UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA	§	
	§	
V.	§	**CAUSE: NO. 21-CR-327**
	§	
LUKE RUSSELL COFFEE	§	
	§	

REPLY TO GOVERNMENT RESPONSE AT ECF NO. 86

Comes now the Defendant LUKE COFFEE, by and through undersigned counsel, and replies to the Government's ECF No. 86 Response to Mr. Coffee's Motion at ECF No. 66 filed on January 9, 2023, and requests that the Court grant his motion at ECF No. 66, and replies as follows:

I. BACKGROUND:

Mr. Coffee's Motion at ECF No. 66, dated January 9, 2023, (heretofore referred to as the "Motion") requested that the Federal Rules of Evidence be followed, and that certain items be excluded. He asked to exclude other people's bad acts where the Government regularly inserts these at trials and into plea deals to confer guilt on the defendant. The government has weak evidence and intends to rely on irrelevant and unfairly prejudicial insertions that do not belong in this upcoming trial. The government wants to present questionably "impartial" D.C. juries of victims with large amounts of video, hearsay, irrelevant, and unfairly prejudicial "evidence" completely unrelated to Defendant's acts. Mr. Coffee's Motion referred to videos, words, documents, and testimonies that are unfairly prejudicial and not inherent or related to crimes charged specifically against Mr. Coffee.

The government's intent is underscored by its modus operandi in trials to date. Mr. Coffee is charged as the principal, responsible for his acts. The government cannot prove its case with Mr.

Coffee as the principal, and will try to confuse the jury that he was an accessory to the bad acts by others he never saw, met, or acted for. The government has in this District been allowed to add jury instructions for 18 U.S.C. Section 2 that are not in the indictment, as if aiding and abetting is inherent to the crime charged, similar to "attempted." This is why the government introduces irrelevant and highly prejudicial material at trials. The government and some judges unconstitutionally assert that by mere presence alone, a defendant aided and abetted unknown and unnamed people to commit crimes. This completely violates our system of American jurisprudence. In this District, with no evidence of any element of the Section 2 crime, which is not even in the indictments, defendants are found guilty based on the acts of others.[1]

Mr. Coffee's motion requested that unfairly prejudicial and irrelevant presentations be excluded ahead of time. Given what has been allowed in trials, anyone might assess that the prosecution of January 6th cases has become a free for all by the government as long as anything it presents happened on or around January 6, 2021, and was something said or done somewhere by someone not the defendant. Mr. Coffee's Motion asks that a decision regarding the Federal Rules of Evidence be made now so that during trial his defense team is not required to constantly object on the record because the government believes it has the Court's permission to poison the jury. Further, it is intuitive that jury limiting instructions cannot make them "unsee" or "unhear" unfairly prejudicial videos, documents, pictures, and words, whether relevant in any sense or not at all. The government walks into Court on day one with its opening meant to unfairly prejudice the jury. There can be no recovery from that by a litany of objections or jury limiting instructions.

[1] See for example among many Richard Barnett's case: 1:21-cr-00038-CRC, Document 158 Filed 01/24/23 where Section 2 was added to jury instructions while not contained in the indictment, and was added after the evidence closed. Other indictments add Section 2 to all counts.

As stated: "the trial should be directed at Mr. Coffee's conduct and the offenses with which he is charged." ECF 66 Motion at 2. The government in its response insists it must show the acts of others to convict Mr. Coffee. That is antithetical to the American system of justice. Mr. Coffee is not charged with conspiracy nor are there any co-defendants in his case. Mr. Coffee's trial cannot be a one-sided, continuing referendum against all January 6th protestors where he is guilty by mere presence on the grounds.

II. REVIEW OF LEGAL STANDARD:

Motions in limine are designed to narrow the evidentiary issues at trial. *Williams v. Johnson*, 747 F. Supp. 2d 10, 14 (D.D.C. 2010). Such motions are an important mechanism of insulating the jury from inadmissible evidence and of adhering to the goal of conducting proceedings "fairly . . . to the end of ascertaining the truth and securing a just determination." *United States v. Bikundi*, No. 14-CR-030 (BAH), 2015 WL 5915481, at *3 (D.D.C. Oct. 7, 2015) (citing Fed. R. Evid. 102 and *Banks v. Vilsack*, 958 F. Supp. 2d 78, 82 (D.D.C. 2013)). Rulings on motions in limine in advance of the trial permit counsel to make the necessary strategic determinations. See *United States v. Jackson*, 627 F.2d 1198, 1209 (D.C. Cir. 1980); *Burns v. Levy*, Civ. No. 13-898, 2019 WL 6465142, at *3 (D.D.C. 2019).

Irrelevant evidence is not admissible. FRE 402. Evidence is relevant only if "it has any tendency to make a fact more or less probable than it would without the evidence; and the fact is of consequence in determining the action." FRE 401. Evidence is therefore relevant only if it logically relates to matters that are at issue in the case. E.g., *United States v. O'Neal*, 844 F.3d 271, 278 (D.C. Cir. 2016); see *Sprint/United Mgmt. Co. v. Mendelsohn*, 552 U.S. 379, 387 (2008).

The Federal Rules of Evidence direct the court to exclude otherwise admissible evidence where its probative value is substantially outweighed by a danger of unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence. Fed. R. Evid. 403. Mr. Coffee is asking this Court to do just that.

III. ARGUMENT

Federal Rule of Evidence 403 allows for the limitation of otherwise relevant evidence when: *Relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury, or by considerations of*

undue delay, waste of time, or needless presentation. Mr. Coffee asserts that nothing on the east side of the U.S. Capitol, and nothing inside the Capitol building, have any probative value to the acts and charges he is accused of committing. He is accused of acts after 3:15 p.m. yet the government wants this Court's permission to show violence and present police testimony about other people's acts much earlier on the east side and in the building's interior.

Video, testimony, and evidence about what other protestors may or may not have done at other times and places is not relevant to the charges against Mr. Coffee based on where he was located and when. Motions in limine are meant to preclude unnecessary mini trials within a trial. If the government is allowed to try to convict Mr. Coffee based on video, pictures, documents, and testimony about others, then mini trials will need to ensue to counter government allegations that are not directly related to acts by Mr. Coffee. Reviews from other trials show that video and testimony where the event did not relate to the defendant on trial was unfairly prejudicial with no probative value. The government went so far as to state in its Response that it has to show people's bad acts not anywhere near Mr. Coffee in order to prove he was involved in Civil Disorder. Under this apparently unconstitutional standard, anyone within a mile of the U.S. Capitol who asked a policeman on the street for directions is guilty of Civil Disorder.

The Motion is meant to ensure a fair trial and not lead the jury to convict based on a sense of social responsibility. The U.S. President and U.S. Attorney General continue to falsely claim that police were killed by protestors on January 6, 2021, and that conservatives are "extremists" who pose an existential threat to America. Raising these specters at trial is wrong.

> A prosecutor may not urge jurors to convict a criminal defendant in order to protect community values, preserve civil order, or deter future lawbreaking. The evil lurking in such prosecutorial appeals is that the defendant will be convicted for reasons wholly irrelevant to his own guilt or innocence. Jurors may be persuaded by such appeals to believe that, by convicting a defendant, they

> will assist in the solution of some pressing social problem. The amelioration of society's woes is far too heavy a burden for the individual criminal defendant to bear.

United States v. Monaghan, 741 F.2d 1434, 1441 (D.C. Cir. 1984); see also *United States v. Hawkins*, 595 F.2d 751, 754 (D.C. Cir. 1978).

The government knows that Mr. Coffee did not enter the building but charged him with that. They know he did not knowingly enter the Capitol grounds illegally since other cases have shown that signs and fencing were removed prior to Mr. Coffee's arrival. The government knows he was present in D.C. for documenting on film and not to obstruct anything. The insertion of other people's bad acts and words aims to transfer alleged guilt of others to Mr. Coffee. This is wrong.

> It is fair to say that the average jury, in a greater or less degree, has confidence that these obligations, which so plainly rest upon the prosecuting attorney, will be faithfully observed. Consequently, improper suggestions, insinuations, and, especially, assertions of personal knowledge are apt to carry much weight against the accused, when they should properly carry none.

United States v. Berger, 295 U.S. 78, 88 (1935).

Here, the prosecution appears to be arguing that it should be allowed to obtain a conviction by prejudicing the jury by using the acts of others - including places on the U.S. Capitol grounds and in the building where Mr. Coffee never went and involving people he did not see or know. This includes using terms that refer to crimes for which Mr. Coffee is not charged (riot, terrorism, insurrection, etc.). Response at 4.

The decision for the jurors should be based on the application of the facts to the elements of each offense as explained to them by the Court. No part of that process is furthered by video, testimonial language, or commentary concerning terrorism, insurrection, sedition, assault on democracy, etc., or by showing the acts of others that do not involve Mr. Coffee. Such use of terms and phrases risks that the jurors will focus attention and their determination not on the charges

against the Mr. Coffee, but rather on broader issues that are the subject of public debate and disagreement. Showing acts of others can only be intended to obtain a conviction against Mr. Coffee for the acts of others that are shown outside of full context.

> The prosecutor is in a peculiar and very definite sense the servant of the law, the two-fold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor -- indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones.

Id. See *United States v. Johnson,* 231 F.3d 43, 47 (D.C. Cir. 2000) ("A prosecutor may not make comments designed to inflame the passions or prejudices of the jury. And a prosecutor may not ask jurors to find a defendant guilty as a means of promoting community values, maintaining order, or discouraging future crime."); *United States v. Ring,* 706 F.3d 460, 472 (D.C. Cir. 2013) (unfair prejudice relates to "an undue tendency to suggest decision on an improper basis") (quoting Fed. R. Evid. 403, advisory committee's note). Whether used once or many times in the courtroom, the words cannot be unheard even if stricken from the record.

Mr. Coffee like all January 6 defendants already faces a steep uphill battle in public sentiment within the juror pool in the District of Columbia. This Court has the obligation to ensure that the jurors can set aside any personal views or opinions they might have formed about the events of January 6 or other persons alleged to have been involved in committing crimes on that day. The D.C. media who make their living by reporting about January 6th cases are relentless in continuous publication of stories about the alleged acts and convictions. The government's use of unfairly prejudicial terms and irrelevant information apparently seeks to capitalize on the existing prejudice.

References, testimony, and/or commentary using video and words/phrases of the type set forth in Mr. Coffee's motion that the government opposes have no relevance to the issue of guilt

or innocence for his charges. No video or testimony about the east side of the Capitol or protestors acts inside the Capitol building provides any context for where Mr. Coffee was located. No protestors and no law enforcement outside on the west could see the events on the east side or inside the building. The government's use will only inflame and unfairly prejudice the jury. Because such references have no probative value, and risk undue and unfair prejudice to Mr. Coffee's right to a fair trial and due process, the Court should order that such inflammatory video, terms, pictures, or phrases not be used in a case where they do not fall within the charges.

Mr. Coffee's motion at ECF No. 66 supports trial efficiency as a motion in limine should do. The motion asks that the Court ahead of trial apply the Federal Rules of Evidence to only allow relevant evidence that has probative value - and truth - where false and unfairly prejudicial assertions and name calling are disallowed. And because the trial and justice are not a "win at any and all costs" affair, the Court should grant Mr. Coffee's motion in the interests of justice, and as supported by the Federal Rules of Evidence. Again, we do not need to waste time on mini-trials. If the government is allowed to show the east and interior for example, then a mini trial where Mr. Coffee can show the rest of the hidden story will be warranted for fairness and justice.

In further consideration of fairness and a government attempt to unfairly prejudice the jury, not a single person was charged with "rioting" under federal law. 18 U.S.C. supplies the specific requirements to charge the federal crime of rioting. A Metropolitan Police Department (D.C. MPD) officer appears to have called a "riot" over the operations channel. This would be under D.C. law which is nothing like a federal riot. The government is incorrect when it states the actions at the Capitol can be described as a riot under federal law. There is a reason "rioting" was not charged and that involves the many elements for a riot under federal law. For example, a riot must have been planned, and it must have included interstate travel to execute the plan.

With no rioting charges, the DOJ on its own declared a "civil disorder" days after January 6, 2021. But, the DOJ continues to refer to every protestor as a rioter without regard for federal standards of that crime. No defendant is charged with rioting D.C. or federal statute. The term "rioting" then can only be meant to confuse the jury so it will not look at the elements for Civil Disorder. Further, despite people forming a crowd, everyone anywhere on the U.S. Capitol grounds is now prejudicially called part of a "mob." It has become acceptable for the government to accuse anyone present on January 6, 2021 of being a rioter, insurrectionist, and member of a mob. "The court may not permit a jury to render a guilty verdict based on 'ambiguous evidence' from the government, which encourages the jury to 'engage in speculation.' *Bailey v. United States*, 416 F.2d 1110, 1116 (D.C. Cir. 1969). The government has no evidence of rioting and insurrection but wants jurors to speculate and infer guilt. This demonization should stop with this trial.

Mr. Coffee requests that the Court grant his motion at ECF No. 66. Otherwise the result will be time spent in mini trials during his trial so that he may defend himself. If his motion is denied, Mr. Coffee will have to defend against unfair prejudice and jury confusion. He will need to present witness testimony and impeachment evidence to counter a government trial strategy that avoids addressing the elements of the crimes charged, and deliberately exacerbates existing conscious and subconscious bias among jury members that voir dire cannot eliminate. Given that Mr. Biden and AG Garland continue to falsely declare that protestors caused police deaths on January 6th, and that "MAGA" is an existential threat to democracy, and where anyone on the Capitol grounds except selected media and those acting as informants and undercover agents are charged, the government should not be allowed to make baseless claims or use name-calling at trial. A trial is not supposed to be a government "information operation" or "psychological operation" targeting the Court and jurors.

When allowed, the government begins its opening statement with a twenty-five minute video montage that is a highly prejudicial, edited, cherry-picked compilation that makes January 6, 2021 look like there was five hours of violence, everywhere, by everyone. The government wants to start off with an opening that can fairly be called *reverse jury nullification*. In reverse jury nullification, the presentation gets the jury to ignore both the law and lack of government evidence that supports acquittal, and where despite lack of evidence, leads to a conviction. Nowhere is this riper to happen than among a D.C. jury of victims such as in this case.

The government argues against following the Federal Rules of Evidence because it wants the jury to speculate. "The court may not permit a jury to render a guilty verdict based on 'ambiguous evidence' from the government, which encourages the jury to 'engage in speculation.'" *Bailey v. United States*, 416 F.2d 1110, 1116 (D.C. Cir. 1969). Mr. Coffee again requests that the government be precluded from using video footage and testimony regarding events on the east side of or inside the US Capitol. He was not there. On the west, he did not rip down bike racks or fencing. Further, any showing of barricades pushed down must include time stamps rather than with those time stamps removed as the government has done with videos on evidence.com. As an important note, the government deliberately took action to remove the imbedded, visible time stamps in video it uses, and for what it made available to all defendants on the evidence.com data base.

The government's montage and witness testimony that addresses bad acts by others and what happened on the east side and inside the building will exacerbate existing juror bias and introduce speculation during trial despite how they answer any questionnaire. D.C. resident jurors would have to never have used the internet and social media, or watched or read any D.C. news, to not already have been bombarded with "the insurrection," "the Capitol attack,'" "threat to

democracy," and "dangerous extremists." The Government intends to exploit the existing bias of jurors who themselves were victims as they endured months of National Guard visible presence and road blockages while shut out of a militarized "Green Zone" by fencing as if D.C. had become Baghdad, Iraq.

Underlying bias that jurors may not recognize is never going to be completely uprooted in voir dire or managed by a jury limiting instruction. The only expectation any defendant can have is that the jury realizes when the government has not proven its case. That is why the government wants to rely on unfair prejudice on day one of trial as its overarching strategy. Unfair prejudice will grow when irrelevant and nonprobative videos, words, pictures, documents, and messages that operate as propaganda are allowed to offset the government's weak if non-existent case. Jurors cannot unhear or unsee what the Government says and shows at trial. They will assume that the Government's words about insurrection, rioting, mobs, terrorism, and acts by other people elsewhere at the Capitol on January 6th convey guilt to Mr. Coffee, no matter how unrelated in reality to his intent and acts. This is not befitting of American justice.

Incredibly, in its response the government alleges that its video about others, with times and places where Mr. Coffee was not located, will prove that Mr. Coffee interrupted government business. Likewise is its claim that anywhere else at any time must be shown to depict the interruption of commerce and a government function. The prosecution has not provided any specificity about what government business, commerce, or government function Mr. Coffee specifically impeded or obstructed under 18 USC Section 1752(A)(2) or 231(a)(3). Yet in its response the government admits that its strategy is to blame Mr. Coffee before the jury of acts of others at different places and times. This subterfuge should not be allowed.

For example: Showing the departure of Mr. Pence from upstairs in the building at 2:20 p.m. before Mr. Coffee was present outside indicates a deliberate intent to implicate Mr. Coffee in whatever caused the evacuation - which may as much have been due to pipe bombs nearby as to protestors entering the building from the west side a few minutes earlier at around ~2:14 p.m. Prior witness testimony from Mrs. Pelosi's chief assistant and the U.S. Secret Service included that the "evacuation" and interruption was due to the entry of unscreened protestors. The government wants to confuse and unfairly prejudice the jury where it will no longer even recognize the law and elements. That any jury has returned a verdict in 90 minutes or less after just having been read the jury instructions in a January 6th case with over eight charges for a multi-week trial speaks for itself. Because unfair prejudice is a tactic that requires little to make its mark on a jury that is filled with victims, the Court should grant Mr. Coffee's motion and strictly enforce the Federal Rules of Evidence.

IV. CONCLUSION.

Mr. Coffee thus stands by his Motion at ECF No. 66 and requests that the Court allow only facts related to him, and relevant, not unfairly prejudicial evidence to be used at trial. Mr. Coffee wants the standards for a professional and ethical DOJ to be upheld at his trial because anything otherwise is a threat to democracy and American justice.

Wherefore, because Mr. Coffee's Motion in Limine at ECF No. 66 is based on the Federal Rules of Evidence standards, and supports efficient conduct of a fair trial, the Court should grant his motion.

Respectfully submitted.

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CERTIFICATE OF SERVICE

I hereby certify that on the 2nd day of October, 2023, I filed the foregoing document using the CM/ECF system which will give electronic notification to all attorneys of record.

/s/ Anthony F. Sabatini
ANTHONY F. SABATINI