

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 MOTION FOR LEAVE OF COURT TO FILE WITH SURREPLY
ATTACHED AS EXHIBIT**

Comes now the Defendant, Richard Barnett, by and through undersigned attorneys, and respectfully requests leave to file a sur-reply 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 for unexcused lateness, strike it from the record docket, ignore it in totality, and make no decision on the matter of Defense experts until just prior to the Defendant's case in chief. Mr. Barnett provides the following in support:

Shortly before the January 4, 2023 Pretrial Conference, having received notice of Mr. Barnett's intended expert witnesses, the government inexplicably filed the unripe motion at ECF No. 111 to preclude the Defense's expert witnesses. The Defense gave the government notice of only what Mr. Barnett can anticipate at this time that the experts may testify to given government allegations; and without seeing what it actually presents at trial. The experts' testimony may have a vast expanse of topics based on the government's assertions during its case in chief. One known fact is that the government is asserting that Mr. Barnett violated Section 1512(c)(2) without

giving any showing of any act, and after filing a defective indictment that claims Mr. Barnett obstructed a non-existent proceeding; and that without any act within the scope of the law and no violence he allegedly also violated Section 231(a)(3).

The government wants to show the entirety of actions at the Capitol that were nowhere near Mr. Barnett, such as a proposed opening with pictures of the west terrace and Senate wing doors - neither of which Mr. Barnett was near - to transfer the acts of others to Mr. Barnett. Yet the government argues that experts cannot show acts of others may have caused a decision to evacuate which would moot the Section 1512(c)(2) charge. The government wants to place a smokescreen around the decision point to evacuate chambers on January 6, and has provided no records of communications by any decision-makers to show the decision was based on a door breach shortly after 2:00 pm rather than pipe bombs discovered nearby shortly before and after 1:00 p.m. The government does not want to explore that the Vice President was kept in a bomb blast protected area rather than in his large office or at a nearby military base where the rest of Congress was taken.

The finality of proposed expert testimony in this case cannot be determined until Mr. Barnett sees what this Court allows the government to present. The response at ECF No. 121 thoroughly addresses the arguments supporting the experts' testimony. The time for decision is not ripe. And yet the government cannot reply on time to a response to its own motion.

At the Pretrial Conference the government proceeded with its January 6 cases' "playbook" where every effort is made to deny the accused a defense and to give the government unfair advantage. That was most significantly witnessed by the government's filing of the superseding indictment at ECF No. 96 with a completely new and distinct felony charge and substantial changes to the existing Section 1512(c)(2) count within nine business days of trial start. Despite

the Defense's argument with caselaw in support that the new indictment so close to trial impaired and disadvantaged the Defense, and after providing specific examples on January 4, 2023, of how the Defense was already disadvantaged and impaired, the Court denied Mr. Barnett's motion for a continuance.

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.**

In general, “a party seeking to file a surreply may do so only by seeking leave of court,” typically to address issues raised for the first time in a reply brief. *Flanagan v. Wyndham Int’l Inc.*, 231 F.R.D. 98, 101 (D.D.C. 2005); see *Amobi v. D.C. Dep’t of Corr.*, 257 F.R.D. 8, 9 (D.D.C. 2009). In exercising its discretion to permit or deny a sur-reply, the Court may consider “whether the movant’s reply in fact raises arguments or issues for the first time, whether the nonmovant’s proposed surreply would be helpful to the resolution of the pending motion, and whether the movant would be unduly prejudiced were leave to be granted.” *Banner Health v. Sebelius*, 905 F. Supp. 2d 174, 187 (D.D.C. 2012) (citing *Glass v. LaHood*, 786 F. Supp. 2d 189,

231 (D.D.C. 2011)).

The government could not possibly be prejudiced if the Court grants the surreply, and it is Mr. Barnett whom the government continues to prejudice and acts to impair his defense. The late filing without excuse should be considered inexcusable.

Emboldened after misrepresenting the law in other responses and replies, the government now believes it does not have to follow court orders. The government declares itself the law in its motion at ECF No. 111 and the unexcused late reply at ECF No. 129 for which it requested no extension of time. **The assertion that Mr. Barnett does not have an absolute right to defend himself shocks the conscience and reflects a chilling state of affairs within the DOJ as it abandons the United States Constitution.** ECF No. 129 at 2.

Given that the government has removed available time for a more complete surreply, the surreply is attached as an exhibit.

Wherefore, because the government filed without excuse and without Court allowance for a late reply, this Court should allow the surreply that requests this Court strike the reply at ECF No. 129 from the record docket. Because the matter is not ripe for decision, no decision should be made until just prior to the Defense's case as contained in the surreply.

January 9, 2023

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify on the 9th 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.
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