

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA)	
)	
v.)	CRIMINAL NO. 22-00060-BAH
)	
VINCENT GILLESPIE)	

DEFENDANT’S REPLY IN SUPPORT OF MOTIONS IN LIMINE

The government continues to press for introducing general evidence, including testimony, videos, photos, or other exhibits, of the events of January 6, 2021, from locales at the Capitol where Gillespie never was and did not know about, and continues to assert that it should be permitted to use pejorative characterizations of the event and participants in it. Government’s Opposition to Defendant’s Motions in Limine [D.E. 34] (“Gov’t Opp.”). For the reasons below, the Court should allow the defendant’s motion *in limine* on both points and so preclude the government from introducing the general evidence and prohibit it and its witnesses from the pejorative characterizations.

ARGUMENT

I. THE COURT SHOULD EXCLUDE GENERAL EVIDENCE THAT INCLUDES THE ACTS OF OTHERS UNLESS AND UNTIL THE GOVERNMENT PROVES GILLESPIE’S KNOWLEDGE OF THEM AND DEMONSTRATES THEIR RELEVANCE TO THE CHARGES LEVELED AT HIM.

In arguing for admission of the general evidence, the government ignores that it will not be able to show at trial that Gillespie knew in even the most general sense what protestors in locations other than the Lower West Terrace were doing. Without that knowledge, there is no nexus to the allegations and thus the evidence is irrelevant. It must therefore be excluded. Fed. R. Evid. 401. Even if there were some probative value to what others were doing – there is none –

the evidence is so untethered from Gillespie's alleged conduct that it invites confusion, a high risk of misleading the jury about the issues before them, and thus undue prejudice to Gillespie. Fed. R. Evid. 403. Because the introduction of general evidence of the events of January 6, 2021, is substantially more prejudicial than probative the Court should bar its introduction.

The government's suggestion that a limiting instruction will cure any prejudice, *see* Government's Opposition to Defendant's Motion in Limine at 5, is meritless. Without the necessary nexus to the offenses Gillespie is charged with, it is impossible to conceive of a limiting instruction – other than instructing the jury that the general evidence has nothing to do with what Gillespie is charged with - that will properly focus the jury's consideration and prevent untoward prejudice.

The Court must therefore bar the introduction of the proposed "general evidence" that is completely untethered to Gillespie's charges unless and until it can prove Gillespie's knowledge of others' conduct and demonstrate a nexus to Gillespie's alleged violations.

II. THE COURT SHOULD EXCLUDE PEJORATIVE CHARACTERIZATIONS OF THE EVENT.

The government's argument that it is permitted unfettered use of pejorative terms to describe the events on January 6 is likewise wrong. Such references to the participants and the events carry a high risk of unfair prejudice and confusion as the jurors may - indeed, are likely to - equate Gillespie's participation in the events as indicative of general criminality. The government principally relies on *United States v. Berger*, 295 U.S. 78, 88 (1935), for the proposition that the United States Attorney may resort to such references because it has an obligation to "prosecute with earnestness and vigor." Gov't Opp. at 6. In citing *Berger*, however, the government ignores that the Supreme Court reversed the decision below for prosecutorial misconduct and tellingly omits the next two sentences of the Court's reasoning:

But, while [an Assistant U.S. Attorney] may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

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[I]mproper suggestions, insinuations, and, especially, assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none.

Id. at 88. So too here. The pejorative characterizations are misleading and prejudicial and designed to carry undue prejudicial weight. The characterizations do nothing to prove any fact at issue “more probable or less probable than it would be without” the resort to such characterizations and therefore must be excluded and regardless carry with them such a high likelihood of unfair prejudice and confusion that they must be excluded. Fed. R. Evid. 401, 402, & 403. The government and its witnesses should instead be instructed to use neutral terms such as “event” for the assembled crowd and “participants” for those involved.

CONCLUSION

For the foregoing reasons, as well as those in his moving papers, the Court should grant Gillespie’s motion *in limine* as to the two issues raised.

VINCENT GILLESPIE

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CERTIFICATE OF SERVICE

I, Timothy G. Watkins, hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) on November 21, 2022.

/s/ Timothy G. Watkins
Timothy G. Watkins