UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA	:	
	:	
v.	:	CASE NO. 21-cr-626 (PLF)
	:	
DEREK COOPER GUNBY,	:	
	:	
Defendant.	:	

DEFENDANT GUNBY'S **PROPOSED FINAL JURY INSTRUCTIONS**

COMES NOW Defendant Derek Gunby with these proposed final jury instructions. [Areas of disagreement with the prosecution are highlighted in the text (with some footnotes regarding explanations) below:] And in some cases, we have added strikethroughs.]

Ladies and gentlemen, the time has now come when all of the evidence is in. It is now up to me to instruct you on the law. Before we talk about the specific charges alleged here and some of the specific issues in this case, I want to take a few moments to talk about some general rules of law. Some of these will repeat what I told you in my preliminary instructions.

Function of the Court

My function is to conduct this trial in an orderly, fair, and efficient manner; to rule on questions of law; and to instruct you on the law that applies in this case.

It is your duty to accept the law as I instruct you. You should consider all the instructions as a whole. You may not ignore or refuse to follow any of them.

Function of the Jury

Your function, as the jury, is to determine what the facts are in this case. You are the sole judges of the facts. While it is my responsibility to decide what is admitted as evidence during the trial, you alone decide what weight, if any, to give to that evidence. You alone decide the credibility or believability of the witnesses.

You should determine the facts without prejudice, fear, sympathy, or favoritism. You should not be improperly influenced by anyone's race, ethnic origin, or gender. Decide the case solely from a fair consideration of the evidence.

You may not take anything I may have said or done as indicating how I think you should decide this case. If you believe that I have expressed or indicated any such opinion, you should ignore it. The verdict in this case is your sole and exclusive responsibility.

Jury's Recollection Controls

If any reference by the court or the attorneys to evidence does not coincide with your own recollection of the evidence, it is your recollection that should control during your deliberations.

Considering the Evidence in the Case

During your deliberations, you may consider only the evidence properly admitted in this trial. The evidence in this case was the sworn testimony of the witnesses, the exhibits that were admitted into evidence, and any stipulations agreed upon by the parties. Such stipulations should be considered as undisputed facts.

When you consider the evidence, you are permitted to draw, from the facts that you find have been proven, such reasonable inferences as you feel are justified in the light of your experience.

Direct and Circumstantial Evidence

There are two types of evidence from which you may determine what the facts are in this case - direct evidence and circumstantial evidence. When a witness, such as an eyewitness, asserts actual knowledge of a fact, that witness's testimony is direct evidence. On the other hand, evidence of facts and circumstances from which reasonable inferences may be drawn is circumstantial evidence.

Let me give you an example. Assume a person looked out a window and saw that snow was falling. If he later testified in court about what he had seen, his testimony would be direct evidence that snow was falling at the time he saw it happen. Assume, however, that he looked out a window and saw no snow on the ground, and then went to sleep and saw snow on the ground after he woke up. His testimony about what he had seen would be circumstantial evidence that it had snowed while he was asleep.

The law says that both direct and circumstantial evidence are acceptable as a means of proving a fact. The law does not favor one form of evidence over another. It is for you to decide how much weight to give to any particular evidence, whether it is direct or circumstantial. You are permitted to give equal weight to both. Circumstantial evidence does not require a greater degree of certainty than direct evidence. In reaching a verdict in this case, you should consider all of the evidence presented, both direct and circumstantial.

Statements of Counsel – Not Evidence

The opening statements and closing arguments of the lawyers are not evidence. They are only intended to assist you in understanding the evidence.

Inadmissible and Stricken Evidence

The lawyers in this case sometimes objected when the other side asked a question, made an argument, or offered evidence that the objecting lawyer believed was not proper. You must not hold such objections against the lawyer who made them or the party s/he represents. It is the lawyers' responsibility to object to evidence that they believe is not admissible.

If, during the course of the trial, I sustained an objection to a lawyer's question, you should ignore the question, and you must not speculate as to what the answer would have been.

If, after a witness answered a question, I ruled that the answer should be stricken, you should ignore both the question and the answer and they should play no part in your deliberations.

Information Not Evidence

In my instructions to you at the beginning of trial, I summarized to you the charges made against the defendant from a document called an Information. The Information is not evidence; it is merely the formal way of accusing a person of a crime to bring him to trial. You must not consider the Information as evidence of any kind-you may not consider it as evidence of the defendant's guilt or draw any inference of guilt from it.

Burden of Proof – Presumption of Innocence

Every defendant in a criminal case is presumed to be innocent. This presumption of innocence remains with the defendant throughout the trial unless and until the government has proven she is guilty beyond a reasonable doubt. This burden never shifts throughout the trial. The law does not require the defendant to prove his innocence or to produce any evidence at all. If you find that the government has proven beyond a reasonable doubt every element of a particular offense with which the defendant is charged, you may ~~it is your duty to~~ find him guilty of that offense. On the other hand, if you find the government has failed to prove any element of a particular offense beyond a reasonable doubt against the defendant, you must find him not guilty of that offense.

Reasonable Doubt - Defined

The government has the burden of proving the defendant guilty beyond a reasonable doubt. In civil cases, it is only necessary to prove that a fact is more likely true than not, or, in some cases, that its truth is highly probable. In criminal cases such as this one, the government's proof must be more powerful than that. It must be beyond a reasonable doubt. Reasonable doubt, as the name implies, is a doubt based on reason – a doubt for which you have a reason based upon the evidence or lack of evidence in the case. If, after careful, honest, and impartial consideration of all the evidence, you cannot say that you are firmly convinced of the defendant's guilt, then you have a reasonable doubt.

Reasonable doubt is the kind of doubt that would cause a reasonable person, after careful and thoughtful reflection, to hesitate to act in the graver or more important matters in life.

However, it is not an imaginary doubt, nor a doubt based on speculation or guesswork; it is a doubt based on reason. The government is not required to prove guilt beyond all doubt, or to a mathematical or scientific certainty. Its burden is to prove guilt beyond a reasonable doubt.

Credibility of Witnesses

In determining whether the Government has proved its case, you must consider and weigh the testimony of all the witnesses who have appeared before you.

You are the sole judge of the credibility of the witnesses. In other words, you alone are to determine whether to believe any witness and the extent to which any witness should be believed.

In reaching a conclusion as to the credibility of any witness, you may consider any matter that may have a bearing on the subject. You may consider the demeanor and the behavior of the witness on the witness stand; the witness's manner of testifying; whether the witness impresses you as a truthful person; whether the witness impresses you as having an accurate memory and recollection; whether the witness has any motive for not telling the truth; whether the witness had a full

opportunity to observe the matters about which he or she has testified; whether the witness has any interest in the outcome of this case, or friendship or hostility toward other people concerned with this case.

Inconsistencies or discrepancies in the testimony of a witness, or between the testimony of different witnesses, may or may not cause you to discredit such testimony. Two or more persons witnessing an incident or transaction may see or hear it differently; an innocent mis- recollection, like a failure of recollection, is not an uncommon experience. In weighing the effect of the inconsistency or discrepancy, always consider whether it pertains to a matter of important or unimportant detail, and whether the inconsistency or discrepancy results from innocent error or intentional falsehood.

You may consider the reasonableness or unreasonableness, the probability or improbability, of the testimony of a witness in determining whether to accept it as true and accurate. You may consider whether the witness has been contradicted or supported by other credible evidence.

If you believe that any witness has shown him or herself to be biased or prejudiced, for or against either side in this trial, you may consider and determine whether such bias or prejudice has colored the testimony of the witness so as to affect the desire and capability of that witness to tell the truth. You should give the testimony of each witness such weight as in your judgment it is fairly entitled to receive.

Law-Enforcement Officer's Testimony

A law-enforcement officer’s testimony should be considered by you just as any other evidence in the case. In evaluating the officer's credibility, you should use the same guidelines that you apply to the testimony of any witness. In no event should you give either greater or lesser weight to the testimony of any witness merely because he or she is a law-enforcement officer.

Nature of Charges Not to be Considered

One of the questions you were asked when we were selecting this jury was whether the nature of the charges would affect your ability to render a fair and impartial verdict. There was a reason for that question. You must not allow the nature of the charges themselves to affect your verdict. You must consider only the evidence that has been presented in this case in rendering a fair and impartial verdict.

Right of Defendant Not to Testify

Every defendant in a criminal case has an absolute right not to testify. The Defendant has chosen to exercise this right. You must not hold this decision against him. There are many reasons entirely consistent with innocence for which a person may decide not to testify. It would be improper for you to speculate as to the reason or reasons for his decision, and you must not draw any inference of guilt from it.

Ladies and gentlemen, I would now like to talk with you about the specific offenses charged in this case.

Count 1, Obstructing an Official Proceeding (18 U.S.C. § 1512(c)(2))

Count 1 of the indictment charges the defendant with corruptly obstructing an official proceeding, which is a violation of the law. Count 1 also charges the defendant with attempt to obstruct or impede an official proceeding and aiding and abetting others to commit that offense. The Court will first explain the elements of the substantive offense, along with its associated definitions. Then, the Court will explain how to determine whether the defendant attempted the offense and whether

the defendant aided and abetted the offense.

Elements

In order to find the defendant guilty of corruptly obstructing an official proceeding, you must find that the government proved each of the following **six** elements beyond a reasonable doubt:

First, the defendant attempted to or did obstruct or impede an official proceeding.

Second, the defendant committed acts personally and individually that directly caused the obstruction or impeding of an official proceeding.

Third, the defendant acted with the intent to obstruct or impede an official proceeding which is currently occurring and which the defendant reasonably believed was aware of the defendant's actions.

Fourth, the defendant acted knowingly, with awareness that the natural and probable effect of his conduct would be to obstruct or impede the official proceeding.

Fifth, the defendant acted corruptly.

Sixth, the defendant's conduct was not protected speech, expression, advocacy or petitioning for redress of grievances under the First Amendment.

Definitions The term "official proceeding" includes a proceeding before the Congress. The official proceeding must be pending or about to be instituted at the time of the offense. The government must prove beyond a reasonable doubt that

disrupting the official proceeding was reasonably foreseeable to the defendant.

A person acts "knowingly" if he realizes what he is doing and is aware of the nature of his conduct, and does not act through ignorance, mistake, or accident. In deciding whether the defendant acted knowingly, you may consider all of the evidence, including what the defendant did or said.

To act "corruptly," the defendant must knowingly use unlawful means or act with an unlawful purpose, or both. The defendant must also act with "consciousness of wrongdoing." "Consciousness of wrongdoing" means with an understanding or awareness that what the person is doing is wrong.

To prove that the Defendant acted "corruptly," the Government must prove more than the Defendant acted "unlawfully." The Government must prove that the Defendant used unlawful and deceptive means with the intent to secure an unlawful substantial benefit either for one's self or for another. [1]

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[1] The definition provided under *United States v. Aguilar*, 515 U.S. 593, 616 (1995) (Scalia, J., concurring in part) *(emphases added)* for 18 U.S.C. 1503 must apply:

> Finally, respondent posits that the phrase "'corruptly ... endeavors to influence, obstruct, or impede' may be unconstitutionally vague," in that it fails to provide sufficient notice that lying to potential grand jury witnesses in an effort to thwart a grand jury investigation is proscribed. Brief for Respondent 22, n. 13. Statutory language need not be colloquial, however, and the term "corruptly" in criminal laws has a longstanding and well-accepted meaning. It denotes ***"[a]n act done with an intent to give some advantage inconsistent with official duty and the rights of others*** .... It includes bribery but is more comprehensive; because an act may be corruptly done though the advantage to be derived from it be not offered by another." *United States* v. *Ogle,* 613 F.2d 233, 238 (CAlO) (internal quotation marks omitted), cert. denied, 449 U. S. 825 (1980). *See also* Ballentine's Law Dictionary 276 (3d ed. 1969); Black's Law Dictionary 345 (6th ed. 1990). **As the District Court here instructed the jury:**

Not all attempts to obstruct or impede an official proceeding involve acting corruptly. For example, a witness in a court proceeding may refuse to testify by invoking his constitutional privilege against self-incrimination, thereby obstructing or impeding the proceeding, but he does not act corruptly. In contrast, an individual who obstructs or impedes a court proceeding by bribing a witness to

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> "An act is done corruptly if it's done voluntarily and intentionally to bring about either an unlawful result or a lawful result by some unlawful method, with a hope or expectation of either financial gain or other benefit to oneself or a benefit of another person." App. 117.

"[7] Black's Law Dictionary defines 'corruptly' as used in criminal-law statutes as 'indicates a wrongful desire for pecuniary gain or other advantage.' Black's Law Dictionary 371 (8th ed. 2004)." *United States of America vs. Samuel Saldana*, U.S. Court of Appeals for the Fifth Circuit, Case No. 04-50527, Opinion, August 18, 2005 , footnote 7.

Marinello v. United States, 138 Ct. 1101, 1114 (2018) is highly instructive:

> The difference between these *mens rea* requirements is significant. While "willfully" requires proof only "that the law imposed a duty on the defendant, that the defendant knew of this duty, and that he voluntarily and intentionally violated that duty," *Cheek v. United States,* 498 U.S. 192, 201, 111 S.Ct. 604, 112 L.Ed.2d 617 (1991), "corruptly" requires proof that the defendant "act[ed] with an intent to procure an unlawful benefit either for [himself] or for some other person," *United States v. Floyd,* 740 F.3d 22, 31 (C.A.1 2014) (collecting cases); see also Black's Law Dictionary 414 (rev. 4th ed. 1951) ("corruptly" "generally imports a wrongful design to acquire some pecuniary or other advantage"). In other words, "corruptly" requires proof that the defendant not only knew he was obtaining an "unlawful benefit" but that his "objective" or "purpose" was to obtain that unlawful benefit. See 21 Am.Jur.2d, Criminal Law § 114 (2016) (explaining that specific intent requires both knowledge and purpose).

refuse to testify in that proceeding, or by engaging in other independently unlawful conduct, does act corruptly. A person does not act corruptly where he reasonably believes his expressive conduct is protected by the First Amendment.

Count II: Entering and Remaining in a Restricted Building or Grounds

Count 1 of the information charges Mr. Gunby with entering or remaining in a restricted building or grounds. The Government must prove beyond a reasonable doubt that:

1. Mr. Gunby entered or remained in a restricted building without lawful authorization to do so; and
2. He acted willfully and knowingly.

[Note: Gunby asserts that 'willfully,' or something like willfully, is the standard required. 18 U.S.C. § 1752 is a 'trespassing' corollary—equivalent to trespass statutes in every state and the common law over many centuries. This vast landscape of law requires willfullness on the part of a defendant. The law would be preposterous otherwise, as the government could convict people for simply knowing they are standing or sitting somewhere, without the person having any knowledge he is doing something wrong or without even being informed of the restricted nature of a place.]

The term "restricted building" means any posted, cordoned off, or otherwise fenced or barricaded ~~restricted~~ area of a building where a person protected by the Secret Service is or will be temporarily visiting.

[Explanation: "restricted" should not be defined as "restricted." This concept cannot be open-ended. It requires tangible, real-world barricades, signage, warnings, walls of separation, or fences.]

The term "person protected by the Secret Service" includes the Vice President and the immediate family of the Vice President.

A person acts "knowingly" if she realizes what she is doing and is aware of the nature of his conduct, and does not act through ignorance, mistake, or accident. In deciding whether Ms. Gunby knowingly entered or remained in a restricted building, you may consider all of the evidence, including what Mr. Gunby did, said or perceived. A person who enters or remains in a restricted area with a good faith belief that she is entering or remaining with lawful authority is not guilty of this crime.

[reinsert definition of "willfully" here. A person acts "willfully" if she acts with the intent to do something that the law forbids -that is, to disobey or disregard the law. . . .]

Count III: Disorderly Conduct in a Restricted Building or Grounds

Count 2 charges Mr. Gunby with disorderly or disruptive conduct in a restricted building or grounds. The Government must prove beyond a reasonable doubt that:

1. Mr. Gunby engaged in disorderly or disruptive conduct;
2. He did so knowingly and with the intent to impede or disrupt the orderly conduct of Government business or official functions;
3. His conduct was in a restricted building or grounds; and
4. His conduct in fact impeded or disrupted the orderly conduct of Government business or official functions.

"Disorderly conduct" occurs when a person acts in such a manner as to cause another person to be in reasonable fear that a person or property in a person's immediate possession is likely to be harmed or taken, uses language likely to produce violence on the part of others, or language that is unreasonably loud, abusive, and disruptive under the circumstances. It is behavior that tends to disturb the public peace, offend public morals, or undermine public safety.

"Disruptive conduct" is a disturbance that interrupts an event, activity, or the normal course of a process.

The term "restricted building" has the same meaning provided in Count I. The term "knowingly" has the same meaning provided above.

~~Aiding and Abetting~~

~~A person may be guilty of an offense because she personally committed the offense herself or because she aided and abetted another person in committing the offense. A person who has aided and abetted another person in committing an offense is often called an accomplice. The person whom the accomplice aids and abets is known as the principal. In this case, the government alleges that the Defendant aided and abetted others in committing the offense of Disorderly Conduct in a Restricted Building.~~

~~To find the Defendant guilty as an aider and abettor, you must find that the government proved beyond a reasonable doubt each of the following four requirements: First, that others committed the offense charged. Second, that the Defendant knew that the offense charged was going to be committed or was being committed by others. Third, that the Defendant knowingly did some act for the purpose of aiding, assisting, facilitating, or encouraging others in committing the specific offense charged and with the intent that others commit that specific offense. Fourth, that the Defendant performed an act in furtherance of the offense charged. In deciding whether the Defendant had the required knowledge and intent to satisfy the third requirement for aiding and abetting, you may consider both direct and circumstantial evidence including her words and actions and other facts and circumstances. However, evidence that the Defendant merely associated with persons involved in a criminal venture or was merely present or was merely a knowing spectator during the commission of the offense is not enough for you to find her guilty~~

~~as an aider and abettor. If the evidence shows that the Defendant knew the offense was being committed or was about to be committed but does not also prove beyond a reasonable doubt that she had the intent and purpose to aid, assist, encourage, facilitate or otherwise associate herself with the offense, you may not find her guilty of the offense as an aider and abettor. The government must prove beyond a reasonable doubt that the Defendant in some way participated in the offense committed by others as something she wished to bring about and to make succeed.~~

~~Attempt~~

~~In Count 2, the defendant is also charged with attempt to commit the crime of Disorderly Conduct in a Restricted Building. This offense is a crime even if the defendant did not actually complete the crime of Disorderly Conduct in a Restricted Building.~~

~~In order to find the defendant guilty of Disorderly Conduct in a Restricted Building, you must find that the government proved beyond a reasonable doubt each of the following two elements: First, that she intended to commit the crime of Disorderly Conduct in a Restricted Building, as I have defined the offense above. Second, that she took a substantial step toward committing the crime of Disorderly Conduct in a Restricted Building.~~

~~With respect to the first element of attempt, you may not find the defendant guilty merely because she thought about it. You must find that the evidence proved beyond a reasonable doubt that the defendant's mental state passed the stage of thinking about the crime to actually intending to commit it. With respect to the substantial-step element, you may not find the defendant guilty merely because she made some plans to or some preparation for committing that crime. Instead, you must find that the defendant took some firm, clear, undeniable action to accomplish her intent to commit the crime. However, the substantial-step element does not require the government to prove that the defendant did everything except the last act necessary to complete the crime.~~

[Note the government seeks to insert 'aiding and abetting' and 'attempt' into the instructions. These are not generally recognized as inchoate aspects of misdemeanors such as trespassing. Such misdemeanors require very little threshold of preplanning or high-level states of mind; consequently, adding "attempt" or "aiding and abetting" to a trespass accusation can effectively convert the allegation into something like a strict liability offense. It would be preposterous if someone could be convicted of 'aiding and abetting' another person's trespass by, for example, driving them to the scene of a trespass, or being a "getaway driver" for a trespass. And an allegation of "attempted trespass" becomes almost comedic in its possible scope: leaning on a fence? Moving toward a boundary without crossing it?

Proposed Instruction No. __

COUNT FOUR

PARADING, DEMONSTRATING, OR PICKETING IN A CAPITOL BUILDING

40 U.S.C. § 5104(e)(2)(G)

Count Two of the Information charges the defendant with parading, demonstrating, or picketing in a Capitol Building, which is a violation of federal law.

In order to find the defendant guilty of this offense, you must find that the government proved each of the following elements beyond a reasonable doubt:

1. First, that the defendant paraded, demonstrated, or picketed in any of the United

States Capitol Buildings.

2. Second, that the defendant acted willfully and knowingly.

3. Third that the defendant's parading, demonstrating, or picketing delayed, impeded, or otherwise disrupted the orderly processes of the legislature.

The terms "parade" "demonstrating" and "picket" have their ordinary meanings.

The law does not prohibit all organized expression, speechmaking, or advocacy; only conduct that would disrupt the orderly business of Congress by, for example, impeding or obstructing passageways, hearings, or meetings.[2]

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[2] In *Bynum v. United States Capitol Police Board*, 93 F. Supp. 2d 50, 58 (D.D.C. 2000), this district court specifically upheld an organized "prayer tour" inside the Capitol, during which "Reverend Bynum led a small group of people to various historic sites in the Capitol," viewing, praying, and speaking "in a quiet, conversational tone, during which the members of the group bowed their heads and folded their hands."

While Bynum did pronounce that the interior of the Capitol is not a "public forum" in the way that a public sidewalk is, *Bynum* did not set much of a floor or ceiling on freedom of speech or advocacy.

> As the seat of the legislative branch of the federal government, the inside of the Capitol might well be considered to be the heart of the nation's expressive activity and exchange of ideas. After all, every United States citizen has the right to petition his or her government, and the Houses of Congress are among the great democratic, deliberative bodies in the world. But it also has been recognized that the expression of ideas inside the Capitol may be regulated in order to permit Congress peaceably to carry out its lawmaking responsibilities and to permit citizens to bring their concerns to their legislators. There are rules that members of Congress must follow, as well as rules for their constituents. To that end, Congress enacted the statute at issue here so that citizens would be "assured of the rights of freedom of expression and of assembly and the right to petition their Government," without extending to a minority "a license . . . to delay, impede, or otherwise disrupt the orderly processes of the legislature which represents all Americans."

Bynum at 55-56.

Later, on page 57 of the Opinion, Judge Friedman explicitly held that "speechmaking" and other "expressive conduct" is allowed in the halls of the Capitol.

> While the regulation is justified by the need expressed in the statute to prevent disruptive conduct in the Capitol, it sweeps too broadly by inviting the Capitol Police to restrict behavior that is in no way disruptive, such as **"speechmaking . . . or other expressive conduct. . . ."**

At the bottom of the opinion, Judge Friedman ruled that it is "FURTHER ORDERED that defendants, their agents and employees are ENJOINED AND RESTRAINED from enforcing **any restrictions on First Amendment** conduct within the United States Capitol on the basis that such conduct is "expressive conduct that convey[s] a message supporting or opposing a point of view or has the . . . propensity to attract a crowd of onlookers."

~~Aiding and Abetting~~

~~In this case, the government is alleging that Derrick Gunby aiding and abetted others who committed the offense of Disorderly Conduct in a Capitol Building.~~

~~To find Derrick Gunby guilty as an aider and abettor, you must find that the government proved beyond a reasonable doubt each of the following four requirements: First, that others committed the offense charged. Second, that Gunby knew that the offense charged was going to be committed or was being committed by others. Third, that Gunby knowingly did some act for the purpose of aiding, assisting, facilitating, or encouraging others in committing the specific offense charged and with the intent that others commit that specific offense. Fourth, that Mr. Gunby performed an act in furtherance of the offense charged. In deciding whether Mr. Gunby had the required knowledge and intent to satisfy the third requirement for aiding and abetting, you may consider both direct and circumstantial evidence including her words and actions and other facts and circumstances. However, evidence that Mr. Gunby merely associated with persons involved in a criminal venture or was merely present or was merely a knowing spectator during the commission of the offense is not enough for you to find her guilty as an aider and abettor. If the evidence shows that Mr. Gunby knew the offense was being committed or was about to be committed but does not also prove beyond a reasonable doubt that she had the intent and purpose to aid, assist, encourage, facilitate or otherwise associate herself with the offense, you may not find her guilty of the offense as an aider and abettor. The government must prove beyond a reasonable doubt that Mr. Gunby in some way participated in the offense committed by others as something she wished to bring about and to make succeed.~~

[Again, the defense opposes the prosecution's attempt to create criminal liability for innocent acts. If someone could be convicted of aiding and abetting disorderly conduct, they might be convicted of a crime simply for standing around while another is disorderly.]

Proposed Instruction No. __

First Amendment Rights

Every person has the right to petition his or her government, and express ideas and bring their concerns to their legislators. Citizens also have the right to peaceably assemble with others to petition their government. And under the First Amendment, a person has a constitutional right to make violent or anti-government statements and threats and may call upon others to act violently, except in rare circumstances where the speaker knows such violent threats have an immediate likelihood of getting others to immediately carry out such violence and reasonably knows that others have the ability and are likely to carry out such threats.

These First Amendment rights apply to every count in the indictment. If you find that the defendant's conduct was First Amendment protected speech, expression, or advocacy, you must find the defendant not guilty.

The United States Capitol is one of America's largest public buildings. It is the headquarters of the Legislative Branch of government, where the American people have broad rights to petition, advocate, protest, and meet with members of Congress and staff in order to promote or prevent the advancement of legislation or other congressional acts.

6.10 MERE PRESENCE[3]

Mere presence at the scene of a crime or mere knowledge that a crime is being committed is not sufficient to establish that the defendant committed any of the crimes charged in the indictment. The defendant must be a participant and not merely a knowing spectator. The defendant's presence may be considered by the jury along with other evidence in the case.

Proposed Instruction No. __

Guilt Must be individualized

[3] From U.S. 9th Circuit Pattern Jury Instructions.

The determination of guilt must be an individualized matter. Defendant Kastner cannot be convicted of crimes by a mob or group, unless you find beyond a reasonable doubt that Kastner himself committed such crimes.

The right to associate does not lose all constitutional protection merely because some members of the group may have participated in conduct or advocated doctrine that itself is not protected.

N.A.A.C.P. v. Claiborne Hardware Co., 458 U.S. 886, 908 (1992); Scales v. United States, 367 U.S. 203, 229 (1961); *Carr v. District of Columbia*, 561 F. Supp. 2d 7, 13 (D.D.C. 2008). See also *Barham v. Ramsey*, 434 F.3d 565, 573 (D.C. Cir. 2006). "Where the standard is probable cause, a search or seizure of a person must be supported by probable cause particularized with respect to that person. This requirement cannot be undercut or avoided by simply pointing to the fact that coincidentally there exists probable cause to search or seize another ...."

Dated: October 28, 2023

Respectfully Submitted,

/s/ John M. Pierce
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CERTIFICATE OF SERVICE

I, John M. Pierce, hereby certify that on this day, October 28, 2023, I caused a copy of the foregoing document to be served on all counsel through the Court's CM/ECF case filing system.

/s/ John M. Pierce
John M. Pierce