

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

UNITED STATES OF AMERICA :
 :
 v. : **CRIMINAL NO. 21-CR-708 (RCL)**
 :
 :
 Leo Kelly :

DEFENDANT’S TRIAL BRIEF ON ADMISSIBILITY OF DEFENSE
EXHIBIT 103, THE UNITED STATES CAPITOL POLICE CDU
OPERATIONAL PLAN

Comes now Defendant, Leo Kelly, and files this Trial Brief in support of the admissibility of Defense Exhibit 103, The United States Capitol Police, CDU Operational Plan. Contrary to the Government’s arguments in objecting to its admission in evidence, this document is relevant and admissible under applicable exceptions to the general rule against the admission of hearsay, and testimony about the document likewise is admissible.

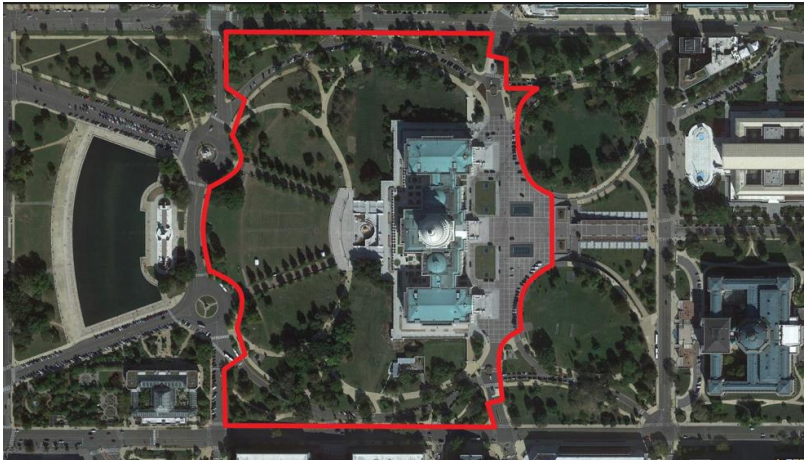
Defendant’s Exhibit 103 is the United States Capitol Police CDU (Civil Disturbance Unit) Operational Plan dated January 5, 2021. This document contains details regarding the planned operations for the operational period January 3 – January 9 of 2021 and encompasses the events of January 6, 2021. It details plans

and preparations in relation to the restricted perimeter around the Capitol, permitted demonstration areas on Capitol grounds, mission objectives, and CDU staffing for the operational period of Sunday, January 3, 2021, through Saturday January 9, 2021. (Def Exh. 103 at 1.)

Background

Defendant Kelly seeks to call several witnesses to testify about the creation and implementation of this Ops Plan in his case in chief. The purpose of the testimony is primarily to inquire about the creation of and existence of boundaries of the restricted perimeter established by the U.S. Capitol Police on January 6, 2021, and what access, if any, was allowed that day to members of the public inside the purportedly restricted perimeter. Defendant seeks to solicit testimony and proffer evidence—including Exhibit 103—that support his contention that the restricted perimeter on January 6 was not exactly as the government has portrayed it and that USCP were briefed on a completely different restricted perimeter prior to the January 6 event.

The Government alleges that Mr. Kelly transgressed what the prosecution contends was a restricted area around the Capitol on January 6, 2021, as purportedly illustrated by Government's Exhibit 1:

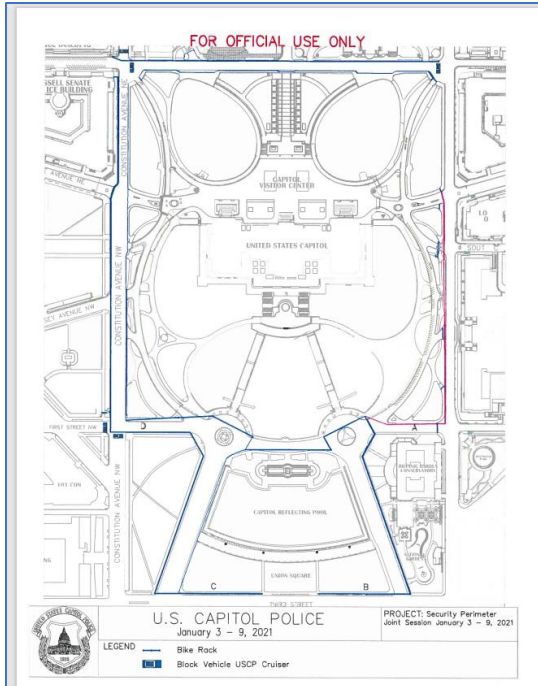


The Ops Plan contains a section labeled “Current Permitted Events for this operational period” and a March entitled “Donald, You’re Fired March on DC” is the first such listed event. (Def. Exh 103 at 2.) The location of this event is listed as the “U.S. Capitol to White House” from 1200-1500 hours with the attendance listed as “Unknown.” A description of the event states the following:

On January 6th, 2021 at 12:00pm, Eastern Time, We the People will convene at the steps of the United States Capitol to witness this momentous occasion. Upon the declaration [sic] the results of the 2020 elections, held on November 3rd, 2020, We the People will proceed, peacefully and safely, from the Capitol Building to the White House to deliver the message to Mr. Trump, “Donald, You’re Fired!”

(Id.)

Additionally, a map attached to the Ops Plan and marked “For Official Use Only” differs significantly from the redlined map offered into evidence in all the government’s prior cases and in this case. (*Id.* at 17).



Argument

The Ops Plan Is Relevant and Material to the Allegation That Mr. Kelly Transgressed a “Restricted” Area

Under the Federal Rules of Evidence, relevant evidence is admissible unless an applicable rule of law, like the Fifth Amendment, provides otherwise. Fed. R. Evid. 402. Evidence is relevant, and thus admissible, if it tends to make a fact “of consequence in determining the action” more or less probable. *Id.* 401.

Because the fact that law enforcement agencies planned to allow members of the public to gather “at the steps of the United States Capitol” during the early afternoon of January 6, 2021, is “of consequence in determining” one or more

charges against Defendant Kelly makes evidence tending to prove that fact relevant and therefore admissible. Here's why:

Kelly is charged with violating 18 U.S.C. § 1752(a)(1) by entering or remaining in a “restricted building or grounds without lawful authority.” Given the statutory definition of “restricted building or grounds,” this charge depends on the premise that Kelly entered an area near the Capitol that was “posted, cordoned off, or otherwise restricted” by appropriate authorities. *Id.* § 1752(c)(1).¹

If the Capitol Police planned to allow a “permitted event” entitled “Donald, You’re Fired March on DC,” (with “unknown” attendance) to gather on the Capitol Steps at noon on January 6 and for hours thereafter (facts that the Ops Plan would allow the jury to find), then the factual premise of the prosecution’s charges against Mr. Kelly fails. If, as the Ops Plan tends to prove, law enforcement agencies at the Capitol were prepared to allow unidentified members of the public—without tickets or any limitation in number or kind—to access such an area in the immediate vicinity of the Capitol, the premise that such territory satisfies the statutory definition of “restricted” cannot hold.

¹ Kelly also is alleged to have violated 18 U.S.C. § 1752(a)(2) by certain conduct relating to a restricted building or grounds, which also depends upon the existence and scope of such restricted territory.

As Judge Kollar-Kotelly recently observed in an order in another January 6 case, it is germane to the elements of such Section 1752 charges whether “the federal government took some measures to restrict an area.” *U.S. v. Griffith*, Crim. No. 21-244-2 (CKK), ECF No. 121, Omnibus Memorandum Op. and Order, at 8 (Feb. 16, 2023). It also would be germane, “whether individual law enforcement officers were ordered to ‘stand down’ in order to ‘un-’restrict Capitol grounds may go to whether Capitol grounds were in fact ‘restricted’ on January 6, 2021. *Id.* at 9. By the same reasoning, it is “of consequence” in determining whether those grounds “were in fact ‘restricted’ on January 6” whether law enforcement officers had planned to allow unidentified members of the public to convene on or around the Capitol’s steps that afternoon. This reasoning led the Court in that case to hold that the defendant could “elicit testimony regarding which authority designated Capitol grounds as restricted, how that authority did so, and if and when that same authority allegedly “un”-restricted Capitol grounds on January 6, 2021.” *Id.* at 12.²

The Government’s relevance objections to the Ops Plan and related testimony is without merit. Moreover, Mr. Kelly possesses a Sixth Amendment

² This evidence of plans to allow unknown members of the public to gather on the Capitol steps during the afternoon of January 6, 2021, tends to make the facts of this case different from those in many other Section 1752 cases, such as cases in which the “trier of fact could presume as a matter of common knowledge that an ordinary citizen without any known authorization would be allowed inside the White House or on its grounds.” *U.S. v. Jabr*, 4 F.4th 97, 105 (D.C. Cir. 2021).

right to mount a defense to this prosecution. *See, e.g. Faretta v. California*, 422 U.S. 806, 818 (1975) (“In short, the [Sixth] Amendment constitutionalizes the right in an adversary criminal trial to make a defense as we know it.”). “Few rights,” in fact, “are more fundamental than that of an accused to present witnesses in his own defense.” *Taylor v. Illinois*, 484 U.S. 400, 408 (1988). This Court should allow testimony regarding the Ops Plan and the relevant restricted areas referenced in the document, including the “Donald, You’re Fired March on DC”, other “Permitted Demonstration Activity” listed on page 13 (and corresponding permits) and the map attached to the document labeled “Security Perimeter Joint Session January 3-9, 2021.” This map demonstrates that at least by January 5, 2021, a map showing a dramatically different restricted perimeter had been widely circulated to USCP and used as the basis for staffing and threat analysis for the day. This map was introduced and admitted as an exhibit in the *United States v. Griffith*, 21-CR-244 (CKK) trial through the testimony of the USCP General Counsel, who testified that he relied on the Ops Plan in the performance of his duties on or about January 6, 2021. Additionally, he testified that he was listed as the Office of General Counsel point of contact for the Jan 5-9, 2021 operational period in the Ops Plan. A screenshot of the map, which was attached as the last page of the Ops Plan, was

introduced in the Griffith trial, exhibit 103d and is similarly listed as such on the exhibit list in this case and was shown to the Court at the end of the day today.

The Operations Plan (Ex. 103) Should Not Be Excluded as Hearsay Because It Is Admissible Under Evidence Rules 803(6) and/or 807

The purpose of the general rule forbidding hearsay evidence to prove the truth of the matter asserted is to exclude a statement whose speaker's sincerity or veracity cannot be tested by cross examination. But exceptions to the rule exist when statements are under circumstances that demonstrate the speaker's sincerity and bases for knowledge. Thus, "the Federal Rules of Evidence also recognize that some kinds of out-of-court statements are less subject to these hearsay dangers, and therefore except them from the general rule that hearsay is inadmissible."

Williamson v. U.S., 512 U.S. 594, 598 (1994); *see also U.S. v. Slatten*, 865 F.3d 767, 804 (D.C. Cir. 2017). The Ops Plan plainly was created under such circumstances as its author intended for colleagues in the Capitol Police to rely on it. Therefore, as detailed below, Exhibit 103 should be admitted in evidence under Federal Rules of Evidence 803(6) and/or 807.

Rule 803(6)

The Ops Plan qualifies for admission under Rule 803(6) because it is a business record of the Capitol Police's activity in protecting the Capitol on and around January 6, 2021. Specifically, the Ops Plan was made at the time of that

activity by, or from information transmitted by, someone with knowledge of the Capitol Police’s plans for such protection; the Plan was kept in the course of regularly conducted Capitol Police activity protecting the Capitol; such plans are regularly made in connection with such protective activity; and witness testimony can establish these circumstances. *See* Fed. R. Evid. 803(6). Courts have recognized that an organization’s plan for business or activity can constitute a “business record” for purposes of Rule 803(6). *See, e.g., In re Outsidewall Tire Litig.*, 748 F. Supp. 2d 543, 555 (E.D. Va. 2010), *aff’d sub nom. Tire Eng’g & Distrib., LLC v. Shandong Linglong Rubber Co.*, 682 F.3d 292 (4th Cir. 2012)).

Rule 807

In the alternative to Rule 803(6), Exhibit 103 is admissible under the residual exception of Rule 807. In accord with that rule, the totality of the circumstances under which the Ops Plan was made and corroborating evidence provide “sufficient guarantees of its trustworthiness” and the Plan is more probative with respect to a material fact—the scope of the restricted area on January 6, 2021—than other evidence Mr. Kelly can obtain through reasonable efforts. *See* Fed. R. Evid. 807. Indeed, the Ops Plan satisfies all the criteria spelled out by the D.C. Circuit for reliance on Rule 807’s residual exception:

First, the statement must have “equivalent circumstantial guarantees of trustworthiness” comparable to those found

in Rule 803's and Rule 804's enumerated hearsay exceptions. Second, it must be "offered as evidence of a material fact." Third, the statement must be "more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts." Fourth, "admitting it [must] ... serve the purposes of these rules and the interests of justice." And finally, the proponent of the statement must have given "an adverse party reasonable notice of the intent to offer the statement and its particulars, including the declarant's name and address, so that the party has a fair opportunity to meet it."

Slatten, 865 F.3d at 806 (internal citations to Rule 807 omitted).

Admitting Exhibit 103 especially "serves the interest of justice" in this criminal proceeding in which the Ops Plan is directly probative with respect to an essential element of the Government's burden of proof. Mr. Kelly maintains that the contents of the Ops Plan rebut the allegation that he transgressed the boundaries of an established restricted area on January 6, 2021. The exclusion of such probative evidence would be manifestly material to Mr. Kelly's rights under the Fifth Amendment Due Process Clause.

While the Government has suggested that the author of the Ops Plan erred in writing some of its contents, that contention goes to the weight rather than to the admissibility of Exhibit 103. *See* ECF No. 92 (Government motion in limine, contending that "Exhibit 103 was not intended to be gospel").³ The Government

³ The Court denied this motion in limine as untimely. Minute Order. Apr. 28, 2023).

I certify that a copy of the forgoing was filed electronically on ECF for all parties of record on
this 2 day of May 2023

 /s/
Nicole Cubbage
Attorney for Leo Kelly