IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA	)	
	)	
v.	)	Case No. 1:21-cr-00263-TSC
	)	
RUSSELL DEAN ALFORD	)	

REPLY TO GOVERNMENT'S OPPOSITION TO MOTION FOR JUDGMENT OF ACQUITTAL UNDER FEDERAL RULE OF CRIMINAL PROCEDURE 29

The Defendant, Russell Dean Alford, hereby submits the following reply to the government's response in opposition[1] to Mr. Alford's motion,[2] under Federal Rule of Criminal Procedure 29, for judgment of acquittal. The Rule 29 motion sufficiently explains why judgment of acquittal is warranted on Count One; accordingly, this reply focuses on the government's response as to Counts Two through Four.

I. The government has failed to present sufficient evidence that Mr. Alford knowingly or willfully engaged in disorderly or disruptive conduct, because mere presence is insufficient under the circumstances here.

Judgment of acquittal on Counts Two and Three is warranted as a matter of law because the evidence is insufficient to show that Mr. Alford knowingly or willfully engaged in disorderly or disruptive conduct.[3] The government's response doesn't

[1] The government's written response has not at this time been formally filed in this case, but copies were hand-delivered to the Court and the defense in open court on this date.

[2] Doc. 90.

[3] Count Two requires proof that Mr. Alford "knowingly, and with intent to impede or disrupt the orderly conduct of Government business or official functions, engage[d] in disorderly or disruptive conduct," 18 U.S.C. § 1752(a)(2). Similarly, Count Three requires proof that he "willfully and knowingly . . . engage[d] in disorderly or disruptive conduct," 40 U.S.C. § 5104(e)(2)(D); Doc. 8 at 2.

seriously contend that Mr. Alford engaged in conduct that would meet ordinary definitions of "disorderly" or "disruptive." Instead, it offers two flawed arguments.

First, it conflates this conduct element with a separate element—the *harm* element—of Count Two: that Congressional proceedings *actually were* disrupted. *See* 18 U.S.C. § 1752(a)(2). The government's response asks the Court to find that Mr. Alford knowingly or willfully engaged in disorderly or disruptive conduct because the Electoral College Certification could not proceed until the Capitol had been cleared. But that plainly goes to the harm element; it does not show knowing or willful disorderly or disruptive conduct.

Second, the government argues that Mr. Alford's *mere presence* can suffice to establish that he engaged in disorderly or disruptive conduct. It bases that position entirely on the Findings of Fact and Conclusions of Law in *United States v. Rivera*, No. 1:21-cr-60-CKK (D.D.C. June 17, 2022), ECF No. 62. But *Rivera*'s facts are plainly distinguishable from the evidence here—and distinguishable in ways that won't support the strained analogy. Mr. Rivera "tore through barricades, police lines, and broken windows and doors to gain access to the Capitol and halt Congressional proceedings." *Id.* at 2. "[H]e 'pushed [his] way through the [lines of] riot police.'" *Id.* at 3. After he had done so, his mere presence in defiance of conspicuous barriers, building architecture, and police resistance established that he was knowingly or

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The failure to show that Mr. Alford knowingly or willfully engaged in disorderly or disruptive conduct therefore is fatal to both charges.

willfully "disturb[ing] the normal and peaceful condition of the Capitol grounds and buildings, its official proceedings, and the safety of its lawful occupants." *Id.* at 11.

Here, though, the government hasn't shown equivalent circumstances that could convert mere presence into knowing or willful disorderly or disruptive conduct. Redbook Instruction 6.643 provides,

> "Disorderly conduct" occurs when a person acts in such a manner as to cause another person to be in reasonable fear that a person or property in a person's immediate possession is likely to be harmed or taken, uses words likely to produce violence on the part of others, is unreasonably loud and disruptive under the circumstances, or interferes with another person by jostling against or unnecessarily crowding that person.
>
> "Disruptive conduct" is a disturbance that interrupts an event, activity, or the normal course of a process.

The circumstances here differ significantly from those in *Rivera*, and the government's evidence is simply insufficient to raise a jury question as to whether Mr. Alford's was knowingly or willfully engaging in disorderly or disruptive conduct merely by his silent presence. The government has not presented any evidence that Mr. Alford knew he was present in defiance of police or other authority, nor that he knew Congress was actually interrupted by his presence. The Court should, therefore, enter judgment of acquittal on Counts Two and Three.

II. No rational trier of fact could find beyond a reasonable doubt that Mr. Alford intended to impede, disturb, or disrupt Congress.

While Mr. Alford was on the Capitol Grounds and inside the Capitol Building, he did nothing demonstrating an intent to impede, disturb, or disrupt Congress, as

Counts Two[4] and Three[5] require. The government's response notes the principle that a factfinder may infer that a person intends the natural and probable consequences of his actions. *See United States v. Mejia*, 597 F.3d 1329, 1341 (D.C. Cir. 2010). But even when the evidence is viewed in the light most favorable to the government, the evidence shows that when Mr. Alford had the opportunity to act in a way likely to impede, disturb, or disrupt Congress, he silently stood still, minute after minute, until he was instructed to leave—and at that point, he promptly headed to the exit and waited until there was space for him to slip out.

The government tries to plug that hole in the evidence with incendiary Facebook posts. But no rational trier of fact could find the required intent where a defendant's conduct so plainly contradicts it, and the jury here should not be offered the chance to make such a finding. The absence of evidence to support the intent element, like (and independent of) the absence of evidence to support the conduct element, warrants judgment of acquittal on Counts Two and Three.

III. The government has failed to show that Mr. Alford paraded, picketed, or demonstrated in the Capitol Building.

Count Four requires the government to prove that Mr. Alford "willfully and knowingly . . . parade[d], demonstrate[d], or picket[ed] in any of the Capitol Buildings," § 5104(e)(2)(G). The government has presented no evidence here that Mr. Alford was in any Capitol Building except *the* Capitol Building, so conviction requires

[4] *See* § 1752(a)(2) ("intent to impede or disrupt the orderly conduct of Government business or official functions").

[5] *See* § 5104(e)(2)(D) ("intent to impede, disrupt, or disturb the orderly conduct of a session of Congress or either House of Congress").

proof that he paraded, demonstrated, or picketed there. But evidence that he did is so lacking that the government's response focuses principally on Mr. Alford's conduct *outside* the Capitol Building—which isn't covered by the statute and can't support a conviction.

The government has presented evidence that Mr. Alford *went* in the Capitol Building, but not that he paraded, demonstrated, or picketed in it. Indeed, his conduct inside the building is thoroughly documented and not seriously disputed. He walked a short distance into the building. He took some photos and some videos. Mostly, he just stood still until he was told to leave. There's no evidence that he spoke at all, nor that he was spoken to. He displayed no political message on a sign or his clothing. His conduct was indistinguishable from the conduct of journalists from legitimate news organizations who were inside the Capitol to document events. Those journalists did not parade, demonstrate, or picket, and neither did Mr. Alford. The Court should enter judgment of acquittal on Count Four because the government has not presented evidence sufficient to sustain a conviction.

For the foregoing reasons and those stated in Mr. Alford's Rule 29 motion, the motion is due to be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 3, 2022, I electronically filed the foregoing via this Court's CM/ECF system, which will send notice of such filing to all counsel of record.

Respectfully submitted,

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