UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA	)	
	)	
	)	
v.	)	No. 1:22-CR-00086-TFH
	)	JUDGE HOGAN
	)	
MICHAEL LEE ROCHE	)	

DEFENDANT'S MOTION TO DISMISS COUNT ONE

Defendant Michael Lee Roche respectfully moves to dismiss Count One of his indictment for failing to state an offense. Count One alleges he corruptly obstructed an "official proceeding," specifically, "Congress' certification of the Electoral College vote." That allegation fails to state an offense because (1) certification is not an "official proceeding" since that term encompasses only proceedings that are hearings of a judicial nature, and (2) the alleged obstruction act was not taken with respect to any document, record or object. Roche's Points of Law and Authorities is incorporated in this motion.

STATEMENT OF FACTS

Michael Roche was initially arrested on a criminal complaint. (*See* ECF No. 1.) The complaint alleged that, when Congress convened in the U.S. Capitol on January 6, 2021 to certify the vote count of the Electoral College of the 2020 presidential election, Roche and many others entered the Capitol without authorization to disrupt the certification. (*Id.* at 2.) It alleged that, after the representatives had vacated the chamber, Roche got behind the Vice-President's desk and prayed to Jesus Christ. (*Id.* at 3.)

On March 16, 2022, the government filed a six-count indictment against Roche. (ECF No. 33.) Count One alleges:

> On or about January 6, 2021, within the District of Columbia, MICHAEL LEE ROCHE attempted to, and did, corruptly obstruct, influence, and impede an official proceeding, that is, a proceeding before Congress, specifically, Congress' 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.
>
> (Obstruction of an Official Proceeding and Aiding and Abetting, in violation of Title 18, United States Code, Sections 1512(c)(2) and 2).

(ECF No. 33 at 1-2.)

POINTS OF LAW AND AUTHORITY

A defendant can move to dismiss an indictment for failing to state an offense. Fed. R. Crim. P. 12(b)(3)(B). At this stage "the indictment must be tested by its sufficiency to charge an offense," *United States v. Sampson*, 371 U.S. 75, 78 (1962), and "the allegations of the indictment must be taken as true," *Boyce Motor Lines, Inc. v. United States*, 342 U.S. 337, 343 n.16 (1952).

Taking its allegations as true, the indictment still fails to state an offense for two reasons.

I. Section 1512(c)(2) prohibits obstructing a hearing of a judicial nature by impairing the integrity or availability of records or objects.

Section 1512(c) of Title 18 makes it illegally to corruptly (1) alter or destroy a document, record or other object intending to impair the object's integrity or availability for an official proceeding, or (2) "otherwise obstruct[], influence[], or impede[] any official proceeding, or attempt[] to do so." Section 1515(a)(1) defines "official proceeding" as (A) a proceeding before a judge; (B) "a proceeding before Congress," (C) a proceeding before a federal agency, or (D) certain proceedings before any insurance regulatory agency. 18 U.S.C. § 1515(a)(1).

As Judge Carl Nichols of this Court has explained, "§ 1512(c)(2) must be interpreted as limited by subsection (c)(1), and thus requires that the 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." *United States v. Miller*, 2022 U.S. Dist. LEXIS 45696, *39-40 (D.D.C. Mar. 7, 2022). *But see United States v. Rodriguez*, 2022 U.S. Dist. LEXIS 157483, *23-24 (D.D.C. Aug. 31, 2022) (disagreeing with *Miller* and citing other district courts taking same view). Subsection (c)(2) must be interpreted in that way partly due to the guidance the Supreme Court gave when interpreting a similar statutory clause in *Begay v. United States*, 553 U.S. 137 (2008), *abrogated on other grounds by Johnson v. United States*, 576 U.S. 591 (2015). In *Begay*, the Supreme Court considered whether drunk driving was a "violent felony" for purposes of the sentencing provision imposing a mandatory minimum term of an offender with three prior convictions for a "violent felony" as defined in 18 U.S.C. § 924(e)(2)(B)(ii) ("the term 'violent felony' means any crime punishable by imprisonment for a term exceeding one year . . . that--. . . is burglary, arson, or extortion, involves the use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another."). *Begay*, 553 U.S. at 141. The Supreme Court concluded that the examples listed before "otherwise" limited the scope of the residual clause to similar crimes. *Id.* at 142-48. In light of *Begay*, it is reasonable to read § 1512(b)(2) such that the examples of obstructive conduct listed in subsection (b)(1)—coming before "otherwise" in subsection (b)(2)—limit the scope of subsection (b)(2) to crimes similar to those listed in (b)(1). *Miller*, 2022 U.S. Dist. LEXIS 45696 at *23-25. Accordingly, it is reasonable to read § 1512(b)(2) such that "otherwise" obstructing or impeding a proceeding

requires taking "some action with respect to a document, record, or other object," as required by subsection (b)(1). *Miller*, 2022 U.S. Dist. LEXIS at *39-40.

Since that interpretation of § 1512(b)(2) is reasonable and supported by *Begay*, there is, at the least, genuine ambiguity as to the meaning of § 1512(b)(2), and the rule of lenity requires a court to adopt the interpretation favorable to a criminal defendant. *Liparota v. United States*, 471 U.S. 419, 427 (1985) ("Under the rule of lenity, courts construe penal laws strictly and resolve ambiguities in favor of the defendant"). Accordingly, the proper interpretation of § 1512(b)(2) is that to obstruct or impede a proceeding a defendant must do so by taking some obstructive action with respect to a document, record or other object.

Plus, that obstructive action must be aimed at obstructing an "official proceeding" within the meaning of 18 U.S.C. § 1515(a)(1). Granted, that statute does list "a proceeding before Congress" as one type of official proceeding. 18 U.S.C. § 1515(a)(1)(B). But as pointed out by the Ninth Circuit, *United States v. Ermoian*, 752 F.3d 1165 (9th Cir. 2013), "the descriptor 'official' indicates a sense of formality normally associated with legal proceedings," and "[t]he use of the preposition 'before' suggests an appearance before an agency *sitting as a tribunal*." *Id.* at 1170-71 (emphasis added). Accordingly, although a "proceeding before Congress" is an "official proceeding," to qualify as one protected by § 1512(a)(2) it must be one of a judicial nature where evidence is received, such as a Congressional hearing. That conclusion is confirmed by the fact that a separate statute criminalizes the obstruction of "the orderly conduct of official business" in the Capitol building that might not be of a judicial nature. 40 U.S.C. § 5104(e)(2)(c); *see* 40 U.S.C. § 5109(b) (penalizing violation of § 5104(e)(2) by up to six months in prison).

In sum, § 1512(c)(2) prohibits obstruction of a proceeding, but that proceeding must be a hearing judicial in nature and the obstructive act must be taken with respect to a document, record or other object.

A. Congress' certification of the Electoral College vote is not an "official proceeding."

Count One of Roche's indictment specifically alleges that the putative "official proceeding" in question was Congress' certification of the Electoral College vote. But the certification of that vote is not a hearing of a judicial nature. For example, no judge is involved, no testimony is taken, and no claim is adjudicated. Rather, when certifying the vote, Congress engages in a ministerial act that is a matter of "official business." 40 U.S.C. § 5104(e)(2)(C). Because this certification is not an "official proceeding" within the meaning of § 1515(a)(1), Count One fails to state an offense, and the Court should dismiss it.

B. The government has not alleged Roche took obstructive action with respect to any document, record or object.

There is an additional reason to dismiss Count One. Count One fails to allege that Roche's allegedly obstructive action was taken with respect to any document, record or object. Due to that same charging flaw, Judge Nichols dismissed a § 1512(c)(2) count. *Miller*, 2022 U.S. Dist. LEXIS 45696 at *40. *See generally United States v. Salisbury,* 983 F.2d 1369, 1374 (6th Cir. 1993) ("Where an indictment sets forth a bare recitation of the statutory language, such indictment may be sustained only if the statute sets forth all the necessary elements fully and clearly, without ambiguity or uncertainty, accompanied by a statement of facts sufficient to

inform the accused of the specific conduct which is prohibited.").[1] The Court should do the same here for the same reason.

CONCLUSION

For the foregoing reasons, the Court should dismiss Count One of the Indictment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 23, 2022, I electronically filed the foregoing *Defendant's Motion to Dismiss Count 1* with the clerk of the court by using the CM/ECF system, which will send a Notice of Electronic Filing to the following: Christopher Amore, Assistant United States Attorney, DOJ-USAO, District of New Jersey, 970 Broad Street, Suite 700, Newark, NJ 07102.

/s/ *Mariah A. Wooten*
MARIAH A. WOOTEN

[1] Only from the criminal complaint do we know what "specific conduct," *Salisbury*, 983 F.3d at 1374, the government believes is prohibited by § 1512(a)(2), *viz.*, entering the Capitol in an unauthorized crowd, prompting the representatives to leave the chamber, and then praying to Jesus Christ from the Vice-President's desk. That specific conduct falls outside the scope of § 1512(a)(2).