

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

UNITED STATES OF AMERICA	:	
	:	Case No. 21-CR-38 (CRC)
v.	:	
	:	
RICHARD BARNETT	:	
also known as “Bigo Barnett,”	:	
	:	
Defendant.	:	

**GOVERNMENT’S OPPOSITION TO THE DEFENDANT’S MOTION TO DISMISS
COUNT TWO OF THE SUPERSEDING INDICTMENT**

The United States of America, by and through its attorney, the United States Attorney for the District of Columbia, hereby submits this opposition to the Defendant’s Motion to Dismiss Count Two of the Superseding Indictment. ECF No. 124. Count Two of the Superseding Indictment charges the defendant with Obstruction of an Official Proceeding, in violation of 18 U.S.C § 1512(c)(2). The United Sates respectfully requests that the defendant’s motion be denied.

PROCEDURAL BACKGROUND

On January 29, 2021, a grand jury charged the defendant with Obstruction of an Official Proceeding pursuant to 18 U.S.C. § 1512(c)(2), and six other charges. ECF No. 19. The Court set a deadline for pretrial motions of September 22, 2022, after granting the defendant five prior continuances of that deadline. *See* 9/19/2022 Minute Order; ECF No. 114 (setting forth detailed procedural history of continuances).

On September 22, 2022, the defendant filed his pretrial motions, including a 27-page motion to dismiss the charge of Obstruction of an Official Proceeding, in violation of 18 U.S.C. § 1512(c)(2), which was Count One of the original indictment. ECF No. 74. On November 23, 2022,

the Court denied the defendant's motion, finding that "[t]he Court has already addressed and rejected several of the arguments that Barnett advances, and any novel arguments are unpersuasive." ECF No. 90 at 5. That denied motion is almost identical to the present motion, using similar or identical argument headings, language, and law.

On December 21, 2022, the grand jury returned a superseding indictment that, among other things, modified the language of the Obstruction of Official Proceeding charge by adding the following underlined language and removing the following stricken language:

On or about January 6, 2021, within the District of Columbia and elsewhere, RICHARD BARNETT, also known as "Bigo Barnett," attempted to, and did, corruptly obstruct, influence, and impede an official proceeding, that is, a proceeding before Congress, specifically Congress's 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 ~~by entering and remaining in the United States Capitol without authority and engaging in disorderly and disruptive conduct.~~

Compare ECF Nos. 19 (Count One) *and* 96 (Count Two).

On January 4, 2023, the Court held a pretrial conference. There, the Court heard argument as to the defendant's Motion to Continue Trial, or to Dismiss the Superseding Indictment. ECF No. 112. The defendant argued that the new Count One, charging the defendant with interference with law enforcement officers during civil disorder, in violation 18 U.S.C. § 231(a)(3), should be dismissed. The defendant also argued that the modified language of Count Two, Obstruction of an Official Proceeding pursuant to 18 U.S.C. § 1512(c)(2), made it newly objectionable. While the Court denied the defendant's pending motion to dismiss the entire superseding indictment, the Court permitted the defendant to file a motion to dismiss arising from the new charges and modified language in the superseding indictment. The Court did *not* re-open the defendant's deadline for all pretrial motions, nor did it authorize the defendant to relitigate issues that had already been resolved.

On January 5, 2023, the defendant filed the present motion to dismiss Count Two, Obstruction of an Official Proceeding pursuant to 18 U.S.C. § 1512(c)(2). ECF No. 124. Although that motion mentions the superseding indictment and its changes to the language of Count Two, its arguments are nearly identical to those presented to the Court in the defendant's first motion to dismiss; in fact, in most cases, the arguments and citations are verbatim. *Compare* ECF Nos. 74 and 124. Nowhere in his motions does the defendant even attempt to explain why the changes in the superseding indictment's language render the otherwise legally valid Count Two defective.

ARGUMENT

The defendant's second motion to dismiss his § 1512(c)(2) charge should be denied for two reasons. First, the validity of the charge of Obstruction of an Official Proceeding has already been litigated and ruled on by this Court. In denying the defendant's first motion to dismiss the charge of Obstruction of an Official Proceeding, *see* ECF No. 74, the Court explicitly held that Congress's certification of the Electoral College vote qualified as an "official proceeding" under 18 U.S.C. §§ 1512(c)(2). *See* ECF No. 90 at 8. As such, this holding is now the law of the case and it "should continue to govern the same issues in subsequent stages" of the case, including subsequent motions to dismiss the same offense. *Musacchio v. United States*, 577 U.S. 237, 244-45 (2016); *see also Messenger v. Anderson*, 225 U.S. 436, 444 (1912) ("courts generally . . . refuse to reopen what has been decided."); *LaShawn A. v. Barry*, 87 F.3d 1389, 1393 (D.C. Cir. 1996) ("the *same* issue presented a second time in the *same* case in the *same* court should lead to the *same result*") (emphasis in original).

Second, the Court should decline to consider the defendant's motion as untimely. The motion comes almost two years after the defendant was charged with Obstruction of an Official Proceeding, ECF No. 19, more than three months after the defendant's deadline for pretrial

motions, 9/19/2022 Minute Order, and one business day before the start of trial, which is set to begin on January 9, 2023. At the January 4, 2023 pretrial conference, the Court did not throw the door open for the defendant to file otherwise out-of-time motions. The Court narrowly authorized the defendant to raise new legal arguments tied to the change in charges or language contained in the superseding indictment, and only those issues.

Nevertheless, nowhere does the defendant's motion explain why the addition of the language "specifically, Congress's 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" makes an otherwise properly-pled charge improper.¹ There is no possible explanation, since the Court already determined that Congress's certification of the Electoral College vote qualified as an "official proceeding." ECF No. 90 at 8.² Nor does the defendant's motion even suggest that the removal of the language, "by entering and remaining in the United States Capitol without authority and engaging in disorderly and disruptive conduct" somehow renders the otherwise legally sufficient charge deficient. Indeed, in his first motion, the defendant *complained* about that language, arguing that "the Government makes entering the capitol and alleged disorderly conduct lesser crimes under Section 1512(c)(2)." ECF No. 74 at 23.³ The removal of that language in no

¹ There was never any confusion on the defendant's part that the "official proceeding" at issue in the original indictment referred to Congress's certification of the Electoral College vote set forth in the Twelfth Amendment and Title 3 of the United States Code. In the defendant's first motion, he expressly argued that the "Electoral Count is not a Proceeding" while acknowledging that, "[t]he counting of the Electoral College votes by the Vice Presidents is conducted pursuant to the Twelfth Amendment of the U.S. Constitution and the rules spelled out in 3 U.S.C. § 1 et seq." ECF No. 74 at 24.

² The motion does contain the new position that "[t]he only places where certification occurs is at the states," ECF No. 124 at 10, but this claim, which lacks any legal citation, is included merely to bolster the position that the defendant already raised and lost – that Congress's certification of the Electoral College vote is not an official proceeding.

³ Notably, the defendant persists in raising the verbatim argument in the present motion, despite the removal of that language from the Superseding Indictment. *See* ECF No. 124 at 27 ("the

way invalidates the § 1512(c)(2) charge. Because the defendant's motion does not comply with the Court's deadline for filing pretrial motions, or present any new arguments directly related to the change in the language of the § 1512(c)(2) charge, it should be denied.

CONCLUSION

For the reasons stated above, and for the reasons stated in the Court's Order denying the defendant's first motion to dismiss the charge of Obstruction of an Official Proceeding, ECF No. 90, the Court should deny the defendant's latest motion.

Respectfully submitted,

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Government makes entering the capitol and alleged disorderly conduct lesser crimes under Section 1512(c)(2)").

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