

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA

v.

BRUNO JOSEPH CUA

Criminal Action No. 21-00107 (RDM)

Honorable Randolph D. Moss

Trial: February 13, 2023

**BRUNO CUA'S NOTICE OF MOTION AND SUPPLEMENTAL
BRIEF REGARDING MOTION TO DISMISS COUNT TWO OF
THE SECOND SUPERSEDING INDICTMENT**

Defendant Bruno Cua, through his counsel, files this notice and brief to supplement his prior motion to dismiss Count Two, charging him with violating 18 U.S.C. § 1512(c)(2).

NOTICE OF PRIOR MOTIONS

Mr. Cua previously filed a Motion to Adopt, Conform, and Supplement Motions to Dismiss Counts Alleging Violation of 18 U.S.C. § 1512(c)(2), in which he requested that he be permitted to adopt, conform, and supplement other motions filed before the Court requesting dismissal of counts charging violations of section 1512(c)(2), including those papers filed in *United States v. Montgomery, et al.*, Case No. 1:21-cr-00046-RDM.¹ See ECF No. 84. That motion supplements the *Montgomery* papers with additional legislative history for the Court's consideration. *Id.* The government subsequently filed the Second Superseding Indictment in this case. See ECF No. 90. Mr. Cua then filed a second Motion to Adopt, Conform, and Supplement Motions and Briefs to Dismiss Counts Alleging Violation of 18 U.S.C. § 1512(c)(2), which sought to apply his prior motion to the Second Superseding Indictment. ECF No. 94.

¹ Mr. Cua cited ECF Nos. 39, 48, 59, 60, and 66, as well as the transcript at ECF No. 53, from *Montgomery*. For the avoidance of doubt, Mr. Cua also requests to adopt ECF Nos. 40, 41, 44, 47, 66, and 80 from *Montgomery*, which were not explicitly listed in his prior motion.

On December 7, 2021, the Court denied the motion at ECF No. 84 without prejudice as moot and recognized ECF No. 94 as the operative motion to dismiss Count Two for violation of section 1512(c)(2).

The government filed its opposition on December 15, 2021. *See* ECF No. 98. Mr. Cua filed a reply brief in support of his motion on December 29, 2021, which also incorporated by reference relevant arguments from other cases presented to this Court. *See* ECF No. 103.

The Court has not ruled on the merits of Mr. Cua's motion to dismiss Count Two.²

SUPPLEMENTAL ARGUMENT

Mr. Cua provides the following additional argument for the Court's consideration:

Because no court has construed § 1512(c)(2) as the government proposes in this case prior to January 6, 2021, to retroactively apply that construction against Mr. Cua in this matter would violate the novel construction principle of the Due Process Clause of the Fifth Amendment. *Bouie v. City of Columbia*, 378 U.S. 347, 353 (1964). “[A]n unforeseen judicial enlargement of a criminal statute, applied retroactively, operates precisely as an *ex post facto* law, such as Art. I, § 10, of the Constitution forbids.” *Id.* If a “legislature is barred by the *Ex Post Facto* Clause from passing such a law, it must follow that a [court] is barred by the Due Process Clause from achieving precisely the same result by judicial construction.” *Id.*

Bouie also concerned a trespass prosecution. The 1964 case involved a combination drugstore and restaurant in South Carolina. The establishment would not serve black Americans. Two black college students took seats in the restaurant. After they entered, an employee hung up a “no trespass” sign. The store manager called the police, who asked the students to leave. When they refused, they were arrested and charged with trespass. The students were tried and

² Mr. Cua recognizes that the Court previously denied a motion to dismiss section 1512(c)(2) counts in the *Montgomery* case.

convicted, with the State Supreme Court upholding the trespass convictions. The Supreme Court vacated the convictions based on the novel construction principle of the Due Process Clause. It reasoned that the South Carolina Supreme Court's construction of the trespass statute was effectively an *ex post facto* law. By its terms, the state statute merely prohibited “*entry* upon the lands of another . . . *after* notice from the owner . . . prohibiting such entry. . .” 378 U.S. at 355 (emphasis added). However, there “was nothing in the statute to indicate that it also prohibited the different act of *remaining* on the premises *after* being asked to leave. Petitioners did not violate the statute as it was written; they received no notice before entering either the drugstore or the restaurant department.” *Id.* (emphasis added). Finally, “the interpretation given the statute by the South Carolina Supreme Court . . . ha[d] not the slightest support in prior South Carolina decisions.” *Id.* at 356.

So too here. Mr. Cua did not “violate the statute as it was written.” *Bouie*, 378 U.S. at 355. Section 1512 prohibits obstruction of “official proceedings” which has been construed to mean proceedings before a tribunal that mimic a court of law. There is “nothing in the statute to indicate that it also prohibited the different act,” *Bouie*, 378 U.S. at 355, of interfering with proceedings that do not hear evidence or find facts. “The interpretation given the statute by the [government] . . . has not the slightest support in prior [§ 1512] decisions.” *Id.* Accordingly, the novel construction principle requires rejection of the government's interpretation, which would operate as an *ex post facto* law in violation of the Due Process Clause of the Fifth Amendment.

For the foregoing reasons and the reasons stated in Mr. Cua's prior motions on this issue, including moving papers he has adopted from other cases, Mr. Cua respectfully requests that the Court dismiss Count Two of the Second Superseding Indictment.

Respectfully submitted,

DATED: December 5, 2022

/s/ William E. Zapf

Jonathan Jeffress (D.C. Bar No. 479074)

William E. Zapf (D.C. Bar No. 987213)

KaiserDillon PLLC

1099 14th Street NW

8th Floor West

Washington, DC 20005

T: (202) 640-2850

F: (202) 280-1034

jjeffress@kaiserdillon.com

wzapf@kaiserdillon.com

Attorneys for Bruno Joseph Cua

CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of December 2022, I filed the foregoing with the Clerk of the United States District Court for the District of Columbia by using the CM/ECF system and served a copy of it by electronic mail on counsel for the United States, Assistant United States Attorneys Kaitlin Klamann, Carolina Nevin, and Kimberly Paschall.

Dated: December 5, 2022

/s/ William E. Zapf
William E. Zapf