IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA	No. 21-cr-508-01-BAH
v.	
LUKE WESSLEY BENDER,	
Defendant.	

DEFENDANT'S MOTION TO DISMISS COUNT ONE OF THE INDICTMENT

Defendant, Luke Wessley Bender, through his undersigned counsel and pursuant to Federal Rule of Criminal Procedure 12, hereby moves for an Order dismissing Count One of the Indictment in this matter.

INTRODUCTION

On January 6, 2021, *subsequent* to both the evacuation of members of Congress and Vice President Mike Pence and the suspension of the certification of the vote count of the Electoral College, Luke Bender walked into the United States Capitol. Mr. Bender remained inside for less than a half hour, during which time he entered the Senate chamber, took photographs, and stood on the dais in the Senate floor. Mr. Bender was not armed, nor was he part of any organized group planning to do harm that day. Mr. Bender did not steal or destroy any property or documents, nor did he assault or threaten anyone — law enforcement or civilian. He walked in and later walked out. Even prior to entering the United States Capitol, the suspension of the official proceeding was known to Mr. Bender and other individuals outside the building.

Nevertheless, Count One of the Indictment charges Mr. Bender with Obstruction of an Official Proceeding, in violation of 18 U.S.C. § 1512(c)(2). Count One is sparse, alleging as

follows:

> On or about January 6, 2021, within the District of Columbia and elsewhere, LUKE WESSLEY BENDER, attempted to, and did, corruptly obstruct, influence, and impede an official proceeding, that is, a proceeding before Congress, specifically Congress's certification of the Electoral College vote as set out in the Twelfth Amendment of the Constitution of the United States and 3 U.S.C. §§ 15-18.

Indictment, ¶¶ 1-2 (D.E. 7).

Mr. Bender seeks the dismissal of Count One of the Indictment as he respectfully asserts that his alleged conduct does not fall within the confines proscribed by § 1512(c)(2). While this Court, joined by a number of other judges, has rejected similar challenges to the statute at issue, other decisions support the requested dismissal of Count One in the Indictment. *See United States v. Miller*, ___ F. Supp. 3d ___, No. 21-cr-00119 (CJN), 2022 WL 823070, at *15 (D.D.C. Mar. 7, 2022), *reconsideration denied*, 2022 WL 1718984 (D.D.C. May 27, 2022); *United States v. Singleton*, No. H-06-cr-080, 2006 WL 1984467, at *3 (S.D. Tex. Jul. 14, 2006); *United States v. Hutcherson*, No. 6:05-cr-00039, 2006 WL 270019, at *2 (W.D. Va. Feb. 3, 2006)

Notwithstanding this Court's prior decision in *United States v. Decarlo*, No. 21-cr-73-BAH, Jan. 21, 2022 Order (D.E. 66), Mr. Bender preserves his right to seek dismissal on the grounds set forth in this Court's recent decision in *United States v. Miller*, which is currently on appeal, to the extent the United States Court of Appeals for the D.C. Circuit (or higher court) affirms that decision.

For these reasons, which are set forth in further detail below, Mr. Bender requests dismissal of Count One of the Indictment.

FACTUAL BACKGROUND

In this case, the Government alleges that on January 6, 2021, Mr. Bender, then 20 years old: (i) "*walk[ed]* in the Rotunda of the U.S. Capitol"; (ii) "*walked* down the hallway in the East

Front Corridor, towards the Senate Chamber"; (iii) "*walked* inside of the Senate chamber;" (iv) took photographs inside the Senate Chamber; and (v) "*stood* on the dais in the Senate floor." Complaint, Statement of Facts, at 6-9 (D.E. 1-1) (emphasis added). The Government's discovery purports to show that Mr. Bender entered the Capitol at 2:45 p.m. and exited approximately 25 minutes later, at 3:10 p.m. According to the Government's allegations, by the time Mr. Bender entered the building, the certification of the election had already been postponed until 8:00 p.m. and members of Congress had already been evacuated. *Id.* at 1.

The Government does not allege that Mr. Bender, while inside or outside the United States Capitol on January 6, 2021, assaulted or threatened anyone, or stole or defaced any property. And while many others attacked their way into the United States Capitol, injuring officers and destroying property, the Government's discovery shows Mr. Bender calmly walking into the United States Capitol and subsequently walking out, with officers standing next to him

Government Alleges Mr. Bender Entered at 2:45 p.m.

Government Alleges Mr. Bender Exited at 3:10 p.m.

Additionally, the Government does not allege, nor would it be able to establish at trial, that Mr. Bender had any weapons with him on January 6, 2021, or that he was part of any militia or organized group that planned or trained to do harm at the United States Capitol on January 6, 2021. Instead, on January 6, 2021, Mr. Bender was present with his co-Defendant, Landon Mitchell, whom he knew from prior employment.

Mr. Bender was charged on July 26, 2021 and arrested on July 29, 2021. Mr. Mitchell was charged on October 19, 2021 and arrested on October 20, 2021. According to the Government, upon his arrest, Mr. Bender truthfully answered all questions posed to him by the Federal Bureau of Investigation ("FBI"), identified Mr. Mitchell, provided Mr. Mitchell's contact information, and described the extent of his knowledge of Mr. Mitchell. *See United States v. Mitchell*, 21-cr-717-BAH, Complaint, Statement of Facts, at 4-5 (D.E. 1-1).

On August 4, 2021, a grand jury indicted Mr. Bender on six counts relating to his presence

at the United States Capitol on January 6, 2021.[1] Indictment (D.E. 7). Count One of the Indictment charges Mr. Bender with felony obstruction of an official proceeding in violation of 18 U.S.C. § 1512(c)(2), based solely on the allegation that he passed a prosecutorial bright line of demarcation, *i.e.*, the floor of the United States Senate. While other defendants may have been screaming "Stop the Steal" and carrying on around the United States Capitol in a threatening and menacing manner, in the absence of any violent conduct, they would not be charged with felony obstruction unless they passed this certain prosecutorial line of demarcation.

ARGUMENT

An indictment must contain "a plain, concise, and definite written statement of the essential facts constituting the offense charged." Fed. R. Crim. P. 7(c). Under Federal Rule of Criminal Procedure 12(b)(3)(B)(v), a defendant may move to dismiss an indictment on the ground that it fails to state an offense, "including because the statutory provision at issue does not apply to the charged conduct." *United States v. McHugh*, No. 21-cr-453 (JDB), 2022 WL 1302880, at *2 (D.D.C. May 2, 2022); *see also* Fed. R. Crim. P. 12(b)(3)(B)(v). "The operative question is whether the[ ] allegations, if proven, are sufficient to permit a jury to find that the crimes charged were committed." *United States v. Guertin*, No. 21-cr-262 (TNM), 2022 WL 203467, at *1 (D.D.C. Jan. 24, 2022) (quoting *United States v. Payne*, 382 F. Supp. 3d 71, 74 (D.D.C. 2019)). "The Court is bound by the language in the [i]ndictment. Adherence to the language of the indictment is essential because the Fifth Amendment requires that criminal prosecutions be limited to the unique

[1] Mr. Mitchell was charged separately with the same six offenses. On May 13, 2022, the Government moved to join the criminal actions against Mr. Bender and Mr. Mitchell (*see* D.E. 33). On May 24, 2022, this Court granted the Government's motion over Mr. Bender's opposition, directing that this case, No. 21-cr-508, be consolidated for all purposes with *United States v. Mitchell*, No. 21-cr-717 (May 24, 2022 Min. Order).

allegations of the indictments returned by the grand jury." *United States v. Saffarinia*, 424 F. Supp. 3d 46, 70-71 (D.D.C. 2020) (citations and punctuation omitted).

In this case, the Indictment fails to allege a violation of 18 U.S.C. § 1512(c)(2).

I. Section 1512(c)(2) Requires the Defendant to Have Taken Some Action with Respect to a Document, Record, or Other Object.

In *United States v. Miller*, Judge Carl J. Nichols interpreted § 1512(c)(2) as requiring that a "defendant have taken some action with respect to a document, record, or other object in order to corruptly obstruct, impede or influence an official proceeding." *Miller*, 2022 WL 823070, at *15. The Court noted that "[r]eading § 1512(c)(2) alone is linguistically awkward . . . because of the adverbial use of the word 'otherwise,' such that § 1512(c)(2), on its own, makes criminal 'whoever corruptly . . . otherwise obstructs, influences, or impedes any official proceeding, or attempts to do so." *Id.* at *6. Looking "just to the text" of § 1512(c)(2), the Court concluded that "there are three possible, and two quite plausible, interpretations." *Id.* at *11. The Court further observed that the "structure and scope of § 1512 also suggest that subsection (c)(2) has a narrow focus." *Id.* Finally, the Court looked to the historical development of § 1512 and the legislative history of § 1512(c), finding that both supported a narrow reading of subsection (c)(2). *Id.* at *13-14. More specifically, the Court opined that the legislative history "suggests that, in the wake of the Enron scandal, Congress was faced with a very specific loophole: that then-existing criminal statutes made it illegal to cause or induce *another* person to destroy documents, but did not make it illegal to do so oneself." *Id.* at *14.[2] In light of the serious ambiguity in the statute, the Court

[2] There are a variety of federal statutes governing obstruction in a number of settings. In light of all these statutes, it is surprising to imagine that Congress would create a catchall obstruction statute to eclipse all other existing statutes and would decide to relegate such a remedy to a subsection of a specific statute titled, "Tampering with a witness, victim, or an informant," that could ultimately be used to elevate existing misdemeanor statutes governing protest inside the Capitol to felony conduct.

applied the rule of lenity, pursuant to which "courts have 'traditionally exercised restraint in assessing the reach of a criminal statute,' . . . and have 'construe[d] penal laws strictly and resolve[d] ambiguities in favor of the defendant." *Id.* at *15 (citations omitted).

Courts in other jurisdictions have analyzed the statute in the same manner as Judge Nichols did in *Miller*. *See United States v. Singleton*, No. H-06-cr-080, 2006 WL 1984467, at *3 (S.D. Tex. July 14, 2006) ("Section 1512(c)(2) is the 'catch all' that follows the prohibition in § 1512(c)(1) that a person may not 'corruptly' alter, destroy, or conceal records, documents or tangible objects with the intent to impair the object's integrity or its availability for use in an official proceeding. The language of subsection (c)(1) implies that the record, document, or other object is in existence when the defendant acts to alter, destroy, or conceal it. The residual language in subsection (c)(2) must, therefore, capture conduct similar to but different from that specifically described in (c)(1). . . . The Court holds also, however, that to violate § 1512(c)(2), the charged conduct must have some reasonable nexus to a record, document or tangible object" (citations and punctuation omitted)); *United States v. Hutcherson*, No. 6:05-cr-00039, 2006 WL 270019, at *2 (W.D. Va. Feb. 3, 2006) ("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 availability of records, documents, and other tangible objects. In essence, the amended § 1512(c) created a specific subsection dealing with tampering of tangible evidence, in what was otherwise a statute that previously dealt only with tampering of persons. Section 1512(c)(1) lists specific conduct that is prohibited under this subsection; while § 1512(c)(2) is intended to account for unenumerated conduct that violates the subsection. If an individual corruptly obstructs an official proceeding through his conduct in relation to a tangible object, such person violates this subsection." (citation omitted)).

Mr. Bender respectfully asserts that Judge Nichols in *Miller* reached the correct conclusion — to violate § 1512(c)(2), which operates as a catchall to § 1512(c)(1), a defendant must take some action with respect to a document, record, or other object. *See Miller*, 2022 WL 1718984, at *1, n.1 (considering the opinions from other Judges in the District on the issue of the interpretation of § 1512(c)(2) and confirming decision on scope of § 1512(c)(2)). Here, the Indictment does not allege that Mr. Bender took any such action with the intent to "corruptly" obstruct an official proceeding, nor could the Government prove such an allegation. Absent such allegations, the Indictment fails to allege a violation of § 1512(c)(2) and Count One must be dismissed.

II. Section 1512(c)(2), Even When Interpreted More Broadly, Does Not Proscribe the Conduct Alleged.

Other judges in this District have rejected the narrow interpretation of § 1512(c)(2) set forth in *Miller*, *Singleton*, and *Hutcherson* and have concluded that the statute is a "broad prohibition on all forms of obstruction." *McHugh*, 2022 WL 1302880, at *1; *see also id.* at *3 (citing cases in which judges in this District have adopted a broad interpretation of § 1512(c)(2) in January 6th cases and in which judges have signaled disagreement with *Miller*). As stated by the Court in *McHugh*, "paragraph (c)(2) prohibits acts which obstruct, influence, or impede an official proceeding 'in a different way' from the interference with documents or evidence covered by paragraph (c)(1), regardless of how that obstruction is accomplished." *Id.* at *12. In the event that the Court declines to adopt the interpretation set forth in *Miller*, *Singleton*, and *Hutcherson* and interprets the statute more broadly, Mr. Bender's conduct still does not amount to a violation of § 1512(c)(2).

The Indictment fails to set forth sufficient allegations that Mr. Bender committed any acts that obstructed the certification proceeding in any way, or that he did so "corruptly." *See United States v. Decarlo*, No. 21-cr-73-BAH (D.E. 66 at 45) ("At this stage, the Court need not craft a

redefined definition of 'corruptly' because, as Judge Friedrich explained, the ordinary meaning of wrongful, along with the judicial opinions construing it, identify a core set of conduct against which Section 1512(c)(2) may be constitutionally applied. Specifically, this term covers independently criminal conduct, that is inherently malign, and committed with the intent to obstruct an official proceeding" (citing *United States v. Sandlin*, No. 21-cr-88-DLF, 2021 WL 5865006, at *3 (D.D.C. Dec. 10, 2021)).

Instead, as alleged in the Statement of Facts, Mr. Bender entered the United States Capitol *after* the evacuation of members of Congress, including the President of the Senate, Vice President Mike Pence, and the suspension of the joint session to certify the vote count of the Electoral College of the 2020 Presidential Election. Moreover, none of the actions taken by Mr. Bender while inside the United States Capitol served to impede the joint session from reconvening. Instead, Mr. Bender walked into the United States Capitol, where he is alleged to have taken photographs and walked on the Senate floor, and then walked out less than a half hour later, with law enforcement officers standing next to the exit. Rather than proceed to the location where the certification was to occur — the best evidence of an intent to obstruct such a proceeding — Mr. Bender *walked* to a totally different chamber.

In stark contrast to the allegations regarding Mr. Bender's actions on January 6, 2021 are the facts considered by this Court in *United States v. Decarlo*, No. 21-cr-73-BAH. As the Court set forth in a hearing on the Defendants' motion to dismiss, the Indictment in that matter alleged as follows:

> . . . Defendants: Purposely conspired to obstruct, influence, and impede Congress's certification of the Electoral College vote, and to attempt to do so through a variety of means, including by:
>
> One, agreeing to participate in and planning an operation to stop, delay, and hinder Congress's certification of the Electoral College vote. . . .

> Two, forcibly storming past exterior barricades, Capitol Police, and other law enforcement officers to enter the U.S. Capitol on January 6, without authorization. . . .
>
> Three, traveling through the Capitol Building and occupying the premises after the Capitol had been breached by the first wave of unauthorized persons entering the building. . . .
>
> Four, defacing the memorial door of the Capitol by inscribing the words "MURDER THE MEDIA" on the door. . . .
>
> Five, stealing a pair of flex handcuffs belonging to the U.S. Capitol Police. . . .
>
> And six, knowingly and with intent to impede and disrupt the orderly conduct of government business and official functions; engaging in disorderly and disruptive conduct in restricted areas of the U.S. Capitol Building and its grounds, conduct that also would constitute a violation of 18 U.S.C. Section 1752(a)(2).

United States v. Decarlo, No. 1:21-cr-73-BAH (D.E. 66 at 46-47). Here, the Indictment does not allege that Mr. Bender forcibly entered the United States Capitol, assaulted or threatened anyone, agreed to participate in a plan or operation to hinder the joint session or to deface or steal any property. If Mr. Bender had stopped one inch before the Senate floor, he would have been offered a plea offer to a petit misdemeanor parading and demonstrating charge and this matter would likely no longer be remaining on the Court's very busy and heavy docket.

For all these reasons, Count One of the Indictment fails to state a violation of § 1512(c)(2).

CONCLUSION

For all these reasons, Defendant Luke Wessley Bender respectfully requests that this Court enter an Order dismissing Count One of the Indictment in this matter.

Dated: September 2, 2022

Respectfully submitted,

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