



The Fourth Circuit has held that FRE 801(d)(2)(D) applies to statements offered against the Government made by criminal investigators:

"To the extent that the Government argues that because the prior statements were made by a third party they are inadmissible on hearsay grounds, its position is untenable. If [the defendant] can lay a foundation for the statements, they are admissible over any hearsay objection because [the investigative agent] made them in her capacity as a government official on matters within the scope of her employment, and as such, the statements are of a party-opponent and therefore not hearsay. *See Fed. R. Evid. 801(d)(2)(D).*"

*United States v. Barile*, 286 F.3d 749, 758 (4<sup>th</sup> Cir. 2002).

The Sixth Circuit, similarly, ruled in a criminal case:

"Rule 801(d)(2)(D) provides that "[a] statement is not hearsay if . . . the statement is offered against a party and is . . . a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship . . . ." [The defendant's] theory is that Sumpter and Maddox acted as the government's agents in taping the conversations and that their taped statements thus may be admitted against the government. To a certain extent [the defendant] is correct. Sumpter and Maddox were acting as agents of the government, and this court has interpreted "a matter within the scope of the agency" broadly enough that "statements" of Sumpter or Maddox would be admissible against the government."

*United States v. Reed*, 167 F.3d 984, 989 (6<sup>th</sup> Cir. 1999).

Accordingly, S/A Esposito's grand jury testimony vis-a-vis having no evidence to conclude that the November 14, 2020 and December 12, 2020 events were "dry runs" for J6 are statements of a party opponent pursuant to Rule 801. His testimony directly contradicts the Indictment, Mr. Nestler's opening argument, and S/A Michael Palian's testimony, all of which suggested that Caldwell, et. al. used the prior events as dry runs for J6. S/A Esposito's redacted testimony is highly relevant on this issue and should be admitted. Thank you for your consideration.

David W. Fischer, Esq.

Fischer & Putzi, P.A.

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7310 Ritchie Hwy.

Glen Burnie, MD 21061

(410) 787-0826

---

**From:** Edwards, Troy (USADC) <Troy.Edwards@usdoj.gov>  
**Sent:** Friday, October 28, 2022 5:11 PM  
**To:** fischer and putzi fischer <fischerandputzi@hotmail.com>; Jean Claude Douyon <Jean-Claude\_Douyon@dcd.uscourts.gov>; David Alpert <David\_Alpert@dcd.uscourts.gov>  
**Cc:** Hughes, Alexandra (NSD) <Alexandra.Hughes@usdoj.gov>; Rakoczy, Kathryn (USADC) <Kathryn.Rakoczy@usdoj.gov>; Nestler, Jeffrey (USADC) <Jeffrey.Nestler@usdoj.gov>; Manzo, Louis (CRM) <Louis.Manzo@usdoj.gov>; Sher, Justin (NSD) <Justin.Sher@usdoj.gov>; phillip linder <attorneylinder@gmail.com>; Lee Bright <jlbright@gmail.com>; Edward Tarpley <edwardtarpley@att.net>; jcrisp@crisplegal.com <jcrisp@crisplegal.com>; Juli Haller <hallerjulia@outlook.com>; Stanley Woodward <stanley@brandwoodwardlaw.com>; Brad Geyer <bradford.geyer@formerfedsgroup.com>  
**Subject:** RE: FRE 801 (Grand Jury testimony of S/A Marc Esposito)

Chambers and counsel,

The government objects and requests an opportunity to be heard on the matter.

Special Agent Marc Esposito investigated a limited portion of this case and the testimony at issue was in response to a grand juror's question, falling outside the limited scope of prior D.C. Circuit decisions admitting law enforcement statements "approved" by the United States Attorney's Office such as search warrant and complaint affidavits. Mr. Fischer has not cited a case in which the D.C. Circuit (or any other circuit) has taken that narrow scope and expanded it to cover any prior grand jury testimony, let alone testimony that is prompted by a grand juror. The government attaches its prior opposition and caselaw for the Court's convenience.

Have a nice weekend.

**Troy A. Edwards, Jr.**  
Assistant United States Attorney  
U.S. Attorney's Office for the District of Columbia  
(202) 258-1251

---

**From:** fischer and putzi fischer <fischerandputzi@hotmail.com>  
**Sent:** Friday, October 28, 2022 3:41 PM  
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**Subject:** [EXTERNAL] FRE 801 (Grand Jury testimony of S/A Marc Esposito)

Judge Mehta:

Last week you denied Caldwell's request to allow into evidence a redacted transcript for FBI S/A Marc Esposito. However, you advised that you would keep an open mind on this issue as you were unclear as to what role S/A Esposito played in the FBI's investigation. Attached to this email are two attachments: S/A Esposito's full March 12, 2021 grand jury testimony, and the redacted version sought to be introduced on behalf of Caldwell.

As you may recall, in response to a grand juror's question, S/A Esposito testified that he had no evidence that the Oath Keepers participation in the November 14, 2020 and December 12, 2020 protests in Washington, D.C. were "dry runs" for January 6. The defense believes this is relevant testimony for three reasons: 1) the Indictment suggests that the November 14<sup>th</sup> and December 12<sup>th</sup> protests were dry runs; 2) the Government in opening argument specifically alleged that the Oath Keeper defendants learned "valuable lessons" from these prior events, suggesting they were dry runs; and 3) S/A Michael Palian twice suggested during his testimony that these prior events were dry runs for J6. The defense believes that S/A Esposito's grand jury testimony clearly falls under FRE 801(d)(2) as an adopted statement, a statement made by a "party authorized to make a statement on the subject," and a statement "made by the party's agent or employee on a matter within the scope of [their] relationship."

After reviewing S/A Esposito's full grand jury testimony, it is clear that this FBI agent was not a peripheral player in the instant investigation. Esposito testified that he investigated events involving the Oath Keepers related to November 14, 2020. (See pg. 11-12). He testified about Rhodes's "call to action" in early November. (See pg. 12). He provided investigatory insight on multiple defendants, including Roberto Minuta, Joshua James, Jessica Watkins and Kelly Meggs. He also investigated events related to the December 12, 2020 rally in Washington and provided testimony as to that event. (See pg. 18). In short, S/A Esposito personally investigated the prior protests held on November 14<sup>th</sup> and December 12, 2020. Accordingly, the testimony sought to be introduced by Caldwell is not only relevant and admissible under FRE 801, it was also sworn to by an FBI who personally investigated the events in question. Finally, it should be noted that S/A Esposito testified two subsequent times before the Grand Jury on J6-related matters, demonstrating his breadth of knowledge of the alleged conspiracy.

Accordingly, on behalf of Mr. Caldwell, the defense respectfully requests that the Court allow into evidence the attached redacted testimony of S/A Marc Esposito. Thank you for your consideration.

David W. Fischer, Esq.  
Fischer & Putzi, P.A.  
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Glen Burnie, MD 21061  
(410) 787-0826

**CAUTION - EXTERNAL EMAIL:** This email originated outside the Judiciary. Exercise caution when opening attachments or clicking on links.





[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

---

From: fischer and putzi fischer <fischerandputzi@hotmail.com>

Sent: Saturday, October 29, 2022 11:11 AM

To: Edwards, Troy (USADC) <Troy.Edwards@usdoj.gov>; Jean Claude Douyon <Jean-Claude\_Douyon@dcd.uscourts.gov>; David Alpert <David\_Alpert@dcd.uscourts.gov>

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Subject: Re: FRE 801 (Grand Jury testimony of S/A Marc Esposito)

**CAUTION - EXTERNAL:**

Judge Mehta:

My apologies for this follow-up email. However, I neglected to argue to the Court that personal knowledge is not a requirement for the admission of statements of party opponents. See **M. Graham, Federal Practice and Procedure: Federal Rules of Evidence**, Sec. 7015, at 188 (2011 ed. & 2016 Supp.) ("Personal knowledge of the matter admitted is not required[.]") & Sec. 7024 at 261-62 ("[T]he fact remains that lack of personal knowledge on the part of the declarant does not bar introduction of a statement as an admission of a party-opponent under Rule 801(d)(2)."); 2 **McCormick on Evidence**, Sec. 255 at 265 (Broun ed., 7<sup>th</sup> ed. 2013) ("[T]he traditional view that firsthand knowledge is not required for admissions is accepted by the vast majority of courts and adopted by the Federal Rules.").

Notably: "The requirement of personal knowledge imposed by Rule 602 is rarely applied to opposing statements, since the party is usually in a position to explain the statement at trial." 5 **Weinstein & Berger, Weinstein's Federal Evidence**, Sec. 801.30[1] & n. 13, at 801-64 (Brodin & McLaughlin ed. 2016)

Accordingly, it is Caldwell's position that S/A Esposito's grand jury testimony is admissible regardless of his tenure in the instant investigation. Thank you for your consideration.

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**Subject:** [EXTERNAL] FRE 801 (Grand Jury testimony of S/A Marc Esposito)

Judge Mehta:





[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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From: fischer and putzi fischer <fischerandputzi@hotmail.com>

Sent: Saturday, October 29, 2022 4:10 PM

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Haller <hallerjulia@outlook.com>; Stanley Woodward <stanley@brandwoodwardlaw.com>; Brad Geyer  
<bradford.geyer@formerfedsgroup.com>

Subject: Fw: \_QRF- Attack

**CAUTION - EXTERNAL:**

Judge Mehta:

Attached are two transcripts that Caldwell seeks to introduce into evidence.

The first transcript is highlighted in yellow to show the portions Caldwell seeks to admit. I have left portions of the transcript unredacted at this time to allow the Court to review appropriate context. Specifically, Caldwell seeks to admit Assistant U.S. Attorney Manzo's statements denying that the QRFs allegedly coordinated by Mr. Caldwell were purposed to attack the U.S. Capitol on J6. Respectfully, Mr. Manzo's clear and unambiguous statements stand in direct contradiction to Mr. Nestler's opening argument wherein it was claimed that the QRFs were part of a coordinated plan to attack the Capitol. These statements are admissible under FRE 801 and are extremely relevant.

The second transcript is from Caldwell's January 19, 2021 detention hearing in the Western District of Virginia at which time Assistant U.S. Attorney Christopher Kavanaugh incorrectly advised the presiding magistrate judge that Mr. Caldwell had a "minimal criminal history" and "several traffic matters that are in fugitive status." This redacted transcript is offered under FRE 801 and is relevant as to the reliability and competency of the investigation regarding Mr. Caldwell.

Thank you for your consideration.

David W. Fischer, Esq.  
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Glen Burnie, MD 21061  
(410) 787-0826

**CAUTION - EXTERNAL EMAIL:** This email originated outside the Judiciary. Exercise caution when opening attachments or clicking on links.

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

*****	)	
UNITED STATES OF AMERICA,	)	Criminal Action
	)	No. 22-00015
Plaintiff,	)	
	)	
vs.	)	<b>AFTERNOON SESSION</b>
	)	
ELMER STEWARD RHODES, III,	)	Washington, D.C.
et al.,	)	October 17, 2022
	)	
Defendants.	)	1:31 p.m.
	)	
*****	)	

TRANSCRIPT OF JURY TRIAL - DAY 12  
BEFORE THE HONORABLE AMIT P. MEHTA,  
UNITED STATES DISTRICT JUDGE

APPEARANCES:

FOR THE GOVERNMENT:	KATHRYN L. RAKOCZY, ESQ.
	TROY A. EDWARDS, JR., ESQ.
	JEFFREY S. NESTLER, ESQ.
	LOUIS MANZO, ESQ.
	UNITED STATES ATTORNEY'S OFFICE
	FOR THE DISTRICT OF COLUMBIA
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	ALEXANDRA S. HUGHES, ESQ.
	JUSTIN T. SHER, ESQ.
	U.S. DEPARTMENT OF JUSTICE
	950 Pennsylvania Avenue, Northwest
	Washington, D.C. 20530
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MEGGS:

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CRISP AND ASSOCIATES, LLC  
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Harrisburg, Pennsylvania 17110

FOR THE DEFENDANT  
CALDWELL:

DAVID W. FISCHER, SR., ESQ.  
FISCHER & PUTZI, P.A.  
7310 Governor Ritchie Highway  
Glen Burnie, Maryland 21061

REPORTED BY:

LISA EDWARDS, RDR, CRR  
Official Court Reporter  
United States District Court for the  
District of Columbia  
333 Constitution Avenue, Northwest  
Room 6706  
Washington, D.C. 20001  
(202) 354-3269

1 Q. Okay. Which direction on that map would the Capitol be?

2 A. To the east.

3 Q. Okay. Fair enough.

4 And, Agent, where you just -- where you pointed up  
5 here, M Street, where Mr. Caldwell is sending the QRF, you  
6 would agree that that's going in a different direction than  
7 where the United States Capitol is.

8 A. I don't recall any messages that the QRF were  
9 specifically for anything at the Capitol.

10 Q. I'm sorry? Are you -- you're saying the QRF had nothing  
11 to do with the Capitol?

12 A. No. I said I didn't see any messages that that would  
13 have been the destination of the QRF.

14 Q. Well, you understand the Government's entire theory was  
15 the QRF is for the purpose of attacking the United States  
16 Capitol. Right?

17 A. That is not my understanding.

18 MR. MANZO: Objection.

19 THE COURT: Sustained.

20 MR. FISCHER: Your Honor, could we get on the  
21 phone?

22 (Whereupon, the following proceedings were had at  
23 sidebar outside the presence of the jury:)

24 MR. FISCHER: Your Honor, during the opening  
25 argument, Mr. Nestler specifically said that this QRF was to



1 attack the Capitol. I have the transcript.

2 THE COURT: Okay. If that's what he said. You've  
3 probably got a better recollection than I do. Okay.

4 Mr. Manzo?

5 MR. MANZO: We would disagree with that unless we  
6 saw the transcript. And talking about the legal theory of  
7 the case --

8 MR. FISCHER: Your Honor, what it says is: You  
9 will hear evidence during this trial that these five  
10 Defendants reached an agreement with each other to stage an  
11 arsenal of firearms, including semiautomatic rifles, just  
12 across the Potomac in Arlington and to physically prevent  
13 members from coming -- from meeting and certifying the  
14 election as they descended upon D.C. to attack not just the  
15 Capitol, not just Congress, not just our government, but our  
16 country.

17 MR. MANZO: And we would disagree with  
18 Mr. Fischer's assertion that the QRF was to attack the  
19 Capitol. The QRF was available.

20 THE COURT: I'm sorry?

21 MR. MANZO: The QRF was available and then there  
22 was an attack on the Capitol.

23 THE COURT: Well, look, you can ask the question  
24 and she'll answer it however she wants.

25 And ultimately, you can clean it up on redirect if

1 you think it's appropriate.

2 (Whereupon, the following proceedings were had in  
3 open court:)

4 THE COURT: The objection is overruled.

5 Mr. Fischer?

6 BY MR. FISCHER:

7 Q. Agent, are you aware that the Government's claim in this  
8 case -- or their theory in this case is that the purpose of  
9 the QRF was to attack the United States Capitol?

10 A. No. The purpose of the QRF was to support an attempt to  
11 keep Biden from taking power in whatever form that took.

12 Q. Well, the Electoral College certification was meeting on  
13 January 6th at the United States Capitol. Correct?

14 A. Correct.

15 Q. So the QRF wasn't meant to invade the Department of  
16 Labor. Right?

17 A. I think the QRF was meant to occupy D.C.

18 Q. And so, Agent, you would agree -- so are you aware that  
19 to get from the hotel in Arlington, where this Comfort Inn  
20 is, to get to the Capitol, that you can simply take 66 east  
21 to Route 1 south to 395 and it drops you off right on South  
22 Capitol Street? Were you aware of that route?

23 A. I am aware of taking 66 to Constitution all the way to  
24 the Capitol. Yes.

25 Q. Well, fair enough.

USA v. Thomas Edward Caldwell - 1/19/2021

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IN THE UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF VIRGINIA  
HARRISONBURG DIVISION

\*\*\*\*\*

UNITED STATES OF AMERICA,

CASE NO.: 5:21-MJ-00004

January 19, 2021

Rule 5 - Initial Appearance

Zoom Videoconference

Plaintiff,

vs.

THOMAS EDWARD CALDWELL,

Before:

HONORABLE JOEL C. HOPPE

UNITED STATES MAGISTRATE JUDGE

WESTERN DISTRICT OF VIRGINIA

Defendant.

\*\*\*\*\*

APPEARANCES:

For the Plaintiff:

**CHRISTOPHER ROBERT KAVANAUGH**

United States Attorneys Office - Charlottesville

Western District of Virginia

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Charlottesville, VA 22902

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For the Defendant:

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Mary J. Butenschoen, Transcriber

PROCEEDINGS TAKEN BY ELECTRONIC RECORDING; TRANSCRIBED USING  
COMPUTER-AIDED TRANSCRIPTION.

USA v. Thomas Edward Caldwell - 1/19/2021

2

1 (Proceedings commenced 3:41. p.m.)

2 THE COURT: Good afternoon. Ms. Dotson, would you  
3 please call the case.

4 THE CLERK: Yes, Your Honor. This is Criminal Action  
5 Number 5:21-MJ-4. *United States of America v. Thomas Edward*  
6 *Caldwell.*

7 THE COURT: Mr. Kavanaugh, is the government ready to  
8 proceed?

9 MR. KAVANAUGH: Yes, we are, Your Honor. Good  
10 afternoon.

11 THE COURT: Good afternoon. And Ms. Lorish, is the  
12 defendant ready to proceed?

13 MS. LORISH: He is, Your Honor. Thank you.

14 THE COURT: We're here for your initial appearance  
15 and then also an identity and removal hearing, and that's  
16 because you've been arrested on an arrest warrant on amended  
17 complaint out of the United States District Court in the  
18 District of Columbia. So there are several things I need to go  
19 over with you, and I'll advise you of some rights and the  
20 nature of the charge against you, and then explain your right  
21 to an identity hearing and production of the warrant.

22 I will need to ask you some questions, and your  
23 answers do have to be under oath, so would you please raise  
24 your right hand.

25 THOMAS EDWARD CALDWELL, SWORN

USA v. Thomas Edward Caldwell - 1/19/2021

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USA v. Thomas Edward Caldwell - 1/19/2021

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IN THE UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF VIRGINIA  
HARRISONBURG DIVISION

\*\*\*\*\*  
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January 19, 2021

Plaintiff,  
vs. Rule 5 - Initial Appearance  
Zoom Videoconference

THOMAS EDWARD CALDWELL, Before:  
HONORABLE JOEL C. HOPPE  
Defendant. UNITED STATES MAGISTRATE JUDGE  
WESTERN DISTRICT OF VIRGINIA

\*\*\*\*\*  
APPEARANCES:

For the Plaintiff:

**CHRISTOPHER ROBERT KAVANAUGH**  
United States Attorneys Office - Charlottesville  
Western District of Virginia  
255 West Main Street, Room 130  
Charlottesville, VA 22902  
434-293-3981  
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For the Defendant:

**LISA M. LORISH**  
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22 I will need to ask you some questions, and your  
23 answers do have to be under oath, so would you please raise  
24 your right hand.

25 THOMAS EDWARD CALDWELL, SWORN

USA v. Thomas Edward Caldwell - 1/19/2021

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[illegible]

Third and finally -- or third is the history and characteristics of the individual, Mr. Caldwell. And the government admits that he does have minimal criminal history and that appears that -- all I am aware of is that it appears to be several traffic matters that are in fugitive status, but that is the only evidence that I have regarding his criminal history. But regarding his characteristics is that it is -- the government alleges that he maintains a leadership position with the Oath Keepers [REDACTED]

[illegible]

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

1		
2	*****	)
3	UNITED STATES OF AMERICA,	) Criminal Action
4	Plaintiff,	) No. 22-00015
5	vs.	) AFTERNOON SESSION
6	ELMER STEWARD RHODES, III,	) Washington, D.C.
7	et al.,	) October 17, 2022
8	Defendants.	) 1:31 p.m.
9	*****	)

TRANSCRIPT OF JURY TRIAL - DAY 12  
BEFORE THE HONORABLE AMIT P. MEHTA,  
UNITED STATES DISTRICT JUDGE

APPEARANCES:

14	FOR THE GOVERNMENT:	KATHRYN L. RAKOCZY, ESQ.
15		TROY A. EDWARDS, JR., ESQ.
16		JEFFREY S. NESTLER, ESQ.
17		LOUIS MANZO, ESQ.
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23		JUSTIN T. SHER, ESQ.
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REPORTED BY:

LISA EDWARDS, RDR, CRR  
Official Court Reporter  
United States District Court for the  
District of Columbia  
333 Constitution Avenue, Northwest  
Room 6706  
Washington, D.C. 20001  
(202) 354-3269



1 Q. Okay. Which direction on that map would the Capitol be?

2 A. To the east.

3 Q. Okay. Fair enough.

4 And, Agent, where you just -- where you pointed up  
5 here, M Street, where Mr. Caldwell is sending the QRF, you  
6 would agree that that's going in a different direction than  
7 where the United States Capitol is.

8 A. I don't recall any messages that the QRF were  
9 specifically for anything at the Capitol.

10 Q. I'm sorry? Are you -- you're saying the QRF had nothing  
11 to do with the Capitol?

12 A. No. I said I didn't see any messages that that would  
13 have been the destination of the QRF.

14 Q. Well, you understand the Government's entire theory was  
15 the QRF is for the purpose of attacking the United States  
16 Capitol. Right?

17 A. That is not my understanding.

18 MR. MANZO: Objection.

19 THE COURT: Sustained.

20 MR. FISCHER: Your Honor, could we get on the  
21 phone?

22 (Whereupon, the following proceedings were had at  
23 sidebar outside the presence of the jury:)

24 MR. FISCHER: Your Honor, during the opening  
25 argument, Mr. Nestler specifically said that this QRF was to

1 attack the Capitol. I have the transcript.

2 THE COURT: Okay. If that's what he said. You've  
3 probably got a better recollection than I do. Okay.

4 Mr. Manzo?

5 MR. MANZO: We would disagree with that unless we  
6 saw the transcript. And talking about the legal theory of  
7 the case --

8 MR. FISCHER: Your Honor, what it says is: You  
9 will hear evidence during this trial that these five  
10 Defendants reached an agreement with each other to stage an  
11 arsenal of firearms, including semiautomatic rifles, just  
12 across the Potomac in Arlington and to physically prevent  
13 members from coming -- from meeting and certifying the  
14 election as they descended upon D.C. to attack not just the  
15 Capitol, not just Congress, not just our government, but our  
16 country.

17 MR. MANZO: And we would disagree with  
18 Mr. Fischer's assertion that the QRF was to attack the  
19 Capitol. The QRF was available.

20 THE COURT: I'm sorry?

21 MR. MANZO: The QRF was available and then there  
22 was an attack on the Capitol.

23 THE COURT: Well, look, you can ask the question  
24 and she'll answer it however she wants.

25 And ultimately, you can clean it up on redirect if

1 you think it's appropriate.

2 (Whereupon, the following proceedings were had in  
3 open court:)

4 THE COURT: The objection is overruled.

5 Mr. Fischer?

6 BY MR. FISCHER:

7 Q. Agent, are you aware that the Government's claim in this  
8 case -- or their theory in this case is that the purpose of  
9 the QRF was to attack the United States Capitol?

10 A. No. The purpose of the QRF was to support an attempt to  
11 keep Biden from taking power in whatever form that took.

12 Q. Well, the Electoral College certification was meeting on  
13 January 6th at the United States Capitol. Correct?

14 A. Correct.

15 Q. So the QRF wasn't meant to invade the Department of  
16 Labor. Right?

17 A. I think the QRF was meant to occupy D.C.

18 Q. And so, Agent, you would agree -- so are you aware that  
19 to get from the hotel in Arlington, where this Comfort Inn  
20 is, to get to the Capitol, that you can simply take 66 east  
21 to Route 1 south to 395 and it drops you off right on South  
22 Capitol Street? Were you aware of that route?

23 A. I am aware of taking 66 to Constitution all the way to  
24 the Capitol. Yes.

25 Q. Well, fair enough.