UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA **v.** **MELODY STEELE SMITH,** **Defendant.**	**Crim. Action No. 1:21CR77 (RDM)**

MS. STEELE SMITH'S REPLY TO THE GOVERNMENT'S OPPOSITON TO HER MOTION TO DISMISS OBSTRUCTION CHARGE

Melody Steele Smith, through undersigned counsel, files this reply in response to the government's Opposition to her Motion to Dismiss Count One of the Indictment. The decision in *United States v. Miller*, No. 21-cr-119 (CJN), ECF No. 73, is not flawed as the government suggests in its opposition and the Court should dismiss count five of the superseding indictment.[1]

I. The Serious Concerns of Ambiguity in 18 U.S.C. § 1512(c)(2) Require the Government to Specifically Allege the Offense

In its Opposition, the government asserts that the *Miller* decision is flawed because even under the *Miller* ruling, the government has sufficiently alleged a violation of Section 1512(c)(2) by tracking the provision's "operative statutory text," which leaves intact the theory that Ms. Smith obstructed an official proceeding by taking some action with respect to a document. *See* Gov. Opp. at 2.[2] In making this

[1] *See also United States v. Fischer*, 21-cr-234 (CJN), ECF No. 64 (dismissing 18 U.S.C. § 1512(c)(2) charges for same reasons as in *Miller*).
[2] The government argues that Judge Nichols wrongly decided this issue in *Miller*. As to that argument,

assertion, the government relies on *United States v. Williamson*, 903 F.3d 124, 130 (D.C. Cir. 2018), where the court stated that "it is generally sufficient that an indictment set forth the offense in the words of the statute itself." In its view, the government thus need not allege, more specifically, that the obstruction took the form of some action with respect to a document because the indictment's allegations mirror the operative statutory text. *Id.* The government is mistaken.

Williamson relied on *Hamling v. United States*, 418 U.S. 87, 117 (1974), which held:

> It is *generally* sufficient that an indictment set forth the offense in the words of the statute itself, *as long as those words of themselves fully, directly, and expressly, without any uncertainty or ambiguity*, set forth all the elements necessary to constitute the offence intended to be punished.

(emphases added) (citation omitted). Here, for the reasons discussed in *Miller*, the words of § 1512(c)(2) raise serious ambiguity concerns. *See Miller* Opinion at 28-29. Because of this ambiguity, and to ensure that an ambiguous statute does not reach beyond its clear scope, *Miller* properly concluded that § 1512(c)(2) must be limited by § 1512(c)(1). *Id.* (citing *United States v. Nasir*, 17 F.4th 459, 473 (3d Cir. 2021)). Given the statute's ambiguity, it is not sufficient to simply mirror the statutory text as the government suggests. Therefore, the government's reliance on *Williamson* is misplaced because that case specifically dealt with a statute where

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Ms. Smith respectfully adopts the arguments which were fully briefed by the defense in *United States v. Miller*, 21-cr-119 (CJN), ECF No. 80 (Defendant's Opposition to Government's Motion for Reconsideration).

there were no concerns of ambiguity.

II. Mirroring the Operative Text of the Statute is Insufficient when the "very core of criminality" Under the Statute is Omitted

The government suggests that it has done its job to provide fair notice to Ms. Smith by mirroring the operative "text" of the statute even though, by doing so, it failed to allege any act that § 1512(c)(2) may constitutionally and unambiguously prohibit, as discussed in *Miller*. The government is wrong. An indictment must contain the specific allegation that is pertinent to deciding guilt. *Russell v. United States*, 369 U.S. 749, 757 (1962). In *Russell*, the defendant was charged with 2 U.S.C. § 192, 2 U.S.C.A. § 192, which made it unlawful to refuse to answer any question pertinent to a matter of inquiry under consideration before the House or its committee. *Id.* However, the government did not specify in Russell's indictment the subject that was under inquiry. *Id.* The Supreme Court, therefore, held that the indictment was insufficient, reasoning that:

> The very core of criminality under 2 U.S.C. 192 is pertinency to the subject under inquiry of the questions which the defendant refused to answer. What the subject actually was, therefore, is central to every prosecution. *Where guilt depends so crucially upon such a specific identification of fact*, our cases have uniformly held that an indictment must do more than simply repeat the language of the criminal statute.

Id. at 764. (emphasis added). In so ruling, the Supreme Court emphasized that such an omission was not just technical but rather deprived the defendant of notice "of what he must be prepared to meet" and, therefore, resulted in prejudice to the defendant. *Id.*

The same is true here. The government's vague indictment is plainly

insufficient. The superseding indictment does not allege that Ms. Smith took some action with respect to a document, record, or other object in order to corruptly obstruct, impede or influence an official proceeding, which is what the *Miller* court found was required in order to fit the narrow scope of criminal conduct penalized in Section 1512(c)(2). *United States v. Miller*, No. 21-cr-119 (CJN), ECF No. 73 at 28. The indictment thus fails to charge the "very core of criminality" that is central to the statute and the government's case, thereby depriving Ms. Smith of fair notice and failing to apprise her of what she must be prepared to meet.

III. If the Government's Theory of Prosecution Survives *Miller*, then, at a Minimum, a Bill of Particulars is Required

Ms. Smith has moved for a Bill of Particulars on Counts One, Three, Four and Five. *See* ECF. No. 30. Pursuant to Federal Rule of Criminal Procedure 7(f), a bill of particulars is needed where the indictment provides insufficient notice of the specific charges against the Defendant. *See United States v. Butler,* 822 F.2d 1191, 1193 (D.C. Cir. 1987). Ms. Smith supplements her arguments in her Motion for a Bill of Particulars to contend that if the government plans to prosecute her for taking "some action with respect to a document, record, or other object" (Gov. Opp. at 36), then she is entitled to know what action she allegedly took with respect to what document, record or other object, so that she can (1) understand the charge, (2) prepare a defense, (3) and avoid prejudicial surprise at trial. *Id.*

Given the fact that the discovery in Ms. Smith's case is devoid of any reference to any action she allegedly took with respect to a document or record, she cannot possibly understand the charge against her and prepare for her defense.

Accordingly, the Court should dismiss Count One of the Indictment for failure to state an offense or lack of specificity. At a minimum, the Court should order the government to produce a bill of particulars.

Respectfully Submitted,

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