mr. Sahady's Motion for Relief in Support of His Selective Prosecution Claim, ECF No. 56, and its accompanying memorandum, ECF No. 56-1 ("Def.'s Mem."). The defendant's selective treatment arguments lack merit, and his request for compelled discovery should be denied.

BACKGROUND

The defendant is charged with Entering and Remaining in a Restricted Building or Grounds, in violation of 18 U.S.C. § 1752(a)(1); Disorderly and Disruptive Conduct in a Restricted Building or Grounds, in violation of 18 U.S.C. § 1752(a)(2); Disorderly Conduct in a Capitol Building, in violation of 40 U.S.C. § 5104(e)(2)(D); and Parading, Demonstrating, or Picketing in a Capitol Building, in violation of 40 U.S.C. § 5104(e)(2)(G).[1] These charges all stem from the defendant's conduct at the U.S. Capitol on January 6, 2021.

On January 6, a joint session of Congress convened to certify the votes of the Electoral College for the 2020 Presidential Election, which took place on November 3, 2020. At

[1] The Second Superseding Information, which added Count Four charging Parading, Demonstrating, or Picketing in a Capitol Building in violation of 40 U.S.C. § 5104(e)(2)(G), was filed on March 22, 2023.

approximately 1:30 p.m., the House and Senate adjourned to separate chambers to resolve a particular objection. Vice President Michael R. Pence was present and presiding, first in the joint session and then in the Senate chamber.

As the proceedings continued in both the House and the Senate, and with Vice President Pence present and presiding over the Senate, a large crowd gathered outside the United States Capitol. Officers with the United States Capitol Police ("USCP") and the Metropolitan Police Department ("MPD") attempted to keep the crowd away from the building. Shortly after 2:00 p.m., individuals in the crowd forced entry into the U.S. Capitol by, among other things, breaking windows and assaulting both USCP and MPD officers as others in the crowd encouraged and assisted those acts. In response to this intrusion, representatives, senators, and Vice President Pence evacuated their respective chambers around 2:20 p.m.

The defendant, Mark Sahady, and Suzanne Ianni,[2] travelled together to Washington, D.C. to attend President Trump's "Stop the Steal" rally on January 6, 2021. Following the rally, at approximately 2:41 p.m., the defendant and Ianni were part of a mob of rioters gathered on restricted grounds at the Northwest Courtyard of the U.S. Capitol. Rioters in this area were gaining entry in the Capitol building by breaking windows, forcing open doors, and breaching police barricades. While there, the defendant joined the crowd in chanting "Let us in!" and began his own chant of "Fight for Trump!" At approximately 2:45 p.m., the defendant and Ianni entered the U.S. Capitol through the recently-breached Parliamentarian Door, where they joined a mob that attempted to push past police in the Brumidi Hallway. At approximately 3:03 p.m.—18 minutes

[2] On September 14, 2022, Ianni pled guilty to 40 U.S.C. § 5104(e)(2)(D). As part of her plea, Ianni admitted that she traveled from Boston to Washington, D.C., via bus, with Mark Sahady and other members of the "Super Happy Fun America" organization. Ianni also admitted that the purpose of this trip to Washington, D.C., was to protest Congress' certification of the Electoral College vote for President of the United States.

after they entered—the defendant and Ianni exited the Capitol building through the North Door.

ARGUMENT

The defendant asserts that the government selectively targeted him for prosecution based on his political beliefs. In his motion—permeated with speculation, unsupported conclusions, and unsubstantiated insinuations—he claims his assertion is evidenced by differences between prosecutions related to similar conduct occurring during protests around the Portland, Oregon federal courthouse in May and June 2020. But the defendant does not reference any common charges between himself and the Portland protesters. Nor does he reference any demonstrable irregularities that would justify the compulsion of discovery for a selective prosecution claim in this case. Ultimately, the defendant cannot make the threshold evidentiary showing for a selective-prosecution claim. Accordingly, his request for compelled discovery should be denied.

I. Requisite to His Request for Discovery, the Defendant Must Make a "Rigorous" Showing on Each Element of His Selective Prosecution Claim.

Because "[t]he Attorney General and United States Attorneys retain broad discretion to enforce the Nation's criminal laws," a "presumption of regularity supports their prosecutorial decisions and, in the absence of clear evidence to the contrary, courts presume that they have properly discharged their duties." *United States v. Armstrong*, 517 U.S. 456, 464 (1996) (internal quotation marks and citations omitted). This presumption "rests in part on an assessment of the relative competence of prosecutors and courts." *Id.* at 465. "Such factors as the strength of the case, the prosecution's general deterrence value, the Government's enforcement priorities, and the case's relationship to the Government's overall enforcement plan are not readily susceptible to the kind of analysis the courts are competent to undertake." *Id.* (citation omitted). "Few subjects are less adapted to judicial review than the exercise by the Executive of his discretion in deciding when and whether to institute criminal proceedings, or what precise charge shall be made, or

whether to dismiss a proceeding once brought." *United States v. Fokker Servs. B.V.*, 818 F.3d 733, 741 (D.C. Cir. 2016) (cleaned up). So "the presumption of regularity" applies to "prosecutorial decisions and, in the absence of clear evidence to the contrary, courts presume that prosecutors have properly discharged their official duties." *Id.*

As a result, "[i]n the ordinary case, so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion." *Armstrong*, 517 U.S. at 464. This presumption of regularity "also stems from a concern not to unnecessarily impair the performance of a core executive constitutional function." *Armstrong*, 517 U.S. at 465. To overcome the presumption of regularity and obtain dismissal of the criminal charges, a defendant must present "clear evidence" that the government's decision to prosecute was "based on an unjustifiable standard such as race, religion, or other arbitrary classification." *Id.* at 464-65 (citations omitted).

Concerned that selective-prosecution inquiries "will divert prosecutors' resources and may disclose the Government's prosecutorial strategy," the Supreme Court has also imposed a "correspondingly rigorous standard for discovery in aid of such a claim." *Armstrong*, 517 U.S. at 468. The defendant must initially produce "some evidence tending to show the existence of the essential elements of" selective prosecution, which are: "discriminatory effect and discriminatory intent." *Id*. (citation omitted). The defendant's evidence must also be "credible"—something more than "personal conclusions based on anecdotal evidence." *Id*. at 470. "If either part of the test is failed," the defendant cannot "subject[] the Government to discovery." *Att'y Gen. of United States v. Irish People, Inc*., 684 F.2d 928, 947 (D.C. Cir. 1982); *see also United States v. Lewis*, 517 F.3d 20, 25 (1st Cir. 2008) ("[D]iscovery will not be allowed unless the defendant's evidence

supports each of the two furcula of his selective prosecution theory: failure on one branch dooms the discovery motion as a whole").

II. The Defendant Fails to Proffer Any Evidence Supporting an Inference of Selective Prosecution.

The defendant cannot make the threshold showing on any of the applicable selective prosecution elements. First, he has not presented any evidence suggesting he "was singled out for prosecution from among other[] similarly situated [defendants.]" *Branch Ministries v. Rossotti*, 211 F.3d 137, 144 (D.C. Cir. 2000). Second, he has not presented any evidence showing that his "prosecution was improperly motivated." *Id.* "[T]he standard is a demanding one" and the defendant has not – and cannot – meet it. *Armstrong*, 517 U.S. at 463.[3]

A. The defendant has not made a sufficient showing that the government singled him out for prosecution for his crimes.

The defendant must first adduce evidence that "others similarly situated generally have not been prosecuted for conduct similar to that for which he was prosecuted." *Irish People, Inc.*, 684 F.2d at 946 (citation omitted). As Judge Jackson has explained, an individual may be similarly situated if he "committed the same basic crime in substantially the same manner as the defendant—so that any prosecution of that individual would have the same deterrence value and would be related in the same way to the Government's enforcement priorities and enforcement plan—and against whom the evidence was as strong or stronger than that against the defendant." *United States v. Stone*, 394 F.

[3] As Judge Bates recently explained, "this Court and others in this District have already denied similar requests for discovery in support of selective prosecution claims in January 6 cases." *United States v. Padilla*, No. 21-cr-214 (JDB), 2023 WL 1964214, at *5 (D.D.C. Feb. 13, 2023) (citing *United States v. Brock*, No. 21-cr-140 (JDB), 2022 WL 3910549, at *2 (D.D.C. Aug. 31, 2022); *United States v. Judd*, 579 F. Supp. 3d 1, 4 (D.D.C. 2021); *United States v. Rhodes*, No. 22-cr-15 (APM), 2022 WL 3042200, at *4–5 (D.D.C. Aug. 2, 2022)); *see also* Order, ECF No. 67, *United States v. Miller*, No. 21-cr-119 (CJN) (Dec. 21, 2021).

Supp. 3d 1, 31 (D.D.C. 2019) (quoting *United States v. Smith*, 231 F.3d 800, 810 (11th Cir. 2000)); *see also United States v. Lewis*, 517 F.3d 20, 27-28 (1st Cir. 2008) ("A similarly situated offender is one outside the protected class who has committed roughly the same crime under roughly the same circumstances but against whom the law has not been enforced. . . . A multiplicity of factors legitimately may influence the government's decision to prosecute one individual but not another. These may include, inter alia, the comparability of the crimes, the similarities in the manner in which the crimes were committed, the relative efficacy of each prosecution as a deterrent, and the equivalency of the evidence against each prospective defendant.") (internal citations omitted).

The defendant has failed this showing because he "has failed to point to any Portland case that is similar to [his] and in which the government made a substantially different prosecutorial decision." *See United States v. Miller*, No. 21-cr-119 (CJN), ECF No. 67 at 3 (D.D.C. Dec. 21, 2021). A selective-prosecution claim requires the defendant to identify "similarly situated" individuals who "have not been prosecuted," *Irish People, Inc.*, 684 F.2d at 946 (citation omitted), and the defendant has pointed to no such individual. Instead, he refers to "the general events in Portland, Oregon, in 2020," Def.'s Mem. at 2, and three cases where the government charged federal offenses arising from riots around the federal courthouse in Portland, Oregon, *see id.* at 4–5. Thus, rather than attempt to show disparate treatment in the government's charging approaches, the defendant instead focuses on the manner in which the government ultimately resolved the Portland cases. This presentation "falls woefully short of demonstrating a consistent pattern of unequal administration of the law."[4] *United States v. Bernal-Rojas*, 933 F.2d 97, 99 (1st Cir. 1991).

More fundamentally, the Portland cases serve as improper "comparator[s]" because the defendant is not similarly situated with them. *Stone*, 394 F. Supp. 3d at 31. According to the defendant,

[4] The defendant neglects to reference a larger and more representative sample of the Oregon cases, presumably because the government's litigation decisions in many of those cases do not conform to his inference of selective treatment.

"commonality" exists because "both groups are charged with trespassing on a federal building, in large groups, in major cities, during political protests just months apart from one another." Def.'s Mem. At 7. However, there are clear differences between the attack on the U.S. Capitol and the riots in Portland, Oregon. Here, the defendant unlawfully entered the U.S. Capitol—the seat of the nation's legislature and the workplace of hundreds of federal officials—as part of a massive riot that antagonized law enforcement, interfered with governmental functions, and desecrated an international symbol of democracy. The defendant joined this riot while elected lawmakers and the Vice President of the United States were present in the building and attempting to certify the results of the 2020 Presidential Election in accordance with Article II of the Constitution. This conduct all was captured on video and acknowledged in the defendant's statements prior to and following the riot. Indeed, the defendant's actions—which impacted the personnel and gears of the legislative branch and posed "a grave danger to our democracy," *United States v. Munchel*, 991 F.3d 1273, 1284 (D.C. Cir. 2021)—reflects a "distinguishable legitimate prosecutorial factor[] that might justify making different prosecutorial decisions" in the defendant's case. *Rossotti*, 211 F.3d at 145 (citation omitted). Thus, "[t]he circumstances between the riots in Portland and the uprising in the Nation's capital differ in kind and degree, and the Portland cases (and the government's prosecutorial decisions) are therefore not sufficiently similar to this case . . . ." *Miller*, No. 21-cr-119 (CJN), ECF No. 67 at 3.

The Portland cases—despite involving individuals that committed serious offenses—never grappled with considerations of this breadth—namely, an attack on the United States government. Indeed, multiple decisions from this jurisdiction have documented the *sui generis* nature of this criminal conduct. The D.C. Circuit has observed that "the violent breach of the Capitol on January 6 was a grave danger to our democracy." *United States v. Munchel*, 991 F.3d 1273, 1284 (D.C. Cir. 2021). Members of this Court have similarly described it as "a singular and chilling event in U.S. history, raising legitimate concern about the security—not only of the Capitol building—but of our

democracy itself." *United States v. Cha*, No. 21-cr-107, 2021 WL 918255, at *3 (D.D.C. Mar. 10, 2021); *see also United States v. Fox*, No. 21-cr-108 (D.D.C. Jun. 30, 2021) (Doc. 41, Hrg. Tr. at 14) ("This is not rhetorical flourish. This reflects the concern of my colleagues and myself for what we view as an incredibly dangerous and disturbing attack on a free electoral system."); *United States v. Chrestman*, No. 21-mj-218, 2021 WL 765662, at *7 (D.D.C. Feb. 26, 2021) ("The actions of this violent mob, particularly those members who breached police lines and gained entry to the Capitol, are reprehensible as offenses against morality, civic virtue, and the rule of law.").

These decisions confirm that the actions taken by the defendant and others on January 6, 2021, differ in kind and in degree from the Portland cases to which the defendant insufficiently refers. Therefore, the defendant's motion fails.

B. The defendant has not shown that the government harbored an improper motive in prosecuting him for his crimes.

With respect to the second prong, the defendant cannot point to *any* evidence that improper motives undergird this prosecution.

Instead, the defendant swiftly concludes that the only discernable difference between the Portland cases and Capitol Riot cases is the defendants' political viewpoints. But the defendant presents no evidence linking any Portland defendant to a particular political viewpoint.[5] Stripped to its core, the defendant relies on rank conjecture in suggesting that political favoritism has guided

[5] The defendant's comparator cases do not blanketly support his assumption. *See United States v. Johnson*, No. 3:20-mj-00170 (D. Ore. July 27, 2020), ECF No. 1-1 (defendant "stated his reason for attending the protest was to make sure his friends get home safe"); *United States v. Bouchard,* case no. 3:20-mj-00165 (D. Ore. July 24, 2020), ECF No. 1-1 (defendant made no statement about his intent other than to say "his intent was not to hurt anyone, but to 'stand his ground.'"); *United States v. Bouchard,* No. 3:20-mj-00165 (D. Ore. July 24, 2020), ECF No. 1-1 (defendant "stated that he comes out often to the protests because he supports the movement that the protest represents" with no further explanation provided); *United States v. Webb*, No. 3:20-mj-00169 (D. Ore. July 27, 2020), ECF No. 1 (defendant non-specifically stated that "he comes out often to the protests because he supports the movement that the protest represents.")

the government's charging and plea decisions. That is not enough to warrant discovery here; "a defendant must provide something more than mere speculation or 'personal conclusions'" of selective prosecution. *Stone*, 394 F. Supp. 3d at 31 (quoting *Armstrong*, 517 U.S. at 470).

At bottom, the government has determined that the defendant's offense conduct warrants a different penalty than the cases he references. That reflects an appropriate exercise of its prosecutorial discretion in balancing the seriousness of the defendant's conduct, the strength of the evidence against him, the need for his rehabilitation, the need to deter him and others from future criminal activity targeting the electoral process, and the allocation of the government's resources. All these factors constitute permissible prosecutorial considerations. *See Price*, 865 F.3d at 681.

The defendant argues that his case is so distinguishable as to suggest "incredibly harsh prosecution in contrast to" that from the Portland cases because he is not alleged to have engaged in violent conduct, unlike some of the Portland defendants. That argument assumes that the level of actual violence and property destruction is the only difference between the Portland protestors and January 6 defendants, which is not the case. As part of the mob that stormed the Capitol, the defendant is alleged to have taken part in the events of January 6th, which caused, *inter alia*, "[m]embers of Congress [to] cower[ ] under chairs while staffers blockaded themselves in offices, fearing physical attacks from the rioters." *Judd*, 579 F. Supp. 3d at 8. The government also alleges that the defendant shouted encouragement to a violent mob attempting to forcibly breach into the Northwest side of the Capitol.

In any event, the defendant has adduced no evidence that the government initiated these charges in response to his political views. The U.S. Attorney for the District of Columbia—as an officer of this Court—further represents that such a consideration plays no role in his office's charging policies—be it in this investigation or elsewhere. Accordingly, the defendant fails his

burden on the second element.

Up to this point, the government has accepted the defendant's comparator cases at face value and demonstrated that no impermissible inference arises under *Armstrong*. That alone forecloses his request for discovery. But his motion suffers an additional defect: even a cursory inspection of the District of Oregon's public docket reveals that his comparator cases incompletely and unreliably represent the handling of the Portland cases as a whole. Indeed, the defendant's three comparator cases and references to the "general events," Def.'s Mem. at 2–3, in Portland are underinclusive because they conspicuously omit discussion of any Portland case where the government has proceeded with prosecution. In a selective-prosecution claim, the defendant has the right to allege a class of defendants who purportedly received more favorable treatment. But the defendant just as assuredly carries the obligation to proffer accurate, complete information with respect to his alleged class so that the government can provide a fair response and this Court can decide whether a prima facie case has been made. The defendant—in proffering just three specific cases, failing to substantiate his speculative assumptions, and omitting key aspects of the Portland case sample—has fallen well short on that obligation. His motion should be denied on that basis as well.

CONCLUSION

For the reasons set forth herein, the government respectfully requests that this Court deny the defendant's motion.

Respectfully submitted,

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