UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

UNITED STATES of AMERICA	:	
	:	
Plaintiff	:	
	:	Criminal Case No.: 21-CR-00127
v.	:	
	:	
JOSHUA MATTHEW BLACK	:	
	:	
Defendant	:	

DEFENDANT'S MOTION TO DISMISS COUNT ONE OF THE INDICTMENT

The Defendant, **JOSHUA MATTHEW BLACK,** by and through his attorney, Clark U. Fleckinger II, hereby moves this Honorable Court, pursuant to the provisions of Fed.R.Crim.P. 12(b)(3)(B), to dismiss Count One of the Indictment in the above captioned matter. As grounds therefore, the Defendant represents as follows:

Background

1. That, on February 17, 2021, an eight count indictment was filed by the Government charging Mr. Black with various offenses stemming from the events of January 6, 2021 in Washington, DC. Those events were related to the joint session of Congress convening at the U.S. Capitol for the purpose of certifying the vote count of the Electoral College of the November 3, 2020 Presidential election. Following a rally put on by then President Trump, many of the participants at that rally went to the U.S. Capitol to protest the Presidential election results and the certification of the Electoral College votes. Many of the protestors became violent and destructive. Mr. Black was one of the persons at the U.S. Capitol that day as the violence and destruction erupted. Although Mr. Black entered the Capitol and, like many others, found himself at one point on the Senate floor, Mr. Black was

never violent and never destructive. Upon information and belief, the Government is not alleging that Mr. Black ever participated in assaultive or destructive conduct.[1]

2. That, the February 17, 2021 indictment charged Mr. Black with a violation of 18 U.S.C. §1512(c)(2) and "2)" (Obstruction of an Official Proceeding and Aiding and Abetting) in Count One[2] as well violations of 3 subsections of 18 U.S.C. §1752 while armed with a dangerous weapon and 4 subsections of 40 U.S.C. §5104 in Counts Two through Eight. Count One is the subject of the instant motion to dismiss.[3]

3. That, 18 U.S.C. §1512(c) provides: "(c) Whoever *corruptly* --- (1) alters, destroys, mutilates or conceals a record, document, or other object or attempts to do so, with the intent to impair the object's integrity or availability for use in an *official proceeding*; or (2) *otherwise* obstructs, influences or impedes any *official proceeding*, or attempts to do so, shall be fined under this title or imprisoned not more than 20 years, or both." (Emphasis added.)

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[1] In fact, Mr. Black was himself injured during the violence when law enforcement shot rubber projectiles into a crowd. The projectile went through his left cheek and caused substantial bleeding. When it became apparent to some members of the crowd that Mr. Black had been shot and injured, several members of the crowd became combative toward the law enforcement officers who were there. Mr. Black was not one of those combatants. Rather, when one of the law enforcement officers fell to the ground, Mr. Black covered his body over the fallen officer in order to protect the officer and told others in the crowd not to hurt the officer.

[2] There is no recitation in the narrative portion of the indictment as to what Mr. Black did to aid and abet and the Obstruction of an Official Proceeding and the citation of "2)" as part of the overall statutory citation to the offense(s) charged in Count One appears to be superfluous. Specifically, Count One alleges that Mr. Black "attempted to, and did, corruptly obstruct, influence and impede an official proceeding, that is, a proceeding before Congress, by entering and remaining in the United States Capitol without authority and engaging in disorderly and disruptive conduct."

[3] At the time of the preparation of this motion approximately 775 persons (hereinafter "January 6 Defendants") have been charged in the U.S. District Court for the District of Columbia with various offense arising out of the events of January 6, 2021. Although it is unclear to undersigned counsel how many of those persons have been indicted for a violation of 18 U.S.C. §1512(c)(2), upon information and belief, a relatively substantial minority of all those persons charged with various offenses arising from January 6, 2021, have been indicted for that violation. Upon information and belief, approximately 20 motions to dismiss that count of the indictment charging 18 U.S.C. §1512(c)(2), have been filed with the District Court by those defendants so charged. Most of those motions have been denied and some are still pending a ruling by the District Court. Two of the motions to dismiss have been granted and have been the subject of Memorandum Opinions. *See, United States, v. Miller,* No. 21-cr-00119 (ECF No. 72) and *United States v. Fischer,* No. 21-cr-00234 (ECF No. 64.)

4. That, as noted previously, one of the January 6 protesters who has been indicted for a violation of 18 U.S.C. §1512(c)(2) is Garret Miller in *United States v. Miller,* No. 21-cr-00119.[4] Mr. Miller has filed a Motion to Dismiss [the Count charging him with that offense] on June 28, 2021 (ECF No. 34), [a] Reply to the Government's Opposition to [that Motion to Dismiss …] (ECF No. 38), [a] Supplement to Motion to Dismiss … (ECF No. 47) and [a] Second Supplement to Motion to Dismiss …. (with the attached Exhibit A, the transcript of an August 3, 2021 hearing before the Honorable Randolph D. Moss in *United States v. Montgomery, et al.,* No. 21-cr-00046, on those January 6 Defendants' Motion to Dismiss the 18 U.S.C. §1512(c)(2) count of the indictment as to those Defendants) (ECF No. 59). Mr. Black respectfully requests that he be permitted to adopt in his own case those submissions filed on behalf of Mr. Miller and for leave to conform his (Mr. Black's) case and particular circumstances to the arguments made, and points and authorities in support thereof, by Mr. Miller.

5. That, on March 7, 2022, the Honorable Carl Nichols issued a Memorandum Opinion in *United States v. Miller, supra,* (ECF No. 72) and granted Mr. Miller's Motion to Dismiss … the §1512(c)(2) count of the indictment of Mr. Miller (ECF No. 73.)[5]

6. That, the essence of Mr. Miller's arguments as to why the § 1512(c)(2) count of the indictment fails to state an offense and, accordingly, should be dismissed are: (1) that the January 6, 2021 Congressional proceeding to certify the 2020 Presidential election was not an "*official proceeding*" as contemplated by §1512(c)(2); (2) that §1512(c)(2) cannot be viewed as independent crime but, rather, is a residual clause tethered to, and a catchall for, §1512(c)(1) which addresses prohibited conduct as such conduct relates to documents,

[4] *See,* Footnote 3, *supra.*
[5] The Government filed a Government's Motion For Reconsideration of the Court's Ruling Dismissing [the 18 U.S.C. §1512(c)(2) Count] of the Indictment on April 1, 2022. (ECF No. 75.)

records and other things which are relevant to the obstruction of an official proceeding; and, (3) that the *mens rea* element of §1512(c) which requires that the prohibited act be undertaken *corruptly* is unconstitutionally vague. In addition, Mr. Miller contends that, when considering his various arguments, the Court is obligated to exercise restraint in construing criminal statutes and to apply the rule of lenity where genuine ambiguity exists as to the application of the statute to the alleged offense. *See,* Memorandum Opinion of Judge Nichols (ECF No. 72 at 6-7.) Mr. Black adopts those submissions by Mr. Miller for himself.

7. That, as noted by Judge Nichols in his *Miller* Memorandum Opinion, the standard to be applied to a Fed.R.Crim.P. 12(b)(3)(B)(v) motion to dismiss a charge based on a defect in the indictment for failure to state an offense is "whether the allegations in the indictment, if proven, permit a jury to conclude that the defendant committed the criminal offense as charged." *United States v. Akinyoyenu,* 199 F.Supp. 3d, 106 at 109 (D.D.C. 2016). *See, Miller* Memorandum Opinion (ECF No. 72 at 8). Mr. Black submits that, for the reasons submitted herein, a jury could not conclude that the allegations contained in Count One of the indictment applied to his conduct on January 6, 2021.

8. That, when construing a federal criminal statute so as to determine whether that standard has been met as to the alleged violation of the statute by the defendant before the Court, the Court should both exercise restraint in assessing the reach of a federal criminal statute out of both deference to Congress and out of concern that persons should be given fair notice of what the statute prohibits. Additionally, and pursuant to the rule of lenity, when resolving any ambiguities in what the relevant statute prohibits, the Court should resolve such ambiguities in favor of the defendant provided that such a resolution does not

conflict with the implied or expressed intent of Congress. *See, Miller* Memorandum Opinion (ECF No. 72 at 8 - 9).

9. That, Mr. Black submits that the joint session of Congress convened for the purpose of certifying a Presidential election is not an "*official proceeding*" as contemplated by §1512(c) because it is not a proceeding in furtherance of the administration of justice. In support thereof, Mr. Black initially notes that the title of 18 U.S.C. §1512 is Tampering with a witness, victim, or an informant thereby implying that the intended reach of the statute is limited to courts and other federal governmental bodies which have the protection of witnesses, victims, and informants at its core who seeking the testimony and other information from those who the statute purports to protect. Although not completely dispositive, the title of a statute can be instructive as to what Congress was trying to reach when enacting the statute. Mr. Black submits, as did Mr. Miller, that the joint session of Congress to certify the Electoral College votes of the 2020 Presidential election was not a proceeding in furtherance of the administration of justice and, therefore, not an "*official proceeding*" coming within the ambit §1512 prohibitions. Such a definition of what constitutes an "*official proceeding*" in the context of §1512 is consistent with the holdings of other courts considering the reach of §1512. *See, Miller* Motion to Dismiss … (ECF No. 34 at 8-11) which Mr. Black hereby adopts and incorporates by reference as well adopting and incorporating by reference Mr. Miller's submissions in his Defendant's Reply to the Government's Opposition to [that Motion to Dismiss …] (ECF No. 38) and [his] Supplement to Motion to Dismiss … (ECF No. 47 at 8 – 9). Mr. Black recognizes that 18 U.S.C. §1515(a)(1)(B) defines an *official proceeding* as a including a proceeding before Congress. However, such a definition does not necessarily include every proceeding before Congress. Rather, like other governmental bodies in addition to courts, Congress conducts

impeachment hearings, as well as other investigative hearings which are designed to elicit evidence relevant to a governmental function. Such a hearing by Congress would be an "official proceeding" in furtherance of the administration of justice and would come within the reach of §1512. Certification by Congress of a Presidential election does not.[6]

10. That, in support of Mr. Black's submission that the *mens rea* component of §1512 which requires that the prohibited conduct be carried out *corruptly* is unconstitutionally vague, Mr. Black adopts and incorporates by reference Mr. Miller's Second Supplement to Motion to Dismiss … (ECF No. 59 at 7 – 16). Citing *Bouie v. City of Columbia,* 378 U.S. 347 at 351 (1964), Mr. Miller posits that "in order to comply with due process, a statute must give fair warning." (ECF No. 59 at 8). Section 1512(c)(2) does not do that. Notwithstanding the definition of "corruptly" in 18 U.S.C. §1515(b) as "… acting with an improper purpose, personally or by influencing another, including making a false or misleading statement or withholding, concealing, altering or destroying a document or other information, that definition of "corruptly" is limited by the terms of the statute itself to the concept of "corruptly" as referenced in 18 U.S.C. §1505. Accordingly, the definition of "corruptly" in this Circuit is framed by the holding in *United States v. Poindexter,* 951 F.2d 369 (D.C. Cir. 1991). The *Poindexter* Court noted that the term "corruptly" itself is vague and that an analysis of the legislative history of 18 U.S.C. §§ 1503, 1505 and 1512 does nothing to ameliorate the vagueness of the term. (ECF No. 59 at 9 – 11). Thus, when the Government charges one with *corruptly* obstructing, influencing, and impeding a proceeding before Congress, such an allegation does not *clearly* and necessarily include entering and remaining in the United States Capitol without authority and committing an act

[6] In *Miller,* Judge Nichols concluded otherwise. *See, Miller* Memorandum Opinion (ECF No. 72 at 9 – 10).

of civil disorder and engaging in disorderly and disruptive conduct as is alleged here.[7] Where is the line crossed when the conduct morphs from misdemeanor trespass and disorderly conduct as acts of civil disobedience in protest of governmental action or inaction to felony obstruction of an official proceeding?[8] That lack of clarity with regard to the requisite *mens rea* would seem to be an obvious example of an unconstitutionally vague statute and, accordingly, dismissal of Count One of the indictment charging Mr. Black with a violation of 18 U.S. C. § 1512(c)(2) for the reasons proffered is appropriate.

11. That, Mr. Black's last challenge to the propriety of Count One of the indictment charging him with Obstruction of an Official Proceeding is that an alleged violation of §1512(c)(2) cannot be viewed as an independent substantive offense but, rather, must be viewed as a residual clause of the statute which is tethered to, and operates as a catchall for, §1512(c)(1). Judge Nichols granted Mr. Miller's Motion to Dismiss that count of the indictment in the prosecution against him for a violation §1512(c)(2) on that basis.[9] Judge Nichols concluded that the term "otherwise" at the beginning of sub-section (c)(2) was susceptible to various interpretations, some of which had more force than others. Ultimately, Judge Nichols concluded that, like other sub-sections of § 1512, sub-section (c) has a narrow focus. Specifically, while sub-sections (a), (b) and (d) were narrowly focused on, respectively: (1) crimes against the person to prevent the attendance of the person at an official proceeding; (2) verbal conduct toward a person such as threats which are intended to prevent testimony at an official proceeding; or (3) intentional harassment of a person so as to prevent the testimony of that person at such a proceeding, sub-section (c) was, like the

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[7] *See,* Footnote 2, *supra.*

[8] In his *Miller* Memorandum Opinion, Judge Nichols did not address the vagueness issue raised by Mr. Miller other than to summarize the Government's argument in opposition to the vagueness challenge and indicating that the Court of Appeals and the Supreme Court have rejected challenges to convictions under statutes requiring that the Defendant acted "corruptly." (ECF No. 72 at 7).

[9] *See, Miller* Memorandum Opinion (ECF No. 72 at 10-29).

other sub-sections of §1512, narrowly focused on prohibiting obstructive conduct in relation to records, documents and other tangible things. As previously noted, § 1512(c)(1) prohibits "alter[ing], destroy[ing], mutilate[ing] or conceal[ing] a record, document or other object, or attempt[ing] to do so, with the intent to impair the objects integrity or availability for use in an official proceeding." Judge Nichols further concluded that an assessment of both the structure of § 1512, as well as the historical development and the legislative history of § 1512 suggests that § 1512(c)(2) operates as a residual catchall to § 1512(c)(1) and accordingly, the "*otherwise*" reference to obstruction, influences, or impeding language of sub-section (c)(2) is a reference to prohibiting corrupt conduct as such conduct relates to records, documents or other objects rather than a free for all as to a broad array of allegedly obstructive conduct.

12. That, it is anticipated that the Government will allege that, while on the Senate floor on January 6 for period lasting about a minute, Mr. Black heard someone say that Senator Cruz's notes were exposed on a counter on the Senate floor after which Mr. Black looked at, and photographed with his mobile phone, some of those notes. After doing so, he left the notes where they were. Accordingly, and notwithstanding the interpretation of §1512(c)(2) by Judge Nichols as applied to Mr. Miller, it is anticipated that the Government will contend that Judge Nichols' construction of §1512(c)(2) does not apply to Mr. Black because Mr. Black's conduct which forms the basis for §1512(c)(2) charge deals with, *inter alia,* looking at and photographing some of the notes of Senator Cruz and, thus, corruptly interacting with documents or records.

13. That, Mr. Black respectfully submits that looking at, and photographing, some of the exposed notes of a Senator, without more, does not constitute the alteration destruction, mutilation, or concealment of such notes with the intent to impair the notes'

integrity or availability for use in an official proceeding, or the attempt to undertake such alteration, destruction, mutilation or concealment or that he *otherwise* obstructed, influenced or impeded any official proceeding as the result of the interaction with such notes. Accordingly, and consistent with Judge Nichols' construction of § 1512(c)(2), Mr. Black submits that Count One of the indictment charging him with a violation of § 1512(c)(2) should be dismissed for that reason as well.

WHEREFORE, for these and such other reasons as may appear to this Honorable Court, the Mr. Black requests that the Court dismiss Count One of the Indictment charging him with a violation of 18 U.S.C. § 1512(c)(2).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Defendant's Motion to Dismiss Count One of the Indictment has been served, by ECF, upon AUSA Seth Adam Meinero, at the United States Attorney's Office, located at 555 4th Street, NW, Washington, D.C. 20530, this 28th day of April, 2022.

_______/S/_____________________

Clark U. Fleckinger II