

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

<b>UNITED STATES OF AMERICA</b>	:	
	:	
<b>v.</b>	:	<b>Case No. 22-cr-60 (BAH)</b>
	:	
<b>VINCENT GILLESPIE,</b>	:	
	:	
<b>Defendant.</b>	:	

**MOTION IN LIMINE REGARDING  
AUTHENTICATION OF VIDEO EVIDENCE**

The United States of America, by and through its attorney, the United States Attorney for the District of Columbia, hereby submits the following motion *in limine* regarding the authentication of video evidence at trial.

**BACKGROUND**

The riot at, and attack on, the United States Capitol Building was an event of unparalleled size and scope. Much of the event was recorded on video: on surveillance footage captured by the U.S. Capitol Police (“USCP”) cameras; on Metropolitan Police Department (“MPD”) body-worn cameras; on cameras carried by journalists; and on cameras, and phones, held by members of the mob. The government’s case at trial will rely heavily on such evidence to explain the defendant’s specific conduct, to contextualize through other contemporaneous events, and to give the jury a sense of the riot as a whole. This memorandum outlines the types of exhibits the government plans to use and seeks a pretrial ruling on their authenticity.

Under Federal Rule of Evidence 901(a), “[t]o satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is.” Rule 901(b) provides a non-exhaustive

list of examples of evidence that satisfies this requirement. As relevant here, those examples include:

(1) *Testimony of a Witness with Knowledge*. Testimony that an item is what it is claimed to be.

...

(3) *Comparison by an Expert Witness or the Trier of Fact*. A comparison with an authenticated specimen by an expert witness or the trier of fact.

(4) *Distinctive Characteristics and the Like*. The appearance, contents, substance, internal patterns, or other distinctive characteristics of the item, taken together with all the circumstances.

...

(9) *Evidence About a Process or System*. Evidence describing a process or system and showing that it produces an accurate result.

Fed. R. Evid. 901(b)(1), (3), (4), (9).

As a general matter, establishing an item's authenticity is not "a particularly high hurdle." *United States v. Ortiz*, 966 F.2d 707, 716 (1st Cir. 1992). *See also United States v. Vidacek*, 553 F.3d 344, 349 (4th Cir. 2009) ("The burden to authenticate under Rule 901 is not high"); *Link v. Mercedes-Benz of N. Am., Inc.*, 788 F.2d 918, 927 (3d Cir. 1986) ("The burden of proof for authentication is slight."); *United States v. Hassanshahi*, 195 F. Supp. 3d 35, 48 (D.D.C. 2016) ("The threshold for the Court's determination of authenticity is not high, . . . and the proponent's burden of proof for authentication is slight[.]") (citation and quotation marks omitted). Rule 901 "requires only a prima facie showing of genuineness and leaves it to the jury to decide the true authenticity and probative value of the evidence." *United States v. Harvey*, 117 F.3d 1044, 1049 (7th Cir. 1997) (citing cases). *See also, e.g., United States v. Belfast*, 611 F.3d 783, 819 (11th Cir. 2010) ("[A]uthentication itself is 'merely . . . the process of presenting sufficient evidence to make out a prima facie case that the proffered evidence is what it purports to be.'" (quoting *United States v. Caldwell*, 776 F.2d 989, 1002 (11th Cir. 1985))); *Vidacek*, 553 F.3d at 349 ("only a *prima facie* showing is required"). Stated differently, "[t]he standard the district court must apply in

evaluating a document’s authenticity is whether there is enough support in the record to warrant a reasonable person in determining that the evidence is what it purports to be.” *United States v. Blanchard*, 867 F.3d 1, 6 (1st Cir. 2017) (quoting *United States v. Paulino*, 13 F.3d 20, 23 (1st Cir. 1994)). Once that showing is made, “[t]he factual determination of whether evidence is that which the proponent claims is ultimately reserved for the jury.” *Vidacek*, 553 F.3d at 349. *See also, e.g., Belfast*, 611 F.3d at 819 (“Once that *prima facie* case is established, the evidence is admitted and the ultimate question of authenticity is decided by the jury.”).

To make out a *prima facie* showing of authenticity, “circumstantial evidence of authenticity can be sufficient.” *United States v. Bruner*, 657 F.2d 1278, 1284 (D.C. Cir. 1981). *See, e.g., United States v. Broomfield*, 591 F. App’x 847, 851 (11th Cir. 2014) (unpublished) (“Authentication may be established ‘solely through the use of circumstantial evidence.’”) (quoting *United States v. Smith*, 918 F.2d 1501, 1510 (11th Cir. 1990)). And, importantly, the party seeking to admit evidence need not “rule out all possibilities inconsistent with authenticity, or to prove beyond any doubt that the evidence is what it purports to be.” *United States v. Holmquist*, 36 F.3d 154, 168 (1st Cir. 1994). Rather, “the government must only ‘demonstrate that, as a matter of reasonable probability, possibilities of misidentification and adulteration have been eliminated.’” *United States v. Celis*, 608 F.3d 818, 842 (D.C. Cir. 2010) (quoting *United States v. Stewart*, 104 F.3d 1377, 1383 (D.C. Cir. 1997)). *See, e.g., United States v. Bowens*, 938 F.3d 790, 794-95 (6th Cir. 2019) (explaining that “[a]nyone could have used the defendants’ Facebook accounts, just as the pictures could have depicted the men smoking tobacco cigars, and ‘getting high’ could have been a reference to skydiving,” but that there was sufficient circumstantial evidence “for the jury to infer that the accounts belonged to the defendants, and that the defendants were the authors of the posts about using marijuana”); *Broomfield*, 591 F. App’x at 852 (finding sufficient evidence of

authenticity even though “there was no testimony establishing that the recording equipment was reliable or that the video was not altered or staged”).

In deciding preliminary questions about the admissibility of these videos, “[t]he court is not bound by evidence rules, except those on privilege.” Fed. R. Evid. 104(a). In other words, the government may rely upon otherwise inadmissible evidence in establishing the authenticity of the video evidence described in this motion. *See, e.g., United States v. White*, 116 F.3d 903, 914 (D.C. Cir. 1997). Of course, even with a pretrial ruling that evidence is authentic, and thus admissible, the government must introduce sufficient evidence at trial from which a reasonable juror could reach the same conclusion regarding authenticity. *See, e.g., United States v. Gammal*, 831 F. App’x 539, 542 n.6 (2d Cir. 2020) (unpublished) (“Insofar as the District Court relied on non-public information to make its preliminary determination, it did not err because it did not do so in lieu of the presentation of sufficient authenticating public evidence later at trial.”); *United States v. Puttick*, 288 F. App’x 242, 246 (6th Cir. 2008) (unpublished) (“It is permissible for the judge to make a preliminary determination as to authentication, admit the evidence conditionally under Rule 104(b), and then allow the jurors to be the final arbiters of whether it was actually authenticated.”); *United States v. Branch*, 970 F.2d 1368, 1371 (4th Cir. 1992) (“Thus, even though the district court may have ruled during an in camera proceeding that the proponent had presented sufficient evidence to support a finding that a tape recording was authentic, evidence that would support this same ruling must be presented again, to the jury, before the tape recording may be admitted.”).

### ANALYSIS

The government’s evidence will show that all the videos described herein fairly and accurately depict events at the Capitol which are relevant to an issue of consequence in defendant’s

trial. While the government anticipates that the admission of USCP, MPD, and Associated Press (“AP”) video footage will not be controversial, we discuss the evidentiary basis for authentication below.

### **1. U.S. Capitol Police Video Footage**

Admission of footage from USCP’s own systems is straightforward. The government will present a USCP witness to testify to their surveillance system. This witness will explain how the system is used, that it reliably records and depicts the areas where USCP has installed cameras and describe the internal characteristics of videos—such as date and time stamps—which allow USCP to identify and retrieve segments of video. A USCP witness who was present during the attack on the Capitol will explain that the videos used by the government here are consistent with the events that occurred, generally, on January 6, 2021. Such evidence satisfies the requirement of Fed. R. Evid. 901(b)(4), which allows authentication by way of “the appearance, contents, substance, internal patterns, or other distinctive characteristics of the item, taken together with all the circumstances.” It also accords with the requirements of Rule 901(b)(9), which allows authentication by “[e]vidence describing a process or system and showing that it produces an accurate result.”

### **2. Body-Worn Camera Footage from the Metropolitan Police Department**

The admissibility of footage from body-worn cameras worn by MPD Officers on January 6, 2021, is likewise clear. Either the officer who wore the camera, or any other witness to the events depicted in the video, can authenticate the video based on his/her personal knowledge that the video fairly and accurately depicts the events that occurred. Fed. R. 901(b)(1) (allowing authentication by “[t]estimony that an item is what it is claimed to be”). This is standard authentication for any photograph or video. *See, e.g., United States v. Patterson*, 277 F.3d 709, 713 (4th Cir. 2002) (“The necessary foundation for the introduction of a photograph is most



commonly established through eyewitness testimony that the picture accurately depicts the scene in question[.]”); *United States v. Rembert*, 863 F.2d 1029, 1026 (D.C. Cir. 1988) (noting one method of authentication occurs where “a sponsoring witness (whether or not he is the photographer) who has personal knowledge of the scene depicted testifies that the photograph fairly and accurately portrays that scene”).

While MPD officers deployed throughout the Capitol Building and grounds on January 6, 2021, this case will focus on MPD officers in the Lower West Terrace tunnel, which is where the defendant’s assault against a law enforcement officer, charged in Count One, occurred. Between approximately 4:11 p.m. and 4:13 p.m. Gillespie is seen and heard on the body-worn camera of an MPD officer. Gillespie is pushing his way through the crowd toward the law enforcement officers; using a police shield to ram the law enforcement officers; and screaming “traitor” more than once and “treason,” as he points to a law enforcement officer.

At least two body-worn cameras capture portions of the assault. Any single officer who was present there will be able to testify that all the videos fairly and accurately depict what occurred. Fed. R. 901(b)(1). The assault can also be seen from an elevated USCP surveillance camera, and a comparison of this view of the assault with MPD body-worn cameras make clear that they record the same event. Thus, the USCP footage corroborates the events recorded on body-worn camera and supports their admissibility. *See* Fed. R. Evid. 901(b)(3) (authentication by comparison with another authenticated specimen).

### 3. Associated Press Video

The government seeks to authenticate an AP video depicting an interview with Gillespie, on January 6, 2021, on the Capitol grounds.<sup>1</sup> Gillespie's statements are non-hearsay admissions of a party opponent, pursuant to Federal Rule of Evidence 801(d)(2)(A). To satisfy the requirement of authenticating or identifying said video, the government must produce evidence sufficient to support a finding that the item is what the government claims it is. *See* Fed. R. Evid. 901(a). Here, the government has made out a prima facie case as to the video's authenticity, because the video contains ample circumstantial indicia that there is no reasonable possibility of misidentification or adulteration. *See United States v. Celis*, 608 F.3d at 842. Federal Rule of Evidence 901(b) sets forth a non-exhaustive list of evidence that would satisfy the requirement of authenticity.

For instance, the government will establish authenticity by asking the jury to compare the video with other, authenticated exhibits: USCP surveillance and MPD body-worn camera depicting Gillespie's assault on a police officer in the Lower West Terrance tunnel. *See* Fed. R. Evid. 901(b)(3). Gillespie was wearing the same clothing while he was being interviewed that he was wearing in the tunnel – a dark-colored hooded sweatshirt and a drawstring backpack with white markings on the straps. While Gillespie was being interviewed, blood was visible on his head. The USCP and MPD footage shows that while Gillespie was in the tunnel, other rioters unintentionally struck him in the head with various objects. The jury could reasonably infer that would have caused Gillespie's head to bleed. Additionally, Gillespie poured water into his eyes while on camera. The USCP and MPD footage shows that officers deployed OC spray (colloquially, "pepper spray") in the tunnel. It is well-known that one of the most common effects

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<sup>1</sup> Steve LeBlanc and Ben Fox, *Son of Famed American Artist Charged in Jan. 6 Capitol Riot*, April 26, 2022, <https://apnews.com/article/capitol-siege-travel-lifestyle-boston-riots-be83671f6b1d952713c5da5bad37bb4f>.

of OC spray is that its inflammatory properties cause the eyes to close. Gillespie's conduct on video was an indication that he was still feeling those effects and was attempting to mitigate them.

The government also will establish authenticity by establishing the distinctive characteristics of the video, taken together with all the circumstances. *See* Fed. R. Evid. 901(b)(4). USCP officers will testify at trial that they recognize the scene captured on the video as the west front of the Capitol grounds on January 6, 2021, due to the hundreds of people gathered on the grounds, and because the media tower visible behind Gillespie had been erected by that date in anticipation of the inauguration. FBI special agents will testify at trial that they recognize the person speaking on camera to be Gillespie, due to the time they spent with him during arrest processing.

The evidence supports the ultimate finding that there is no reasonable possibility of misidentification or adulteration in the video. By comparing the video to other authenticated exhibits and by establishing the distinctive characteristics shown in the video, the government will establish its authenticity.



### CONCLUSION

For the reasons stated herein, the government respectfully requests that this Court rule *in limine* that the government's video evidence satisfies the authenticity requirement of Fed. R. Evid. 901.

Respectfully submitted,

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