UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA	:	
	:	
	:	**Case No: 21-cr-38 (CRC)**
v.	:	
	:	
RICHARD BARNETT[1]	:	
	:	
Defendant.	:	

DEFENDANT'S OPPOSITION TOMOTION OF THE GOVERNMENT TO EXCLUDE THE PROPOSED EXPERT TESTIMONY OF MARK K. SNELL AND STEVE HILL

Defendant Richard Barnett ("Barnett") hereby opposes the Motion of the Government to exclude the proposed testimony on behalf of Defendant Barnett in Barnett's chosen case in defense at trial, which Government Motion was filed at ECF Dkit. # 111, on December 30, 2022, and in his Opposition states the following:

I. INTRODUCTION AND OVERVIEW

A. It appears that almost the entirety of the Government's Motion consists of misunderstanding rather significantly what the proposed testimony of the expert witnesses would be. The Motion extensively argues against certain testimony which Defendant beliefs is not what his expert witnesses would testify about.

B. Likewise, it should be recognized that parties, particularly the Defendant who goes second after the Government rests its case, plan witnesses and exhibits, including expert witnesses, based on envisioning what the prosecution is going to present as evidence during the Government's case in chief before the Defendant's case in chief

[1] Charged by the prosecution as being also known as "Bigo Barnett," evidently referring only to a call sign in communications or social media handle, not a typical pseudonym.

begins. Anticipated witnesses generally are planned to respond to the prosecution's case. For example, if the prosecution in any case on any topic were to unexpectedly fall short of proving part of a crime, the Defendant's counsel would most likely skip that topic in his case in chief. The need for Defendant's witnesses and evidence is normally related to what the prosecution proved during the Government's case in chief.

C. The Defendant Barnett timely filed a notice of intent to call expert witnesses Mark K. Snell and Steve Hill, including with their qualifications. Said notice sent to the prosecution is also posted as Exhibit #1 to the Government's Motion to Exclude, so that the Defendant's Notice is posted at ECF Dkt. # 111-1. Defendant believes attachment of documents already posted in the ECF record is disfavored as repetitive.

D. The experts are extraordinarily well-qualified and their expertise and experience is beyond question.

E. No response was required to Defendant's Notice. The Government is not filing a regular response in a motion cycle on the Defendant's proposed expert witnesses.

F. The Government has started a new motion cycle by initiating a motion to exclude the expert witnesses.

G. Yet, apparently, to the best of counsel's knowledge, the Government made no attempt to consult with either counsel for Defendant Barnett before filing the motion, whether on a short turn-around schedule or long. That is the Government did not attempt to negotiate or consult to improve upon the dispute or reach a partial or complete resolution without the need for judicial intervention.

H. The Government seeks what is in effect "extraordinary relief" in terms of pre-emptively ruling on the contents of a witness' testimony prior to the flow of evidence and

witnesses developed during trial and prior to the Court considering the actual questions posed to the witnesses. Normally, the presiding judge would rule on specific questions or question topics as those questions are presented. This means, among other things, that the judge would then be best informed by the entire scope and flow of evidence that has been developed during the trial before reaching those rulings on those questions.

I. The Court is actually choosing between ruling on questions at the time they are posed or now ahead of trial. There should be a heavy preference for ruling on those questions at the time they are asked.

J. The Defendant wrote a brief and concise notice.

K. The Government could have inquired of the Defendant any questions or concerns it has, but did not.

L. However, now, upon reviewing and opposing the Government's motions, the Defendant can provide more detail and clarification which could also have been done by telephone or email or letter with the U.S. Attorney's Office.

M. In footnote 1, the Government's Motion insinuates "Ultimately, Judge Mehta did not allow either Mr. Snell or Mr. Hill to testify on these matters" but fails to explain that the issue there was procedural and not a ruling on the qualifications or expertise of the witnesses.

II. GOVERNING LAW – DEFENDANT IS ENTITLED TO PRESENT HIS CASE.

Federal Rules of Evidence Rule 702 provides that:

Rule 702. Testimony by Expert Witnesses

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:
>
> **(a)** the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
> **(b)** the testimony is based on sufficient facts or data;
> **(c)** the testimony is the product of reliable principles and methods; and
> **(d)** the expert has reliably applied the principles and methods to the facts of the case.

Meanwhile, it is a fundamental violation of due process for either the Court or worse the Government to script the Defendant's defense case in chief for him. Whether the Court, the prosecutors, or even ultimately the jury like the Defendant's presentation of his defense or not – which we may ultimately see – it is the Defendant's constitutional right with and through his legal counsel to present his own defense. The idea that the Court can decide what a Defendant's case in chief may be is an alarming departure from traditional criminal law and constitutional Due Process. One cannot imagine a concern raised about events of January 6, 2021, which are as serious of a threat to our nation's constitutional system than disabling a Defendant from presenting his own chosen defense in Court.

Put another way, the Defendant is not and need not be asking permission to call witnesses factual or expert which he believes will best present his case in chief in defense to the jury.

In *Holmes v. South Carolina*, 547 U.S. 319 (2006), the Court, quoting *Krane v. Kentucky*, 476 U.S. 683, 690 (1986), held: "Whether rooted directly in the Due Process Clause or in the Compulsory Clause of the Sixth Amendment, the constitution guarantees criminal defendants a meaningful opportunity to present a complete defense." See *Washington v. Texas*, 388 U.S. 14 (1967); *Chambers v. Mississippi*, 410 U.S. 284 (1973); *Crane v. Kentucky*, 476 U.S. 683 (1986); *Rock v. Arkansas*, 483 U.S. 44 (1987). The U.S. Supreme Court reversed a South Carolina

conviction in which the defendant was barred from introducing certain evidence that implicated another person in the commission of the crime. The Supreme Court unanimously (Justice Alito's first opinion) held that this rule violated the defendant's Due Process rights.

In *United States v. Murray*, 736 F.3d 652 (2d Cir. 2013), the Second Circuit reversed a refusal to allow expert testimony. The trial court decided that the Government's cell phone geolocation data (in 2013) was not particularly incriminating and therefore the defendant's expert witness would not be especially meaningful in rebuttal. The Court of Appeals reversed holding that the Defendant had the right to present his case including his expert witness.

In *United States v. Garcia*, 729 F.3d 1171 (9th Cir. 2013), the defendant sought to introduce evidence that the victim had previously engaged in various acts of violence and the defendant knew of these other incidents. The trial court erred in excluding this evidence. In a self-defense case, the defendant's knowledge of the victim's prior assaultive behavior is relevant to show his state of mind in shooting the victim.

Therefore, the only basis for the Government objecting to testimony is its relevance to the criminal charges that the Government itself indicted the Defendant for. If the expert witness testimony does not illuminate the charges which the Government brought, the expert testimony might not be "helpful" in evaluating the evidence. However, if the asserted facts being explored are material to the criminal charges, then the Defendant has a constitutional right to present the defense that he chooses to present, not the defense that the Government wants to face.

Recall for analysis by comparison, that the Government has the choice of bringing or dropping criminal charges. If the Government has chosen to press a charge of a criminal violation, the Defendant has a right to respond. The prosecution has little place to complain on topics that it opened up and chooses to maintain at issue.

The United States Court of Appeals For The Armed Forces has explained in *United States v. McAllister,* 64 M.J. 248 that an accused has the right to present his own witnesses to establish a defense; this right is a fundamental element of due process of law. In *United States v. Hennis*, 79 M.J. 370, that Circuit Court makes clear that the Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense. In *United States v. Teffeau*, 58 MJ 62, it is taught that fundamental due process demands that an accused be afforded the opportunity to defend against a charge before a conviction on the basis of that charge can be sustained; few constitutional principles are more firmly established than a defendant's right to be heard on the specific charges of which he is accused. In *United States v. Bess,* 75 M.J. 70 the Armed Forces Circuit declared that it is undeniable that a defendant has a constitutional right to present a defense, whether rooted directly in the Due Process Clause or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, the Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense.

It is for the Defendant – not for the Judge as invited by the Government – to decide what the Defendant's defense will be and how to present his case.

III. TOPICS OF THE EXPECTED TESTIMONY OF EXPERTS

It appears that the problem here is the Government's misunderstanding of what the experts would testify about that are meaningful to the elements of the crimes which the Government must prove beyond a reasonable doubt.

It should also be recalled that these experts after countless hours of scouring through U.S. Capitol security system surveillance camera videos provided to the Defendant, body-worn camera (bodycam) videos, radio transmissions among law enforcement provided to Defendant, etc. can,

should, and will testify to information collected as part of their normal work as experts and may testify to their conclusions about the mountains of evidence and summarize all of this information quickly.

Moreover, it should also be noted that the U.S. Attorney's Office has in fact consistently addressed the same topics from the Government's perspective.

Even the more controversial topics proposed by experts Snell and Hill concerning the initiation and development of crowds of protestors, some of whom deteriorated into riots or brawling, over 90% of whom did not, are simply the mirror image, flip side of the Government's case in chief. The Government has in every trial arising from January 6, 2021, and necessarily will here, present the prosecutor's view of how around 300 to 1500 of the approximately 10,000 people[2] demonstrating peacefully in the vicinity of the Capitol broke away from the main group and descended into violence, a very few assaulting police, many wandering around inside the Capitol as tourists, some of them however trying to break through the doors of the House and Senate chambers, some allegedly spraying bear spray and the like, and everything in between.

The Government's case will consist largely of its view of how the crowd developed, gathered, organized itself, and acted, while seeking to block any alternative view of those same topics. Almost the entire trial will consist of the prosecution's view of the same topics that it seeks to exclude here now.

The Defendant proposes to call Snell and Hill on the following topics, as stated in Defendant's Notice of Expert Witness, as further explained and clarified here:

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[2] In a statement by Acting Chief of the U.S. Capitol Police, found at https://twitter.com/MikevWUSA/status/1354104955553067010/photo/1, Yogananda D. Pittman documents during a topic otherwise ***not*** relevant to this motion nor adopted by the Accused that the U.S. Capitol Police estimated that "tens of thousands" of demonstrators were at the U.S. Capitol. Elsewhere Pittman estimates the crowd at 10,000.

A. Near the bottom of page 13 of the Motion "Next, while the defendant's role and culpability in general, in particular, are core issues for this trial, his *relative* role or culpability is irrelevant.

Defendant by counsel is at a loss to see where the issue of "relative" culpability entered into the discussion. The Court's rule of consultation should have been followed. Neither the Defendants case in chief, proposed evidence, or witnesses, nor the expert witnesses are prepared to present to a fair, unbiased jury evidence that Defendant Barnett is not guilty. He is accused of entering the Capitol with a hiking stick, acting peacefully at all times. He is accused of stealing an envelope after it cut him and it became soiled with his blood and he sought to discard of it properly. He is accused of talking to two police officers, primarily while he was leaving the Capitol and then realized that he had left his flag behind and wanted to retrieve it. The Government thinks talking to a police officer is obstructing or interfering. In those and many other details, the Defendant is not seeking to prove his *relative* guilt, but instead his innocence. Barnett is completely innocent because what the Government accuses him of doing was actually done by others or not done at all. He is innocent because he did not do what other people actually did. But that is not about a *relative* culpability. For instance, he is accused of bringing a deadly and dangerous weapon onto federal property. The Govt expert witness Hill will testify that Defendant Barnett did not possess a weapon that is capable of killing or permanently disabling others.

It would seem that this arises because the Government is so thoroughly indoctrinated into its assumptions that it cannot evaluate the evidence in any other light

than guilt.

Or the Government is committed to the false idea of collective or group guilt. The Government must prove the individual guilt of each defendant separately from all other persons or defendants. There is no concept of "relative" culpability because no one is guilty of the actions of a crowd or a group or what other people did. The Defendant can only be guilty of what he, individually, did. Because there is not group guilt, it is not relevant whether the Defendant is more or less guilty than others. He is either proven guilty beyond a reasonable doubt or he is not. It is a light switch.

For example, at the bottom of page 13, the Motion argues that "Consequently, Mr. Snell should be prohibited from providing his "expert" opinion that the defendant's conduct was no worse or impactful than many others'." However, unless Defendant Barnett is proven beyond a reasonable doubt to directly cause the effects identified in each statute, he has no impact at all. This and many other statements by the Government in this case all related cases suggest that the Government is convinced that everyone is collectively guilty as a crowd. From today's pre-trial conference, the government seems to be intent on calling such witnesses both inside and outside the Capitol—with intense focus on what others are doing--while seeking our own ability to present any context, counter evidence or alternative interpretations to government interpretation.

B. Near the bottom of Page 4, the Motion argues: "Congress still could not resume the joint session, however, until law enforcement determined that it was safe to do so, which involved sweeping the building for dangerous items, among other tasks."

Thus, the Government concedes and admits that the expert witness testimony of Snell and Hill is relevant, meaningful, appropriate, and proper. Having argued that law enforcement had to sweep "the building for dangerous items," before the Joint Session could resume, the Government Motion concedes that Snell and Hill are appropriate expert witnesses.

What steps were required? Did Barnett individually affect that process in any way or the time necessary to complete it? The Motion inadvertently admits that the question is of extreme importance whether Barnett caused any delay in the resumption of the Joint Session of Congress.

C. At the top of Page 14, the Motion argues that "Mr. Snell's opinion that 'Mr. Barnett did not corruptly contribute to obstructing or impeding an official proceeding' is patently improper."

However, in context, it is clear that Mr. Snell's opinion is that the official proceeding had already been recessed and the U.S. Congress had already been evacuated from the U.S. Capitol building before Barnett did anything of which he is accused and more importantly that the security protocols for a security screening of the building could not have been extended in time or expanded in workload by Barnett.

The context makes clear that Barnett ***factually*** did not contribute to obstructing or impeding an official proceeding because the facts do not support the charge. Barnett did not contribute to causing something that had already happened before Barnett arrived in the area.

D. At some time sometime between 2:45 and 2:50 PM, approximately, soon after the House Chamber was evacuated

By reviewing and summarizing and testifying to their review of the video recordings and other facts, Snell and Hill can testify that [to clarify: individuals outside the House Chamber Main Door and the Speaker's Lobby would perceive the House Chamber as being] evacuated sometime between 2:45 PM and 2:50 PM as shown by the available Capitol building security camera videos and other evidence produced by the Government.[3]

E. As to the US Capitol Police and the Secret Service, it is their opinion that the decision to evacuate both Houses of Congress was reached between approximately 2:20 and 2:35 p.m. and that a decision was made to not resume Certification of the Electoral Votes until, among other requirements, the Restricted Capitol Grounds (not just the Capitol Building by itself) were cleared and made safe. The effort to make the Restricted Capitol Grounds safe for returning Senate and House personnel required the effort of multiple police, security and safety personnel, requiring command and control decisions and communications, coordination between multiple agencies searching for dangers such as "stay-behinds" (explosives, booby traps, electronic recording or communication

[3] The wording here has been changed somewhat based on the timeline released by the Select Committee stating that at 14:57 the "Evacuation of Members on House Floor [was] completed." It is the experts' opinion that there were only a small number in the Chamber after the time range 2:50 p.m. in any case that still needed to be evacuated That timeline is available at https://www.govinfo.gov/content/pkg/GPO-J6-DOC-CTRL0000000056/pdf/GPO-J6-DOC-CTRL0000000056.pdf

devices) armed/violent persons and/or any unauthorized personnel. It is their opinion that immediately upon the USCP security personnel losing sight one or more of the first unauthorized individuals to enter the restricted area, the USCP lost control over all of the restricted areas requiring immediate lockdown/evacuation, lengthy search and secure effort entering and physically inspection of each room within this large area, looking for unauthorized personnel, dangerous persons, items and articles left behind that posed potential danger to returning personnel.

The experts can testify to their evaluation of government charging documents, security camera video recordings, USCP OPS channel transcripts, and other evidence that the evacuation of the Chambers of Congress demonstrate – from their security experience and training – that a decision to evacuate Congress must have been reached earlier than the actual evacuation itself, therefore approximately 2:20 PM to 2:35 PM.

An expert can summarize a review of all of the evidence to establish these points.

That is these experts like many experts can summarize, filter, streamline and draw conclusions from massive amounts of raw data and present a conclusion that is more clear and faster for the jury than the parties presenting hours of raw video on every topic and leaving the jury to sort out the events.

In this situation, the standards for expert witnesses argue in favor of allowing the experts to testify because (1) the Government can and will have already now and review before trial the information that the experts will testify to (2) the experts can summarize in just a few minutes the end results and outcome of analyzing many hours

or raw data, (3) the Government can and of course will cross-examine the experts and/or present their own evidence if the Government disagrees.

However, it might also be considered that the Government has steadfastly resisted all attempts to disclose when the actual decision was made to start recessing or evacuating the Capitol and what criteria and information went into that decision so the expert witnesses can only testify to the available evidence and disclosures from the Government.[4]

F. Soon after the House Chamber was evacuated sometime between 2:45 and 2:50 PM, approximately, those attackers who organized and executed these activities on the second floor then left, leaving a large number of protestors, who knew nothing about the planned assault, in place to do as they latter saw fit.

Again, this very same topic from the Government's perspective will comprise the majority of the Government's presentation at trial. The Defendant will disagree with the Government's interpretation. But in every related case, the Government has spent large amounts of time presenting videos and interpretations of the behavior and motivation of the crowds, as if they are a single group mind.

The Government has strenuously objected in all contexts to considering any

[4] As an example of the increasing availability of information, testimony released by the House Select Committee on January 6 brings into question whether the Restricted Capitol Grounds needed to be cleared. Perhaps a more precise way of describing the requirements that had to be achieved before resuming is the following: (1) to clear individuals from and sweep the entire Capitol (2) to secure the entire Capitol; and (3) to establish some sort of security perimeter between the Capitol and the thousands of protestors still on the Capitol grounds. It is not clear from available documents where precisely that perimeter was established with respect to the Restricted Capitol Grounds.

alternative analysis of what happened on January 6, 2021, other than its own. The Government does not want to prove individual guilt of individual Defendants beyond a reasonable doubt. The Government wants to advance vague, imprecise, unsubstantiated theories about why crowds (not just one uniform crowd) gathered in different locations, what "the crowd" wanted as if crowds can want things, what "the crowd" planned, what "the crowd" did, etc.

G. The further conclusion the expert witnesses reach are that the activities involving in purposely and corruptly storming and occupying the Capitol on the one hand; and those involved in putting the Certification into recess, evacuating the Chambers, and clearing the Grounds on the other, were not affected in any more significant way by Mr. Barnett compared to how these activities were affected by any one of the thousands of Trump supporters on the Capitol Grounds who did not enter the Capitol or attack police. Thus Mr. Barnett did not corruptly contribute to obstructing or impeding an official proceeding by delaying any activities such as evacuation on the front end or in clearing the grounds so Certification could resume on the back end.

Expert witness Hill has expertise in security management and crowd controls, such that they can testify to what the USCP would have to do to conduct a security sweep and review of the Capitol building before the Joint Session of Congress would be cleared to resume.

Based on Mr. Hill's expertise, and Mr. Snell's expertise in detection and delay of persons who are not cleared to be on a site, both will testify that Defendant Barnett

did not affect the resumption of the Joint Session of Congress by 1 second. The Joint Session of Congress resuming at 8 PM was not delayed by 1 second from Defendant Barnett exiting the building at 3:13 p.m. and leaving the area thereafter.

Again, the Government's recently-discovered idea is that even though the Government cannot prove that Defendant Barnett or any other person *individually* caused the Joint Session of Congress to be obstructed or interfered with that the Government imagines and speculates (guesses) that perhaps the resumption of the Joint Session of Congress could have been affected.

That speculation occurs against the backdrop of the Government's adamant refusal to disclose the documents and records of the U.S. Capitol Police leadership making those decisions whether to recess Congress and when and whether to resume the Joint Session of Congress. The Government will not provide the actual evidence of what actually happened.

H. Thus Mr. Barnett did not corruptly contribute to obstructing or impeding an official proceeding by delaying any activities such as evacuation on the front end or in clearing the grounds so Certification could resume on the back end.

Steve Hill can testify what would be required, such as the USCP would examine rooms or areas in exactly the same quantity in exactly the same way whether Defendant Barnett were present until 3:20 PM or whether Barnett had never been born. There could be no change in the USCP's routine of checking every room or area, running explosive-sniffing dogs through the building, etc., etc.

Thus, based on the expert's testimony, Barnett cannot be guilty, but must be

innocent (not merely not guilty, but proven innocent) of the charge under 18 U.S.C. 15129(c)(2) of obstructing an official proceeding under Count II.

Therefore, Defendant Barnett's presence earlier had no effect on when the Joint Session of Congress resumed.

I. At the top of Page 16, the Motion argues of expert Steven Hill: "Consequently, there is no basis for allowing him to muse to the jury about what he thinks the USCP and Congress had to do to clear the rioters, secure the building, and resume the certification proceeding."

However, this is exactly, as the Government concedes, the core issue of the case. As a former police officer and security expert, Hill is well-qualified to explain what would be required to complete a security screening of the U.S. Capitol police and explain and opine that Richard Barnett's brief presence ending at 3:20 PM could have no impact whatsoever on the process for screening the Capitol before the Congress resuming the Joint Session of Congress. This is especially true where the Government has systematically concealed the records and documents concerning the USCP's evaluations of threats developing throughout the day, the decision to recess the Congress and evacuate the building and to resume the Joint Session. Searching a building involves standard protocols known to every law enforcement officer.

There is no uniquely U.S. Capitol way for a police officer to search and clear a room. There is no uniquely U.S. Capitol way for a trained and skilled K-9 handler to walk a bomb sniffing dog around a building. This is especially true when the U.S. Capitol does have video security camera surveillance which, although not overly

sophisticated, is capable of quickly assisting officers and trained dogs on foot in looking into every area of a building.

It is unfortunate that the U.S. Capitol Police and U.S. Congress pretend that the relative outdated systems in the U.S. Capitol building are super-secret, highly advanced technology, such as concerning the placement of security cameras. Expert Hill's experience is with more recent systems than equipment purchased from the lowest bidder.

J. In the middle of page 17, the Motion argues that "The defendant seeks to call Mr. Hill to speculate and substitute what he thinks the USCP, USSS and Congress decided, and what the USCP, MPD, USSS and others did, for what actually happened."

This is incorrect. The Defendant demands under pain of the dismissal of the entire case that the U.S. Capitol Police comply with the constitutional command of Brady v. Maryland, and disclose all of the documents, records, text messages, emails, notes, radio communications with headquarters, standard operating procedures, threat assessments and decision documents throughout January 1st through the afternoon of January 6, 2021, showing exactly what the perceived threats were – such as the discovery of pipe bombs – when those threats developed and why the authorities mentioned decided that the Joint Session needed to be recessed and when the U.S. Capitol needed to be evacuated – and why. These records, which the Government is constitutionally required to disclose ahead of trial even without being asked, will show that Richard Barnett was not the cause of any obstruction of any official proceeding

either at the front end or the back end of his brief visit from 2:43 PM to 3:20 PM in the Capitol.

However, realizing that the Government will continue to violate *Brady v. Maryland*, the Defendant is entitled to be prepared to work around the Government's resistance to disclosing the information. Given the withholding of the records and documents, the Defendant is entitled to put on the alternative proof that standard law enforcement protocols make it impossible for Defendant Barnett to be guilty of violating 18 U.S.C. 1512(c)(2).

Testimony, even where deductive opinions are necessary, that would completely exonerate the Defendant, is constitutionally required of the Court. If the expert witness' deductive conclusions would fill in the gaps left by the Government withholding exculpatory information, the Defendant is entitled to put on such testimony by an expert deducing from standard law enforcement protocols and security protocols that Richard Barnett's presence from 2:43 PM to 3:20 PM was incapable of obstructing an official proceeding that recessed at 2:18 PM and did not resume until 8 PM.

K. On page 17, the Motion also argues that: "Mr. Hill's opinion that the defendant's 'presence was immaterial to these operations and had no effect on when the proceedings were suspended or restarted' is equally based on speculation, not reliable facts or methodology.

That is completely false.

It is a scientific impossibility for Barnett to act at 2:43 PM and have a

consequence at 2:18 PM. According to reliable facts and methodology, outside perhaps of quantum particle accelerators, causes at 2:43 PM do not have effects earlier in time at 2:18 PM. That is not speculation. Those are reliable methodologies.

Similarly, when the facts show that the security clearance of the US Capitol was mostly completed by 3:10 PM and there was no one in the building outside of the Rotunda and the Senate Wing and possibly the Lower terrace level, there was plenty of time to screen and clear (approve) the building for use by 8 PM. There was plenty of slack in the process. It is a matter of physical and scientific impossibility for Barnett's presence to extend by even 1 second the time required to perform a complete security review and check of the building. Nothing Barnett did would have any impact on that whatsoever.

The USCP would have to check every room or area. They would not skip any. The number of rooms and areas checked would be the same if Richard Barnett had never been born.

The USCP would be aided, including by radio communication, guided by the security team watching on security television monitors both in real time and of recordings of events earlier in the day. The security team would be able to guide teams on foot and look into every room and area by security cameras while search teams went from room to room, to see if anyone were in the rooms that should not be there.

The USCP would use highly-skilled and trained tactical teams, K-9 police officer dog handlers and bomb-sniffing dogs (probably including sniffing ammunition and gun powder or odd chemicals such as gas or the like). Those skills are unrelated to the location, and are not limited to the U.S. Capitol. It would take so much time to

walk teams of police dogs through and around the building. Nothing would change if Richard Barnett had never been born. The time would be exactly the same either way.

L. Mr. Snell's opinion is that a sophisticated, organized attack on the Capitol began just before 1 PM with the intention of occupying it and flooding the building with large numbers of Trump supporters so as to allow the latter to protest outside the Chambers.

Again, the prosecution logically must and always has and necessarily will present its theories on these same events.

The Government agrees that there was "a sophisticated, organized attack on the Capitol [that] began just before 1 PM." That is, the most controversial topic is one where both sides agree.

However, the two sides sharply disagree on who is responsible. This Defendant will insist that he had nothing to do with any of that.

It is quite striking that the Government in these cases is arguing both sides of the same coin without seeming to realize that it is doing so. Unmistakably, it is the core thesis of the Government that that there was "a sophisticated, organized attack on the Capitol [that] began just before 1 PM."

Yet the Motion argues as if this core thesis of the prosecution is now a preposterous idea. But if the Government may not mention this thesis, then the Government needs to dismiss the charges right now and save the Judiciary the burden of a trial. What is in dispute is the Government simply guessing that the Defendant and other defendants are the ones responsible for the "sophisticated, organized attack

on the Capitol [that] began just before 1 PM." and that the attack was both (1) not planned ahead of time but was lit like a match by then President Donald Trump's speech at the Ellipse and also (2) planned ahead of time as early as November 2020.

IV. So having made this organized attack the centerpiece of its prosecution of all cases relating to January 6, the Government's Motion now argues that the Government's own theory is ridiculous. If the Government will prosecute the Defendant with theories about the motivations and behavior of the crowds, the Defendant is constitutionally entitled to present a defense. FURTHER ARGUMENT

Most emphatically, the Motion also argues of the expert "Mr. Snell's proffered testimony about the relative role or culpability of the defendant as compared to other rioters is pure speculation at well." On the contrary, the time line does not lie. There are those who were physically present as early as 1:00 PM who could have obstructed the Joint Session of Congress. But not Barnett. The Government admits that Barnett was not present until 2:43 PM and left at 3:30 PM. It is a scientific impossibility for Barnett to have obstructed the official proceeding.

This does not require knowledge of the law. It requires tracking carefully the video and other evidence of what was happening along a time line.

The Motion would have us view this as a really simple thing that does not require experts. Yet we do not see the Government dismissing the case. Even though at 2:43 PM Barnett did not obstruct an official proceeding under 18 U.S.C. 1512(c)(2) that recessed at 2:18 PM, the Government is prepared to fight to the death to prosecute Barnett for doing so.

In the middle of Page 11, the Motion also argues of the experts "He has not experienced the government's trial presentation."

Everyone knows the Government's trial presentation. People in other countries know what is the Government's trial theories, evidence, arguments, exhibits, and documents. The Government's trial presentation was live-tweeted by dozens of journalists of all stripes.

The Motion argues as if the same presentation the Government has given over and over dozens of times now is a proprietary secret. And if it were? Would that comply with *Brady v. Maryland*, 373 U.S. 83 (1963)? Is there a secret prosecution case?

The Motion argues on page 11 that "He does not have comprehensive knowledge of the conduct of, and evidence against, all the other "thousands of Trump supporters on the Capitol grounds" to whom he seeks to compare this Defendant.

The referenced section refers to the status of simply being in a crowd of approximately 10,000 people that were on Capitol grounds not the conduct of approximately 900 who have cases filed against them which is approximately 10% of the whole. Most of the other approximately 90% did indeed trespass based on where they were located but appear to have done nothing else. The Motion objects that the expert "has no insight into the experiences of the Vice President, the Members of Congress forced to pause the Joint Session and evacuate."

However, the Government has not charged Barnett with having any interaction between himself and the Vice President or any Members of Congress.

Emphasizing the problem, the Government systematically attempts to find crowds or groups responsible instead of individuals. The Motion – entirely unnecessarily – recites claims that have nothing to do with this Defendant. For example, at the bottom of page 2, the Motion recites what "individuals in the crowd" did and what "others in the crowd" did and what "rioters" did. The Motion claims that "Some explicitly called for violence."

The Motion claims that at 2:20 PM Congressional leaders suspended the joint session of Congress and evacuated the Congressional Chambers.

Then at the top of Page 3, the Motion asserts that the Defendant entered the East Rotunda Doors (essentially synonymous with the Columbus Doors as, being set together in two layers) at

2:43 PM. So having asserted that Congressional leaders suspended the Joint Session of Congress at 2:20 PM, the Government then claims that Defendant Barnett did not enter the Capitol until 23 minutes after the Joint Session had been stopped.

Thus the Government once again admits that Defendant Barnett is not guilty (not just not proven guilty, but actually innocent) of any charge of violating 18 U.S.C. 1512(c)(2). Defendant Barnett did not obstruct an official proceeding that went into recess at 2:18 PM (according to the Congressional Record) by entering the building at 2:43 PM.

The prosecution seems unaware that none of that has anything to do with this Defendant. The Government persistently seeks to hold crowd or "someone" responsible for actions that the Defendant did not do. The Government seems unaware that this Court cannot convict crowds or convict "someone" for things that this Defendant did not do.

Thus, seemingly unaware that what "someone" did is not a basis for criminal liability against Defendant Barnett, the Government does admit that Defendant Barnett did not obstruct or interfere with any official proceeding.

Having addressed the same points, details, and circumstances from different directions, this Opposition does not need to confront the Government Motion's arguments in the order or conceptual framework of the Motion. Defendant contends that it is obvious that the Motion is not persuasive and consists mostly of misunderstanding the expert witness' proposed testimony.

However, of particular concern, both in terms of the Government's intransigence and the importance of the issues, the Motion argues on page 8 *(emphasis added):*

> Yet the defendant wishes to have Mr. Snell offer the following "expert" opinions.
>
> > As to the US Capitol Police and the Secret Service, it is his opinion that the decision to evacuate both Houses of

> Congress was reached between approximately 2:20 and 2:35 p.m. and that a decision was made to not resume Certification of the Electoral Votes until, among other requirements, the Restricted Capitol Grounds (not just the Capitol Building by itself) were cleared.

Attachment 1 at 2. First, these are not opinions at all. ***The time at which USCP, USSS, and Congressional leadership decided to evacuate the House and Senate chambers is a matter of fact.***

On the contrary, the Government has steadfastly refused to disclose these facts. They may be facts. But they are facts known only within the secret records of the U.S. Capitol Police.

Let's be clear about what we are saying: There was a time *before* the Congressional hearing recessed when there was a *decision* for a recess.

The issue in the criminal charge against Defendant Barnett is whether Barnett did or did not obstruct an official proceeding. Therefore, when the USCP reached a decision to evacuate and/or recess the official proceeding in Congress is directly relevant to – probably entirely exculpatory to – Defendant Barnett's innocence.

Why did the USCP decide to recess the official proceeding? Did it have anything to do with Defendant Barnett? Was it because of something else we don't even know about now?

If security personnel monitoring television cameras exclaimed "Oh, no! There's Richard Barnett on the steps! We're in trouble now!" (a) that would be relevant to the criminal charge that Barnett obstructed the official proceeding, but (b) we would have heard about it already. If the decision to recess the Congress was because someone recognized Richard Barnett on the security cameras, it is a reasonable guess that the Government would be eager to produce those decision-making records.

Similarly, the decision to evacuate the building happened at a specific point in time. It happened for a reason. There was a point in time when someone decided that the Capitol should

be evacuated.

Since we are talking here not about when the evacuation happened, but when the decision happened. The decision and the documents about the decision tell us why the Capitol was evacuated. It would tell us that Barnett had nothing to do with it.

We are not talking about when the recess happened. We are talking about when the decision to recess the official hearing occurred. And why it occurred.

So, because the Government has kept those crucial, almost certainly exculpatory, records secret, the best that the Defendant has is the expert witness' extrapolation of when the decisions – not the result of the decisions, the decisions – were being made and why.

Here, the Motion agrees with the importance of these facts. But the Motion neglects to point out that the Government is withholding the records, documents, communications, and conversations about the developing threat assessments and decisions to recess the Joint Session of Congress and evacuate the building.

In many related cases, defense counsel have been demanding these facts for as much as a year and a half. Even cases that have gone through trial did not produce these records from the U.S. Capitol Police.

Finally, the Motion brings into focus again the both-sides-of-the-coin at the same time approach of the Government. The Government wants to withhold the reasons and timeline of why and when the US Capitol Police recessed and evacuated the U.S. Capitol, but does not want the Defendant's expert witnesses to try to fill in the blanks.

CONCLUSION

Without Snell's and Hill's detailed expert testimony, the vague, broad-brush stroke, superficial comments of Government witnesses will go unchallenged.

Dated: January 4, 2023

RESPECTFULLY SUBMITTED, By Counsel
/s/ Brad Geyer

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CERTIFICATE OF SERVICE

I hereby certify that on January 4, 2023, a true and accurate copy of the forgoing was electronically filed and served through the ECF system of the U.S. District Court for the District of Columbia.

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