

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA

vs.

CRIMINAL NO. 1:21-CR-458(RJL)

RICHARD CROSBY, JR.

June 23, 2022

DEFENDANT'S MOTION TO DISMISS COUNT ONE OF THE INDICTMENT

Richard Crosby, the defendant in the above captioned matter, respectfully moves to dismiss Count One of the Indictment pursuant to Federal Rule of Criminal Procedure 12(b)(3)(A)(iv). The factual and legal basis for this motion are more fully set forth in the accompanying memorandum of law. However, he moves to dismiss on the grounds that:

- (1) The government's decision to bring Count One constituted selective prosecution in violation of the Fourteenth Amendment to the United States Constitution and this decision falls beyond the deference usually accorded to exercises of prosecutorial discretion. *See e.g. United States v. Armstrong*, supra, 517 U.S. 456, 464 (1996); *Wayte v. United States*, 470 U.S. 598, 607-08 (1985). This is so because, but for his entry into the Senate Floor, he similarly situated to the hundreds of misdemeanor defendants who illegally entered the Capitol, milled about, and left without committing assault, property damage, or acts demonstrative of preparation. This is an arbitrary and capricious distinction where any legitimate governmental interest is already captured in Count Four (illegal entry into the Floor of Congress in violation of 18 U.S.C. 5104(e)(2)(A)). Brining a more serious charge on a circumstantial theory is an unnecessary burden on Mr. Crosby calculated to punish Mr. Crosby for the highly offense symbolic value of his trespass rather than a legitimate law enforcement interest; and

(2) For the purposes of preservation only, the theories articulated in *United States v. Garrett Miller*, 1:21-cr-119(CJN), Doc. No. 72 overruled *United States v. Fischer*, 2023 U.S.App.LEXIS 8284, 2023 WL 2817988 (D.C. Cir., 2023) in the event certification is granted in the *Fischer* case. Mr. Crosby concedes that the Court is currently bound by *Fischer* and must deny this claim.

WHEREFORE, he respectfully requests a dismissal of Count One of the indictment based upon the facts and law articulated in his accompanying memorandum of law.

Respectfully Submitted,

/s/Daniel M. Erwin/s/
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CERTIFICATION OF SERVICE

This is to certify that on June 23, 2023, a copy of the forgoing was filed electronically via the Court's CM/ECF system, and by that system, counsel for the Government has been provided with a copy of the forgoing.

/s/Daniel M. Erwin/s/
Daniel M. Erwin