

DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO

1437 Bannock St.
Denver, CO 80203

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Petitioners:

NORMA ANDERSON, MICHELLE PRIOLA,
CLAUDINE CMARADA, KRISTA KAUFER,
KATHI WRIGHT, and CHRISTOPHER
CASTILIAN,

v.

Respondents:

JENA GRISWOLD, in her official capacity as
Colorado Secretary of State, and
DONALD J. TRUMP,

and

Intervenors:

COLORADO REPUBLICAN STATE CENTRAL
COMMITTEE, and DONALD J. TRUMP.

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**Pro hac vice* admission pending

**PETITIONERS' OPPOSITION TO INTERVENOR DONALD J. TRUMP'S RULE 702
MOTION TO EXCLUDE THE TESTIMONY OF [REDACTED]**

[REDACTED] is an internationally recognized scholar on [REDACTED]
[REDACTED] proposed expert testimony in this case will help the Court understand, as the finder of fact, the official actions that then-President Trump *could have taken* in his capacity as Chief Executive and Commander-in-Chief to quell the January 6, 2021 attack on the Capitol. *See* Petitioners' Verified Petition, at 98-99.

Intervenor Trump moves to exclude [REDACTED] testimony, arguing that it is "legal analysis, in the guise of expert opinion" and stands to be "highly prejudicial" while offering "little, if any, probative value to the Court." Mot. at 2, 9–10. Trump is wrong. [REDACTED] will not offer opinions on any ultimate legal issue in this case (such as whether Trump "engaged" in insurrection). Rather, [REDACTED] will draw on [REDACTED] expertise in national security law, counterterrorism, emergency and war powers, and civilian-military relations to explain actions

then-President Trump *could have taken* to put down the attack. As this Court recently reminded the parties, expert testimony is “more likely to be admitted” in bench trials, “with the court assessing its weight and discounting it where appropriate.” Order: Motion for Extension of Time to File 702 Motions Challenging Certain of Petitioners Proposed Expert Witnesses (Oct. 17, 2023) (citing *People v. Hall*, 2021 CO 71M, ¶ 36).

Because [REDACTED] testimony will “assist” the Court “to understand the evidence or to determine a fact in issue,” C.R.E. 702, Trump’s motion should be denied.

Legal Standard

Colorado Rule of Evidence 702 governs the admissibility of testimony by expert witnesses. In making that determination, a trial court focuses on “the reliability and relevance of the proffered evidence.” *People v. Shreck*, 22 P.3d 68, 70 (Colo. 2001). In determining whether the evidence is reliable, the court should “apply a liberal standard that only requires proof that the underlying scientific principles are *reasonably* reliable.” *Kutzly v. People*, 2019 CO 55, ¶ 12 (citing *Shreck*, 22 P.3d at 77). In determining whether the evidence is relevant, the court considers “whether the testimony would be useful to the [finder of fact].” *Shreck*, 22 P.3d at 77.

While Rule 702 applies in bench trials, “the usual concerns regarding unreliable expert testimony reaching a jury obviously do not arise when a district court is conducting a bench trial.” *Att’y Gen. of Oklahoma v. Tyson Foods, Inc.*, 565 F.3d 769, 779 (10th Cir. 2009). Rather, “[i]n a bench trial ... ‘there is a presumption that all incompetent evidence is disregarded by the court in reaching its conclusions.’” *Hall*, 2021 CO 71M, ¶ 36. “[A] judge conducting a bench trial” thus has “greater leeway in admitting questionable evidence, weighing its persuasive value upon presentation.” *Tyson Foods*, 565 F.3d at 780.

Argument

Trump does not challenge [REDACTED] qualifications or the reliability of [REDACTED] testimony, but instead argues that [REDACTED] report is a “legal brief” not “intended to assist this Court in determining a disputed fact.” Mot. at 2-3. [REDACTED] will opine on the “various authorities” which President Trump, as Commander-in Chief and chief executive of the Executive Branch, was authorized to employ in order to defend the U.S. Capitol on January 6, 2021. Ex. 1, [REDACTED] at 2-3, 9. [REDACTED] is a national security legal expert whose scholarship has focused on national security, civilian-military relations, domestic terrorism, and counterterrorism. *Id.* at 3. [REDACTED] expert opinions are based on more than 40 years of experience in national security matters and will certainly be “useful to the fact finder.” *People v. Ramirez*, 155 P.3d 371, 381 (Colo. 2007).

A. [REDACTED] is not offering improper legal opinions.

[REDACTED] is not offering improper legal opinions. Nor is [REDACTED] attempting to “usurp[] . . . the role of the court” or “circumvent the fact finder’s decision-making process.” Mot. at 4. [REDACTED] is offering specialized knowledge on a specific question of fact—namely what actions Trump could have taken to quell the attack—that will assist the Court in determining Trump’s ultimate culpability. As Trump himself acknowledges, “[e]xperts are permitted to ‘assist the trier of fact to understand the evidence or to determine a *fact* at issue.’” *Id.* at 3 (quoting Colorado Republican State Central Committee’s Rule 702 Motion to Exclude the Testimony of [REDACTED] [REDACTED] October 16, 2023, pp. 2-5).

Trump’s almost three hours of inaction on January 6, 2021, is damning evidence of his role in, and intent regarding, the attack on the Capitol. It is particularly damning given the many options Trump had available as Commander-in-Chief to stop the attack, options the Court will

not be familiar with absent ██████████ expert testimony. *See Venalanzo v. People*, 388 P.3d 868, 875 (Colo. 2017) (“Expert testimony, by contrast, is that which goes beyond the realm of common experience and requires experience, skills, or knowledge that the ordinary person would not have.”). Because so many of those options were available to Trump only through the authority vested in him as Commander-in-Chief, any informed discussion of those actions necessarily requires discussion of the President’s lawful powers. Such discussion necessarily extends to ██████████ offered testimony that there was no legal prohibition stopping Trump from posting a tweet or issuing a statement calling for the mob to leave the Capitol. *See* Ex. 1 ██████████ report, at 12. Such reference to the law by ██████████ does not “invade the court’s authority by discoursing broadly over the entire range of applicable law,” but instead is “focused on a specific question of fact.” *Specht v. Jensen*, 853 F.2d 805, 809 (10th Cir. 1988).

Trump’s cited cases, to the extent they are relevant, undermine his own argument and support the propriety of ██████████ expert testimony. For instance, the court in *Specht v. Jensen* made clear that it was “a witness may refer to the law in expressing an opinion” and “may properly be called upon to aid the jury in understanding the facts in evidence even though reference to those facts is couched in legal terms.” 853 F.2d at 809. It cited its previous decision permitting an expert to testify “that a certain weapon had to be registered with the Bureau of Alcohol, Tobacco, and Firearms,” despite that being a legal question, because it “focused on a specific question of fact.” *Id.* The same is true here. ██████████ is not testifying on the law applicable to the case, but on the specific factual question of what options Trump had available under the law to respond to the attack on the Capitol.

In any event, *Sprecht* and other cases cited by Trump involved *jury* trials.¹ As noted, “a judge conducting a bench trial maintains greater leeway in admitting questionable evidence, weighing its persuasive value upon presentation.” *Tyson Foods*, 565 F.3d at 780; *see also Hall*, 2021 CO 71M, ¶ 36. In other cases cited by Trump, experts were *permitted* to testify on matters within their expertise even if they were closely adjacent to the ultimate factual and legal issues in the case.² Trump’s remaining cases involved experts giving opinions on the ultimate issue in the case, something [REDACTED] is not doing here.³

B. [REDACTED] Testimony Is Probative and Does Not Prejudice Intervenor Trump

Trump’s unsupported claims that [REDACTED] proposed testimony “has very little, if any, probative value” and is “prejudicial” to President Trump are similarly unavailing. Mot. at 9. [REDACTED] testimony regarding the courses of action available to a sitting president to put an end to the attack on the United States Capitol is highly probative of Trump’s state of mind during his almost three hours of inaction during the attack and the ultimate question of whether Trump engaged in the insurrection on January 6 through that inaction.

¹ *See People v. Lesslie*, 939 P.2d 443, 450 (Colo. App. 1996); *Town of Breckenridge v. Golforce, Inc.*, 851 P.2d 214, 216 (Colo. App. 1992); *King v. McKillip*, 112 F. Supp. 2d 1214, 122 (D. Colo. 2000).

² *See Lawrence v. People*, 2021 CO 28, ¶¶ 36-37 (affirming in securities fraud jury trial admission of expert testimony by Colorado Securities Commissioner on “the ultimate issues of whether [an] investment was a security and whether the facts that [the defendant] failed to disclose to her were material”); *People v. Rector*, 248 P.3d 1196, 1203 (Colo. 2011) (rejecting argument that a medical expert “opined on the ultimate legal issue and thereby usurped the jury’s role as a fact finder”); *see also Hines v. Denver & Rio Grande Western R.R. Co.*, 829 P.2d 419 (Colo. App. 1991) (no err in allowing expert to opine that plaintiff’s conduct was negligent).

³ *See Quintana v. City of Westminster*, 8 P.3d 527, 530 (Colo. App. 2000) (expert offered legal conclusion that police “officer’s actions were ‘reckless in nature and disregarded the safety of [other] individuals’”); *CIT Grp./Bus. Credit, Inc. v. Graco Fishing & Rental Tools, Inc.*, 815 F. Supp. 2d 673, 678 (S.D.N.Y. 2011) (expert “opine[d] as to whether certain events constituted a material breach of” contract).

Any argument that [REDACTED] testimony would “hamstring” Trump’s ability to counter it at trial, rendering said testimony “prejudicial” is baseless. Mot. 9-10. Beyond being able to cross-examine [REDACTED] or offer a rebuttal expert, Trump is free to take the stand and testify himself about what authorities he believes he had available and why he did not use them. That he has chosen not to do so is no basis for excluding [REDACTED] testimony.

In any event, “it is improper to exclude evidence under Rule 403 on the grounds that it is unfairly prejudicial” in a bench trial. *U.S. Election Integrity Plan*, 2023 WL 3865720, at *4 (citing *United States v. Kienlen*, 349 F. App’x 349, 351 (10th Cir. 2009). “In that context, ‘the prejudicial effect of improperly admitted evidence is generally presumed innocuous.’” *People v. Caimo*, 2021 COA 134, ¶ 29. Rather than exclude evidence, the Court is competent to weigh the evidence as it sees fit. *See id.*

Conclusion

Because [REDACTED] proposed expert testimony is relevant and reliable, the State Party’s motion should be denied.

Date: October 27, 2023

Respectfully submitted,

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