UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, -v- CHRISTOPHER WORRELL, Defendant.	Case No. 21-cr-00292 (RCL)

DEFENDANT'S REPLY TO GOVERNMENT'S OPPOSITION TO MOTION TO DISMISS INDICTMENT AS DEFECTIVE

Defendant, Christopher Worrell, by and through his counsel, tenders this Reply to Government's Opposition to Mr. Worrell's Motion to Dismiss the Indictment as Defective. *See* ECF No. 51. The Government's argument fails with regard to specificity of the indictment as it ignores recent case law, requiring the inclusion of specific facts and circumstances of the crime charged rather than "solely tracking the statutory language" which "can create ambiguity regarding the defendant's conduct." *United States v. Hillie*, 227 F. Supp. 3d 57, 69-71 (D.D.C. 2017) (citing *United States v. Palfrey*, 499 F. Supp. 2d 34, 45 (D.D.C. 2007); *see also United States v. Carll*, 105 U.S. 611, 612, 26 L. Ed. 1135 (1881).

Regarding the dangerous or deadly weapon analysis the Government's argument fails due to improper collapsing of the analysis of whether pepper spray is inherently dangerous (it is not) and if it is dangerous was the spray used in a way that is *likely* to endanger life or inflict great bodily harm (the government has also not alleged any facts that it was *used* in a way that it was likely to endanger life or inflict great bodily harm). *United States v. Chansley*, No. 21-cr-3 (RCL), 2021 U.S. Dist. LEXIS 43000, at *19 (D.D.C. Mar. 8, 2021) (emphasis added).

For these reasons, the Indictment is defective and must be dismissed.

I. The Government Fails to Meet Even the Low Bar of Alleging the Time, Place, and Circumstances of the Conduct Charged.

The Government asserts that "Worrell misunderstands the purpose of an indictment and the low bar an indictment must clear to satisfy the federal rules and Constitution". ECF No. 51 at 2. The Government is correct that the indictment is a low bar to clear to satisfy the federal rules and the Constitution, and yet, here the Government has still failed to clear it.

The Government rests its argument on *United States v. Haldeman* and *United States v. Verrusio*, contending that an indictment which tracks the statutory language exactly, and offers no more explanation of the offense other than the where in the most general terms, that is the Capitol Building, and the when, January 6, is sufficient to apprise a defendant of the charged conduct. *See* ECF No. 51 at 2-4; *See* 559 F.2d 31 (D.C. Cir. 1976); 762 F.3d 1, 13 (D.C. Cir. 2014).

In their Opposition, the Government has failed to consider intervening law which specifically addressed the exact argument the Government makes here and rejected it. *See Hillie*, 227 F. Supp. 3d at 69.

> Courts have found that it is especially important to include such facts and circumstances in cases where, by solely tracking the statutory language, the indictment's terms create ambiguity regarding the defendant's conduct. *See United States v. Palfrey*, 499 F. Supp. 2d 34, 45 (D.D.C. 2007); *see also United States v. Carll*, 105 U.S. 611, 612, 26 L. Ed. 1135 (1881) (finding that "it is not sufficient to set forth the offen[s]e in the words of the statute, unless those words of themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements

> necessary to constitute the offen[s]e intended to be punished". Thus, "[a]n indictment not framed to apprise the defendant 'with reasonable certainty of the nature of the accusation against him is defective, although it may follow the language of the statute.'" *United States v. Nance*, 533 F.2d 699, 701, 174 U.S. App. D.C. 472 (D.C. Cir. 1976) (quoting *United States v. Simmons*, 96 U.S. 360, 362, 24 L. Ed. 819 (1877)).

Id. at 69-71.

The indictment must not only include the time and place of the charges but the circumstances of the charges. *Hillie*, 227 F. Supp. 3d at 71-72 (citing *United States v. Cruikshank*, 92 U.S. 542, 558, 23 L. Ed. 588 (1875); *see also* U.S. Const. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation [against him.]")).

The D.C. Circuit has long held that an indictment that is drawn in the generic words of a statute and that fails entirely to describe in any meaningful way the acts of the defendant that constitute the offenses charged is insufficient to notify a defendant of the nature of the accusations against him. *See, e.g., Nance*, 533 F.2d at 701 (holding that an indictment "following the generic wording of a statute" but lacking "any [factual] allegation whatsoever" with respect to a key element of the offense is "fatally defective"); *Thomas*, 444 F.2d at 922 (noting that an indictment that "describes the offense only in impermissibly broad and categorical terms" drawn from the statute fails to "achieve the requisite degree of precision" demanded by the Constitution).

Going as far back as 1918, the D.C. Circuit has dismissed an indictment for failing to describe with sufficient allegations whether the defendant "congregated and

assembled" or if he "crowd[ed], obstruct[ed], and incommode[d] the free use of the sidewalk" where the indictment did not demonstrate factual allegations which informed the defendant "the nature of the acts which were relied upon by the prosecution as constituting alleged obstruction of the sidewalk". *Hunter v. Dist. of Columbia*, 47 App. D.C. 406 (D.C. Cir. 1918).

"Little may be left open to construction or interpretation of an indictment" after the grand jury returns its charge, because "[i]f the offense is not plainly stated and is made so only by a process of interpretation, there is no assurance that the Grand Jury would have charged such an offense." *Van Liew v. United States*, 321 F.2d 664, 669 (5th Cir. 1963). Further, where there is ambiguity, "the principal harm suffered by the [defendant] because of the lack of precision in the indictment results from his inability to discern the specific underlying offense, if any, that the grand jury had in mind when it returned the indictment." *Thomas*, 444 F.2d at 922.

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. "[B]ut that language must be supplemented with enough detail to apprise the accused of the particular offense with which he is charged." *United States v. Saffarinia*, 424 F. Supp. 3d 46, 71 (D.D.C. 2020) (citing *United States v. Conlon*, 628 F.2d 150, 155, 202 U.S. App. D.C. 150 (D.C. Cir. 1980)).

The indictment does not apprise Mr. Worrell with sufficient precision to limit any construction or interpretation, describe in any meaningful way, and is

insufficient to notify him of the charges against him. With regard to Count 2, the Government has failed to offer sufficient factual allegations or clarification regarding whether Mr. Worrell is alleged to have "impeded" or "disrupted", what conduct he engaged in which disrupted or impeded this conduct, what the terms "the orderly conduct of Government business and official functions" mean, and how Mr. Worrell is alleged to have disrupted them through a course of conducted.

Count 3 similarly fails to explain whether Mr. Worrell engaged in physical acts of violence against a person or against property, and the Government's failure to clarify renders the charge defectively vague. Also, the Government's failure to explain how Mr. Worrell used his pepper spray gel in the commission of this charge is necessary to formulate a defense, denying such fair notice confounds the very purpose of the indictment. Mr. Worrell needs to understand whether the Government intends to argue that his pepper spray gel stained the marble steps of Congress or injured someone, as the defense strategies would be significantly different based on the Government's theory behind the charge. Count 4 fails to explain with sufficient specificity the where, who, and when, such that it is likely that Mr. Worrell could be charged twice for the same offense, raising the "Specter of Fifth Amendment Violations." *Hillie*, 227 F. Supp. 3d at 78.

Count 5 again mirrors the language of the statutes, but does not offer definitions or clarifications about which sections of the statute Mr. Worrell is alleged to have violated. It is unclear whether Mr. Worrell obstructed, impeded, or interfered, or some combination of the three with a law enforcement officer because the

Government offered no narrative explanation of the charges. It offers no explanation of the alleged civil disorder. Or how the civil disorder obstructed, delayed, and adversely affected the conduct and performance of a federally protected function.

Count 6, once again, as with the other counts, tracks the language exactly but offers no narrative explanation to clarify which part of the statute Mr. Worrell is alleged to have violated. The Government is required to indicate with preciseness whether he assaulted, resisted, opposed, impeded, intimidated, or interfered, or if they actually intended to argue that he did all of these things. As it currently stands, it remains unclear.

For the forgoing reasons, the indictment is impermissibly vague, lacking any specificity and the Government's opposition relies entirely on outdated caselaw and for that reason, the indictment must be dismissed.

II. The Government's Analysis Regarding Deadly or Dangerous Weapons is Incorrect, Failing to Acknowledge Pepper Spray is Not an Inherently Dangerous Weapon.

In the Government's Opposition to Mr. Worrell's Motion to Dismiss, the Government states that:

> Worrell's misunderstanding of the definition of a "dangerous weapon," which infects his motion. It is true that some cases have emphasized the actual serious injuries suffered by victims of pepper-spray attacks, for those actual injuries are plainly sufficient to show that pepper spray is a dangerous weapon. But such injuries are not necessary. As the Sentencing Guidelines, D.C. Circuit case law, and text of Sections 1752(b)(1)(A) and 111(b) make clear, the government need not show serious bodily injury—or even that the victim was touched by the dangerous weapon—in a particular case. The Guidelines and this Circuit's *Arrington*

> case make this point obvious by stating that a weapon is dangerous if it is merely "capable" of inflicting "serious bodily injury" in the way it was used, even if it did not in fact do so. U.S.S.G. § 1B1.1 n.1(E) (emphasis added);

Arrington, 309 F.3d at 45. ECF No. 51 at 8-9.

The Government goes on the analogize Mr. Worrell's alleged use of pepper spray to the use of a firearm or a car and refers to the analogy as "logically indistinguishable." *Id.* at 10. This analysis is in error, conflating dangerous weapons which are by their nature dangerous or deadly, to objects or weapons which have been alleged to have been used in a manner which makes them dangerous or deadly, but are not inherently deadly weapons.

A dangerous weapon is defined as an object or weapon that must be likely to cause "serious bodily injury" such as "*extreme* physical pain or the *protracted impairment* of a function of a bodily member, organ, or mental facility; or requir[e] medical intervention such as *surgery, hospitalization*, or *physical rehabilitation*." *United States v. Perez*, 519 F. App'x 525, 528 (11th Cir. 2013) (citing U.S.S.G. § 1B1.1, comment. (n.1(L)) (emphasis in original).

It can be either inherently dangerous or is used in a way that is likely to endanger life or inflict great bodily harm. *See United States v. Anchrum*, 590 F.3d 795, 802 (9th Cir. 2009); *United States v. Smith*, 561 F.3d 934, 939 (9th Cir. 2009) (en banc); *United States v. Sturgis*, 48 F.3d 784, 787-88 (4th Cir. 1995); *United States v. Gibson*, 896 F.2d 206, 210 & n.l (6th Cir. 1990); *United States v. Guilbert*, 692 F.2d 1340, 1343 (11th Cir. 1982) (per curiam).

"Inherently dangerous" weapons are those that are "obviously dangerous" such as "guns, knives, and the like." *Smith*, 561 F.3d at 939 (quoting *United States v. Riggins*, 40 F.3d 1055, 1057 (9th Cir. 1994)). In recent cases, the Court has found that a spear was an inherently dangerous weapon. *United States v. Chansley*, No. 21-cr-3 (RCL), 2021 U.S. Dist. LEXIS 43000, at *19 (D.D.C. Mar. 8, 2021). However, not all knives are even considered to be inherently dangerous by the Courts. *See United States v. Broadie*, 371 U.S. App. D.C. 499, 506, 452 F.3d 875, 882 (2006). In the Government's analogy, the firearm would fall under the inherently dangerous category, it is designed to kill, and is exclusively used for those purposes, so brandishing or carrying it, using it in any way would warrant the dangerous or deadly weapon charge. The same cannot be said of pepper spray, it is specifically designed *not* to cause serious bodily injury and *not* to be lethal. Pepper spray is extremely unlikely to cause extreme pain or protracted impairment by its nature, thus it is not "logically indistinguishable" from a firearm.

Furthermore, the Government, through their barebones indictment has not alleged any factual assertions that indicate that Mr. Worrell used the pepper spray gel in a particular manner so as to make it dangerous or deadly in this circumstance, as in the analogy of driving the car towards an individual, or using a shod foot to kick someone's head. Without any specific facts alleged by the Government that Mr. Worrell used the pepper spray gel in a particular manner that made it likely to cause "*extreme* physical pain or the *protracted impairment* of a function of a bodily member, organ, or mental facility; or requir[e] medical intervention such as *surgery,*

hospitalization, or *physical rehabilitation"* the Government has failed to state an offense as it relates to the dangerous weapon portions of the indictment and those charges must be dismissed.

III. CONCLUSION

Viewing the indictment, considering all the facts alleged to be true, and considering the document as a whole, the indictment is defective. The indictment lacks specificity, fails to state an offense with regard to the deadly or dangerous weapon enhancements, the Government's Opposition relies on old case law and an improper deadly or dangerous weapon analysis. As a result of these defects, the indictment is constitutionally deficient and dismissal by this Court is warranted.

Dated: May 26, 2021

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CERTIFICATE OF SERVICE

I hereby certify that, on May 26, 2021, this motion and the accompany declaration was filed via the Court's electronic filing system, which constitutes service upon all counsel of record.

/s/ John M. Pierce
John M. Pierce