UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA	)	
	)	
v.	)	**Case No. 1:21-cr-00038 (CRC)**
	)	
RICHARD BARNETT,	)	
	)	
Defendant.	)	

DEFENDANT'S REPLY TO OPPOSITION RESPONSE AT ECF No. 125

Comes now the Defendant, Richard Barnett, by and through undersigned attorneys, and replies to ECF No. 125 - the government's opposition to ECF No. 124 that requested this Court for good reason to dismiss Count 2 of the superseding indictment - and respectfully requests this Court to grant the Defendant's Motion at ECF 124-1 and states in support:

ARGUMENT

The Government's response is deficient of legal argument and presents no argument at all about the defective second count that fails to allege an offense. There can be no obstruction of a non-existent proceeding. Count Two is facially defective. Continued prosecution should be considered repugnant to the law. Defendant Barnett's Motion ECF 124-1 presented caselaw as to why the Court should dismiss Count Two. The government made no counterarguments and presented no caselaw in response. It argued other points.

The government unjustifiably attacks the Defense, making the claim that Mr. Barnett should have previously argued this. Yet he could not have previously argued the language of obstructing the specific proceeding of Congress's "*Certification* of the Electoral Vote" because no proceeding was ever identified in the original indictment. Mr. Barnett in his prior motion made the argument about defects and that the indictment lacked specificity. The Court authorized the *Motion to dismiss at ECF No. 124 based on the superseding indictment.* The Defense

presented a complete motion and not just a stand-alone argument at ECF-124, given a possible scenario with appeal. The Court can write that it does not want to address the remainder of the motion not specific to the non-existent "certification" as the proceeding Mr. Barnett allegedly obstructed. The Court can grant the motion based solely on the defect of Count Two, and need never reach anything else in ECF No. 124.

The government's response does not provide any legally supported argument to the defectiveness of Count Two and instead ignores the essential element of the alleged crime – obstruction of an identifiable proceeding itself.

The government argues everything except the crucial distinction contained in the superseding indictment. The words "*Certification* of the Electoral vote" were never used in the initial indictment nor did the initial indictment identify any proceeding. The government wrote "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. . . ." Response at 3. The government takes issue that the Defense submitted a complete motion that can serve as a record on appeal. The Court is not obligated to reach any of the arguments after that on Count Two alleging that the identifiable proceeding obstructed was Congress's "Certification of the Electoral vote."

Next, the government wrote that the Court should consider the entire motion untimely. Response at 3-4. The government interprets the new motion to dismiss Section 1512(c)(2) as having been limited to only addressing the words in the superseding indictment. Since no pre-trial conference transcript can be available for nearly two weeks, the defense can only say that this appears to be selective interpretation by the prosecution. The defense recalls no words that said, "only address the change." The Court can decide to only address the portion of the Motion

as it relates to Mr. Barnett being charged with obstructing a non-existent proceeding. The subsequent areas in the motion may be viewed under a different lens if the Court considers that perhaps the Government has always been misleading Grand Juries by saying defendants obstructed a non-existent certification. And as this Court knows, given a superseding indictment, the Defense must preserve all objections on the record should any appeal become necessary. The Court can decide not to consider the other sections of the Motion's argument.

The Court never needs to reach the other arguments in the Motion after the defectiveness of the indictment's Count Two for alleging violation of a non-existent event is ruled upon.

The government twisted and misrepresented Mr. Barnett's words from the initial motion. It wrote: "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 President 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.'" Response at 4. Viewed another way, the government makes the point that the defense argued about *counting* being called a proceeding, and not "certification," where Congress has no *certification* authority. **The government is asserting that a count and certification of state electors are the same**. **They are not**. The Motion presented fact: **certification is a state function**. The government does not get to say here that we argued anything about whether "certification" was a proceeding. "Certification" and "count" are two completely different words - and the use of "certification" is not interchangeable with "counting." The government cannot assert the words are the same, or that anyone besides the

government misled the Grand Jury about what proceeding may have been underway. The Grand Jury indicted for a crime that cannot have been committed - plain and simple. The government's argument lacks any substance regarding the language of the superseding indictment that makes it defective. The government did not address the rich caselaw samples presented in the Motion for precedent that shows why Count Two is defective.

CONCLUSION

The initial indictment's Count One at ECF No. 19 never named or identified the proceeding at issue. Mr. Barnett cannot have objected prior to the superseding indictment because the words "*Certification* of the Electoral vote" were not used. His prior arguments were focused on lack of specificity, and misapplication of the statute. The superseding indictment added language that makes clear he is being prosecuted for a non-existent crime. The government cannot show conduct that violates a non-existent proceeding. The government cannot ethically prosecute Count Two because binding precedent says that neither the Court nor the prosecution may make its own interpretation of the language in a count in an indictment, nor interject words, because the indictment count is defective as written. This law was provided in the Motion at ECF No. 124. There is no such proceeding as the "*Certification* of the Electoral vote." The government obtained an indictment based upon alleged obstruction of a non-existent event.

Whether the government exaggerated the nature of any proceeding in order to inflame the Grand Jury, such as misrepresenting the law to the Grand Jury and making Congress's role more important than watching a tally or count, is of no import at this moment. The fact remains that the government's Count Two is defective and cannot be cured by prosecution opinion. The legal precedents are settled and were presented in the motion to dismiss Count Two. ECF No. 124. Here, the eleventh hour indictment the government obtained on the eve of trial is defective and the

government's argument provides no caselaw in support of the defect because it cannot. None exists. The defective Count Two of the indictment should be dismissed.

Wherefore, Mr. Barnett respectfully requests that because the indictment is defective in its lack of an essential element of the offense, where specifically, there is no such Congressional proceeding under the 12th Amendment to the U.S. Constitution, or 3 U.S.C. Sections 15-18, or any U.S. law that identifies a Congressional "*Certification* of the Electoral vote," and where the obstruction of a proceeding that must be specified in the indictment is an essential element of the alleged crime), Mr. Barnett cannot have committed the alleged crime and this Court should grant his motion at ECF 124.

Dated January 7, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify on the 7th day of January 2023, a copy of the foregoing was served upon all parties as forwarded through the Electronic Case Filing (ECF) System.

/s/ Carolyn Stewart Esq.
Carolyn Stewart, Esq.