

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA :  
 :  
 v. : CASE NO. 1:21-cr-00552 (DLF)  
 :  
 KENNETH JOSEPH OWEN THOMAS, :  
 :  
 Defendant. :

**GOVERNMENT’S SUPPLEMENT TO ITS MOTION REGARDING  
PROPOSED DEFENSE EXPERT STEVEN HILL**

The United States of America respectfully files this Supplement to its April 21, 2023 filing, ECF No. 87, regarding the defendant’s proposed reliance on Mr. Steven Hill as an expert, and the defendant’s potential, yet undisclosed, affirmative defenses. *See* ECF No. 87 n.1 (discussing anticipated replication of Alberts’s defense strategy, especially with respect to affirmative defenses), n.2 (stating the government would provide the Court with the *Alberts* transcript, once it was received). Attached hereto as Exhibit A is the referenced excerpted portion of the April 11, 2023 proceedings in *United States v. Alberts*, No. 21-CR-26, a recent jury trial before the Honorable Christopher R. Cooper, wherein the parties and the Court discussed Mr. Hill and the defendant’s affirmative defenses.

Respectfully submitted,

MATTHEW M. GRAVES  
United States Attorney  
DC Bar No. 481052

/s/ Samantha R. Miller  
SAMANTHA R. MILLER  
Assistant United States Attorney  
New York Bar No. 5342175  
United States Attorney’s Office

For the District of Columbia  
601 D Street, NW 20530  
Samantha.Miller@usdoj.gov

SEAN P. MCCAULEY  
Assistant United States Attorney  
NY Bar No. 5600523  
United States Attorney's Office  
601 D Street NW  
Washington, DC 20530  
Sean.McCauley@usdoj.gov

## **Exhibit A**

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

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THE UNITED STATES OF AMERICA,

Plaintiff,

vs.

CHRISTOPHER ALBERTS,

Defendant.

- - - - - x

Criminal Action No.  
1:21-cr-00026-CRC-1  
Tuesday, April 11, 2023  
9:15 a.m.

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TRANSCRIPT OF JURY IMPANELMENT  
HELD BEFORE THE HONORABLE CHRISTOPHER R. COOPER  
UNITED STATES DISTRICT JUDGE

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APPEARANCES:

For the United States:

**JORDAN ANDREW KONIG, ESQ.**  
**U.S. DEPARTMENT OF JUSTICE**  
P.O. Box 55  
Ben Franklin Station  
Washington, DC 20044  
(202) 305-7917  
jordan.a.konig@usdoj.gov

**SAMUEL DALKE, ESQ.**  
**DOJ-USAO**  
228 Walnut Street, Suite 220  
Harrisburg, PA 17101  
(717) 221-4453  
samuel.s.dalke@usdoj.gov

**SHALIN NOHRIA, ESQ.**  
**UNITED STATES ATTORNEY'S OFFICE**  
601 D Street NW  
Suite Office 6.713  
Washington, DC 20001  
(202) 344-5763  
shalin.nohria@usdoj.gov

(CONTINUED ON NEXT PAGE)

## 1 APPEARANCES (CONTINUED) :

2 For the Defendant:

3 **JOHN M. PIERCE, ESQ.**  
4 **ROGER ROOTS, ESQ.**  
5 **JOHN PIERCE LAW P.C.**  
6 21550 Oxnard Street  
Suite 3rd Floor OMB #172  
Woodland Hills, CA 91367  
(213) 400-0725  
jpierce@johnpiercelaw.com  
rroots@johnpiercelaw.com

7 Court Reporter:

8 Lisa A. Moreira, RDR, CRR  
9 Official Court Reporter  
U.S. Courthouse, Room 6718  
333 Constitution Avenue, NW  
10 Washington, DC 20001  
(202) 354-3187

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**Excerpted Portion Only**

1           THE COURT: Okay. So I suspect it will take us  
2 about an hour to finish up in the morning, so you should be  
3 prepared to probably take a break, let them put their stuff  
4 in the jury room, and then we'll come back and roll into  
5 openings.

6           I know there are a few loose ends from I guess  
7 it's yesterday -- it seems like a long time ago now --  
8 regarding the filings that were made after the pretrial  
9 conference.

10           With respect to the two expert notices, the Court  
11 will exclude testimony from both experts. As an initial  
12 matter, I think both of the notices were untimely. I  
13 realize that I did not set a deadline for expert notices,  
14 but Rule 16(b)(1)(C)(ii), I think, can fairly be read to  
15 require disclosure sufficiently before trial to give the  
16 government an opportunity to counter the expert testimony  
17 notwithstanding a firm deadline from the Court.

18           Here the experts were noticed the weekend before a  
19 Tuesday trial where the government had requested reciprocal  
20 discovery, including expert notices, several months previous  
21 in mid-January. That timing is prejudicial to the  
22 government because it would not give them enough time to  
23 secure and prepare a counter expert.

24           As an alternative independent basis, the Court  
25 also would exclude the testimony of both experts under Rules

1 401 and 403.

2 With respect to Mr. Hill, expert testimony on  
3 excessive force by Capitol Police is not relevant to what  
4 the Court understands to be the potential self-defense claim  
5 by Mr. Alberts. Whether officers violated certain policies  
6 or standards in trying to control the crowd does not inform  
7 whether Mr. Alberts reasonably believed that he faced  
8 imminent threat of death or serious bodily harm or whether  
9 he could have taken actions to avoid any such threat.

10 Any threat by the officers or from the officers  
11 can be established through the videos and percipient witness  
12 testimony. There's not a need for an expert to say whether  
13 the officers' actions violated some rule or standard.

14 Even if Mr. Hill were qualified to testify about  
15 the rules of engagement governing Capitol Police officers  
16 specifically, which the notices do not establish, and even  
17 if Mr. Hill's proposed testimony had some marginal  
18 relevance, it is still inadmissible under 403 because it  
19 would risk confusing the jury about the relevant elements of  
20 any self-defense claim, and that risk substantially  
21 outweighs whatever probative value the testimony would have.

22 That said, Mr. Pierce, consistent with my practice  
23 in other cases -- and it sounds like similar to what Judge  
24 Kelly did in his case -- I have allowed the defense to call  
25 as a summary witness, you know, a paralegal or another

1 consultant -- I don't know if Mr. Hill would fit this bill  
2 or not -- through which the defense can introduce, you know,  
3 video evidence from the voluminous discovery that has been  
4 received that, you know, calls the jury's attention to  
5 something that the government believes is relevant and  
6 admissible and goes to its theory of the case. All right?

7 So, you know, for example, in past cases, you  
8 know, some defendants have claimed that, you know, they were  
9 waved in, and I've said, "Look, you know, if you can show me  
10 in the video where someone is waving your client in, feel  
11 free to call a summary witness and ask them to point that  
12 out." Okay?

13 No opinions. No editorials. No expert testimony.  
14 But to the extent that there are things within the videos  
15 that you've been provided in discovery that you think are  
16 admissible and would be helpful to the jury, I've allowed --  
17 similar to the government's, you know, case agent, who has  
18 pointed out things that are relevant to the government's  
19 case, I've allowed the defense to do that as well.

20 So if Mr. Hill would like to fulfill that role or  
21 is prepared to fulfill that role, I would welcome him to  
22 provide testimony along those lines. But, again, no  
23 editorialization or nothing that goes to a defense that is  
24 not a legally recognized or valid defense.

25 And then, you know, once those videos are in

1 evidence, counsel can make argument in closing as to what  
2 import the jury should place on them.

3 With respect to Mr. Heller, he's being offered as  
4 an expert in, quote, D.C. politics, D.C. community culture,  
5 and the Second Amendment and D.C. gun regulation. That  
6 testimony purportedly supports Mr. Alberts's necessity and  
7 Second Amendment defenses as described in the notice, but  
8 neither of those defenses is legally valid based on the  
9 facts of this case.

10 With respect to necessity, as we discussed  
11 yesterday, if the defense is that Mr. Alberts had no choice  
12 but to arm himself and enter the Capitol grounds to protest  
13 the election, then that is not a proper necessity defense.  
14 It's more in line with a jury nullification argument; and,  
15 therefore, evidence that goes to a legally insufficient  
16 defense is not relevant.

17 Again, that said, if the defendant testifies, and  
18 you were to ask him, you know, "Why did you come to  
19 Washington that day?" I would give him some leeway as to  
20 what the answer would be.

21 But that doesn't mean he's entitled to an  
22 instruction. That doesn't mean that counsel can argue  
23 necessity. But it's hard to -- you know, unless he goes too  
24 far, to stop him from saying, you know, "This is what  
25 motivated me to come to Washington." All right?

1 don't or I have yet to see.

2 Finally, there's a notice of a civil disobedience  
3 defense, which, as far as I can tell, is not a recognized  
4 affirmative defense in a criminal case as far as the Court  
5 knows.

6 So that should dispose of the -- and I read the  
7 belated opposition to the government's omnibus motion in  
8 limine, and nothing in it altered the Court's rulings on  
9 that motion in limine that I gave at the pretrial  
10 conference.

11 So with that, there should be, you know, some  
12 guardrails for openings. Obviously don't go into any areas  
13 in openings that the Court has excluded.

14 You know, sometimes, Mr. Pierce, in criminal cases  
15 if you don't anticipate the defendant is going to -- if you  
16 don't in good faith anticipate that the defendant is going  
17 to testify, then you can't say what the jury is likely to  
18 hear about things that only the defendant can testify about.  
19 You follow me, right?

20 MR. PIERCE: I do, Your Honor.

21 THE COURT: Okay.

22 MR. PIERCE: I mean, he is going to testify, but I  
23 understand.

24 THE COURT: Okay. Counsel, anything else? I'm  
25 sure you're going to remind me of something, Mr. Konig.

1 MR. KONIG: Just two very brief things.

2 The first is, I don't know if Mr. Roots is  
3 doing opening or Mr. Pierce is doing opening, but I'd ask  
4 Mr. Pierce to convey the Court's ruling to Mr. Roots if he  
5 does intend to have Mr. Roots open.

6 And, secondly, we have provided our slides for our  
7 anticipated opening for tomorrow; so we may need five  
8 minutes before the opening so, if he has any objections to  
9 put on the record, that he can do so outside the presence of  
10 the jury.

11 THE COURT: Sure. Mr. Pierce, who's opening  
12 tomorrow?

13 MR. PIERCE: I intend to, Your Honor.

14 THE COURT: Okay. Great.

15 And if you have a PowerPoint or a demonstrative,  
16 let Mr. Konig see it soon enough before so he can lodge any  
17 objections in the morning.

18 MR. PIERCE: Absolutely.

19 THE COURT: All right. Have a good night. We'll  
20 see you in the morning.

21 (Whereupon the hearing was  
22 adjourned at 5:03 p.m.)  
23  
24  
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**CERTIFICATE OF OFFICIAL COURT REPORTER**

I, LISA A. MOREIRA, RDR, CRR, do hereby  
certify that the above and foregoing constitutes a true and  
accurate transcript of my stenographic notes and is a full,  
true and complete transcript of the proceedings to the best  
of my ability.

Dated this 24th day of April, 2023.

/s/Lisa A. Moreira, RDR, CRR  
Official Court Reporter  
United States Courthouse  
Room 6718  
333 Constitution Avenue, NW  
Washington, DC 20001