UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA	:	
	:	**CASE NO. 21-cr-244 (CKK)**
v.	:	
	:	
ANTHONY ALFRED GRIFFITH, SR.,	:	
	:	
Defendant.	:	

GOVERNMENT'S RESPONSE TO DEFENDANT'S SECOND MOTION TO DISMISS COUNTS TWO AND THREE

The United States of America, by and through its attorney, the United States Attorney for the District of Columbia, respectfully responds to defendant Anthony Griffith's third and untimely motion to dismiss Counts Two and Three from the indictment in this case. [ECF Dkt. 136]. Two days *after* the start of trial, the defendant for the first time incorrectly claimed that because the indictment language for Counts Two and Three provides for alternative means of proving the same element, both Counts should be dismissed in their entirety. The suggestion is both without merit and untimely. Even if this Court determined that the additional language in Counts Two and Three is surplusage unsupported by evidence introduced at trial, the appropriate remedy would be to strike that surplus language from the indictment prior to providing it to a jury. Here, in the context of a bench trial, it is sufficient for the Court to merely ignore that surplus language. In any event, by waiting until after trial started to raise this challenge to language on the face of the indictment, the defendant's motion is untimely and should be denied for that reason alone.

Accordingly, for the reasons set forth below, the United States respectfully requests that defendant's motion to dismiss[1] be denied.

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[1] In his oral motion on March 15, 2023, the defendant through counsel referred to his motion as a motion to dismiss pursuant to Federal Rule of Criminal Procedure 12. In his written

I. Background

In 18 U.S.C. § 1752, Congress prohibited certain types of conduct in any "restricted building or grounds." As relevant here, Section 1752 defines a "restricted building and grounds" as "any posted, cordoned off, or otherwise restricted area . . . of a building or grounds where the President or other person protected by the Secret Service is or will be temporarily visiting." 18 U.S.C. § 1752(c)(1)(B). An individual violates Section 1752 by, among other things, "knowingly entering without lawful authority to do so in any posted, cordoned off, or otherwise restricted area of a building or grounds where a person protected by the Secret Service is or will be temporarily visiting," or if that individual "intends to and does impede government business through disorderly or disruptive conduct while in the restricted area." *United States v. Griffin*, No. 21-cr-92 (TNM), 549 F.Supp.3d 49, 54 (D.D.C. 2021) (cleaned up). The list of individuals whom the United States Secret Service is authorized to protect includes the Vice President and the Vice President-elect. 18 U.S.C. § 3056(a)(1).

A federal grand jury indicted the defendant and his apprentice co-defendant Jerry Ryals on March 24, 2021. [ECF Dkt. 12]. Among other charges, the indictment alleges that the defendants violated Section 1752 on January 6, 2021. Specifically, Count Two alleges that the defendants violated Section 1752(a)(1) when they "did unlawfully and knowingly enter and remain in a restricted building and grounds, that is, any posted, cordoned-off, and otherwise restricted area within the United States Capitol and its grounds, *where the Vice President and Vice President-*

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motion, defendant now refers to the motion to dismiss as pursuant to Federal Rule of Criminal Procedure 29. ECF Dkt. 136 ("Defendant's Motion to Dismiss Counts Two and Three of the Indictment Pursuant to Rule 29 FRCrimP [sic]"). Because defendant's briefing continues to seek the *dismissal* of counts Two and Three as a legal matter (rather than *acquittal* on those Counts as an evidentiary matter), the reference to Rule 29 appears to have been a typographical error.

elect were temporarily visiting, without lawful authority to do so." ECF Dkt. 12 at 2 (emphasis added). Likewise, Count Three alleges that the defendants violated Section 1752(a)(2) when they "did knowingly, and with intent to impede and disrupt the orderly conduct of Government business and official functions, engage in disorderly and disruptive conduct in and within such proximity to, a restricted building and grounds, that is, any posted, cordoned-off, and otherwise restricted area within the United States Capitol and its grounds, *where the Vice President and Vice President-elect were temporarily visiting*, when and so that such conduct did in fact impede and disrupt the orderly conduct of Government business and official functions." ECF 12 at 2 (emphasis added).

On October 31, 2022, the Court filed its "Second Amended Pretrial Scheduling Order." [ECF Dkt. 85].[2] Pursuant to that Order, "Defendant's non-evidentiary pretrial motions, *such as motions challenging the indictment*, were due on November 28, 2022. *Id.* at 1 (emphasis added). On November 28, 2022, the defendant filed his "Motion to Dismiss Count Two and Three of the Indictment." [ECF Dkt. 88]. On the same date, the defendant also filed his "Motion to Dismiss Counts Two through Five of the Indictment." [ECF Dkt. 89]. In his motions, the defendant raised a litany of claims challenging Counts Two and Three but failed to suggest—let alone argue—that the inclusion of language "and Vice President-elect" rendered the indictment defective with respect to those Counts. *Id.* On February 6, 2023, the Court filed its Omnibus Memorandum Opinion in which it noted that the defendant's "challenges to the Indictment are multitudinous" and then rejected his motions in their entirety. [ECF Dkt. 119 at 5; 6-10].

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[2] A Third Amended Pretrial Scheduling Order (issued on January 5, 2023) left unchanged the November 28, 2022, deadline for "Defendant's non-evidentiary pretrial motions, such as motions challenging the indictment." [ECF Dkt. 100 at 1].

Trial commenced on Monday, March 13, 2023. [Minute Order dated March 13, 2023]. At trial, the Government elected to prove elements of Counts Two and Three through the introduction of evidence demonstrating that the Vice President and members of his immediate family were at the United States Capitol building and grounds on January 6, 2021. *See* Government Exhibits 001-005; 102. In addition, the parties entered into a written stipulation regarding the Vice President and members of his immediate family. ECF Dkt. 127 and Government Exhibit 015 ("On January 6, 2021, the Restricted Area described above and depicted in Government Exhibit 102 was a posted, cordoned off, or otherwise restricted area where the Vice President and members of his immediate family were and would be temporarily visiting."). In light of the more than sufficient evidence demonstrating that the Vice President was at the United States Capitol building on January 6, 2021—thereby establishing that the U.S. Capitol building and grounds were "restricted areas" within the meaning of 18 U.S.C. § 1752—there was no need to introduce additional evidence regarding the presence of the Vice President-elect at the Capitol on January 6.[3]

Nonetheless, on Wednesday, March 15, 2023 (two days after trial had commenced), the defendant made an oral motion claiming, for the first time, that the inclusion of "and Vice President-elect" rendered Counts Two and Three of the indictment defective and that both counts should be dismissed pursuant to Federal Rule of Criminal Procedure 12. The Government filed a

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[3] While not part of the evidentiary record, it is nonetheless worth noting that factually, Vice President-elect Harris *was* intending to visit the U.S. Capitol that day as a sitting Senator, for the purposes of certifying the 2020 election. Moreover, the Vice President-Elect *did* indeed visit the U.S. Capitol that day. The government had previously clarified that the Vice President-Elect simply was not present at the time of the initial attack of the Capitol. *See, e.g.*, *United States v. John Andries*, 21-cr-93-RC, at 2 n.2 (November 2, 2021). Thus, regardless of the evidence in *this* case, the Vice President Elect's status would generally and factually qualify pursuant to 18 U.S.C. § 1752(a)(1) or (2).

written response via email to Chambers on March 15, 2023, and the defendant subsequently filed his reply later that same evening (also via email to Chambers). On March 17, 2023, four days after trial had commenced, the defendant electronically filed a written motion. [ECF Dkt. 136]. In that subsequent briefing, defendant appears to claim—for the first time and without argument—that inclusion of "and Vice President-elect" in the indictment also amounted to a defect in initiating the prosecution. [ECF Dkt. 136 at 2-3].

Prior to the conclusion of trial, the Court set a briefing schedule for the Government's response and the defendant's reply.

II. Legal Standard

An indictment is sufficient under the Constitution and Rule 7 of the Federal Rules of Criminal Procedure if it "contains the elements of the offense charged and fairly informs a defendant of the charge against which he must defend," *Hamling v. United States*, 418 U.S. 87, 117 (1974), which may be accomplished, as it is here, by "echo[ing] the operative statutory text while also specifying the time and place of the offense." *United States v. Williamson*, 903 F.3d 124, 130 (D.C. Cir. 2018). "[T]he validity of an indictment 'is not a question of whether it could have been more definite and certain.'" *United States v. Verrusio*, 762 F.3d 1, 13 (D.C. Cir. 2014) (quoting *United States v. Debrow*, 346 U.S. 374, 378 (1953)). And an indictment need not inform a defendant "as to every means by which the prosecution hopes to prove that the crime was committed." *United States v. Haldeman*, 559 F.2d 31, 124 (D.C. Cir. 1976). Indeed, "[a] count may allege that the means by which the defendant committed the offense are unknown or that the defendant committed it by one or more specified means." Fed. R. Crim. P. 7(c)(1).

Rule 12 permits a party to raise in a pretrial motion "any defense, objection, or request that the court can determine without a trial on the merits." Fed. R. Crim. P. 12(b)(1). A criminal

defendant may move for dismissal based on a defect in the indictment, such as a failure to state an offense. *United States v. Knowles*, 197 F. Supp. 3d 143, 148 (D.D.C. 2016); *United States v. Griffith*, 21-CR-244-CKK [ECF Dkt. 119 at 5] ("Pursuant to Federal Rule of Criminal Procedure 12(b)(3), a criminal defendant may, *before trial*, move to dismiss a count of the indictment based on a 'defect of the indictment.'") (emphasis added). "In ruling on a motion to dismiss for failure to state an offense, a district court is limited to reviewing the *face* of the indictment and, more specifically, the language used to charge the crimes." *United States v. Barrow*, 2021 WL 663188 *2 (D.D.C. Feb. 19, 2021) (CKK) (citing and quoting *United States v. Sunia*, 643 F. Supp. 2d 51, 60 (D.D.C. 2009); *see also Griffith*, ECF Dkt. 119 at 5 ("When considering a challenge to the indictment, 'a district court is limited to reviewing the face of the indictment;' the Court must 'presume the allegations [in the] indictment to be true.'") (citing and quoting *United States v. Sunia*, 643 F. Supp. 2d 51, 60 (D.D.C. 2009).

III. Argument

Two days after trial began, the defendant through counsel orally moved to dismiss Counts 2 and 3 of the indictment on the grounds that they were defective. In particular, the defendant claimed that the two counts were defective because they included language describing the United States Capitol building and grounds as a place "where the Vice President and Vice President-elect were temporarily visiting." Four days after trial began, the defendant additionally and without argument claimed that the language "and Vice President-elect" in the indictment amounted to a defect in the initiation of the prosecution. Both claims are without merit.

In order to prevail on his motion, the defendant must surmount two high hurdles. First, he must demonstrate that the language of Counts Two and Three is somehow defective. Second, he

must demonstrate that his motion to dismiss (predicated on a defect in the indictment language and grand jury presentment) was timely. He cannot do either. His motion should be denied.

A. Counts Two and Three of the Indictment Are Not Defective.

The inclusion of the words "Vice President-elect" in Counts Two and Three does not make the entire count or the indictment defective. The Fifth Amendment of the Constitution requires that the prosecution of a criminal defendant facing a felony charge[4] "be begun by indictment." *Stirone v. United States*, 361 U.S. 212, 215 (1960). Once an indictment has issued, that charge "may not be broadened through amendment except by the grand jury itself." *Id.* at 216. By contrast, where the indictment "fully and clearly" charges an offense's elements, no constitutional infirmity arises if that indictment "alleges more crimes or other means of committing the same crime." *United States v. Miller*, 471 U.S. 130, 136, 105 S. Ct. 1811, 1815, 85 L. Ed. 2d 99 (1985). Inclusion of language in the indictment charging multiple means of proving the same element is not a defect. *Id.* ("The Court has long recognized that an indictment may charge numerous offenses or the commission of any one offense in several ways."). Thus, language in the indictment that is "unnecessary to and independent of" the offense's allegations "may normally be treated as 'a useless averment' that 'may be ignored.'" *Id.* (quoting *Ford v. United States*, 273 U.S. 593, 602 (1927)).

Furthermore, the Court has the authority "to drop from an indictment those allegations that are unnecessary to an offense that is clearly contained within it." *Miller*, 471 U.S. at 144; *see United States v. Quinn*, 401 F. Supp. 2d 80, 90 (D.D.C. 2005) (granting government motion to

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[4] The counts charging violations of Section 1752 are not felony offenses. But they appear in an indictment because the defendant's co-defendant (his apprentice Jerry Ryals) was charged with a felony offense in Count One. *See* ECF Dkt. 12 at 1, charging Jerry Ryals with a violation of 18 U.S.C. § 1512(c)(2) and 18 U.S.C. § 2.

strike from an indictment language that referred not to "essential elements" but instead to "different means by which the defendants committed an alleged offense (any one which alone could support a conviction)"); *see also United States v. Holland*, 117 F.3d 589, 594-95 (D.C. Cir. 1997) ("Paring down the conspiracy's time frame added no new charges to the indictment" and thus did not require re-submission to the grand jury).[5] In *United States v. Poindexter*, 719 F. Supp. 6 (D.D.C. 1989) (Greene, J.), the government sought to narrow a conspiracy charge by dropping all language referring to one object of the alleged scheme. *Id.* at 7. In granting that motion, Judge Greene concluded that striking language from an indictment was consistent with the Constitution because "(1) the indictment as so narrowed constitute[d] a completed criminal offense, and (2) the offense [wa]s contained in the indictment as originally returned." *Id.* at 9. Judge Green explicitly rejected that doing so deprived the defendant of his Fifth Amendment right to be tried on the charges brought by the grand jury, explaining that defendant's argument "conflicts head-on with the decision of the Supreme Court [citing *United States v. Miller*] . . . In that case, a unanimous Court upheld the validity of a conviction upon proof that was narrower than the allegations in the indictment. In the view of the Supreme Court, this change in the proof did not deprive the defendant of his right to be tried on an indictment returned by a grand jury." *Id.* at 8-9.

To find the defendant guilty of Entering and Remaining in a Restricted Building or Grounds, in violation of 18 U.S.C. § 1752(a)(1), the Court must find that (1) the defendant entered or remained in a restricted building or grounds without lawful authority to do so, and (2) did so knowingly. To find the defendant guilty of Disorderly and Disruptive Conduct in a Restricted

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[5] The Court's authority under *Miller* to strike language from an indictment at the government's request is distinct from the government's authority—with leave of the Court—to dismiss all or part of an indictment, information, or complaint under Rule 48(a) of the Federal Rules of Criminal Procedure.

Building Or Grounds, in violation of 18 U.S.C. § 1752(a)(2), the Court must find that (1) the defendant engaged in disorderly or disruptive conduct in, or in proximity to, any restricted building or grounds, (2) the defendant did so knowingly, and with intent to impede or disrupt the orderly conduct of Government business or official functions, and (3) the defendant's conduct occurred when, or so that, his conduct in fact impeded or disrupted the orderly conduct of Government business or official functions.

The statute further defines "restricted building or grounds" in relevant part to be "any posted, cordoned off, or otherwise restricted area . . . (B) of a building or grounds where the President or other person protected by the Secret Service is or will be temporarily visiting." 18 U.S.C. § 1752(c)(1)(B). Under the statutory definition, therefore, it is only necessary to establish that a single person protected by the Secret Service "is or will be temporarily visiting" to satisfy the "restricted building or grounds" element. The introduction of evidence that *more* than one person protected by the Secret Service "is or will be temporarily visiting" would add nothing.

Here, the language of Counts Two and Three that defendant now belatedly and incorrectly complains of merely specified two alternative means (the Vice President and the Vice President-elect) of independently establishing the same element (that U.S. Capitol building and grounds were restricted areas within the meaning of 18 U.S.C. § 1752 on January 6, 2021). There was no need for the government to introduce evidence of *both* means at trial and electing not to do so does not retroactively render the indictment defective.[6] "To the contrary, it is both common and appropriate

[6] In such cases, as the Supreme Court has recognized, it remains within the discretion of the district court whether to even instruct a jury on such an alternative theory in the absence of proof at trial. "What we have said today does not mean that a district court cannot, in its discretion, give an instruction of the sort petitioner requested here, eliminating from the jury's consideration an alternative basis of liability that does not have adequate evidentiary support. Indeed, if the evidence is insufficient to support an alternative legal theory of liability, it would generally be

for the government to allege a broader scheme yet prove a narrower one . . . By alleging a larger scheme, the Court held, the government does not lock itself into proving every part of that scheme. Rather, it can rest on any part that suffices to establish the elements of the crime charged." *United States v. Coughlin*, 610 F.3d 89, 105 (D.C. Cir. 2010) (citing and quoting *United States v. Miller*, 471 U.S. at 131); *see also United States v. Holland*, 117 F.3d 589, 595 (D.C. Cir. 1997) ("In *Miller*, the government chose to prove only parts of an indictment at trial. Narrowing the indictment by confining the evidence added nothing new to the grand jury's indictment and constituted no broadening. So here. Pairing down the conspiracy's time frame added no new charges to the indictment.") (internal citations and quotations omitted); *United States v. Andries*, 21-cr-93-RC, ECF Dkt. 47 at 39-41 (D.D.C. March 14, 2022) (concluding that the Vice President's temporary visit alone sufficed to satisfy the requirements of establishing a "restricted area" within the meaning of 18 U.S.C. § 1752)).

Likewise, the defendant does not argue—nor can he—that the conjunctive language used in the indictment compels the government to prove *both* means at trial. *United States v. Coughlin*, 610 F.3d 89, 106–07 (D.C. Cir. 2010) ("And, as the Supreme Court has repeatedly held, the government is entitled to prove criminal acts in the disjunctive, notwithstanding that the indictment charges them in the conjunctive.") (citing *Griffin v. United States,* 502 U.S. 46, 56–60, 112 S.Ct. 466, 116 L.Ed.2d 371 (1991); *Miller,* 471 U.S. at 136, 105 S.Ct. 1811; *Turner v. United States,*

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preferable for the court to give an instruction removing that theory from the jury's consideration. The refusal to do so, however, does not provide an independent basis for reversing an otherwise valid conviction. *Griffin v. United States*, 502 U.S. 46, 60, 112 S. Ct. 466, 474, 116 L. Ed. 2d 371 (1991). In the context of a bench trial, as is the case here, the presence of an alternative theory in the language of the indictment is simply otiose.

396 U.S. 398, 420-21, 90 S.Ct. 642, 24 L.Ed.2d 610 (1970) ("[W]hen a jury returns a guilty verdict on an indictment charging several acts in the conjunctive . . . the verdict stands if the evidence is sufficient with respect to any one of the acts charged.").

Indeed, several courts of this district have granted the government's noncontroversial motions to strike the same indictment language related to the Vice President-elect. *See, e.g., United States v. Sheppard*, 21-cr-203-JDB, 1/9/2023 minute order; *United States v. Ibrahim,* 21-cr-496, 10/28/2022 minute order; *United States v. Mault and Mattice*, 21-cr-657-BAH, 3/14/2022 minute order; *United States v. Bacon*, 21-cr-488-CRC, Dkt. 31, *United States v. Gardner*, 21-cr-622-APM, 5/16/2022 minute order; *United States v. Herrera*, 21-cr-619-BAH, 7/5/2022 minute order; and United *States v. Seitz*, 21-cr-279-DLF, 3/8/2022 minute order.

In his written motion to dismiss, the defendant attempts to argue that *Ex Parte Bain*, 121 U.S. 1 (1887) serves to undermine reliance on *United States v. Miller*. He is mistaken. In fact, despite quoting at length much of the *Miller* Court's analysis of *Bain* in his motion to dismiss, ECF Dkt. 136 at 3-4 (quoting *Miller*, 471 U.S. at 140-42), the defendant inexplicably omits from his briefing the language in which the *Miller* court explicitly rejected *Bain* insofar as it stands for the proposition that "a narrowing of the indictment constitutes an amendment that renders the indictment void." *Miller*, 471 U.S. 144. As the *Miller* Court explained

> To the extent *Bain* stands for the proposition that it constitutes an unconstitutional amendment to drop from an indictment those allegations that are unnecessary to an offense that is clearly contained within in it, that case has simply not survived. To avoid further confusion, we now explicitly reject that proposition.

Id. Defendant's reliance on *Bain* fails. *See also United States v. Cotton*, 535 U.S. 625, 631 (2002) ("Insofar as it held that a defective indictment deprives a court of jurisdiction, *Bain* is overruled.").

Likewise, the defendant's claims regarding whether or not the Vice President-elect was at the United States Capitol building and grounds on January 6, 2021, are irrelevant. At trial, neither

party introduced evidence regarding the Vice President-elect's presence at the U.S. Capitol building and grounds on January 6, 2021. For the reasons set forth above, any such evidence would be superfluous in light of the evidence regarding the Vice President's presence at the U.S. Capitol building and grounds that day. Nonetheless, defendant now appears to claim that because Vice President-elect was present in the morning of January 6 and again later in the evening and not at the time that he personally was in the building (notwithstanding his failure to introduce any such evidence to that effect), the presentation to the grand jury was defective. As a threshold matter, this "court need not consider conclusory arguments with no explanation or support." *Avila v. Dailey*, 246 F. Supp. 3d 347, 361 (D.D.C. 2017), *on reconsideration in part*, No. 15-CV-2135 (TSC), 2017 WL 9496067 (D.D.C. Aug. 1, 2017) (citing *POM Wonderful, LLC v. F.T.C.*, 777 F.3d 478, 499 (D.C. Cir. 2015), *cert. denied*, 578 U.S. 965, 136 S.Ct. 1839, 194 L.Ed.2d 839 (2016); *see also Rodriguez*, 2022 WL 3910580 at *14 n.6 ("Defendant Rodriguez makes passing reference to his First Amendment right to petition the government for a redress of grievances, but makes no argument under the First Amendment requiring the Court's consideration."). In any event, defendant is once again mistaken. As noted above, Section 1752 defines a "restricted building and grounds" as "any posted, cordoned off, or otherwise restricted area . . . of a building or grounds where the President or other person protected by the Secret Service *is or will be* temporarily visiting." 18 U.S.C. § 1752(c)(1)(B) (emphasis added). As a matter of law, the presence of the Vice President-elect on the U.S. Capitol building and grounds on the morning of January 6 and again later in the evening would suffice to make the building and grounds "restricted areas" within the meaning of the statute whether or not those periods overlapped with defendant's time there. Defendant's suggestion that there was a defect in the initiation of prosecution is without merit.

In short, Counts Two and Three are not defective. Since the evidence introduced at trial demonstrated that the Vice President was temporarily visiting within the meaning of 18 U.S.C. § 1752, the Court may either ignore or strike language regarding the Vice President-elect. *See, e.g.*, *United States v. Miller*, 471 U.S. 130, 136 (1985) ("A part of the indictment unnecessary to and independent of the allegations of the offense proved may normally be treated as 'a useless averment' that 'may be ignored.'") (quoting *Ford v. United States*, 273 U.S. 593, 602 (1927)); *United States v. Pumphrey*, 831 F.2d 307, 309 (D.C. Cir. 1987) ("our own and Supreme Court precedent has consistently held that excess allegations in an indictment that do not change the basic nature of the offense charged need not be proven and should be treated as mere surplusage"); *see generally United States v. Ibrahim*, 21-cr-496, ECF Dkt. 52 (Government's Motion to Strike Portions of the Indictment) at 3-5. Ignoring or striking the "and Vice-President elect" language "simply 'narrows' the scope of the charges, which 'adds nothing new to the grand jury's indictment and constitutes no impermissible broadening." *United States v. Quinn*, 401 F. Supp. 2d 80, 90 (D.D.C. 2005). Ignoring or striking that language adds nothing to the indictment returned by the grand jury and Counts Two and Three, which continue to state the same viable offenses that have been in the charging document since the date of its return by the grand jury.[7] Respectfully, defendant's motion to dismiss should be denied.

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[7] Amending the subject-verb agreement—from the "Vice President and Vice President-elect *were* temporarily visiting" to the "Vice President *was* temporarily visiting"—is an "insignificant" correction that likewise does not require resubmission to the grand jury. *See United States v. Bush*, 659 F.2d 163, 167 (D.C. Cir. 1981).

B. Defendant's Motion to Dismiss is Untimely Under the Federal Rules of Criminal Procedure and the Court's Pretrial Scheduling Order.

After the defendant raised this issue for the first time in an oral motion on March 15, 2023, the Court appropriately observed that the motion is untimely under the governing Rule of Criminal Procedure. The Court was correct; the motion is equally untimely under the Court's own scheduling orders. [ECF Dkts. 85 and 100]. Beyond failing on the merits, defendant's motion to dismiss should also be denied on purely procedural grounds.

Motions to dismiss an indictment alleging that the indictment is defective must be raised *prior* to trial. "The following defenses, objections, and requests *must* be raised by pretrial motion if the basis for the motion is then reasonably available and the motion can be determined without a trial on the merits." Fed. R. Crim. P. 12(b)(3) (emphasis added). Rule 12 requires parties to make certain motions in advance of trial, including motions identifying defects in an indictment (e.g., multiplicity) or instituting a prosecution (e.g., venue, delay), or motions seeking to suppress evidence." *United States v. Burroughs*, 810 F.3d 833, 837 (D.C. Cir. 2016). Here, the defendant now claims that the inclusion of the language "and Vice President-elect" renders Counts Two and Three of the indictment defective. Per Federal Rule of Criminal Procedure 12(b)(3)(A) and (B), however, a motion to dismiss concerning "a defect in instituting the prosecution" or "a defect in the indictment or information" must be raised be raised *before* trial. In addition, the defendant's motion to dismiss is untimely on the Court's Second and Third Amended Pretrial Scheduling Orders, which both established a deadline of November 28, 2022, for the defendant's non-evidentiary pretrial motions, including motions challenging the indictment. [ECF Dkt. 85 and 100].

Significant prudential considerations militate in favor of strict adherence to such deadlines. "The purpose of the rule is to compel defendants to object to technical defects in the indictment

early enough to allow the district court to focus on their pretrial objections and, of course, to permit the prosecution to accommodate meritorious challenges, and to do so without disrupting an ongoing trial." *United States v. Harris*, 959 F.2d 246, 250 (D.C. Cir. 1992), *abrogated by United States v. Stewart*, 246 F.3d 728 (D.C. Cir. 2001); *United States v. O'Brien*, 926 F.3d 57, 82 (2d Cir. 2019) ("This requirement serves a number of purposes, including sparing the court, the witnesses, and the parties, the burden and expense of a trial, and insuring that indictments are not routinely challenged (and dismissed) after the jury has been seated and sworn.") (internal quotation marks and citations omitted).

Where, as here, the defendant fails to meet the deadline for making a Rule 12(b)(3) motion, "the motion is untimely." Fed. R. Crim. P. 12(c)(3). The same rule allows for a court to consider an untimely motion "if the party shows good cause." *Id.* Here, the defendant has not shown "good cause" for his untimeliness. The grand jury indictment returned the indictment March 24, 2021—almost two years prior to the start of defendant's trial on October 13, 2023. His motion to dismiss is premised entirely upon the inclusion of the "and Vice President-elect" language in Counts Two and Three of the indictment, language that was patent on the face of the indictment. Insofar as defendant had objections concerning that language, there is simply no justification, let alone good cause, for the untimeliness of this motion. As described above, that language put him on notice in March 2021 that the Government could seek to demonstrate that the U.S. Capitol building and grounds was restricted within the meaning of 18 U.S.C. § 1752 by virtue of a temporary visit there by either the Vice President, the Vice President-elect, or both. To claim now that the defendant needed to wait until *after* the close of the Government's case to object to language in that indictment concerning the Vice President-elect is improper.

In any event, the claim is also false: the defendant knew by at least March 6, 2023, when the parties signed and filed a stipulation with the Court, that the Government would prove the existence of a restricted area through evidence of the presence of the Vice President. *See* ECF Dkt. 127 at 5 ("On January 6, 2021, the Restricted Area described above and depicted in Government Exhibit 102 was a posted, cordoned off, or otherwise restricted area where the Vice President and members of his immediate family were and would be temporarily visiting"). Likewise, as a part of that same stipulation the defendant agreed to the admission of multiple exhibits in advance of trial including Government Exhibit 1 (transcript of United States Secret Service Inspector Hawa's prior testimony regarding the Vice President's presence at the U.S. Capitol on January 6), Government Exhibit 2 (an email regarding notification that the Vice President would be at the U.S. Capitol on January 6), Government Exhibit 3 (a document concerning preparation for the Vice President's visit to the U.S. Capitol on January 6), Government Exhibit 4 (CCTV footage of the Vice President at the U.S. Capitol on January 6), and Government Exhibit 5 (a video montage with footage of the Vice President at the U.S. Capitol on January 6). Based on that stipulated language and those exhibits, the defendant was on notice in advance of trial that the Government's evidence on that issue would turn on the Vice President's temporary visit to the Capitol.

Defendant's failure to comply with the timeliness requirements of Rule 12 and the Court's Pretrial Scheduling Orders raises serious concerns. Where such time restrictions are respected:

> [I]inquiry into an alleged defect may be concluded and, if necessary, cured before the court, the witnesses, and the parties have gone to the burden and expense of a trial. If defendants were allowed to flout its time limitations, on the other hand, there would be little incentive to comply with its terms when a successful attack might simply result in a new indictment prior to trial. Strong tactical considerations would militate in favor of delaying the raising of the claim in hopes of an acquittal, with the thought that if those hopes did not materialize, the claim could be used to

> upset an otherwise valid conviction at a time when reprosecution might well be difficult.

Davis v. United States, 411 U.S. 233, 241, 93 S. Ct. 1577, 1582, 36 L. Ed. 2d 216 (1973). Here, defendant's failure to file his motion in a timely fashion is particularly troubling given that any supposed defects could be cured simply through the filing of a superseding information (since the defendant is charged exclusively with misdemeanors). *See* Fed. R. Crim. P. 7(a)(2) and Fed. R. Crim. P. 58(b)(1). Permitting the defendant to wait until the eleventh hour to raise his claim in contravention of the Federal Rules and this Court's own scheduling Orders would only serve to encourage other defendants to engage in such dilatory tactics. *Puckett v. United States*, 556 U.S. 129, 134, 129 S. Ct. 1423, 1428, 173 L. Ed. 2d 266 (2009) ("And of course the contemporaneous-objection rule prevents a litigant from 'sandbagging' the court—remaining silent about his objection and belatedly raising the error only if the case does not conclude in his favor") (internal quotations omitted).

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IV. Conclusion

For the foregoing reasons, the Government respectfully requests defendant's motion to dismiss Counts Two and Three be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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

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Dated: March 24, 2021