IN THE UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA	)	
	)	
v.	)	**Case No. 21-cr-00116**
	)	
WILLIAM MCCALL CALHOUN, JR	)	
Defendant.	)	

DEFENDANT'S REPLY TO THE GOVERNMENT'S RESPONSE TO DEFENDANT'S RENEWED MOTION TO DISMISS COUNT ONE AND MOTION TO DISMISS COUNTS TWO, THREE, FOUR AND FIVE OF THE SUPERSEDING INDICTMENT

COMES NOW, Defendant, William McCall Calhoun, Jr., by and through counsel, Jessica N. Sherman-Stoltz, Esq., and respectfully files this reply to the Government's response to Defendant's renewed motion to dismiss Count One, and motion to dismiss Counts Two, Three, Four and Five.

I. BACKGROUND

The Government clearly places the weight of their prosecution against Mr. Calhoun on his "outspoken" social media posts leading up to January 6, 2021. However, and as the Government proffers, Mr. Calhoun and his co-defendant, Mr. Nalley, traveled to Washington, D.C. together,[1] and had nearly identical conduct around and inside of the Capitol Building on January 6, 2021. Yet, even though Mr. Nalley's social media

[1] Mr. Nalley drove the two, in his vehicle, and reserved/paid for their hotel room while in Washington, D.C. As Defendant previously testified, it was Mr. Nalley's idea to make the trip to Washington, D.C., and he invited Mr. Calhoun to join him on or around December 28, 2020, when Mr. Calhoun then put in for a leave of absence. *See* March 5, 2021, Transcript of Bail Proceedings, p. 28.

arguments and posts leading up to January 6, 2021, were more aggressive, hostile, and outspoken, the Government offered him a misdemeanor plea almost a year ago. For some unknown reason, it seems that Mr. Calhoun is being selectively prosecuted for his political speech.

II. REPLY ARGUMENT

A. The Court Should Not Deny Defendant's Motion to Dismiss Count One

The Government's argument that the Mr. Calhoun's motion to dismiss is a factual allegation that should be reserved for trial after evidence is presented, completely misstates the law and avoids addressing the actual claim made by the Defendant.

According to the Government's Opposition, "[a]n indictment is sufficient... if it 'contains the elements of the offense charged and fairly informs a defendant of the charge against which he must defend.'" (EFC Document No. 144, p. 3). In this case, Count One of the indictment charges Mr. Calhoun under 18 U.S.C. §§ 1512(c)(2) and 2 for Obstruction of an Official Proceeding and Aiding and Abetting. Thus, in order to survive the motion to dismiss the Government needs to produce an indictment which contains the elements of the offense and informs Mr. Calhoun of what crime he is being charged with. The indictment produced by the Government charged Mr. Calhoun for allegedly disrupting the Joint Session of Congress.

Mr. Calhoun's argument as to Count One was not based only on the insufficiency of evidence, but rather it was specific to an essential element being absent based on the

language used to charge the crime in the indictment. In addition to an element being absent, Mr. Calhoun asserts that the indictment is insufficient to put him on notice of the exact crime he is being charged with. If the Defendant is not even aware of the crime he is being charged with, then how can the Court be permitted to find that the crimes charged were actually committed.

Mr. Calhoun is not stating that the Government needs to particularly allege incredibly specific facts and provide hordes of evidence to show what crime the indictment is charging him with; the Government should, at bare minimum, provide some facts to inform him of his charge. It is ridiculous for the Government to oppose a motion to dismiss by stating that the facts will be proven at trial, and provide nothing else to back up their claims specific to Mr. Calhoun's actions. *See* ECF Document No. 144, p. 6.

The Government has not identified ANY factual allegations that Mr. Calhoun obstructed the Joint Session of Congress before he arrived, while he was inside the Capitol Building, or after he left. The Government fails to acknowledge that there were other demonstrators (those who were true rioters and not the mere demonstrators) who remained after Mr. Calhoun left, and many of them remained outside the building beyond the curfew at dusk. Mr. Calhoun, by contrast, merely followed a crowd of people into an open door of the building, briefly looked around in the Rotunda, and then spent the majority of his time in the Capitol trying to get out of the Capitol

Building. True rioters were still in the Capitol building hours after he and Mr. Nalley had left Washington, D.C. and were on their way back home.

B. The Court Should Not Also Deny Defendant's Motion to Dismiss Counts Two and Three

The Government's arguments are clearly erroneous. Though the statutes are slightly different from one another (particularly in some of the wording), that does not change the fact that the statutes significantly overlap with each other, and that Mr. Calhoun is alleged to have committed a single act, on a single occasion, not a single act on multiple occasions, or several different acts in a single occasion. It was one act.

An indictment is considered multiplicitous "when it charges a single offense as an offense multiple times, in separate counts, when, in law and fact, only one crime has been committed. *United States v Chacko*, 169 F.3d 140, 145 (2d Cir. 1999). This is a violation of the Double Jeopardy Clause of the Fifth Amendment, because it subjects a person to punishment for the same offense more than once. *Id*. In addition, including multiple counts for a single act leads the jury to incorrectly assume the severity of the Defendant's criminal culpability. *See United States v. Reed*, 639 F.2d 896, 904 (2d Cir. 1981), (where multiplicity of charges... may lead to multiple sentences for the same offense and may improperly prejudice a jury by suggesting that a defendant has committed not one but several crimes.)

The government's argument fails to acknowledge or deliberately omits the theory

that an analysis for multiplicitous counts is essentially fact- specific and should not turn on any single factor: "The touchstone of any multiplicity analysis should be whether the acts in question, considering all of the relevant factors, constitute a single execution or multiple executions of a scheme...." (*United States v Wiehl*, 904 F.Supp 81, 89 (NDNY 1995) (Munson, J.). Even the Second Circuit has clarified that, "[i]t is not determinative whether the same conduct underlies the counts; rather, it is critical whether the 'offense' – in the legal sense, as defined by Congress – complained of in one count is the same as that charged in another." *United States v. Chacko*, 169 F. 3d, 140, 146 (2d Cir. 1999) (citing *Hudson v. United States*, 522 U.S. 93, 118 S.Ct. 488, 497 (1997) (Stevens, J., concurring in the judgment); *Dixon*, 509 U.S. at 704 (overruling *Grady v. Corbin*, 495 U.S. 508 (1990)).

C. The Indictment Does Not State An Offense And The Court Should Not Deny Defendant's Motion As To Count Four

As stated above, and pertaining to Mr. Calhoun's argument as to Count One, similarly, his argument as to Count Four was not based only on the insufficiency of evidence, but rather it was specific to an essential element being absent based on the language used to charge the crime in the indictment. In addition to an element being absent, Mr. Calhoun asserts that the indictment is insufficient to put him on notice of the exact crime he is being charged with. If the Defendant is not even aware of the crime he is being charged with, then how can the Court be permitted to find that the crimes charged were actually committed.

D. The Court Should Not Also Deny The Motion As To Count Five

Count five plainly violates the First Amendment. Mr. Calhoun is accused of "parading, demonstrating and picketing" in the U.S. Capitol on January 6, 2021. The alleged facts, taken in a light most favoring the United States, cannot justify subjecting Mr. Calhoun to a criminal trial.

A fundamental principle of the First Amendment is that all persons have access to places where they can speak and listen, and then, after reflection, speak and listen once more. The United States Supreme Court has sought to protect the right to speak in this spatial context. *U.S. Capitol. Ward v. Rock Against Racism*, 491 U. S. 781, 796 (1989). A basic rule, for example, is that a street or a park is a quintessential forum for the exercise of First Amendment rights. *Id*.

Even in the modern era, these places are still essential venues for public gatherings to celebrate some views, to protest others, or simply to learn and inquire. *Packingham v. North Carolina*, 137 S. Ct. 1730 (2017). The government misconstrues Judge Friedman's ruling in *Bynum v. United States Capitol Police Board*, 93 F. Supp. 2d 50, 58 (D.D.C. 2000). The Bynum case specifically upheld a "prayer tour" inside the Capitol, during which "Reverend Bynum led a small group of people to various historic sites in the Capitol," viewing, praying, and speaking "in a quiet, conversational tone, during which the members of the group bowed their heads and folded their hands."

While Bynum did pronounce that the interior of the Capitol is not a "public forum" in the way that a public sidewalk is, Bynum did not set much of a floor or ceiling on freedom of speech or advocacy.

> As the seat of the legislative branch of the federal government, the inside of the Capitol might well be considered to be the heart of the nation's expressive activity and exchange of ideas. After all, every United States citizen has the right to petition his or her government, and the Houses of Congress are among the great democratic, deliberative bodies in the world. But it also has been recognized that the expression of ideas inside the Capitol may be regulated in order to permit Congress peaceably to carry out its lawmaking responsibilities and to permit citizens to bring their concerns to their legislators. There are rules that members of Congress must follow, as well as rules for their constituents. To that end, Congress enacted the statute at issue here so that citizens would be "assured of the rights of freedom of expression and of assembly and the right to petition their Government," without extending to a minority "a license . . . to delay, impede, or otherwise disrupt the orderly processes of the legislature which represents all Americans."

Bynum at 55-56.

Later, on page 57 of the Opinion, Judge Friedman explicitly held that "speechmaking" and other "expressive conduct" is allowed in the halls of the Capitol.

> While the regulation is justified by the need expressed in the statute to prevent disruptive conduct in the Capitol, it sweeps too broadly by inviting the Capitol Police to restrict behavior that is in no way disruptive, such as "speechmaking . . . or other expressive conduct. . . ."

This would seem to offer broader protection than simply protections of things like quiet prayers. In fact, at the bottom of the opinion, Judge Friedman ruled that it is "FURTHER ORDERED that defendants, their agents and employees are

ENJOINED AND RESTRAINED from enforcing any restrictions on First Amendment conduct within the United States Capitol on the basis that such conduct is "expressive conduct that convey[s] a message supporting or opposing a point of view or has the . . . propensity to attract a crowd of onlookers."

III. CONCLUSION

For all the above-stated reply reasons and arguments, and Defendant's previously filed Motion to Dismiss (ECF Document No. 140), Defendant, William McCall Calhoun, prays for the entry of an Order dismissing all Counts of the Superseding Indictment.

Dated: January 12, 2023.

Respectfully Submitted,

WILLIAM MCCALL CALHOUN, JR.

/s/ Jessica N. Sherman-Stoltz

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CERTIFICATE OF SERVICE

I hereby CERTIFY that on this the 12th day of January 2023, a true and correct copy of the foregoing *Defendant's Reply to the Government's Response to Defendant's Renewed Motion to Dismiss Count One and Motion to Dismiss Counts Two, Three, Four, and Five of the Superseding Indictment* with the Clerk of Court via the CM/ECF system, which will automatically send an email notification of such filing to all counsel of record.

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