UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES	)	
	)	
v.	)	Case No. 1:21-cr-134
	)	
SAHADY	)	
	)	**Oral Argument Requested**

DEFENDANT'S REPLY
TO UNITED STATES' OPPOSITION TO OMNIBUS MOTION

Defendant Mark Sahady ("Defendant" or "Sahady"), through counsel, hereby files this reply (the "Reply") to the Opposition of the United States to his Omnibus Motion. (the "Omnibus Mot."). For the reasons set forth below, the Government fails to present persuasive argument in support of its deficient indictment, its impermissible felony charging delay, and its selective prosecution of Sahady.

ARGUMENT

I. The Government Fails to Advance a Persuasive Argument in Support of its Deficient Indictment.

The Government begins by misstating the law, carried away as it is with rhetoric over analysis. The Government claims that it is only the "rare" case in which the recitation of the statutory elements of an offense will be insufficient. Reply at 4. In support of this false proposition, the Government cites to *United States v. Haldeman*, 559 F.2d 31 (D.C. Cir. 1976) and *Russell v. United States*, 369 U.S. 749, 764 (1962). Reply at 5. Neither case, of course, mentions anything about the "rarity" of insufficient indictments that merely track statutory language. In fact, the exact opposite is true. Outside of the January 6 context, it is almost unheard of for an indictment simply to recite elements of a statutory offense, unless the statute identifies specific conduct that a person of average intelligence could understand or contains a "to wit"

clause that puts the Defendant on notice of the specifics of the offence charged. The Government argues that the indictment in *United States v. Apodaca*, 275 F. Supp. 3d 123 (D.D.C. 2017) provides a greater degree of notice that indictment in the present case. This is wrong, as the *Apodaca* indictment clearly shows:

> COUNT ONE
>
> From in or about January 2000, and continuing thereafter, up to and including the date of the filing of this Indictment, both dates being approximate and inclusive, in the countries of Mexico, the United States, and elsewhere, the defendant, PANFILO F L O R E S APODACA, also known as "Charmin," together with others, both known and unknown to the Grand Jury, did knowingly, intentionally and willfully conspire (1) to knowingly and intentionally distribute 5 kilograms or more of a mixture or substance containing a detectable amount of cocaine, a Schedule II controlled substance; (2) to knowingly and intentionally distribute 500 grams more of a mixture or substance containing a detectible amount of methamphetamine, a Schedule II controlled substance; (3) to knowingly and intentionally distribute 1 kilogram or more of a mixture or substance containing a detectable amount of heroin, a Schedule I controlled substance; and (4) to knowing and intentionally distribute 1,000 kilograms or more of a mixture or substance containing a detectable amount of marijuana, a Schedule I controlled substance, knowing and intending that said controlled substances would be unlawfully imported into the United States from a place outside thereof, in violation of Title 21, United States Code, Sections 959(a); all in violation of Title 21, United States Code, Section 963 and Title 18, United States Code, Section 2.
>
> COUNT TWO
>
> From in or about January 2005, and continuing thereafter, up to and including the date of the filing of this Indictment, both dates being approximate and inclusive, the defendant PANFILO F L O R E S APODACA, also known as "Charmin," did knowingly and intentionally use, carry and brandish a firearm, during and in relation to one or more drug trafficking crimes, to wit: the crimes charged in Count One, and did loiowingly and intentionally possess a firearm in furtherance of such drug trafficking crimes in violation of in violation of Title United States Code, Sections 924(c)(l)(A)(i), 924(c)(l)(A)(ii), 924(c)(l)(B)(ii).

United States v. Apodoca, 14-cr-57, Dkt. 1.

The fact that these very specific armed drug trafficking charges were spread out over a multi-year period and in multiple locations does not detract from their specificity. The alleged wrongdoer knows exactly what he is being charged with, the specific substances and amounts involved, and the weapons charges that accompany the drug trafficking charges. The

Government is going after a violent drug "kingpin" operating with international scope over a multi-year period—a charge for which no additional detail is necessary.

Apodaca thus provides no guidance in the present case. The Government claims that the Sahady indictment is more specific than the one in Apodaca because, unlike the drug trafficker's multi-year criminal activity, Sahady is alleged to have committed an act on one day only. Opp. at 5. This is not a serious argument. That January 6 cases occurred on January 6 is not a fact that has any constitutional or other significance. Individuals have been charged with numerous misdemeanors and felonies for their participation in the events of January 6, and hundreds of thousands more have not been charged with anything at all. Simply telling a defendant in a January 6 case that she is alleged to have done something on January 6 tells her nothing. In the same vein, saying that the "official proceeding" obstructed was the certification of the electoral votes tells the defendant nothing specific about the alleged "obstruction," which is the crux of the indictment. In some vague, generic, sense the hundreds of thousands of protestors in front of the Capitol – and the millions more who tweeted, posted on other social media sites, wrote letters, made phone calls, or simply told their friends about their 2020 election concerns – "obstructed" the electoral college certification proceedings, yet it would be absurd to argue that all should be charged with a violation of 18 U.S.C. § 1512(c)(2).

"Corruptly" does all the heavy lifting, but this is a term that also lacks any concrete meaning, and – without more – cannot put a defendant on notice of specific criminal charges. The "natural meaning" of "corruptly" may be "clear", as the word is "normally associated with wrongful, immoral, depraved, or evil" conduct. Opp. at 7 (*citing Arthur Andersen LLP v. United States*, 544 U.S. 696, 705 (2005)). But without factual specificity it is no more helpful in an indictment than charging a defendant with behaving in a "wrongful, immoral, depraved or evil" manner.

Moreover, *Arthur Andersen* itself is inapposite for at least three reasons. First, Arther Andersen was charged under 18 U.S.C. § 1512(b)(2), which in relevant part makes it a crime to "corruptly persuade ... another person, ... with intent to ... cause or induce any person to (A) withhold ... a record, document, or other object, from an official proceeding; [or] (B) alter, destroy, mutilate, or conceal an object with intent to impair the object's integrity or availability for use in an official proceeding." *USA v. Arther Andersen*, 02-21200, Dkt. 35 at 3-4. Withholding, altering, destroying, mutilating or concealing documents are acts far more specific than the amorphous "obstructing" or "influencing" charged under 18 U.S.C. § 1512(c)(2). Second, the indictment in *Arthur Andersen* ran eight pages and laid out a tightly described scheme in which a "a small group" of Andersen partners attempted to prevent the SEC from obtaining documents relating to the audits of disgraced gas giant, Enron. *See id*. at 4. As Arthur Andersen put it in summarizing the sealed indictment in its Fifth Circuit appeal, "the government's theory was that this group of partners – inelegantly described during trial as the alleged 'corrupt persuaders' – intended to 'sanitize their files so that all that would be left would be the firm's final audit papers and that those papers would reflect only one point of view, namely, the firm's final conclusions about the particular matter.'" *Id.* at 4. The specific conduct charged under the statute as part of the indictment thus gave all the details necessary to pass Constitutional muster, unlike the Government's perfunctory effort in the present case,

Third, although the phrase "corruptly persuading" coupled with the adverb "knowingly" were clear *linguistically*, they still posed such difficulty for district court that the "jury instructions at issue simply failed to convey the requisite consciousness of wrongdoing." *Arthur Andersen*, 544 U.S. at 706. In other words, even against the backdrop of a detailed, factually specific, eight-page indictment, the concept of "corruptly" *still* posed challenges of application. In the absence of a clear factual charge in the indictment, this Court cannot even begin to

determine the contours of the concept of "corruptly" that troubled the D.C. Circuit in *Fischer* and posed thorny problems of application in *Andersen*.

As to "this districts' precedents," Opp. at 5, the Government is way off base. Most indictments in this District are either returned under statutes that themselves clearly identify the specific conduct at issue or provide a level of specificity far removed from the Government's bare-bones approach in this case. In *United States v. Han*, 280 F. Supp. 3d 144, 149 (D.D.C. 2017), for example, the Grand Jury returned an extremely detailed, 20-page, superseding indictment on charges of securities fraud. *See* Ex. A, Han Indictment. The indictment provided specific allegations that, among other things:

- Han falsely represented to a first investor many times – including in a private placement memorandum – that Envion, the company of which Han was CEO, owned a product called an "EZ Oil Generator" that could convert waste plastics into oil, inducing the investor to invest the precise sum of $ 3,538,000. Ex. A ¶¶ 20-25.

- Han made the exact same misrepresentation to a second investor, inducing that investor to place precisely $3,610,000 million with Han. Ex. A ¶¶ 26-27.

- Han solicited further investors with the same misrepresentation. Ex. A ¶ 28.

- After soliciting and obtaining $7,148,000 million from the two main investors Han diverted at least $3,500,000 to his personal use. Ex. A ¶¶ 29-30.

- Han then solicited an additional $8,300,000 from the first investor and an additional $3,950,000 from the second investor, together with a further $20,000,000 from the first investor, still falsely claiming that he owned the "EZ Oil Generator." Ex. A ¶¶ 37-40.

- Han used the improperly obtained funds to purchase a home in Florida, a Ferrari, a BMW, and a Range Rover, among other things, as well as paying down over $800,000 in personal credit card balances. Ex. A ¶ 41.

- Meanwhile, after soliciting the first several tranches of funds, Han purchased an oil generator in his own name and unsuccessfully attempted to sell it to Envion at a $40,000,000 mark-up. Ex. A ¶ 32-36.

The indictment followed with detailed charges under various statutes, including securities fraud and very precise criminal tax evasion allegations. Ex. A ¶¶ 51-54. As with the allegations referenced above, each and every factual claim in the indictment was clearly and obviously related to the offense charged. The statutory counts did far more than recite elements, and specified how particularized conduct related to each charge. *See* Ex. A ¶¶ 51(a)-(k); 54(a)-(g). In such circumstances, the Court had no difficult "swiftly disposing" of Defendant's challenge. *Id.* at 148.

Similarly, in *United States v. Brodie*, 326 F. Supp. 2d 83, 91-92 (D.D.C. 2004), the Defendant attacked as insufficient a 23-page indictment for conspiracy to commit mortgage fraud and wire fraud. *Brodie*, 326 F. Supp. 2d at 91-92. The indictment laid out in great detail the specific properties affected by Defendants' alleged fraud, the false documents allegedly submitted to the financial institutions in question, and the dates and amounts of the allegedly fraudulent transactions. Ex. B, Brodie Indictment, Overt Acts, ¶ 34 (1) – (94). The Court in this case also had no difficulty quickly concluding "the charges against the defendants are detailed and alleged with particularity." *Brodie*, 326 F. Supp. 2d at 92 (D.D.C. 2004).

Finally, in *United States v. Sanford Ltd.*, 841 F. Supp. 2d 309, 316 (D.D.C. 2012), Defendants challenged a 20-page indictment in which they were charged with a conspiracy to fail to maintain "oil record books" documenting oil waste discharge and to falsify other oil record books. Ex. C, Sanford Indictment ¶ 2. The indictment detailed the specific dates on which Defendants were alleged to have failed to record oil discharges, Ex. C ¶ 4(A) – (C), the specific dates on which Defendants were alleged to have falsified their oil records, Ex. C ¶ 4(D,) and the specific charges against each defendant. In particular, with respect to the obstruction of justice charge in that case (conceptually similar to the issues in 18 U.S.C. § 231(a)(3)), the Government provided a clear statement of the specific act that was alleged to have constituted the "corrupt"

influencing and interfering with a law enforcement's official's duties, namely the specific act of lying to United States Coast Guard personnel and falsely representing that "oily bilge waste was not directly discharged overboard the vessel." Ex. C, Count VI ¶ 2 (to wit clause). With such an indictment, the Court concluded the Defendants had all the information they needed to defend themselves against the charges brought against them. *See Sanford*, 841 F. Supp. 2d at 319-320.

These examples are all at the polar opposite of the indictment and Statement of Facts in the present case. Here, with statutory language that provides no clear, intuitive, or obvious indication of the specific conduct prohibited, the Government has, in effect, thrown a smorgasbord of disparate allegations and factual material at Defendant and said, "you figure it out." This is not a proper approach.

Nor does its truncated citation to *Hamling v. United States*, 418 U.S. 87 (1974), advance the Government's cause. The Government omits the key language from the opinion, underlined below:

> Undoubtedly the language of the statute may be used in the general description of an offence, ***but it must be accompanied with such a statement of the facts and circumstances as will inform the accused of the specific offence, coming under the general description, with which he is charged***.

Hamling, 418 U.S. at 117–18 (1974) (emphasis added).

This Constitutional injunction is not optional: the Government "***must***" provide "a statement of the facts and circumstances as will inform the accused of the specific offence." Outside of the January 6 context, no Court would ever accept as sufficient a statement of facts that simply asserted, as the Government contends is sufficient, that defendant somehow engaged in "obstruction" on the day in question. The Government's citation to *United States v. Williamson*, 903 F.3d 124, 130 (D.C. Cir. 2018), Opp. at 6, is unconvincing. The *Williamson* indictment charged that "on or about June 18, 2014, within the District of Columbia, Jeff Henry Williamson did threaten to assault and murder a Federal law enforcement officer, that is Brian

Schmitt, a Special Agent with the Federal Bureau of Investigation, with intent to retaliate against such Federal law enforcement officer on account of the performance of his official duties." *United States v. Williamson*, 14-cr-00151, Dkt. 7. While this indictment is of the "bare-bones" variety, it alleges *specific*, easily understood, conduct targeted at a specific individual, and was accompanied by a detailed affidavit. *Id.*, Dkt. 1. Attempting to "assault and murder" a named individual, with the specific detail in a sworn affidavit, is simply not comparable to "corruptly" "obstructing" an "official proceeding," with a vague Statement of Facts that fails to identify the particular conduct alleged to constitute the violation.

Just as the official proceeding needs to be identified, so too do the acts constituting or underlying "obstructing" and "corruptly" need to be precisely delineated or else these words simply become empty vessels into which the Government can pour whatever offenses it wants, undermining the goals of the criminal law. *Rules and doctrines assuring fair notice of what constitutes an "offense"*, 1 Crim. L. Def. § 35 and Note 1 (*citing* A. von Hirsch, *Doing Justice: The Choice of Punishments* 45–55 (1976) for the proposition that "a theory of just punishment relies upon the fact that the offender could have avoided the violation, and thus the punishment, by conforming his conduct to the requirements of the law" and G. Williams, *Criminal Law: The General Part 575* (2d ed. 1961) ("the citizen must be able to ascertain beforehand how he stands with regard to the criminal law; otherwise to punish him for breach of that law is purposeless cruelty")).

Here, the indictment is fatally defective in that it does not, under any fair reading, provide Sahady with adequate notice of the *specific* conduct that constitutes his alleged crime. As a result, the indictment must be dismissed.

II. The Government Attempts to Distract from Defendants' Speedy Trial Arguments.

Sahady does not wish to belabor the way the docket entries refer to the Government's charging documents, which is the focus of the Government's opposition. Opp. at 8. Suffice it to say, these entries are confusing: the "third" superseding indictment is in fact the "first" superseding indictment and it is precisely the delay in bringing a first indictment that is the substantive point at issue. In his Omnibus Mot., Sahady had carefully reviewed the cases cited by the Government in its own previous Omnibus Opposition, Dkt. 73 (the "Omnibus Opp.") that were intended to provide support for the Government's belated supersession of a misdemeanor information with a felony indictment. Omnibus Mot. at 12. Sahady showed that none of these cases provide any support for the Government's delay in over two years in superseding its two previous misdemeanor informations with a felony indictment. *Id.*[1] The Government claims that Covid or the defense's agreement to "reasonable delays" somehow excuse the Government from its Constitutional obligations. Omnibus Opp. at 19-20. These arguments have no merit and need not be dwelt on further. The Government then attempts to shift the blame to Sahady by contending that his conduct "does not evince a strong or consistent concern with Sixth Amendment rights." Opp. at 20, *citing United States v. Baugh*, 605 Fed. App'x 488, 492 (6th Cir. 2015). This is disingenuous at best. Not only does it ignore the history of plea offers in this case, but ducks the central issue: what prompted the two year delay, not in superseding the misdemeanor information with another information, but in charging Sahady under a felony indictment? Had Sahady been on notice that the Government intended to prosecute him on felony charges, his desire to vindicate Sixth Amendment rights would

[1] The Omnibus Opp. adds to the "titling" confusion by labelling the Third Superseding Indictment as the "Second Superseding Information and Indictment," a document that does not exist. *See, e.g.*, Omnibus Opp. at 19. This makes it difficult for the defense, and likely for the Court, to follow which precise document is under review.

obviously have been affected, and the Government cannot blame Sahady for a delay in asserting his rights when he was not on notice until nearly halfway through 2023 that the Government intended to proceed under 18 U.S.C. § 1512(c)(2). Nor does the argument that the Government was just too busy with the press of January 6 cases to figure out what crime Sahady was alleged to have committed carry any weight. *See* Omnibus Opp. at 19. The Government claims to have charged over 1,000 defendants "like Sahady." *Id.* Without having done a statistical analysis, Defendant finds it hard to believe that the Government has brought 1,000 felony charges under 18 U.S.C. § 1512 (c)(2). If true, that begs the question of why it took the Government so long to decide that Sahady was one of the 1,000 defendants to have violated 18 U.S.C. § 1512(c)(2). If not true, the defense is left puzzling over why, of the 1,000 defendants "like Sahady," he was belatedly included in the smaller group of defendants charged with "corruptly" "obstructing" an "official proceeding." If the Government's case for its delay boils down to its claim to have discovered "new evidence," this further underscores the infirmity of the indictment, which makes no allusion to any "evidence," new or otherwise, or to any facts whatsoever—leaving a misdemeanor defendant suddenly confronting felony charges without adequate notice, thus compounding the Sixth Amendment speedy trial concern with the even more fundamental due process violation that, as discussed, requires dismissal of the indictment.[2]

III. The Government Misapprehends Sahady's Selective Prosecution Claim, Which Clearly Identifies Other Similarly Situated Individuals Who Were Subject to Different and More Lenient Treatment.

The Government makes a conclusory statement that "the defendant has still failed to show that he is similarly situated to those individuals" who engaged in similar or worse conduct

[2] The Government's sudden addition of felony charges in a vague new indictment also reinforces the concern that Sahady is the target of vindictive prosecution for refusing to plead to a misdemeanor like his co-defendant, Susan Ianuzzi. Sahady reiterates the vindictive prosecution arguments he has previously made. *See* Dkt. 67 at 8-11 and Dkt. 72 at 13.

at the Kavanaugh and Portland Protests. Opp. at 9. But the Government completely ignores that Sahady did show that he is similarly situated to specific individuals.

Sahady identified two Kavanaugh protestors - Ana Anchila and Maria Gallagher - who famously physically assaulted Senator Jeff Flake in an elevator. Omnibus Mot. at 18. The incident was widely reported on CNN. (4) Tearful woman confronts Senator Flake on elevator - YouTube, https://www.youtube.com/watch?v=bshgOZ8QQxU&t=30s. The two women were inside a restricted area and physically obstructed Senator Flake from attending and voting at an official proceeding. It is clear in the video that Senator Flake is being held against his will for almost 5 minutes. His staff can be seen asking for the women to allow the senator to leave, and the women refusing to let him go. The staff can also be seen calling for security. In a television interview, Ms. Anchila admits that she was aware that Senator Flake was trying to flee but stated that she "wouldn't let him go." https://www.youtube.com/watch?v=0mqIRJ-5TCc.
The actions of Anchila and Gallagher qualify as "congressional assaults" in violation of 18 USC 351(e), and corruptly obstructing, influencing, and impeding an official proceedings or attempting to do so, in violation of 18 USC 1512(c)(2). But according to Pacer and public reports, no charges were ever brought against Anchila or Gallagher, certainly no felony charges, as were brought against Mr. Sahady, for conduct that falls far short of the outrageous conduct of the two women. The Government does not even attempt to distinguish between Anchila and Gallagher on the one hand, and Sahady on the other.

The only argument the Government offers is that other January 6 defendants have tried and failed to compare themselves to the Kavanaugh protestors. But none of those defendants could be compared with Anchila and Gallagher the way that Sahady can. The Government cites only *Padila*, *Brock*, and *Rhodes* which are all clearly distinguishable cases from Sahady who is not charged with any violence. *Padila,* 1:21-cr-214 (JDB), pushed a barricade at police and

threw a flagpole at police who were fighting off rioters in the lower western tunnel during the thick of the most violent confrontations on January 6. *Id.* Dkt. 1-1 at 3. In *Brock*, 1:21-cr-140(JBD), "Brock was 'on the Senate floor'—the very floor from which Members of Congress had fled—'holding flex cuffs in his right hand,'" and the Court found that "those allegations alone would be a legitimate factor on which to base more serious charging decisions." *United States v. Brock*, 628 F. Supp. 3d 85, 103. There are no similar allegations against Sahady. Rhodes was allegedly the leader of the Oath Keepers and is considered one of the masterminds behind the events of January 6 and could not be more distinguishable from Sahady who is not accused of being a member of any militia or engaging in any violence or vandalism.

Further, in *Brock*, the court expressly stated, "Brock does not describe any similarly situated defendants given the difference in violence, threat to citizen safety, and scope." *Brock*, 628 F. Supp. 3d 85, 103. Here, Sahady specifically points to Anchila and Gallagher as similarly situated.

Finally, the Government argues that the recent *Frederick Douglass* decision case does not support his claim because "Sahady is not similarly situated to any groups he cites to support his disparate treatment argument." Opp. at 9. Once again, this completely ignores Sahady's comparison to Anchila and Gallagher who are individuals not "groups." The government provides no argument to the comparison with those individuals because it cannot. Sahady met the standard established in Frederick Douglass by pointing to two very specific individuals who are similarly situated, and by showing how they were treated differently for conduct that is at least similar, if not far worse. Also, the distinctions made by Judge McFadden in *Judd* regarding the Portland riots do not apply to the comparison with Anchila and Gallagher. As the Court stated in *Brock*, the main distinction between Portland and January 6 was that Portland happened at night when Government officials were not present. "The decision to file and pursue more

serious charges based on the threat to government officials and employees is certainly a legitimate prosecutorial consideration." Here, Anchila and Gallagher directly threatened the safety of a United States Senator and his staff to the point that security had to be called. The Court also distinguished the Portland riots because "Portland protestors were not alleged to have 'engaged in comparable conduct' since defendant did not identify an 'official proceeding' they obstructed." Brock, 628 F. Supp. 3d 85, 102. Here, Sahady identified an official proceeding, namely, the Kvanaugh confirmation.

In sum, Sahady was a peaceful protestor on January 6. He is not accused of engaging in acts of violence or even of being present in areas like the lower western terrace where much of the most pronounced riotous behavior occurred. His conduct in the capitol can fairly be compared to Anchila and Gallagher, with the big difference being that Anchila and Galagher physically threatened, obstructed, and corruptly tried to influence Senator Jeff Flake, whereas Sahady is merely being accused of being a protestor in a restricted area during a protest that, through no fault of his, happened to turn violent in other areas of the building. Anchila and Galagher are a fair comparison, and Sahady has shown a disparate impact in that the Government chose not to arrest or prosecute them, whereas the Government chose to arrest and prosecute Sahady, belatedly adding a felony charge with the constitutional problems discussed at length above. Sahady has therefore met the standard for selective prosecution established recently in *Frederick Douglass,* and accordingly, the Court should grant his motion to compel discovery.

CONCLUSION

For the reasons set forth above, the "Third" Superseding Indictment must be dismissed and Sahady must be granted discovery in aid of his selective prosecution claim.

October 13, 2023 Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing is being served on opposing counsel via email and via the Court's ECF service on October 13, 2023

/s/ Jonathan Gross

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