UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA	:	
	:	
v.	:	**Case No. 21-cr-134 (CJN)**
	:	
MARK SAHADY	:	
	:	
Defendant.	:	

UNITED STATES' OPPOSITION TO
THE DEFENDANT'S OMNIBUS MOTION

The United States of America, by and through its attorney, the United States Attorney for the District of Columbia, opposes the Defendant's Omnibus Motion ("Sahady's supplement"), ECF No. 88, supplementing his prior motions to dismiss the indictment, ECF Nos. 67, 72, and motion to compel discovery, ECF No. 56. Sahady's new counsel largely retread ground that the parties addressed in prior briefing. Their supplement advances no contention augmenting Sahady's prior motions in any significant respect. What meager new argument Sahady's supplement presents is without merit, and his requests for relief should be denied.

BACKGROUND

The government previously described this case's factual background and procedural history in its omnibus opposition to the defendant's motions to dismiss, ECF No. 73.

Three pretrial motions filed by Sahady's prior counsel, Blake Weiner, remain pending:[1] (1) a motion to compel discovery in support of a selective prosecution claim, ECF No. 56; (2) a

[1] Mr. Weiner also filed a motion for change of venue, ECF No. 55. Given that the defendant has now requested a bench trial, *see* ECF Nos. 76, 77; *see also* Minute Order (Aug. 10, 2023) (granting the bench trial request and ordering defense counsel to docket a jury trial waiver signed by the defendant: an event yet to occur as of the drafting of this opposition), it would appear this request is moot.

motion to dismiss Count Four of the Second Superseding Information (now Count Five of the Indictment), ECF No. 67, and (3) a motion to dismiss Count One and Five of the Indictment, ECF No. 72. The government filed oppositions to these motions at ECF Nos. 64 and 73.

On August 11, 2023, Mr. Weiner moved to withdraw and continue the trial in this case, and the Court granted that motion on August 14, 2023. Sahady's new trial counsel, Jonathan Gross and Eden Quainton, noted their appearances on August 22, 2023. On August 23, 2023, the Court set a new trial date on February 26, 2024. On August 28, 2023, Sahady filed an unopposed request, ECF No. 85, for leave to submit a filing supplementing the defendant's prior counsel's pretrial motions, which the Court granted on September 11, 2023.

Sahady's new counsel filed their supplement—the subject of this opposition—on September 22, 2023. ECF No. 88

ARGUMENT

I. The Defendant's Supplement Fails to Advance Any New Argument Justifying the Dismissal of Count One (Obstruction of an Official Proceeding)

A. The Indictment Sufficiently Charges Count One

Sahady's prior counsel previously argued that elements of 18 U.S.C. § 1512(c)(2)—the statute Count One charges the defendant with violating—were "vague." *See, e.g.*, ECF No. 72 at 5–6. Now, Sahady's new counsel argue that Count One itself, as written in the Indictment, is "void for vagueness." ECF No. 88 at 3. But Sahady's derivative attempt to press a vagueness claim out of the indictment, rather than the statute, fails because Count One "charge[s] an offense with such reasonable certainty that the accused can make his defense." *See United States v. Lattimore*, 215 F.2d 847, 849 (1954).

Federal Rule of Criminal Procedure 7(c)(1) requires only that the indictment "be a plain, concise, and definite written statement of the essential facts constituting the offense charged," and

that it "give the official or customary citation of the statute, rule, regulation, or other provision of law that the defendant is alleged to have violated." As the government explained in prior briefing, ECF No. 73 at 6–7, an indictment's "main purpose is 'to inform the defendant of the nature of the accusation against him.'" *United States v. Hitt*, 249 F.3d 1010, 1016 (D.C. Cir. 2001) (quoting *Russell v. United States*, 369 U.S. 749, 767 (1962)). "[A]n indictment is sufficient if it, first, contains the elements of the offense charged and fairly informs a defendant of the charge against which he must defend, and, second, enables him to plead an acquittal or conviction in bar of future prosecutions for the same offense." *Hamling v. United States*, 418 U.S. 87, 117 (1974). Thus, it is "generally sufficient that an indictment set forth the offense in the words of the statute itself, as long as 'those words of themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offence intended to be punished.'" *Id.* (quoting *United States v. Carll*, 105 U.S. 611, 612 (1882)).

Count One of the Indictment satisfies these requirements, and Sahady's supplemental argument misunderstands the purpose of an indictment and the low bar it must clear to satisfy the Federal Rules of Criminal Procedure and the Constitution. As the D.C. Circuit explained in *United States v. Haldeman*, 559 F.2d 31 (D.C. Cir. 1976), "[a]lthough an indictment must in order to fulfill constitutional requirements apprise the defendants of the essential elements of the offense with which they are charged, neither the Constitution, the Federal Rules of Criminal Procedure, nor any other authority suggests that an indictment must put the defendants on notice as to every means by which the prosecution hopes to prove that the crime was committed." *Id.* at 124. Indeed, "the validity of an indictment 'is not a question of whether it could have been more definite and certain.'" *United States v. Verrusio*, 762 F.3d 1, 13 (D.C. Cir. 2014) (quoting *United States v. Debrow*, 346 U.S. 374, 378 (1953)). "While detailed allegations might well have been required

under common-law pleading rules . . . they surely are not contemplated by Rule 7(c)(1), which provides that an indictment 'shall be a plain, concise, and definite written statement of the essential facts constituting the offense charged.'" *Id.* at 110. As a mere notice pleading, an 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." *United States v. Resendiz-Ponce*, 549 U.S. 102, 108 (2007); *Haldeman*, 559 F.2d at 123 ("The validity of alleging the elements of an offense in the language of the statute is, of course, well established."). Only in the rare case where "guilt depends so crucially upon . . . a specific identification of fact" not included in the statutory language will an indictment that restates the statute's language be insufficient. *Haldeman*, 559 F.2d at 125 (quoting *Russell v. United States*, 369 U.S. 749, 764 (1962)).

Sahady's supplement contends that the government should have included "other factual allegations that could have put Sahady on notice of allegedly felonious conduct." ECF No. 88 at 5. Sahady's supplement also takes issue with the government's representations outside the indictment regarding the conduct underlying Count One. *Id.* at 6. Sahady's new counsel take umbrage with a fictional scenario in which the government has attempted to "sav[e] an otherwise fatally vague indictment," ECF No. 88 at 7, by including more detailed factual background in other briefs filed during the pretrial motions process. The government is not advancing anything close to this theory. Indeed "an indictment need do little more than [ ] track the language of the statute charged and state the time and place (in approximate terms) of the alleged crime." *United States v. Stringer*, 730 F.3d 120, 124 (2d Cir. 2013) (internal quotation omitted). None of the details sought in Sahady's supplement are necessary for Count One to be sufficiently specific, and Sahady does not dispute that all of the elements of each offense are properly alleged in the Indictment. That, by itself, identifies the criminal conduct with which Sahady is charged. Only in the rare case

where "guilt depends so crucially upon . . . a specific identification of fact" not included in the statutory language will an indictment that restates the statute's language be insufficient. *Haldeman*, 559 F.2d at 125 (quoting *Russell v. United States*, 369 U.S. 749, 764 (1962)). Indeed, Count One is more specific than the indictments in *United States v. Apodaca*, 275 F. Supp. 3d 123 (D.D.C. 2017), where the defendants were charged with offenses under 18 U.S.C. § 924(c). The indictments provided only "general detail as to the places where the offenses were committed: namely, Mexico and the United States." *Id.* at 154. As to the "when" of the offenses, the indictments alleged that the offenses had occurred over a two- and nine-year period. *Id.* Finally, the indictments "d[id] not specify a particular weapon that was possessed," or "specify whether the firearms were 'used, carried or brandished'" under the statute. *Id.* Nonetheless, the indictments were sufficient.

Here, Count One notifies Sahady of the exact day on which the alleged crime occurred: January 6, 2021. It identifies the specific proceeding allegedly obstructed, namely, Congress' certification of the Electoral College vote. It cites the provisions of statutes and the Constitution that mandate the certification and the manner of its execution. And Count One tracks the language of Section 1512. Accordingly, Count One is sufficiently specific notwithstanding Sahady's demand for details not required under the Constitution, the Federal Rules of Criminal Procedure, or this district's precedent.[2]

[2] The "[d]efendant reserves the right to move for a Bill of Particulars[.]" ECF No. 88 at 8, but the defendant obviously has enough information to enable him to prepare his defenses to the allegations against him—given that the parties were on the cusp of trial just prior to the most recent continuance. The government has provided, and the defendant has available to him, extensive photographic and video documentation of his actions on January 6, 2021. If the defendant claims to need additional information about the government's intent allegations, the government has also provided, among other things, documentary evidence of the defendant's relevant messages and communications. However, the government is not required to provide the level of granularity sought in the defendant's supplement through a Bill of Particulars—and certainly is not required to do so in the Indictment to establish Count One's mere sufficiency.

B. The Indictment Need Not Elaborate on the "Corruptly" Element in Count One.

Sahady's prior counsel previously argued that the "corruptly" element in Count One "is unconstitutionally vague as applied to [him] pursuant to the Due Process Clause within the Fifth and Fourteenth Amendments." ECF No. 72 at 5–6. Sahady's new counsel now similarly contend that the mere inclusion of this element in the Indictment confuses them and that the definitional issue of "corruptly" "is now squarely before this Court." ECF No. 88 at 8. But, at the motion to dismiss stage, that issue is not "squarely" before the Court, especially as it relates to any purported "failure to provide [ ] facts and circumstances that would illuminate what is meant by the word 'corruptly.'" *Id.* And to the extent Sahady's new counsel argue that the indictment insufficiently pleads facts to explain what "corruptly" means, the parties' prior briefing on Sahady's "vague as applied" argument inevitably treads that same ground. *See* ECF No. 73 at 11–17.

Indeed, the Indictment need not include any kind of intent-specific recitation of facts to sufficiently fulfill the charging instrument's purpose. As Sahady's supplement lays out, the final indictments in *Fischer* all merely alleged that the defendants acted "corruptly," as the statute requires. *See* ECF No. 88 at 4 (concluding the now-active *Fischer* superseding indictment was "obviously vague"). And as explained above, "echo[ing] the operative statutory text while also specifying the time and place of the offense" fairly informs a defendant of the charge against him." *United States v. Williamson*, 903 F.3d 124, 130 (D.C. Cir. 2018). Thus, any dispute about the meaning of a statutory term, like "corruptly," has no bearing on the sufficiency of the indictment for purposes of a motion to dismiss.

In any event, the meaning of "corruptly" is far from a mystery. As the government previously explained, *see* ECF No. 73 at 13, the use of "corruptly" in Count One is straightforward. The term "corruptly" "not only clearly identifies the conduct it punishes; it also 'acts to shield

those who engage in lawful, innocent conduct – even when done with the intent to obstruct, impede, or influence the official proceeding.'" *Puma*, 569 F. Supp. 3d at103 (quoting *Sandlin*, 575 F. Supp. 3d at 33). As the Supreme Court has noted, the "natural meaning" of "corruptly" is "clear" and the word is "normally associated with wrongful, immoral, depraved, or evil" conduct. *See Arthur Andersen LLP v. United States*, 544 U.S. 696, 705 (2005).

II. The Filing of the Indictment Does Not Violate Sahady's Speedy Trial Rights

Sahady's prior filings already argued that the timing of Count One's filing justifies dismissal, ECF No. 72 at 8, and the government has responded to those assertions, ECF No. 73 at 18. Overall, Sahady's supplement provides very little in the way of *new* discourse over his Speedy Trial contentions, and the government's previously filed opposition addresses all retreaded ground. *See id.* at 18–21 (explaining that Sahady's constitutional speedy trial right has not been violated under the *Barker* factors), 21 (explaining that the Indictment's timing does not warrant dismissal under the Speedy Trial Act), 22 (explaining that dismissal under Rule 48(b) is not warranted). Especially now, with Sahady's own decision to change competent counsel—for the second time—delaying this case's proceedings into next year, Sahady cannot continue to claim that his Sixth Amendment and statutory rights have been affronted by the Indictment such that dismissal is required.

Sahady's new counsel focuses on the docket's title for the Indictment: the "Third Superseding Indictment." In an apparent attempt to baselessly accuse the government, Sahady's supplement claims that referring to the Indictment as the "Third" charging instrument is "designed to hide the ball" for speedy trial purposes. ECF No. 88 at 11.

This contention is wrong for several reasons. First, a simple perusal of the docket would reveal to Sahady's new counsel that the Indictment is titled "Indictment" on the actual document.

See ECF No. 65. Second, the docket text reveals that it is the *Clerk's Office* that labeled ECF No. 65 on the electronic docket as the "Third Superseding Indictment." Third, the docket language "Third Superseding Indictment" is not inaccurate to the point of being underhanded because it is the "Third Superseding" charging instrument. Finally, and most obviously, such a brazen attempt to confuse the case's procedural history would pay absolutely no dividend, as the government does not believe this Court would be duped by sophomoric titling tactics.

Additionally, Sahady's new counsel—despite prior counsel's opportunity to do so already in a prior reply, ECF No. 74—claims that the government's authority fails to support its assertion that the Indictment filed in this case is not unprecedented. But none of the government's cited cases differ materially from the situation presented here: a request to dismiss a charging instrument based on the timing of its filing. To that end, the government refers the Court to its previous discussion of the *Barker* factors. *See* ECF No. 73 at 18–21.

III. Sahady Cannot Meet the High Burden Required for Vindictive or Selective Prosecution

Sahady now reiterates for the third time[3] his claims of selective or vindictive prosecution. *See* ECF No. 88 at 14-21. The tenor of Sahady's third argument, especially as it regards his motion to compel discovery,[4] has not changed: he continues to claim that he is being selectively or vindictively prosecuted because of his political beliefs. *See, e.g.*, ECF No. 56 (arguing that the government's treatment of defendants were members of a riot in Portland Oregon makes his prosecution vindictive in comparison). New counsel has added information regarding the "Kavanaugh protests" and now attempts to ground their selective prosecution claims in the First

[3] *See* ECF Nos. 56, 72.

[4] *See* ECF No. 56.

Amendment by citing to the D.C. Circuit's recent decision in *Frederick Douglass Found. Inc. v. District of Columbia*, Case No. 21-7108, 2023 WL 5209556 (D.C. Cir. Aug. 15, 2023). But the defendant's latest attempts to save this claim fail.

The defendant's added reference to the "Kavanaugh protests" does not change the fact that the defendant has still failed to show that he is similarly situated to those individuals. *See* ECF Nos. 30 at 6–11, 64 at 5–10, 73 at 29–34. Indeed, other judges in this district have rejected similar claims referring to the same protests. *See United States v. Padilla*, Case No. 21-CR-214 (JDB), 2023 WL 1964214, *4–5 (D.D.C. Feb. 13, 2023) (collecting cases); *see also United States v. Brock*, 628 F. Supp. 3d 85, 103 (D.D.C. 2022), *aff'd*, No. 23-3045, 2023 WL 3671002 (D.C. Cir. May 25, 2023); *see also United States v. Rhodes*, No. 22-CR-15 (APM), 2022 WL 3042200, at *5 (D.D.C. Aug. 2, 2022) (concluding Supreme Court confirmation protestors' "actions far more closely resemble genuine protest than the actions of which [the defendant] stands accused[]"). Though Sahady, like Brock, points out he is not alleged to have engaged in violence or property destruction, "[t]hat argument assumes that the level of *actual* violence and property destruction is the only difference[.]" *Id.* at 102–03.

Sahady's reference to *Frederick Douglass Found.* likewise does not support his claims. Regardless of that 42 U.S.C. § 1983 civil case's applicability here, Sahady is not entitled to discovery on his selective prosecution claim because he cannot make out a claim of discriminatory effect. As described above and in prior briefing, Sahady is not similarly situated to any of the groups he cites to support his disparate treatment argument. Moreover, Sahady's new argument is concerned entirely with a selective prosecution claim and adds nothing to his previous claim of vindictive prosecution, a different issue, aside from saying he "reiterates" the previous arguments. *See* ECF No. 88 at 13. The government reiterates its response as well. ECF No. 73 at 29–34.

CONCLUSION

For the reasons set forth herein, and for the reasons set forth by the government in prior briefing, Sahady's outstanding motions should be denied.

Respectfully submitted,

Matthew M. Graves
United States Attorney
D.C. Bar No. 481052

By: */s/ Kaitlin Klamann*
KAITLIN KLAMANN
Assistant United States Attorney
601 D Street NW
Washington, DC 20530
(202) 252-6778
Kaitlin.klamann@usdoj.gov
IL Bar No. 6316768

/s/ Nathaniel K. Whitesel
NATHANIEL K. WHITESEL
Assistant United States Attorney
DC Bar No. 1601102
601 D Street NW
Washington, DC 20530
nathaniel.whitesel@usdoj.gov
(202) 252-7759