

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA :

:

v. : Case No.: 1:21-cr-00186-CRC

:

DAVID ALLEN BLAIR :

:

Defendant. :

**DEFENDANT DAVID ALAN BLAIR’S REPLY TO THE
GOVERNMENT’S OPPOSITION TO DEFENDANT’S
AMENDED MOTION TO DISMISS THE INDICTMENT**

David Allen Blair, Defendant, by and through his counsel, Terrell N. Roberts, III, replies to the Government’s Opposition to the Defendant’s Amended Motion to Dismiss the Indictment.

1. Count One of The Superseding Indictment is Insufficient in Law Because It Fails to Allege that the Lacrosse Stick was Capable of Causing Bodily Injury or Death and That It Was Used in That Manner.

The indictment says no more than that the Defendant, while “using a deadly or dangerous weapon, that is, a flag pole,” committed an assault upon on the officer engaged in performing his duties on January 6, 2021. It is undisputed that the alleged “flag pole” was a lacrosse stick and as such it is not inherently deadly. In *United States v. Arrington*, 309 F.2d 40, 45 (D.C. Cir. 2002), the Court stated: “For an object not inherently deadly the government concedes that the following additional element is required: (4) the object must be capable of causing serious bodily injury or death to another person *and* the defendant must use it in that manner.” (*Emphasis in the original.*) Count One is flawed because it does not say that the lacrosse stick was capable of causing serious bodily injury or death or that the Defendant used the stick in that manner. Without knowing the manner in which the stick was used, the Defendant cannot possibly know how to defend the claim that he used a deadly weapon to commit the assault.

The Defendant's motion to dismiss argued that the discovery showed that the lacrosse stick was not used in a deadly manner. The Government's response asserted that the footage from the cameras worn by the police officers involved in the encounter with the Defendant is "distorted, shaky and difficult to follow," and that a trial is necessary to decide that issue. Govt.Opp., 5. We do not agree. Although the body worn camera footage is not ideal, there is other footage which clearly shows the Defendant's use of the stick was nondeadly.¹ The footage shows that the Defendant held the lacrosse stick parallel to the ground and thrust it at the officer's upper torso, making light contact with the officer if at all. This is a movement known in lacrosse as a "check, and it is not capable of causing serious bodily injury or death to another person. One can clearly see from the footage exactly how the defendant used the stick, and that he did not so in a deadly manner. The footage is not ambiguous or subject to guesswork.

For these reasons, Count One fails to allege an offense, namely, that the lacrosse stick was capable of causing serious bodily injury or death and that the Defendant used it in that manner. If Count One so alleged, it would be clear to all that the charge in that Count was false. Thus, the charge under 18 U.S.C. §111(b) should be dismissed.

Count Two Fails to Allege a Civil Disorder As to Which the Officer's Performance of Duties Were Obstructed, Hindered or Delayed.

The Defendant asserted in his Amended Motion to Dismiss Count Two that there was no on-going "civil disorder," as defined by 18 U.S.C. §232(1), going on at the time of the alleged offense in Count Two. Defendant convincingly argued that by 5:47 p.m., the time it is alleged that

¹ There are two videos taken from Youtube videos: <https://www.youtube.com/watch?v=C74sc7dVMTk> and <https://www.youtube.com/watch?v=K0zRqFUQsDU>. In the second video, the action involving the Defendant starts at 6:36. Downloaded copies of these videos are provided separately to the clerk. See Exhibit 1 on CD.

Defendant committed the offense, the disturbance inside the Capitol was over and the House and Senate Chambers were secure (citing to the U.S. Senate Report of the Committee of Homeland Security and Governmental Affairs and Rules Administration, p. 88). On the West Lawn, where it is alleged that Officer KP was performing his official duties “incident to and during the commission of the civil disorder,” Defendant alleges that there was no civil disorder, meaning that there were not “any public disturbance involving acts of violence by assemblages of three or more persons, which causes immediate danger of or results in damage or injury to property of person of any individual.” 18 U.S.C. §232(1). This is plainly supported by the available YouTube footage from the point that MPD officers start a march west bound across the West Lawn to Peace Circle where the march stops. Footage attached. The footage shows the officers moving the crowd and one cannot see any public disturbance involving acts of violence by assemblages of three or more persons which causes immediate dangers of damage or injury of any individual.

Government argues that the defendant’s “highly fact-oriented claim” is not a proper subject for a rule 12(b)(3)(B)(v) motion. It further asserts that it intends to prove at trial “there were still a crowd of rioters in the immediate vicinity of the defendant when he attacked Officer K.P. and that that attack occurred as that officer, and others assisting him, were ordering the crowd to move back and off the Capitol grounds.” Again, the Government’s indictment contains no averments that support a civil disorder on-going at the time of the offense.

The Subsequent Indictment alleges that the civil disorder going on at the West Lawn at 5:47 p.m. affected the movement of an article and commodity in interstate commerce. This is an enormous over-stretch of what was actually going on the West Lawn at 5:47 p.m. and is puny by in comparison to the civil disturbance at the Capitol several hours earlier.

III. Counts Four and Five and Six Fail to State Offenses under 18 U.S.C. §1752 Because the Vice President was Not in the US Capitol and its grounds “Temporarily

Visiting,” Grounds at 5:47 p.m. on January 6th and Signs and Markings Posted the Property as Restricted Had Been Removed.

Counts Four, Five and Six of the Superseding Indictment allege:

COUNT FOUR

On or about January 6, 2021, within the District of Columbia, **DAVID A. BLAIR**, did unlawfully and knowingly enter and remain in a restricted building and grounds, that is, any posted, cordoned-off, and otherwise restricted area within the United States Capitol and its grounds, where the Vice President was temporarily visiting, without lawful authority to do so, and, during and in relation to the offense, did use and carry a deadly and dangerous weapon, that is, a flagpole.

(Entering and Remaining in a Restricted Building or Grounds with a Deadly or Dangerous Weapon, in violation of Title 18, United States Code, Section 1752(a)(1) and (b)(1)(A))

COUNT FIVE

On or about January 6, 2021, within the District of Columbia, **DAVID A. BLAIR**, did knowingly, and with intent to impede and disrupt the orderly conduct of Government business and official functions, engage in disorderly and disruptive conduct in and within such proximity to, a restricted building and grounds, that is, any posted, cordoned-off, and otherwise restricted area within the United States Capitol and its grounds, where the Vice President was temporarily visiting, when and so that such conduct did in fact impede and disrupt the orderly conduct of Government business and official functions, and, during and in relation to the offense, did use and carry a deadly and dangerous weapon, that is, a flagpole.

(Disorderly and Disruptive Conduct in a Restricted Building or Grounds with a Deadly or Dangerous Weapon, in violation of Title 18, United States Code, Section 1752(a)(2) and (b)(1)(A))

COUNT SIX

On or about January 6, 2021, within the District of Columbia, **DAVID A. BLAIR**, did knowingly, engage in any act of physical violence against any person and property in a restricted building and grounds, that is, any posted, cordoned-off, and otherwise restricted area within the United States Capitol and its grounds, where the Vice President was temporarily visiting, and, during and in relation to the offense, did use and carry a deadly and dangerous weapon, that is, a flagpole.

(Engaging in Physical Violence in a Restricted Building or Grounds with a Deadly or Dangerous Weapon, in violation of Title 18, United States Code, Section 1752(a)(4) and (b)(1)(A))

The common thread which runs through Counts Four, Five and Six is that the defendant engaged in unlawful acts “in a restricted building and grounds, that is, any posted, cordoned-off,

and otherwise restricted area within the United States Capitol and its grounds, where the Vice President was temporarily visiting," FBI records furnished in discovery disclosed interviews of PAUL WADE and LANELLE HAWA, agents of the United States Secret Service. The interviews reveal investigation dates of October 19, 2021, of Agent WADE and October 26, 2021, of Agent HAWA. Both individuals are knowledgeable of the whereabouts of Vice President Michael Pence on January 6, 2021. A summary of these reports indicate that Vice President Pence was evacuated by motorcade at 1430 hours from the Capitol and grounds and that he did not return to the Capitol and grounds until 2000 hours on January 6, 2021.

Based on such facts, the alleged cordoned-off or restricted area was not active at 5:47 p.m., because the Vice-President was not in the Capitol or its grounds at that time. In sum, these counts fail to state valid offenses under §1752.

Finally, by 5:47 p.m. on January 6th, signage and marked "restricted" area postings at the entrance to the West Lawn at Peace Circle and Garfield Circle were no longer there. See Exhibit 2, Affidavit of Anne Moser attached. Thus, the defendant had no way of knowing the area of the West Lawn was restricted ground. This is easily demonstratable fact from the available video and photographic footage. Based upon the foregoing, Counts Four, Five and Six fail to state offenses.

Respectfully submitted,
ROBERTS & WOOD

/s/ Terrell N. Roberts, III
Terrell N. Roberts, III
DC Bar No. 965061
Attorney for Defendant
6801 Kenilworth Avenue, Suite 202
Riverdale, Maryland 20737
(301) 699-0764
(301) 699-8706 Fax
troberts@robertsandwood.com

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Defendant's Reply to the Government's Opposition to the Amended Motion to Dismiss was electronically filed via CM/ECF system on December 22, 2021, and an electronic copy was e-served to:

Michael Liebman, Esq.
Assistant United States Attorney
Office of the United States Attorney, District of Columbia
555 4th Street, NW
Washington, D.C. 20530

/s/ Terrell N. Roberts, III
Terrell N. Roberts, III