

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,

v.

DEREK COOPER GUNBY,

Defendant.

Criminal No. 21-cr-626

**DEFENDANT GUNBY'S MOTION
TO DISMISS THE INFORMATION
FOR FAILURE TO STATE A CLAIM**

DEFENDANT GUNBY'S MOTION TO DISMISS THE INFORMATION FOR
FAILURE TO STATE A CLAIM

Or, in the alternative,

TO HOLD A PRELIMINARY HEARING TO DETERMINE IF PROBABLE
CAUSE EXISTS TO GO FORWARD IN THIS CASE

COMES NOW Defendant Derek Cooper Gunby ("Gunby"), by and through undersigned counsel John Pierce, with this Motion to dismiss the information in this case for failure to state a claim. In the alternative, Gunby asks for a preliminary hearing to determine if probable cause exists for any of the counts alleged by the government.

INTRODUCTION

Gunby is purportedly facing four (4) misdemeanor counts as enumerated in the complaint and accompanying Statement of Facts (ECF #1):

**18 U.S.C. § 1752(a)(1) - Knowingly Entering or Remaining in any
Restricted Building or Grounds Without Lawful Authority,**

18 U.S.C. § 1752(a)(2) - Disorderly and Disruptive Conduct in a Restricted Building or Grounds,

40 U.S.C. § 5104(e)(2)(D) - Violent Entry and Disorderly Conduct on Capitol Grounds,

40 U.S.C. § 5104(e)(2)(G)- Parading, Demonstrating, or Picketing in a Capitol Building.

But the Statement of Facts on file simply do not lay out facts which enunciate sufficient probable cause to charge Gunby with the crimes listed. The Statement of Facts describes “the Columbia, South Carolina Field Office of the FBI” receiving “information that DEREK GUNBY had posted photos and a video to Facebook indicating that he had been involved in the riot at the Capitol building.”

Then the Statement of Facts describes details of Gunby’s alleged posts on Facebook about Gunby’s travels to D.C. on Jan. 6. Nothing regarding Gunby’s political comments on Facebook, outlined in the Statement of Facts, constitutes any of the crimes listed.

Then the Statement of Facts describes “video provided by the U.S. Capitol Police, which includes security camera footage inside and outside of the U.S. Capitol building” showing “DEREK GUNBY *walking up and down a hallway* inside the Capitol building.” Photos allegedly of Gunby doing just that are included.

Then the Statement of Facts describes the affiant, an FBI officer going to visit Gunby in Anderson, South Carolina. “[Gunby] stated that he went to Washington, D.C. on January 6, 2021 to listen to President Trump speak. He stated that after the President spoke, DEREK GUNBY followed the crowd that was moving toward the Capitol to protest the “stealing of the election.” “Your affiant asked DEREK GUNBY if he went inside the Capitol, to which DEREK GUNBY replied that he did. DEREK GUNBY stated to your affiant that *there was no one stopping him from going in, so he went in and walked around.*”

Significantly, nothing in the Statement of Facts purports to refute Gunby’s alleged statement that Gunby entered the Capitol unrestricted on January 6. The only statements even suggesting the Capitol was restricted are boilerplate statements copied and pasted at the beginning:

The U.S. Capitol is secured 24 hours a day by U.S. Capitol Police. Restrictions around the U.S. Capitol include permanent and temporary security barriers and posts manned by U.S. Capitol Police. Only authorized people with appropriate identification are allowed access inside the U.S. Capitol. On January 6, 2021, the exterior plaza of the U.S. Capitol was also closed to members of the public. On January 6, 2021, a joint session of the United States Congress convened at the U.S. Capitol, . . .

Well-settled black-letter law relating to trespass requires that an individual must have actual, individualized, personal notice that a property

is restricted before an individual can be accused of trespassing. Neither the complaint nor the Statement of Facts provided by the government provide any facts suggesting that such individualized notice occurred with regard to Mr. Gunby.

The Statement of Facts then accuses Gunby of crimes by mere account of Gunby's mere presence:

Based on the aforementioned evidence, there is probable cause to believe that DEREK GUNBY *was present* inside the U.S. Capitol building during the riot and related offenses that occurred at the U.S. Capitol building, located at 1 First Street, NW, Washington, D.C. 20510 on January 6, 2021 and *participated in* the obstruction of the Congressional proceedings.

Nor does the complaint or the Statement of Facts provide any specific supporting facts regarding Gunby's alleged "participation in the obstruction" of proceedings. How did Gunby participate? What did he personally do other than "walk up and down a hallway" in the words of the complaining FBI officer.

Criminal charges require more than mere presence.

Accordingly, defendant Gunby requests an order dismissing the charges against him with prejudice. In the alternative, Gunby request a preliminary hearing wherein the government must show it has probable cause to charge Gunby with the listed crimes.

Dated: October 7, 2022

Respectfully Submitted,

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CERTIFICATE OF ELECTRONIC SERVICE

I hereby certify and attest that on October 7, 2022, I caused this document to be uploaded and filed in this case, using the electronic filing system established by the Court. By doing so, I automatically served the document to counsel for the United States.

/s/ John M. Pierce

John M. Pierce