IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,

v. **Case No.: 1:21-CR-247-TFH**

BRADLEY WAYNE WEEKS,

Defendant.

REPLY TO THE GOVERNMENT'S OPPOSITION TO DEFENDANT'S MOTION TO DISMISS COUNT ONE OF THE INDICTMENT

Defendant, Bradley Wayne Weeks, by and through undersigned counsel and pursuant to Local Rule 47(d), hereby submits his Reply to the Government's Opposition to Defendant's Motion to Dismiss Count One of the Indictment ("Opposition"). (Doc. 60).

I. Count One of the Indictment is Insufficient as it Fails to Allege what Proceeding Before Congress was Obstructed, Influenced, and Impeded.

The Government contends (in the heading of its argument in § I. A. at p. 23 of its Opposition) that Count One sufficiently apprises Defendant of the "official proceeding," which is alleged to have been obstructed, influenced, and impeded by providing the date of the alleged crime. However, conspicuously absent from the language of the Indictment, and in particular the allegations set forth in Count One, is any identification of what the "official proceeding" was. Although Defendant may be aware generally of what was taking place in Congress on January 6, 2021, such knowledge does not relieve the Government of its obligation to set forth "the essential facts constituting the offense charged." Fed.R.Crim.P. 7(c)(1).

In *United States v. Murphy*, 762 F.2d 1151, 1152 (1st Cir. 1985), defendants were convicted of knowingly and intentionally using threats of serious bodily harm to influence the testimony of a witness in an official proceeding, in violation of 18 U.S.C. §1512(a)(1). The

indictment alleged in pertinent part that the defendants "did knowingly and intentionally use intimidation or physical force or did threaten another person or did attempt to do so, with intent to influence the testimony of any person in an official proceeding," naming the person threatened and setting forth the statute violated. *Id.* at 1153. "What the proceeding was, or was to be, was in no way indicated." *Id.* In reversing the defendants' convictions, the First Circuit stated:

> Crucial to the preparation of any defense to a charge under the statute is at least some indication of the identity of the proceeding in which the defendant tried to influence testimony. The indictment at issue here presented no such indication and as such it did not "sufficiently apprise[] the defendant[s] of what [they] must be prepared to meet."

Id. at 1154, citing *Russell v. United States*, 369 U.S. 749, 763 (1962). As a result, the court held: "The indictment was defective because it did not adequately apprise the defendants of the charges against them." *Id.* at 1155.[1]

In *United States v. McGarity*, 669 F.3d 1218, 1238 (11th Cir. 2012), defendants challenged the sufficiency of an indictment charging them with obstruction of justice, in violation of 18 U.S.C. §1512(c)(2), the statute at issue here. Although the indictment tracked the relevant language of the statute, the defendants contended that the indictment "must identify which official proceeding was obstructed and otherwise provide sufficient notice to the defendant of the factual predicate for the charge." *Id.* The Government argued that the failure to allege a specific official proceeding was necessary due to the nature of the defendants' obstruction and contended they sought to impede "any possible proceeding that might exist." *Id.*

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[1] The court also rejected the Government's argument that defendants should have moved for a bill of particulars had they wanted more specific information than that contained in the indictment, stating: "[t]his argument is specious, since it has long been settled law than an invalid indictment cannot be cured by a Bill of Particulars." *Murphy,* 762 F.2d at 1154, citing *Russell*, 369 U.S. at 770.

at 1239. The Eleventh Circuit found that despite tracking the statutory language of the statute violated, the indictment was insufficient for failing to allege the official proceeding being obstructed. *Id.* at 1240.

As with the indictments in *Murphy* and *McGarity*, the Indictment here fails to allege what official proceeding was alleged to be obstructed, influenced, and impeded. Such defect is fatal. In its Opposition, the Government contends the "indictment has given them notice that Congress's joint session certifying the Electoral College vote which occurs by law in the afternoon of January 6th is in fact the Official Proceeding at stake here," citing to footnote 2 in Defendant's Motion to Dismiss Count One of the Indictment. However, while Defendant may have such knowledge, it certainly did not come from the Indictment. A Defendant's general knowledge of events taking place does not relieve the Government of its obligation under Rule 7 to provide a statement of the "essential facts constituting the offense charged." As in *Murphy* and *McGarity*, the failure of the Indictment here to set forth the official proceeding being obstructed renders the Indictment defective and requires dismissal of Count One.[2]

II. Weeks' Alleged Conduct Does Not Fit Within the Scope of §1512(c)(2).

Contrary to the Government's expansive reading of the scope of §1512(c)(2)'s reach, *see* Opposition at pp. 23-27, other courts, including cases cited by the Government in its Opposition, have found the charged conduct must have some reasonable nexus to a record, document, or tangible object. In *United States v. Singleton*, 2006 WL 1984467 at *1 (S.D. Texas 2006), a

[2] The Government also claims in its Opposition that: "[t]he grand jurors were informed as to which proceeding was occurring on January 6, 2021." Whether the grand jurors were so advised is completely unknown to Defendant, as well as this Court, as no transcripts of grand jury proceedings have been produced to support such contention. As a result, such contention, wholly supported by any proffer of evidence, should not be considered by the Court in making its determination on this issue.

defendant was indicted for Commodity Exchange Act violations, fraud and one count of obstruction of justice, in violation of 18 U.S.C. §1512(c)(2). The conduct giving rise to the indictment was Singleton's providing false information to an energy company's lawyers that was used to create a written report to various government agencies. *Id.* at *5. Singleton moved to dismiss the obstruction of justice count, arguing that his alleged conduct did not fall within the scope of §1512(c)(2) on the basis of the arguments that Defendant Weeks asserts here. *Id.* Specifically, Singleton argued that the statute prohibits only efforts only to tamper with physical evidence. *Id.* at *2. The Government opposed the motion on the basis that the "broad statutory language" of the statute encompassed Singleton's conduct. *Id.* The court did not adopt either party's proposed interpretation of the statute, but rather found that "to violate §1512(c)(2), the charged conduct must have some reasonable nexus to a record, document or tangible object." The court found that the allegations of the indictment met "the requirement for some nexus to a document or other tangible evidence," in that the allegations contained therein set forth that Singleton provided false information to attorneys that would be used to create a written report submitted to governmental agencies. *Id.* at *5. Unlike Singleton, the Indictment here has no reasonable nexus to a record, document, or tangible object.

Likewise, in *United States v. Hutcherson*, 2006 WL 270019 (W.D. Va 2006), the defendant was charged with various counts of fraud, one count of false statement to a federal official and one count of obstruction of justice, in violation of §1512(c)(2). The conduct at issue entailed Hutcherson creating documents that were subsequently produced to a grand jury and making certain statements to an FBI agent. *Id.* While the court ruled that it could not reasonably find that the prosecution would be unable to set forth any facts under the circumstances to prove Hutcherson's guilt, and therefore, denied the motion, in so doing, the court stated:

> Section 1512(c) was one of the measured responses by Congress to improve the accuracy and reliability of corporate disclosures by penalizing those who obstruct justice by somehow impairing the integrity or the availability of records, documents, and other tangible objects. In essence, the amended §1512(c) created a specific subsection dealing with the tampering of tangible evidence, in what was otherwise a statute that previously dealt only with tampering of persons.

Id. at *2. Unlike Hutcherson, there is no conceivable set of facts that would show Mr. Weeks impaired "the integrity or availability of records, documents, and other tangible objects." As a result, this Court should dismiss count one of the Indictment.

Interpreting §1512(c)(2) to require a nexus to a record, document or tangible object is consistent with the use of the term "otherwise" in the subsection. Rather than the all-encompassing "catch all" residuary clause the Government urges which would sweep in any obstructive conduct, use of "otherwise" in subsection (c)(2) signifies a relation to the conduct prohibited by the preceding subsection and must have some relation to "a record, document, or other object." By failing to limit the scope of subsection (c)(2) to conduct impairing documents or tangible objects, the statue renders "otherwise" mere surplusage, as set forth by Judge Nichols in *United States v. Miller*, 2022 WL 823070 at *12 (D.D.C. March 7, 2022). Defendant urges this Court to adopt the reasoning of Judge Nichols in the Miller Opinion in favor of the other jurists that have rejected similar challenges to indictments charging violations of §1512(c)(2) arising from the events of January 6, 2021.

For all the foregoing reasons, Defendant respectfully requests that this Court grant his Motion to Dismiss Count One of the Indictment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on August 26, 2022, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system which will send a notice of electronic filing to the following:

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ATTORNEY

MRK/jj[weeks,bradley-reply.to.governments.opposition.to.defendants.motion.to.dismiss.count.one.of.the.indictment]