IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

United States of America,	)	Criminal Action
	)	No. 20-cr-109
Plaintiff,	)	
	)	PRETRIAL CONFERENCE
vs.	)	
	)	
Micah Eugene Avery, Jr.,	)	Washington, DC
	)	July 6, 2022
Defendant.	)	Time: 2:15 p.m.

TRANSCRIPT OF PRETRIAL CONFERENCE
HELD BEFORE
THE HONORABLE JUDGE AMY BERMAN JACKSON
UNITED STATES DISTRICT JUDGE

A P P E A R A N C E S

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THE COURTROOM DEPUTY: Good afternoon, Your Honor. This afternoon we have criminal case No. 20-109, the United States of America v. Micah Eugene Avery.

Will counsel for the government please identify herself and her colleague for the record.

MS. MAYER-DEMPSEY: Good afternoon, Your Honor Meredith Mayer-Dempsey for the government. And I'm appearing with my colleague, Mike Engallena.

THE COURT: Good afternoon.

THE COURTROOM DEPUTY: Counsel for the defense.

MR. OHM: Eugene Ohm on behalf of Mr. Micah Avery, along with Clay Wild and Brian Shiue, S-H-I-U-E.

THE COURT: All right.

MR. OHM: Your Honor?

THE COURT: Yes.

MR. OHM: I'm currently communicating with Mr. Avery, who apparently went to Superior Court, and is on his way over here.

THE COURT: I didn't hear what you said.

MR. OHM: Mr. Avery is over in Superior Court. He's on his way over. He got confused.

THE COURT: He's been here.

MR. OHM: He's been here once, but I believe he was brought by the marshals when he was here, so I don't think he's been through the front door.

I do believe that he'll be here any second. And if the Court wishes, I could fill him in on what we do, so that the Court doesn't feel like it's wasting time.

THE COURT: Well, the first issue on my agenda is the ruling on the pending motion to dismiss. So with respect to legal matters only, I believe I can proceed, even in his absence. I don't plan to make any decisions on any issues for which he needs to be present in the next five or ten minutes, but I also don't want to sit here, after already sitting around for 15 minutes or 20 minutes waiting for him.

MR. OHM: That's fine, Your Honor.

THE COURT: Do you agree that under the criminal rules I can proceed to just read a ruling on a legal matter in his absence?

MR. OHM: Yes, Your Honor.

THE COURT: Okay.

MR. OHM: And to the extent they don't, we agree to it anyway.

THE COURT: All right. One motion still pending in this case is the defendant's May 5th motion to dismiss the indictment, it's docket 82. The motion argued that 18 U.S. Code § 1361 is a crime of violence that requires the use of physical force. In particular, the defense contended that the charge of depredation of property requires the use of physical force that would not be satisfied by the use of a spray paint.

But the defendant is not charged with depredation of property and the defendant does not point to any binding authority that holds that physical force is a necessary element of the charge that he injured it.

Under Federal Rule of Criminal Procedure 12(b)(3)(B)(v), a criminal defendant may move before trial to dismiss the indictment because of a defect in the indictment or information, including failure to state an offense. An indictment is sufficient, though, according to the Supreme Court, in *Hamling versus United States*, 418 U.S. 87, at page 117, from 1974, "If, first, it contains the elements of the offense charged and fairly informs a defendant of the charge against which he must defend, and, second, enables him to plead an acquittal and or conviction in bar of future prosecutions for the same offense."

The operative question, according to the D.C. District Court in *United States versus Sanford, Ltd.*, 859 F.Supp.2d, at page 102, from 2012, is whether the allegations, if proven, would be sufficient to permit a jury to conclude that the defendant committed the criminal offense as charged.

In reviewing the indictment, a court affords deference to the fundamental role of the grand jury. That's *United States versus Ballestas*, 795 F.3d 138, at 148, from the D.C. Circuit in 2015, quoting *Whitehouse versus United States District Court*, 53 F.3d 1349, at 1360.

As a result, the D.C. Circuit has said adherence to the language of the indictment is essential because the Fifth Amendment requires that criminal prosecutions be limited to the unique allegations of the indictments returned by the grand jury. It's *United States versus Hitt*, H-I-T-T, 249 F 3d. 1010, at 1016.

Here, Count 1 of the indictment, found at docket 11, states, "On or about May 30th, 2020, in the District of Columbia, Micah Eugene Avery, Jr., willfully and by means of applying spray paint to a granite wall on the Lincoln Memorial property, did injure and commit a depredation against, an attempt to commit a depredation against property of the United States. Specifically, a granite wall adjacent to the Lincoln Memorial located on the Lincoln Memorial property. And the resulting damage was over $1,000." And the indictment cites destruction of government property, in violation of Title 18 U.S. Code § 1361.

The defendant spent much of the motion discussing the history of the word "depredation," and asserting that, quote, committing a depredation is an essential element of 18 U.S. Code § 1361. Says that in his motion on page 9. But the statute states, "Whoever willfully injures or commits any depredation against property of the United States." And the government has made it clear that it intends to move forward by proving that the defendant injured the property.

Defendant posited in his motion, though, that since the indictment alleged that he did injure and commit a depredation, the government has taken on the obligation and must prove both.

That argument, frankly, is very hard to take seriously. According to *United States versus Brown*, 504 F.3d 99, at 104, D.C. Circuit 2007, citing a D.C. Circuit case, *District of Columbia versus Hunt*, 163 F.2d 833, from 1947, the circuit said, quote: It is well established that if a criminal statute disjunctively lists multiple acts which constitute violations, the prosecution may in a single count of an indictment or information charge several or all of such acts in the conjunctive and under such charge make proof of any one or more of the acts, proof of one alone, however, being sufficient to support a conviction.

Defendant responds by saying, well, even if you rely on the injury prong, there's still two issues. The first is by not trying to prove depredation the government is taking a position inconsistent with what it said in other cases, a position, the defendant says, that is so, quote, entirely inconsistent, close quote, that it should be seen as, quote, a strategy of deceit, quote. And such, quote, blatant double speak, quote, that I should dismiss the indictment, quote, to preserve judicial integrity, close quote. That's the defendant's reply, docket 85, at page 2.

Gosh. Actually, the indictment does not imperil the Court's integrity. But advancing this argument did not do much to showcase yours, which I know you have.

The defendant pointed to *United States versus Watkins*, number 21 criminal docket 28, from this District on February 25th, 2021, a pleading at docket 42, in which, according to the defendant, a government attorney supposedly argued that a § 1361 violation is a crime of violence because a depredation committed against property, an essential element of the offense, necessitates the use of force. That's how you characterize the government's filing.

But in that very same filing, on page 8, including footnote 3, the government specifically differentiated between the second prong of 1361, which it was discussing, and the first prong, which contemplates a violation that willfully injures property.

It's quite clear that the government was saying that depredation was an essential element of the second prong of the offense, not that 1361 can't be proved via the injury prong. So there is no inconsistency. And regardless of what the government may have said in an unrelated case --

I'm sorry. Is that Mr. Avery? You can come and sit with your counsel.

Pursuant to the statute, the government can prove this crime via a willful injury. As we noted before, 18 U.S.

Code § 1361 says, "Whoever willfully injures or commits any depredation against any property of the United States." Plus, the original joint pretrial statement, docket 71, which was filed before this motion was filed, provided the Court with an agreed proposed jury instruction on page 13. And it said that "The elements of the offense that the jury would have to find are, first, that the defendant injured or damaged or attempted to injure or damage property. Second, that the property belonged to the United States. Third, that it exceeded the sum of $1,000. And, fourth, that the defendant did so willfully."

And while the parties don't appear to agree anymore as to the order of the elements and as to the precise language of the instruction, and they have recently submitted new dueling versions in your Amended Joint Pretrial Statement, docket 91, even the defendant's new version of this instruction, on page 16 of the Amended Pretrial Statement, instructs the jury that the defendant is charged with damaging or destroying property and that that is what must be shown.

So at no point has there ever been an understanding on the part of the defendant, or anyone else in this courtroom, that the government is proceeding under a depredation theory. And so perhaps the defense is not in the best position to be casting aspersion on the government's candor with the Court in this instance.

I want to caution the young associates who have

offered their services to the federal public defender that the sort of personal, accusatory, snarky pleadings that some civil litigators you're going to run into in your career may think are what is called for in litigation, are actually less persuasive and less effective than just being straightforward. And it would served you well to learn that lesson early in your careers.

The second contention in the motion is that like depredation, injury to property also requires proof of the use or threatened use of force, and that since applying spray paint doesn't qualify as a use of force, the indictment does not allege that the defendant took actions that would violate the statute. But the statute does not indicate the use of force as an element and the defendant cites no binding authority saying that force must be alleged.

Instead, the defense looks at cases that arose in a different context. Whether 1361 is a crime of violence -- which is a defined term of art -- that would trigger a rebuttable presumption in favor of pretrial detention, or for purposes of 18 U.S. Code § 924(c), which would prohibit the possession of a firearm during the course of a crime of violence. But whether destruction of property is a crime of violence for those purposes is not an inquiry here and it isn't what I have to decide. The issue is whether the indictment is so defective on its face the case can't proceed. And the law

plainly supports a finding that the indictment sets out facts that support the allegation that property was injured.

United States versus Cassidy, 616 F.2d 101, from the Fourth Circuit in 1979, affirmed a conviction under § 1361 when defendants threw or poured blood and ashes on the walls and ceiling of the Pentagon. *United States versus Grady*, 18 F.4th 1275, the Eleventh Circuit in 2021, confirmed a 1361 conviction and noted that the defendant's actions were more than just symbolic. In fact, they were incredibly destructive -- that was the Court's word -- spray-painting numerous anti-nuclear and religious messages on the sidewalk and on monuments. *United States versus Urfer*, U-R-F-E-R, 287 F.3d 663, the Seventh Circuit affirms the conviction of defendants who spray painted "Nuremberg" on government property.

In *United States versus Brown*, 517 Fed.App'x 657, the Eleventh Circuit said that the district court did not err when if defined "damage" under 18 U.S. Code 1361 as the reasonable cost of repairing the damaged property.

The defendant tells me to put those aside. And he cites *United States versus Abu Khatallah*, 316 F.Supp.3d 207, from this District in 2018. That case addressed the question raised in a post-trial motion of whether a conviction under a different destruction of property statute, 18 U.S. Code § 1343, was a crime of violence that could properly serve as a predicate for purposes of 18 U.S. Code § 924(c), the possession

of a firearm during the commission of a crime of violence.

The Court was, as we all know from *Johnson* and the cases that is followed it, required to apply what's called a categorical approach, and that means that the trial judge has to look at the elements of the offense and not the facts underlying it. And it concluded that, quote, Injuring federal property categorically requires a use of force against property of another, close quote. That is, quote, force capable of causing injury, close quote.

That standard, that definition was required because the question was whether a crime of violence had been committed, not what was needed to prove injury to property. And I note that the Court didn't purport to add an element that the government would have to prove in a § 1343 or 1341 case. Its point was that the notion that the defendant had used sufficient force was inherent in the element the government already had to prove, that property was injured or destroyed.

The Court looked at prior convictions under §§ 1343 and it observed that what had happened in those cases, tarring a courthouse or breaking a sprinkler, quote, while not particularly brutal, each required that requisite level of force against the property. But he explained what he meant by that, and he said: Applying a substance to the exterior of a building constitutes more than, quote, de minimis intrusion, like a trespassory but otherwise harmless touch. That's the

Khatallah opinion at page 215. And that's why the Court concluded that a crime like 1343, which has an element -- has as an element the intentional injury of property, categorically required that the defendant use force capable of causing injury to that property.

Here, the indictment alleges that the property was in fact injured or damaged and that it sustained damage it took at least $1,000 to repair. Since the indictment here alleges an intentional injury to property, it was sufficient to state and to place the defendant on notice of the charges against him. Whether the government can prove it will be a question for the jury. In any event, the discussion in *Khattala* is consistent with the notion that spray painting is something more than a de minimis intrusion or otherwise harmless touch.

For all these reasons then, the motion to dismiss will be denied.

Mr. Avery, that is the only thing that we've done in your absence, was to begin my ruling on a legal motion, which your counsel agreed I could do, even in your absence. And for the record, you're now present for everything else that's going to happen, and you walked in the courtroom about one-third of the way into that recitation.

I now want to talk about, briefly, voir dire. The parties submitted a joint pretrial statement some time ago and an amended pretrial statement recently. Despite the amendment

and despite my comments at the last pretrial conference, the questions were still quite duplicative. It was fascinating how many times identical questions were proposed by both sides, even some to which you objected to each other's and then posed your same question. And there were many that called for the same information.

So, you've received a copy of the voir dire that I'm planning to utilize. It's been revised and streamlined somewhat and some questions that I believed were irrelevant have been omitted. But I would ask -- I want to get your point of view about one question, and that is question 18. So if you can all look at that one for a moment.

There is a question that gets at the government's concern about whether people have strong feelings about the nature of the charge, and it's kind of being presented in a neutral way. But, what I said is: We've used your statement of the case in my introductory voir dire questions. So they will have learned, when I tell them you're here to pick a jury and this is how we're going to go about it and this is what the charge is, they're going to hear your exact language as to how I'm going to describe the offense.

But, when we get into this question where we're really trying to pose -- find out whether somebody in the jury has strong feelings one way or the other about what they're going to hear in this case, I wrote, "As you heard at the

start, there is one charge in this case, an allegation that the defendant damaged federal property, specifically, in an area on the Lincoln Memorial property, by" -- and you all used the word "vandalizing," but I thought that was a little loaded, so I just said, "by spray painting words on a wall in May of 2020." But I was wondering whether you would agree that I should add either of the sets of bracketed words, which would be, "during a protest," or, "during a Black Lives Matter protest in May of 2020."

The officers are going to explain why they were there, why everybody else was there, why it was necessary for police in plain clothes to be there. On just an ordinary day there may not be as many of them wandering around with cameras as when there are a lot of people there. And it struck me that would be important to lay out for the jury.

And then, the next -- last sentence of question 18 would be, "Do any of you have such strong feelings about the nature of this charge, either about the alleged conduct or the fact that it's being prosecuted, that it would make it difficult for you to render a fair and impartial verdict if you are chosen as a juror."

Ms. Mayer-Dempsey, what's your position about whether we should use the bracket language?

MS. MAYER-DEMPSEY: I think that makes sense. And I would also go so far as even to say, "By spray painting words

on a wall during a protest following the murder of George Floyd in May of 2020." I understand that might be slightly inconsistent with some previous filings in the case. But, I mean, we all live here in D.C., it's, I think, unrealistic to present this case without explaining what was going on that day at the mall and why police were there and why people were there. So the government has no objection to that language.

THE COURT: Mr. Ohm?

MR. OHM: Your Honor, we would prefer it left as is, without the bracketed language. I guess the concern is just that a juror might feel like they're supposed to feel a certain way if it is a Black Lives Matter protest. And we would definitely object to injecting the George Floyd murder into the voir dire question.

THE COURT: All right. Well, I still think --

MS. MAYER-DEMPSEY: If I could respond briefly, Your Honor.

THE COURT: Yes.

MS. MAYER-DEMPSEY: I think the government's concern is that -- and defense counsel raised this and -- you know, I think the words were: It's impossible that someone could have, like, strong opinions, or something to that effect, about spray painting a wall. But I think in this case that's not true, someone could have strong opinions that would render them unfit to be a juror. And I think letting them know what the protest

was about, either in favor of or against what was going on that day, would be of assistance in determining whether or not they could actually serve as a juror in the case.

THE COURT: I thought the defense has, at various points, wanted to explain what he was doing there that day. And if it's going to come up in the trial, it seems to me early on -- there may be people who have strong feelings about spray painting federal property, period. There may be people who feel differently about it depending on the cause. Anyone who comes up and has an opinion one way or the other may not have such a strong opinion that it renders them incapable of giving us a fair and impartial verdict and serving -- it may not be a grounds to strike for cause. But I don't know why we don't want to hear something.

I mean, maybe we don't need to say, "Following the murder of George Floyd." We could just say, "During a protest." We could say, "During a Black Lives Matter protest," which I believe it was, maybe not. But I'm not sure why you've asked all along to have this be in context and now you want no context. Are you planning to have zero evidence and have zero questions during this trial about the context for his conduct?

MR. OHM: Your Honor, the defense is sort of in a difficult position in that the government moved in limine -- and I know it was a different prosecutor, but moved in limine to exclude everything in terms of the context. And so I know

that the Court has said that inevitably some information will come in, but I don't think it's been made clear what is going to be permitted in terms of the historical context of this. If the Court is saying that it's -- or, the government is saying it's withdrawing that motion and we're allowed to get into sort of the --

THE COURT: I've ruled on that motion. But, I've never said that no one could say that this was a protest.

MR. OHM: Right.

THE COURT: And what I said was I wasn't going to get into trying the protestors for being there or trying the police for being there or trying the police for what they've done in the past. They had moved to exclude evidence and arguments about political issues, police brutality, Trump's Tweets, the treatment of Black Lives Matter protestors versus others. They did say the reasons underlying the protest.

And I said I'm not going to try the Black Lives Matter movement, I'm not going to try the police, I'm not going to try the U.S. Attorney's Office for prosecuting the case, or the Park Police concerning evenhandedness for protestors from the left versus right or protestors of color. Those are all political and social issues, but they don't bear on the narrow issue being presented to this jury to decide. And we're not going to try the defendant for his flight after they caught up with him the first time or what happened with the other

protestors after he got apprehended the second time because none of that bears on the destruction of property beyond the recovery of the spray can.

But it seems to me if we're asking the jurors, "Do you have such strong feelings about this allegation, this type of allegation, that you can't even be fair?" I think it's important to at least say that this happened during a protest. We can say "a political protest," and leave it at that. Does that suit you?

MR. OHM: That would be better, yes.

THE COURT: All right. All right. That was my only question about the voir dire. And that's the only thing in there that changes anything that you had in any kind of substantive way. Some of it I just combined, like I combined whether you've been a public defender with whether you have a pending application with the public defender service, that sort of thing. Just merged them to get them down to a reasonable number of questions. So that's the voir dire I'm going to give.

MS. MAYER-DEMPSEY: Your Honor, one note from the government on voir dire. So, you listed three names under Question 5. There is a fourth witness whose name is not listed, so I just wanted to make sure that was included, in case a juror knew this person. Her name is Jacqueline Gulick. She's a representative from the National Park Service.

THE COURT: Okay. No, I had asked -- I didn't have

the complete list, so that's what I asked you to bring today. So what is the name of the fourth person?

MS. MAYER-DEMPSEY: Jacqueline Gulick, G-U-L-I-C-K.

THE COURT: All right. Does the defense have any names it wants me to give? You're not committing to calling them. They're not going to be identified as defense witnesses versus government witnesses. But I think we're at the point where I have to advise the jury that there are people who may testify in this case, for one side or the other. And so are there any other names to add to the list?

MR. OHM: Your Honor, there are -- we do have a couple of names of potential witnesses. If the Court wants me to provide them now, I can.

THE COURT: Yes. I think I ordered you to have them ready for us today so that we could actually be ready on Monday to try this case.

MR. OHM: So one name is K-E-M, as in Mary, Y-T, as in Tom, A. Terry, T-E-R-R-Y.

THE COURT: K-E-M-Y-T-A Terry?

MR. OHM: Yes.

THE COURT: How do you pronounce that? Kemyta? Kemyta?

MR. OHM: Kemyta.

THE COURT: Okay.

MR. OHM: Then Milton, M-I-L-T-O-N, Yates, Y-A-T-E-S.

We have two less-likely-to-call witnesses. I mean, I could give them to you, if you want.

THE COURT: I want all the names that will avoid the jury saying, "Oh, my God, that's my best friend from kindergarten." So you need to tell me the names of anybody that you may call. I'm not committing you to calling anyone.

MR. OHM: Okay. Lauren, L-A-U-R-E-N. Haight, H-A-I-G-H-T.

And then Jonah, like the -- the whale. P, as in Paul, E-R-R-I-N, as in Nancy.

THE COURT: Okay. All right. Thank you. So I'm just going to say the government will call a number of witnesses to testify during the trial, the defendant may also call witnesses, but he's not required to do so. The people who may testify in this case for one side or the other or whose names you might hear include. I'm going to read the three names we already have and all the rest of the names that both sides have named, without specifying who was who, and then say, "Do any of you recognize or think that you may know any of the potential witnesses in this case?"

All right. We'll do that.

MS. MAYER-DEMPSEY: Your Honor, the government would just inquire if any of these individuals are present in the courtroom today?

MR. OHM: No.

THE COURT: Okay. All right. I have also provided you with the general instructions that I'm going to give the jury before voir dire that explains how it's going to proceed. And I've given you a copy of the preliminary jury instructions that I will give after we've selected a jury, before the trial begins, where I tell them there is an opening statement, this is a closing argument, all the general stuff that we tell them at the beginning. I'm going to permit them to take notes.

And one question I have is -- attorneys have different points of view in the preliminary instructions as to whether I say, "The defendant is charged with" and you say what the offense is, "and the government has the burden of proving that beyond a reasonable doubt," and all of that. Or whether I say to them, "The elements of the offense, each of which the government must prove beyond a reasonable doubt are." And so, do you have a point of view about whether you want me to list the elements of the offense?

MS. MAYER-DEMPSEY: We would like you to.

THE COURT: Mr. Ohm?

MR. OHM: We'll defer to the Court on that.

THE COURT: Okay. I don't have a strong feeling one way or the other. So, since the only person who has a strong feeling is Ms. Mayer-Dempsey and the rest of us are not opposed, we'll do it.

All right. So now we have everything that you're

going to need to get you through the jury selection process, the swearing of the jury, the instructing of the jury, and into your opening statements, at which point the trial will be more in your hands.

I want to let you know that generally my procedure is that it's one lawyer per witness. Whoever is putting on the witness or whoever is assigned to that witness will be the one who makes the objections during the questioning, who does the cross-examination. I can't have more than one lawyer at a table popping up when any particular witness is testifying. If a witness is your witness and a question is objectionable, you stand up, so I can see you through all this haze of plexiglass, and you say "Objection." And you can say, "Objection, hearsay; objection, foundation," whatever you want to say. One-word explanation what the objection is. But you may not argue the objection from there in front of the jury.

And then, if I need to hear more, I will -- and I'm going to try to do this as little as possible because bench conferences are awkward during COVID, so if we can avoid it, we will. If I can rule, I will. If I want to hear from you, I'll hear more from you, otherwise I'll just rule. If I rule and you really think I'm wrong, you're welcome to say, "Your Honor, may I be heard?" And we'll figure out a way, either talk on the phone or have a bench conference. But do not stand there and argue in front of the jury.

We have figured out a way that we believe we can successfully accomplish voir dire using this courtroom. But I want to let you know that we're going to be using that first bench that's inside the well of the court. So just for when we read the questions with index cards, the very beginning of voir dire, before they're excused to start bringing them in in smaller groups, don't put your coats or your boxes or anything on that seat. They're going to need that seat. After that, the one on your side is yours, and the one on your side is yours.

Okay. Before we talk about the motion to compel, I understand that the matter of exhibits is not -- was not brought to a close at the last pretrial conference.

MS. MAYER-DEMPSEY: That's correct, Your Honor. I discussed this issue with Mr. Ohm before the pretrial conference. The government does intend to add a few photographs to its exhibit list. Defense counsel has seen these photographs. It's my understanding there's no objection to them. I received them as this conference was beginning, from the witness, and it's just a matter of me putting them on the flash drive and getting that flash drive to Mr. Haley. And I'll, of course, submit an updated exhibit list to the Court.

THE COURT: That would be helpful. Mr. Ohm, is that correct, that you don't object to the exhibits?

MR. OHM: That's correct, Your Honor.

THE COURT: So they'll be admitted. And if you do those other two things, that would be very helpful.

All right. That brings me to docket 94, filed at 11:30 p.m. last night. It is a motion to compel with respect to records maintained by the jury office. And before we talk about it -- and I don't know whether I'll be prepared to rule on it at this point, given the time and given the fact that the government hasn't had a chance to docket a response to it -- or, maybe you have. If you have, I haven't seen it.

The proposed order asks me to order the jury office to provide the information -- in particular, the AO reports for grand juries from May 2019, which was when the grand jury that returned the indictment in this case was sworn, through not just the indictment, but through today. But then in the legal discussion about what you want and what you asked for, and I didn't -- I don't think it attached the actual letters to the jury office. It talked a lot about the law for when, if you want to challenge the representational nature of the venire trial jury, what you're entitled to get and what the law permits you to get.

So, before I ask you questions about any of this, I want to know: What are you seeking exactly in this motion?

MR. OHM: Your Honor, we're seeking the demographic composition of the grand jury that indicted Mr. Avery.

THE COURT: All right. And what would anything that

happened after July 14th, 2020 have to do with any of that? And what actually would -- if they were sworn on May 7th of 2019, what would anything that happened after that have to do with that?

MR. OHM: I don't know, Your Honor. I mean, frankly, grand juries are a little bit of a mystery to me because I've never been part of that process. But I do know that sometimes the grand jury is sworn and then some other people end up being on the grand jury indicting it. I mean, we obviously would only be using the information that would be relative to Mr. Avery. So we were overinclusive with the request.

THE COURT: So you would not disagree with my suggestion that to the extent this request gets granted, it cuts off on July 14th, 2020 when the indictment was returned, because there was no one on the grand jury -- it doesn't matter what the demographics are for a single day after the day he was indicted.

MR. OHM: That sounds right, Your Honor. I think the only reason it might be relevant is to figure out -- I mean, if the government is going to re-indict to make sure that this is a proper grand jury. But I think our position is a lot stronger for the things that happened before the jury office changed their policy to comply with the jury plan.

THE COURT: All right. Now, my next question is: I just want to make sure that you're not seeking any records

whatsoever with resect to the venire, the people that are supposed to show up here on Tuesday -- Monday.

MR. OHM: Your Honor, we've been provided that information.

THE COURT: Okay.

MR. OHM: And so, no, we don't need that additional information or a court order for that additional information.

THE COURT: Okay. And no motion has been filed with respect to that jury, is that correct?

MR. OHM: It is, Your Honor. I will say, though, that I did not -- we received that information yesterday afternoon. I literally received an email, I guess, calculating the numbers of individuals in that pool. I think that there's some likelihood -- I haven't talked to our appellate folks or -- and so I don't know all the steps, but I think just from first glance, I can report to the Court that the pool is severely slanted and not representative of our community.

The information that I just received is that from the pool and the self-reported race information, that 61 percent of the respondents are white, 27 percent are black, 6 percent are Asian and 3 percent report multi-race. My understanding of the city's demographics is it's closer to about 47/46 between black and white individuals.

THE COURT: The demographics that you're relying upon to demonstrate the city's population, when -- what is the date

of those?

MR. OHM: Your Honor, the reason I haven't filed --

THE COURT: The population has, obviously, changed dramatically since when I started trying jury trials in the District of Columbia way back and what I've seen over the past several years. So -- but, this jury has to be fairly representative of today's population.

MR. OHM: Yes, Your Honor. And I believe my information is much more updated than when Your Honor was trying cases.

THE COURT: Oh, I know that. Anything is more updated than when I was trying cases, but --

MR. OHM: I -- the reason we didn't file a motion is because we don't have all the information for the Court yet. I mean, I'm Googling as we speak, and confronting the court's WiFi. I have here that as of 2018, 41 percent are white, 46.9 percent are black. This is Google, so I'm not --

THE COURT: Well, is it fair to ask that if, pursuant to 28 U.S. Code § 1867 we're still going to talk about whether you can file a motion at this point to dismiss the indictment on the grounds of failing to comply with the statute, but a motion to stay the trial proceedings on the ground that the venire doesn't comply, can you file any motion by noon on Friday, so we have some notice whether there's possibly going to be a trial on Monday day or not?

MR. OHM: Yes, we can do that.

THE COURT: I mean, I understand in the *Smith* case that Judge Howell handled, she just went ahead and tried the case and took it up afterwards. I don't know whether that would make sense. So, one thing you should indicate in the motion is how you think we should proceed, and the government should be thinking about that as well.

Now, § 1867(a) also says, "In criminal cases, before the voir dire begins, or within seven days after the defendant discovered or could have discovered, by the exercise of diligence, the grounds therefor, the defendant may move to dismiss the indictment" -- let's talk about that part -- "on the ground of substantial failure to comply with provisions of this title in selecting" -- and now we're talking about the grand jury.

Now, this defendant was indicted on July 14th of 2020. On October 20th, 2020 I set January 15th as the due date for pretrial motions. And on January 15th of 2021 there was no motion to dismiss filed. By that point the Joseph Smith motion had not been decided. That was not decided until February of 2022.

But, you didn't raise this issue, even though the racial composition of the grand jury could have been an issue, even back then. We had a suppression hearing. You did file a suppression motion on time. We had maybe the longest

suppression hearing in the history of mankind for the smallest amount of evidence. But after that was completed, we got together on October 18th of 2021 and set a date for a jury trial and a pretrial conference date, and then I issued a scheduling order on October 26th, 2021, at docket 64, that set a schedule for motions in limine that would be due in December of 2021. You filed them again. You filed motions timely at that time. But, again, this issue didn't come up.

And we had a pretrial conference on January 13, almost exactly six months ago. Then, you moved, on May 5th of 2022, two months ago, for the first time, to dismiss the indictment. It's a little late, but you filed it, we took it up. We didn't get into the issue of whether it was late. But it did not mention the demographics of the grand jury and there is at this moment no such motion pending now.

The Chief Judge, in the *Smith* case, in February 11th of 2022 -- and I know everybody in the defense bar, and certainly in the federal public defender service knew that the issue of the demographics, during the pandemic, of the jurors being selected was percolating in this courthouse. I believe we had a hearing where you even mentioned to me you wanted to see -- you were thinking about whether such a motion needed to be filed, but -- and you may have told me that in another case, so I'm got going to hold it to you in this case. But I know it was something that everyone was aware of.

But even if you had no idea that this had been challenged on February 11th, 2022, Judge Howell ruled that under the old plan the selection of the petit jurors, through the jury office's procedures, did not provide the full proportionality with the census-confirmed demographics of the community. It was a big decision, it was a published decision, and it's been around since February.

So why is this motion saying, You know what? I think now, three days before trial, I would like to get into the possibility that the grand jury wasn't representative. I mean, I know you wouldn't know who the active trial jurors were until they've been summoned here. And they've been summoned here under a different plan and not this plan. So whatever she said in that case doesn't really bear on it. We have to figure out what they're doing now and, really, since the new plan has been implemented, which hasn't been for very long. But why on earth would this be a timely motion, as the statute requires?

MR. OHM: Your Honor, it's obviously not a timely motion. I think the question is whether the government is prejudiced by a late filing of the motion. And I think that that's not a question that is ripe yet for the Court.

I mean, I can tell the Court why it happened. We just completely -- it's just not a reason that I think, on the record, is something that -- there's no statutory exception for an attorney being busy. But I filed a similar motion for the

next trial I had up, when that was the trial I had up. But I did not file them for every single one of my cases. And now if the Court denies --

THE COURT: Well, it's just that we all could have been looking at this data, thinking about this issue, resolve the case one way or the other, if somebody had waived a flag and said, "I need more time." Or maybe we wouldn't have summoned all these witnesses to be here, we wouldn't have summoned 60 jurors to be here on Monday. We wouldn't have set the week aside, if we knew that we were going to be doing this.

So now, I don't know -- I mean, the statute has a requirement of some exercise of diligence after the defendant discovered or could have discovered the grounds for a motion challenging a grand jury that was summoned, pre-pandemic, on May 7th, 2019, but indicted him during the pandemic. So we don't even know if it suffered from the same infirmities --

MR. OHM: Right.

THE COURT: -- of the petit jury that the judge recognized.

MR. OHM: And I'm not making -- I don't want to seem that I'm making excuses, but from the defense attorney's perspective in this jurisdiction, there is always a balancing test of filing motions that you may -- I mean, frankly, there's probably a list of 15 motion that I could file at the beginning of every case to make sure that I would never have this kind of

situation arise, whether I know they're going to go to trial or not, whether I know what the resolution is going to be or not. But I can't practice in a way in this jurisdiction because there's consequences to that, both official and unofficial, in terms of how things work.

And, so, I should have. I think it's -- the bottom line is, I should have. I don't any particular reason, I don't have any strategic reason that I didn't. But I would hope that the Court would consider whether the government --

THE COURT: I'm not saying if you have a showing to make, that we shouldn't discuss this issue. But I don't see how, if you get to the bottom of whatever it is that you want to do by Friday, that we're going to put the jury office and 60 jurors and the government and the government's witnesses and everybody else in this room through their paces to be ready for trial on Monday.

Now, I have been saying all along, this defendant, notwithstanding the fact that he's been on bond for this entire time, has speedy trial rights. And I have tried to recognize them, notwithstanding, as you know, the crush of people who have been locked up and want their cases tried. But I don't see how we're going to get there without knowing whether you're filing a motion or not.

So, I think we're all entitled to some information as soon as possible. And I don't see -- and I guess it would be

nice to know -- there's two things: There's whether you're going to file the motion about the venire, and then there's whether you're going to file the motion about the grand jury. And it seems to me the grand jury motion -- I guess I need to hear from you, whether it makes sense to have the trial and then turn around and say, "Well, actually, maybe we should have never had the trial." At that point I don't know where we are.

So just what order you even think we need to do things in and whether we should -- we're going to stay the case if there's a grand jury motion, a belated -- admittedly now, belated grand jury motion? Do you have any thoughts for me about how I should be structuring my time?

MR. OHM: Yes, Your Honor. I mean, I -- well, I have responses --

THE COURT: And the main thing I'm concerned about is 60 people that have to be here on Monday and squeeze into this courtroom, who may not -- if you're thinking that you're not even going to -- if you're going to move to defer this trial or that we can't start the trial once -- if you're going to the integrity of the indictment? I'd just like to know what your thoughts are at the moment about that.

MR. OHM: Your Honor, as far as the venire, I think that there's -- given the information that I received during this hearing, I think that there's a likelihood that we will be filing a motion so that we can have a proper venire that's

representative of the District.

THE COURT: And you would do that, so you would seek to stay the trial until a new venire is summoned?

MR. OHM: Yes.

THE COURT: Okay. In which case we would have plenty of time to also deal with the grand jury issue, if you decide you're going to raise it once you get the documents.

MR. OHM: Yes.

THE COURT: Ms. Mayer-Dempsey, would you like to join this conversation?

MS. MAYER-DEMPSEY: Your Honor, I have not had time to fully review Mr. Ohm's filing. The government does not want this trial to be continued, but I understand the Court's prerogative in terms of conducting an appropriate inquiry. So at this point that's -- that's, I guess, the extent of our position.

THE COURT: All right. Well, I think that on the assumption that on Friday, at noon, he's going to file something seeking to stay this trial based on the lack of proportionality of the venire, you're welcome to file an opposition to that --

MS. MAYER-DEMPSEY: Yes.

THE COURT: -- between now and then. Sort of a preemptive opposition. And then with respect to the grand jury records, Mr. Ohm, I will order that the jury office produce the

information you're seeking up through the date of the indictment, which was July 14, 2020, but not thereafter because it doesn't bear on the demographics of the people who made the determination to indict Mr. Avery. So that's a much shorter time period. And I think you've agreed that anything after that would not be relevant to this particular inquiry.

Now, in terms of the -- you also asked for manuals and rules and procedures that are being followed. You have, I guess, what was previously the jury plan, what was supposed to be the procedure, correct?

MR. OHM: Yes, I believe we have that.

THE COURT: And there are considerable number of findings in Judge Howell's opinion about what was going on during the pandemic. But the swearing of this panel was before then.

MR. OHM: Right.

THE COURT: So, if you need the AO reports from the grand jurors, the grand jurors sworn as of that date through September 14 -- July 14th of 2020. But for the -- in terms of the procedures of bringing them in, assuming there is anything other than the jury plan, which I'm not sure there is anything else, what is the time that makes sense? January 2019 through July 15th, 2020?

MR. OHM: That sounds like it would be sufficient. And if it isn't, I can always come back.

THE COURT: I'm just pretty sure that there's not going to be a lot of manuals and memos and all that. You've got the jury plan. All right. So I will issue an order after this hearing that covers that.

MS. MAYER-DEMPSEY: Your Honor, just in terms of us being able to file something quickly, we don't have the material about the demographics of the venires. And I know defense counsel does. If they could just essentially pass that along to us.

MR. OHM: Sure, if the government can give us uploading access to the USAfx file.

MS. MAYER-DEMPSEY: Yes.

MR. OHM: Then I could get them in there within 20 minutes.

THE COURT: I'll leave it up to the two of you to share the information you've already received and the information the jury office is going to provide in response to my order. I can just order it be provided to both sides.

All right. I hate to ask this question, but -- we've already got one more issue that we covered on my agenda that I didn't know was going to be on my agenda today -- is there anything else we need to take up today on behalf of the defendant?

MR. OHM: The answer to the Court's question is no, but I'm going to preview another potential issue anyway,

because it might be an issue that needs to be taken up at some point in time.

THE COURT: Okay.

MR. OHM: I just had a conversation with Ms. Mayer-Dempsey right before court about this. There's -- this damages issue, the government's relying largely on the theory that the individuals who worked in order to, I guess, repair or scrub off the spray paint, that that constitutes the vast majority of the $1,000 figure that they have to prove, the felony count.

We have -- I was recently in a trial where the codefendant in our case, in a January 6 case, the government had, in their calculations for the $1,000 amount, they did not use labor costs, they just used materials cost. And so, I inquired of the government as to whether there's a policy that it needs to be consistent with or not. So I just -- that's something that --it's on my mind now, I think might come up later. I just didn't want to give any more surprises for the court.

I don't know where that's going to go, but that is something that we are looking into because if it's -- in our view, if the government proceeded consistent with the *Seefried* case, in terms of the theory of damage, then there would be no $1,000 theory even applicable in this case.

THE COURT: All right. Well, you can avoid the kind

of accusatory language you used before, if you see any inconsistency, that it's some sort of slight of hand and lying on their part. There may be some differences in the two situations that have prompted it. There may not be a policy. And it's not as if I'm bound by something that was done in another court anyway.

I suspect that if you believe that damages have not been proved beyond a reasonable doubt -- and they are an element -- you will stand up at the close of the government's case and tell me so and I will give you an opportunity to brief it, if you choose to do it. And I may rule at the time or I may reserve until after the jury has reached its verdict, in which case we'll have more time to consider it. So I don't think I need to do anything about that at this moment.

MR. OHM: Thank you. And I will follow the Court's recommendation. I think it's also appropriate for me to say at this time that I'm lead counsel in the case and any language that the Court did not like, the Court --

THE COURT: And I wasn't blaming the language on the associates. I was letting them know that in the future they're going to run into civil litigators who are worse, generally, than criminal litigators in this arena, in terms of just thinking that the more you attack counsel for being underhanded and the more you condescend and the more antagonistic you are the more forceful your pleading is. And I just want to tell

you that that stuff is way more satisfying to write than it is to read.

So take it from me as you move forward, you will be better lawyers, your pleadings will be better and more impressive to judges if you don't listen to whatever firebrand bomb-throwing civil litigator tells you to write that way in the future. So, I didn't necessarily think you had written them, I just wanted you to know, now that you've read them, that that's not most judges favorite form of literature to read.

Is there anything that I had need to take up on behalf of the government right now?

MS. MAYER-DEMPSEY: I just wanted to clarify a point of the Court's prior ruling. So it's my understanding that we are precluded from bringing up Mr. Avery's flight after the point where he was initially handcuffed by the officers.

THE COURT: Correct.

MS. MAYER-DEMPSEY: But it's also my understanding that his brief flight before that moment we can elicit testimony on.

THE COURT: Yes. I mean, he starts by walking and then he's running and an officer follows him and then he stops him and recovers the spray can from him, and that's where the case ends.

MS. MAYER-DEMPSEY: Yes.

THE COURT: But the fact that he departed from the scene where he allegedly sprayed on the wall, and at what speed he departed, that can come in.

MS. MAYER-DEMPSEY: Sure. And another thing I just wanted to bring to the Court and counsel's attention is during -- or, in one of the -- Mr. Avery's filings there was some language, I guess sort of criticizing the officers for not intervening and stopping the spray painting as it happened. Criticizing might be too strong of a word. But, just they took note that the officers did not intervene and stop them.

And just in our conversations with the officers in preparation for trial, it's our understanding that part of the reason they chose to wait and stop Mr. Avery away from the crowd is a concern that something like what eventually happened would happen. So, to the extent that that gets -- to the extent the defense questions the officers on that, I just wanted to put out a warning that that could get us into a territory we don't want to be in. So --

THE COURT: There's a way to answer that without saying something like what happened later --

MS. MAYER-DEMPSEY: Yes.

THE COURT: -- would happen. You can say, "We didn't want to create a scene, we didn't want to see a disturbance."

MS. MAYER-DEMPSEY: Yes. And they've been instructed that the case stops at the initial placing of handcuffs on him.

And I will certainly not be asking them about the later incident. But I just wanted to put up, in terms of defense questioning, that there could be a potential conflict in that area. That's it from the government.

THE COURT: I think we might have addressed at the last pretrial conference, but I frankly can't remember, and I'm required to do this under the law at the pretrial conference. I have no doubt what the answer to these questions are. But I think it is important to at least make it clear that defendant is facing a felony charge. As I understand it, at one point there was a plea offer that would permit him to plead to a misdemeanor charge, to which you would agree to a probationary sentence.

And, so, I need to make sure that that gets put on the record, and that it's put on the record whether that was communicated to the defendant and whether it was his decision. You don't need to tell me what their advice was, I just need to know whether they told you about the plea offer or not. So, if the government could just put on the record what the offer is in this case, or was.

MS. MAYER-DEMPSEY: Yes, Your Honor. The government's offer was a plea to destruction of government property, misdemeanor, which is punishable by a fine up to $100,000, one year in jail, or both. However, the government would not oppose a probationary sentence.

THE COURT: All right. Mr. Ohm, was that offer conveyed to Mr. Avery?

MR. OHM: It has been, Your Honor.

THE COURT: All right. Mr. Avery, has your lawyer explained to you that you're facing a felony? What is the maximum sentence for the felony charge?

MS. MAYER-DEMPSEY: Yes, Your Honor. If convicted of the felony, Mr. Avery could face up to a $250,000 fine, ten years in jail, or both. However, under his guidelines he still, I believe, would be probation eligible.

THE COURT: All right. Mr. Avery, has your lawyer explained to you the consequences of being convicted of a felony and the availability of the misdemeanor plea?

THE DEFENDANT: He has, Your Honor.

THE COURT: All right. And so it's your decision to go ahead to trial in this case?

THE DEFENDANT: Yes, Your Honor.

THE COURT: All right. We may or may not go ahead to trial on Monday, but we may. So, I'll read what gets filed on Friday. And I think everyone should assume that we'll be here on Monday because we may have to figure out a schedule for what's going to happen next. I don't know yet about whether the jurors will be here, but hopefully I'll find out in time.

Mr. Haley, can you find out when the Monday jurors are going to be calling into the jury office? Whether it's

Friday after four or whether it's Sunday night, or what the deal is in terms of when I would he need to let them know if we are going to stay this case? You can tell me later, you don't have to find out right now.

THE COURTROOM DEPUTY: Thank you, Your Honor.

THE COURT: All right. Is there anything further we need to take up right now?

MS. MAYER-DEMPSEY: Nothing from the government.

MR. OHM: Your Honor, let me just say, if the Court doesn't mind more of a bare-bone pleading, we can get a -- we can get an initial pleading in earlier, in terms of the motion to continue.

THE COURT: The sooner I know what you're asking for would be great.

MR. OHM: Okay.

THE COURT: But no later than noon on Friday, which I think is -- it's Wednesday, so that's not far away.

MR. OHM: Right. I just -- we'll definitely do the best we can. We're mindful of everybody's scheduling and that annoyances that we would --

THE COURT: All right. Okay.

MR. OHM: We did want, just in case that we -- we wanted to ask, during the COVID procedure, trials, will we be doing most of the talking from -- will we be able to open and close from in front of the -- not in front of the podium, but

in front of the jury, is one question I had. And then the other question I had was are there any other COVID restrictions or procedures that the Court has in place currently?

THE COURT: Okay. We, the last trial in this courtroom, put the jury in the box. And we had the witness in the witness stand. So the witnesses had to come in, as they walked by the jury they had to be masked. They could take their mask off when they were speaking into the microphone. Counsel can take their mask off when they're at the lectern speaking into the microphone.

I think -- now I can't even remember. To avoid having two lecterns -- I can't remember if we had two lecterns or if we let prosecution speak from there and then defense was allowed to come to the lectern to cross-examine witnesses.

For closing, while I ordinarily am a great believer in the right to walk around, I think the jurors have, to this date, appreciated the level of respect that we're trying to provide. And they very wildly in terms of how much -- how concerned they remain about COVID.

So, while we will turn the lectern and move the lectern and you can cheat sideways from the lectern, you can get out from behind it as best you can, we're not going to be strutting around, right up next to the jury box. As much as I understand why any good trial lawyer wants to be there and why I should tell anybody in trial advocacy class they should ask

the judge to do that, I'm not going to let you do that.

MR. OHM: Understood.

THE COURT: And then during the trial the jury is not going to be in our jury room, because its tiny. We'll have another courtroom that they use for jury deliberation and breaks. And, you know, we have the phones and the husher, if we have to have a conference, or we could go into the jury room ourselves, if it's going to be a long one, or we'll figure something out. But, there's really only so much to fight about in this case and I think we ought to be able to get through it without a lot of bench conferences.

I think this jury will not appreciate this trial dragging on forever, and they are smart about who might be requiring that to happen. So, there's that.

All right. I will read what we get, and at this point plan to see you on Monday. Thank you, everybody.

MR. OHM: Your Honor, can I say one additional thing? I think, for Mr. Avery, with regards to the plea colloquy, Mr. -- my understanding is the government is only offering the misdemeanor destruction of property under the federal code, and that's what he understands it to be. If the government offers a misdemeanor under the D.C. code for destruction of property, that would, I think, be given very serious consideration. I just want to make sure that that's clear.

THE COURT: You're not saying that it has to have

diversion attached to it and expungement, you're just saying he would seriously consider pleading to that count?

MR. OHM: I think that's -- yes, that's correct.

THE COURT: All right. Well, everyone should think about the risks and rewards of going to trial and be flexible about looking at what the best way to resolve it might be, if there is a way that it can be resolved that suits everyone. Obviously, Mr. Avery has the right to go to trial. But he also needs to consider every offer seriously.

And, Mr. Avery, you also need to take your obligations to the Pretrial Services Agency just a tad more seriously than you have been. You've been released, your conditions are minimal, and I expect you to comply with them.

All right. Thank you, everybody.

* * *

CERTIFICATE OF OFFICIAL COURT REPORTER

I, JANICE DICKMAN, 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 8th day of July, 2022

_____

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