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 SURREPLY TO ECF NUMBER 129

Comes now the Defendant, Richard Barnett, by and through undersigned attorneys, and respectfully files this surreply in the above-captioned case, in response to the Government's reply at ECF No. 129 that was filed around 10:29 p.m. yesterday; and exceeded the Court's ordered deadline of January 6, 2023 without any request for an extension, and merely continues the government's assault on Mr. Barnett's ability to defend himself. Mr. Barnett requests that this Court deny the government's filing of the reply, strike it from the record docket, ignore it in totality, and make no decision on the matter until just prior to the Defendant's case in chief when the issue of expert testimony will be ripe for Daubert hearing or evidence exclusion decision. Mr. Barnett provides the following in support:

The reply at ECF No. 129 is late without excuse and the government never bothered to request any extension. Any government reply was due by January 6, 2023 based on the verbal order of the Court on January 4, 2023.

Mr. Barnett stated at the January 4, 2023 Pretrial Conference that the matter of determining whether the expert testimony was admissible was based on topics was not ripe. The Court allowed the government to make its argument. This Court ordered the Mr. Barnett to provide any response to ECF No. 111's motion that very same day. The Court then ordered that any reply by the government was due by Friday - meaning January 6, 2023. Mr. Barnett timely submitted his

response at ECF No. 121 on January 4, 2023. The government failed to reply by January 6, 2023 and requested no extension for any good cause before time ran. The government did not request an extension for excusable neglect after failing to file on time, and instead just filed its reply at ECF No. 129. **The reply offers nothing and is not worthy of the Court's attention outside the statement that the Defendant no longer has an absolute right to a defense according to the government**.

The reply adds no value and addresses nothing new. It is a continuation of the government's attempt to deny January 6 defendants any defense while the government steamrolls them. The reply as usual misrepresents facts and law. It omits that at the January 4, 2023 conference the Court said Mr. Hill required no hearing and could just undergo voir dire if the government takes issue with his qualifications. The Court said he could testify as to the walking stick with stun accessory.

The original motion at ECF No. 111 is not ripe and was completely premature.

The government had no good cause to violate the filing deadline.

The government's timing of filing a reply late - nearly 10:30 p.m. yesterday on Sunday, continues to demonstrate vindictiveness and deliberate attempts to impair the Defense. The Defense cannot stay awake all night looking for surprises by the government. here, the government never even extended the courtesy of a heads-up or courtesy copy of the reply via email. The response at ECF No. 121 shows the continuing lack of courtesy and professional conduct by the government.

In all cases, the Court determines whether evidence is relevant. If the evidence is relevant, the Court determines whether it is admissible, pursuant to the Federal Rules of Evidence 401 and 402. *Daniels v. District of Columbia*, 15 F. Supp. 3d 62, 66 (D.D.C. 2014). “Evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would without the evidence;

and (b) the fact is of consequence in determining the action." Fed. R. Evid. 401. Under Rule 402, only relevant evidence is admissible. Fed. R. Evid. 402.

The government cannot even bring itself to apply the same standards to itself as it alleges it is using to preclude defense experts. The "playbook" for the government is antithetical to American jurisprudence as exhibited across January 6 cases thus far. It appears the goal is to stop defendants from defending themselves. This is true as seen here particularly for the charge of Section 1512(c)(2), where the government knows it cannot obtain a conviction based on undistorted evidence and facts related to time, and a defendant's location in space and time when Congress evacuated - and when the decision to do so was made. Defendant's protected First Amendment speech, including hyperbole on social media before the January 6 events in D.C. were ever announced, and well after January 6, 2021 fills the government's exhibit lists. The government seeks to confuse juries about what defendants did when, and to inflame jury emotion to obtain convictions. That is more than apparent in this case.

The Defense does not know what the government will attempt to enter into evidence and what the Court will approve over Mr. Barnett's objections. What the government seeks to do now is to preclude evidence and testimony that may be in response and that shows the government's arguments are false.

The time is not ripe for decision; the government disregarded the deadline to file a reply; the government no longer even thinks it owes the Court an excuse or to present applicable caselaw. This is one more example of the DOJ steamroller that has nothing to do with justice.

Wherefore, Mr. Barnett requests that the Court deny the admission of the reply at ECF Number 129 onto the docket and have it removed; and ignore it in entirety.

January 9, 2023

Respectfully submitted,

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