UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA **v.** **CYNTHIA BALLENGER &** **CHRISTOPHER PRICE** **Defendants.**	**Case No. 1:21-cr-00719-JEB**

DEFENDANTS' MOTION FOR RELEASE PENDING APPEAL AND STAY

Defendant-Appellants Cynthia Ballenger (Price) and Christopher Price (together Defendant-Appellants, Defendants, or the Prices), by and through undersigned counsel, respectfully moves this Court, pursuant to 18 U.S.C. §§ 3141(b) and 3143(b) for motion for release pending appeal, and for stay of execution of each of their sentences under Federal Rule of Criminal Procedure 38. In this motion, each defendant's request for release are based on their claim on appeal that this Court made errors as described below. Defendant-Appellants reserve that there may be other grounds for a motion under Rule 38 or other authority connect to the cancer and care for cancer of Christopher Price. Defendant-Appellants note the Courts hearing set for December 1, 2023 and request that the Defense provide reports from the doctors on that matter.

Defendants-Appellants hope for an affirmative ruling from this Court. Regardless, Defendant-Appellants will want to pursue either an appeal of a negative ruling or a straight petition for release pending appeal under Federal Rule of Appellate Procedure 9, should this

Court not rule in the affirmative. Timely resolution given the threat of jail coming so soon is desirable.

Background

The convictions state violations under 18 U.S.C.§§1752(a)(1) and (2) (Counts 1 & 2) and 40 U.S.C. §§5104(e)(2)(D) and (G) (Counts 3 & 4). Cynthia Ballenger (Price) and Christopher Price timely filed notices of appeal, and the appeals have been docketed in the United States Circuit Court for the District of Columbia at No. 23-3198 and No. 23-3199. The cases have been consolidated. Counsel for Defendants-Appellants has received the trial and sentencing transcripts. Currently, the appeal schedule has the Appellants briefs due January 2, 2024 and the reply briefs scheduled for February 22, 2024. The D.C. Circuit has been taking months to issue opinion in the January 6th cases. Currently, the reporting date from the Bureau of Prisons for prison for Cynthia Ballenger (Price) is January 3, 2024 for what is currently a 4-month prison term. Christopher Price has a 45-day prison term and, as of this writing, has not received a reporting date.

Grounds for Release Pending Appeal

Under 18 U.S.C. § 3143(b)(1), a court shall order release pending appeal if it finds:

(A) by clear and convincing evidence that the person is not likely to flee or pose a danger to the safety of any other person or the community if released . . . ; and

(B) that the appeal is not for the purpose of delay and raises a substantial question of law or fact likely to result in –

(i) reversal,

(ii) an order for a new trial,

(iii) a sentence that does not include a term of imprisonment, or

(iv) a reduced sentence to a term of imprisonment less than the total of the time already served plus the expected duration of the appeal process.

A "substantial question" within the meaning of § 3143(b) is "'a close question or one that very well could be decided the other way.'" *United States v. Perholtz*, 836 F.2d 554, 555 (D.C. Cir. 1987) (per curiam) (quoting *United States v. Bayko*, 774 F.2d 516, 523 (1st Cir. 1985)). This standard does not require that the Court find that Cynthia Ballenger's (Price's) appeal establishes a likelihood of reversal before it may grant her release pending appeal. *See Bayko*, 774 F.2d at 522-23. Rather, the Court must "evaluate the difficulty of the question" on appeal, *United States v. Shoffner,* 791 F.2d 586, 589 (7th Cir. 1986), and grant release pending appeal if it determines that the question is a close one or one that "very well *could* be" decided in the defendant's favor.

Mrs. Price (Ballenger) and Christopher Price have both demonstrated by clear and convincing evidence that neither will flee nor pose a danger to the community by virtue of her complete compliance with the pretrial release conditions that have been in place since the outset of this case. As the Court is aware, Cynthia Ballenger (Price) and her husband, Chris Price, lives in High-Cascade, Maryland. As you know Christopher Price, who has recently been diagnosed with a second round of prostate cancer that has moved to lymph nodes. He is currently receiving treatment. He currently has a job in the community. Cynthia is the primary care giver for Christopher Price. She has a job nearby. Both Cynthia and Chris also provides support and guidance to her youngest son Joseph Morrison, age 19, who lives with them. Both Cynthia and Christopher are is being monitored by the Pretrial Services Office of District of Maryland

Baltimore/District of Columbia. Undersigned counsel has confirmed through Cynthia Ballenger's (Price's) Services Agency Officer on November 9, 2023 that both Cynthia and Christopher Price remain in compliance with their conditions of release. The Prices have been under court supervision for years now and both have remained in compliance.

Defendants submit that the clear evidence is that neither of these appeals are not for purposes of delay and because neither defendant-appellant presents an issue of dangerousness or potential flight risk. The only question is whether his appeal raises a "substantial question of law" that, if decided in defendant-appellants favor, would be likely to result in reversal, or a sentence that does not include a term of imprisonment, or a term of imprisonment that is less than the expected duration of the appeal process.

In this motion, Cynthia Ballenger (Price) and Christopher Price are arguing reversal, remand, and/or potential reductions in sentences with respect to all counts based, at least, on the arguments below. In addition, as it is, the current sentence is less than the expected duration of the current appeal process. Even a single day reduction would mean a sentence that is less than the expected duration of the current appeal process. The reporting dates for Cynthia Ballenger (Price) are listed above, and with the current briefing schedule and follow-up months for an opinion, Cynthia would have served all of her time in prison.

In this case, Defendants-Appellants respectfully submit that several of the questions each wishes to raise on appeal are substantial ones. This motion will only address some of the issues each Defendant-Appellant may take on appeal.

I. There Is A Substantial Question Whether the Government Satisfied the Requirements Of 18 USC § 1752(c), At the Time of the Prices' Walk

A. There Are Substantial Questions Regarding Whether the Ghost of Former Restricted Area Demarcations Can Satisfy 18 U.S.C.§ 1752(c)

As shown by evidence, the circumstances in terms of the red perimeter diagram. Police cordons, location and orientation of bicycle racks and signs, and the situation and Capitol Building doors changed substantially from the morning to when the Prices arrived on the Capitol Grounds. The Defense argued that the elements that demarcate a restricted area under 18 U.S.C.§ 1752(c) must materially exist at the time of the Prices walk as a matter of statutory interpretation. The Court and government disagree. The Court's response to this—not during trial but in the Memorandum Opinion on the Rule 29 motion (Rule 29 Opinion) [ECF 127]—is that:

> Rioters' success in knocking down barriers and doors, however, does not strip an area of its restrictions. *Id.* at 6.

Defendants did not knock down anything. The government may prosecute those that did with a variety of criminal sanctions. There are also other criminal statutes protecting the Capitol and the grounds including 40 U.S.C. § 5104 that would not depend on the restricted area construct. Congress required an 18 U.S.C.§1752(c) restricted area before convicting a person for trespass under that provisions. 18 U.S.C.§1752(c) demarcations are most often temporary. And cordons and alignments can change during a day, and in this case did.

To simplify the Defense position for 18 U.S.C.§1752(c) -

1) there must be a specific area of a building or grounds that is the restricted area
2) That restricted area must be demarcated by postings, cordons, or other restrictions that identify the boundaries of the restricted area or areas
3) The postings, cordons or other restrictions providing the demarcation must materially exist at the relevant time of the defendant's conduct

4) A protectee must be at or be expected to be at, separately, a building or grounds

These readings are supported by the text of statute and ordinary understanding. The Court's reading is not supported by the text of the statute. The traditional and ordinary reading is that, if one cannot identify the "area" at the relevant time by postings, cordons, or other restrictions, then it is not a "restricted area" for purposes of 18 U.S.C.§1752(c). Unlike the White House or its grounds, neither the Capitol Grounds nor the Capitol Building are per se restricted areas for purposes of 18 U.S.C.§1752(c).

A reading that the material existence does not matter is counter to what likely the important Fair Notice requirement the provision addresses. That others either removed or moved perimeter items such that the perimeter is no longer recognizable means there is not a legally cognizable restricted area for the new people coming to that area. That a restriction may or may not exist in the mind's eye of the prosecutor or the desire of the government is not the legal standard.

In the instant case, the Government alleges there was a perimeter around part of the Capitol Grounds, at least in the morning, as described in Government Exhibit 501. Captain Baboulis described the items she claimed formed the red perimeter in the diagram. Trial Transcript March 20, 2023 (TR1) at 35. Captain Baboulis also specifically stated portions of the barricades were compromised in the afternoon hours after the riots had breached the grounds. TR 1 at 52.

The Defense showed videos and other evidence at trial that even if there was a red perimeter in the morning it did not exist at the time of the Price's walk.

The Defense showed video from government camera from Defense Exhibit 401 which

observed a pedestrian street crossing on Constitution and caught some of the area of the grounds south of Constitution—south of the red perimeter. The video is somewhere around the time that Defendants were crossing, and the video showed dozens and dozens of people just walking straight through on to the Grounds.

Defense Counsel then showed the circumstance at the entrance to the upper Northeast Terrace in a series of video clips from the relevant government CCV camera. See Defense Exhibits 215 and 216. This is the entrance to the upper terrace that the Prices would later travel. At first there was a police cordon of at least two police officers with three bicycle racks clearly restricting access. After a time, the police left, and the bicycle racks were moved aside by some other party. No evidence was presented as to who moved them. See, in addition to Defense Exhibits 215 and 216, TR I at 59 and 62. The Defense also showed government video to show there was unrestricted access for hundreds if not thousands of people to the grounds before the Prices arrived. See Def Exhibit and TR 1 at 64.

The statutory terms in 18 U.S.C.§1752 (a) and (c) are both listed in the present tense (or in one instance future tense). 18 U.S.C.§1752(c) says "enters" or "remains" in a restricted building or grounds. The obvious reading is the time of entering or remaining is relevant. The language does not include criminalizing the entering of an area that was formerly posted, cordoned off or otherwise restricted area restricted. Indeed, 18 U.S.C.§1752(c) is a "….posted, cordoned-off, or otherwise restricted area—

> of a building or grounds where the President or other person protected by the Secret Service <u>is</u> or <u>will be</u> temporarily visiting. (emphasis added)

The ordinary reading is everything must line up as a matter of time. If the protectee is gone and

not returning there is no 18 U.S.C.§1752(c) restricted area. Similarly, if the material restrictions are gone there is no 18 U.S.C.§1752(c) charge.

Also, to the extent there is statutory ambiguity between Defendant's proposed interpretation and the Court's proposed interpretation, Defendants' interpretation wins under the Rule of Lenity and *Bittner*.

Prior to January 6, 2021 there is no case law supporting the Court's position. Nor has the government provided a single case example in a trespassing statute case that would operate where signs and fences not there at the time.

B. There Are Substantial Questions Whether a *Mens Rea* Analysis Can Substitute for the 18 U.S.C.§1752(c) Requirements and Whether the Courts "Other Restrictions" Can Apply to Supersede the Demarcations Based on Actual Police Cordons at the Time

Given the Court's statement the court appears to take the position that observations on the part of the Prices that should raise a caution about the situation at the Capitol Grounds or Capitol helps identify a restricted area. The Court argues there is a long list of these which should fall under the term "otherwise restricted area" under 18 U.S.C.§1752(c). A *mens rea* analysis does not substitute for and is not the same as 18 U.S.C.§1752(c) requirements. The 18 U.S.C.§1752(c) requirements are not specific to any defendant. If multiple people arrive at a location, the question of whether an area is restricted for purposes of 18 U.S.C.§1752(c). This question cannot vary based on the different paths or observations of different people in different locations. The court does not segregate these points in the transcript or the Court's Rule 29 and Rule 33 opinion [ECF 127].

C. There is Insufficient Evidence that a Protectee was on or Was Expected to Be on the West Grounds or the Upper Terrace North East, Upper North Terrace,

Upper Terrace Northwest or Upper Terrace West as Required for Restricted Grounds Under 18 U.S.C.§ 1752(c)

The Government provided no stipulation, testimony or evidence to establish an area of the grounds where the President or other person protected by the Secret Service is or will be temporarily visiting on January 6th included the grounds traversed by the Prices, including the Upper Northeast Terrace, the Upper North Terrace, or the Upper Northwest Terrace or the Upper West Terrace. The stipulations clearly indicate these areas are not part of a Capitol Building but are part of grounds. Accordingly, the government fails to establish an element required under 18 U.S.C.§1752(c) with respect to areas outside of the Capitol Building.

D. There is A Substantial Question Whether the Police Cordons Inside the Senate Wing Door Defines the Location of Any Potentially Restricted Areas Under 18 U.S.C.§ 1752(c) As Applies to the Prices

Defendants have consistently taken the position that the bubble area the Defendants walked into inside the Senate Wing Door was not restricted based on the operation of the police cordon that was there at the time. *See* Memorandum of Points and Authorities in Support of Defendants' Motion to Dismiss [ECF 54-1] at 15-18; Reply Memorandum in Support of Defendant's First Motion to Dismiss the Superseding Information [ECF 66 at 5-7]; Notice of Joint Proposed Elements of Law [ECF-99]. Defendants' Memorandum of Points and Authority Stating Concerns with Certain Government Jury Instruction Requests and Support for Defense Jury Instruction Requests [ECF 99-1] at 5-7. Trial Transcript 1 at 14, 21-23, 27, 181; TR II at 27-28, 151-153, 161.

Defendants interpretation, particularly in regard to cordons, is fully supported by *U.S. v. Bursey*, 416 F.3d 301 (4th Cir. 2005), which construes the definition of restricted area in 18 USC §1752(a). In *Bursey*, the Court found that law enforcement agents themselves defined the

cordoned off area by their position:

> Stationing agents at along an areas perimeter squarely falls within the plain meaning of the term "cordoned off," that is, "a line or series of troops or of military posts placed at intervals and enclosing an area to prevent passage' or "a barrier of any kind operating to close off, restrict, or control access." Websters Third New International Dictionary (1976). *Id.* at 307.

The Defense understands an area may be otherwise restricted but also argues that restrictions must apply, in total, to operate in a like manner to *Bursey*-- to demarcate and enclose the specific restricted area or areas.

In its Rule 29 Opinion the Court states:

> Their only challenge to that finding is that police were cordoned within, rather than outside, the Senate Wing Door, and that this cordon was not pushing back against the crowd that entered through the breached doorway. [citation omitted]. Opinion at 7.

The Defendants actual argument is that the position of the police line that materially exists at the time defines the restricted area 18 U.S.C.§1752(c) because that cordon reflects a statutory term and the police officers did not say otherwise. That reading is fully consistent with *Bursey*. The Court held that:

> Ultimately, the officers created a line to prevent people from going north from that foyer upon the Senate wing door entry. TR 2 at 167.

This police cordon did not restrict the threshold to the Senate Wing Door entry itself. The plain meaning is that this police cordon, which was right there did not restrict entrance into the bubble area. The Defense understands an area may be otherwise restricted but also argues that

restrictions must apply, in total, to operate in a like manner to *Bursey*-- to demarcate and enclose to exclude from a c restricted area or areas.

In the Rule 29 opinion the Court claims:

> That rioters had pushed the additional line of officers within the building further back by the time Defendants entered makes no difference; their cordon made sufficiently clear that entry into the building was forbidden. Opinion at 7.

This point was not stated in the transcript. Regardless, the *Bursey* definition of the meaning of the police cordon does not support the Court statement. The history of the foyer does not change whether and where a police cordon materially existed at the time the Prices came to the door. There was also no evidence presented that anyone was pushing police at the time the Prices came to open door.

The Defense pointed out that the government video showed dozens of citizens were in line, entered, and took basically the same short rout as defendant, to the effect they walked south, and then never went past officer A. Tax. All get in the line going the other way to exit. The Court states:

> Defendants maintain that the Court failed to consider two additional facts, but neither is relevant to their knowledge. First, they point out that "[d]ozens and dozens of people entered the door and exited in approximately the same manner as the Prices." Acquittal Mot. at 34–35. That others were engaging in the same conduct has little bearing on Defendants' own knowledge that they (and their companions) were not permitted to be there. Defendants cannot rely on monkeysee-monkey-do logic… Rule 29 opinion at 8.

There are several points here. First, the Court is again speaking to the *mens rea* (knowledge)

and not the independent requirement of the government to demarcate a restricted area under 18 U.S.C.§1752(c). However, this information counters the Court's unsupported argument that the police cordon "made sufficiently clear that entry into the building was forbidden". The Court's argument is dozens and dozens of peaceful Americans chose to violate restriction in front of dozens of police officers, because, even though the police could arrest them it was made clear to them the cordon on the left really represented a cordon across the threshold. The government provided no evidence of the mental states of any of the "companions." Those, Americans who entered just before or during the time the Prices entered also entered peacefully and were not shown to disobey a police officer in the evidence presented. The evidence also specifically shows how a police officer could stand at the door and tell people not to enter. Defense video 201 shows this and shows how people stopped entering when this occurred.

The Defense never argued that that the Capitol Building was not restricted beyond the bubble that the Prices walked in. Indeed, the Defense identified, Officer A. Tax, (see Defense Exhibits 300 Picture 11, and Defense Video Exhibits 200 and 400) as a police officer either being part of a cordon in the South part of the hallway or in any event representing the point at which none of the citizens who came in during that time went further past. The videos are evidence and there is no evidence contradicting this point. The Prices are here fully consistent with the *Bursey* approach to describing the effect of a cordon.

The Court, on the other hand, also claims an external cordon has some impact on the situation at the Senate Wing Door. There is nothing about the position of the external cordon that would allow for that under the Bursey definition. The external police cordon cordoned off a different area and not the area at the Senate Wing door. Defense Exhibit 300 Picture 14 shows

this external police cordon that is cordoning-off an area. The Court's legal view does not follow the approach in *Bursey*. The Court's view is that the line is not a line but rather a reserve of police officers clearing people from the ghost of the perimeter past.

In the Rule 29 Opinion the court states:

> Ballenger, however, admitted on the stand that an additional "line of Metropolitan Police Department officers in bright yellow jackets" stood outside the Capitol, guarding it from the outside. See Tr. II at 101. Rule 29 Opinion at 7.

First, a simple review of the transcript shows Cynthia Ballenger (Price) did not say the line of police officers outside, which were not near the Senate Wing Door at all, were guarding the Capitol building or the door. Regardless, for the purposes of 18 U.S.C.§1752(c), that external line was part of its own specific cordon that, like in *Bursey*, defined a specific area. That area was not near the Senate Wing Door. The Prices did not cross the external police cordon with respect to this separately cordoned-off area.

II. There Is A Substantial Question Whether the Court Properly Interpreted *Actus Reus* Requirements Counts II-IV and Whether There Was Sufficient Evidence at Trial to Prove the Actus Reus Requirements for Those Counts

A. Alleged *Actus Reus* Was Very Limited

According to the Court, the conduct under Count 1 is entering the Capitol building. Trial Tr., March 21, 2023, at 171: 12-16. For Count 2 the Court effectively found the same basic conduct -- entering or "being" at a location. Specifically, the Court found the act of "going into the Capitol" (*Id.* at 172: 4) and "being" on the Upper West Terrace (*Id.* at 172:5) was the "*actus reus*" of "disorderly or disruptive conduct" for Count 2. For Count 3, the Court effectively found the same conduct that formed the basis for Count 1 and Count 2 was the basis for Count 3.

Specifically, the Court found the act of "entering the building" was the *actus reus* of "disorderly or disruptive" conduct for Count 3. *Id.* at 172:12-13.

The Court talks at various points about the conduct inside the foyer. For example, the Court states:

> And the government generally agreed that if this conduct had taken place in a vacuum it might not well be disruptive. *Id.* at 171:23.
>
> And again, they would not be guilty if they had acted by themselves. *Id.* at 172:17.

Similarly, in relation to Count 4 the Court stated:

> Isn't that your best argument, that the activities they took inside the building, if they had been by themselves, would you agree, likely would not satisfy the demonstrate prong since it seems like they were largely peacefully walking, standing, texting or taking pictures? *Id.* at 140:24-15.

The *actus reus* under Count 4, like the basic issues under Counts 1-3, was being in the foyer inside the Senate Wing Door. The Court stated no specific demonstrative conduct—just presence.

Defense Counsel asked related questions of Special Agent Belcher at Trial Tr. 3/20/2023 at 181:

Q: …it seems like the Prices walk in, get in line, and walk out. Is there is something different that you found in your investigation?

A: No.

Q: And in your investigation, did you investigate anything outside of the Senate Wing

Door. That is to say, in the area outside of it, were you able to talk to anyone or you, ask what the situation looked like there?

A: No.

Lt. Grossi never referred to the Prices in testimony and there is no indication he saw them in the foyer. Lt. Grossi was forced to admit **no one** was pushing or challenging any police officer while the Prices were in the foyer. Trial Tr. 3/20/2023 at 88-91 and that the actual police cordon restricting going North was being highly effective in preventing people from going north Id. at 90. Lt. Grossi had no information about what was outside of the Senate Wing Door. Id. at 90. Captain Baboulis had neither testimony regarding the Prices in the Capitol nor outside the Senate Wing door.

The evidence shows the Prices walk through an open Senate door at about 3:22:44 pm. Defense Exhibits 200, 303, 400; Government Exhibit 202D, 703. There is no evidence this door was closed at the time the Prices were on the West Terrace. At the time of entry there is no indication or evidence that any of the police officers inside, but near the door, tells the Prices not to enter. No witness states any police officer made such a statement.

The government never established that anyone present, at the time of the Prices in the foyer pushed anyone or disobeyed a direction of a policeman. The government established chanting of others after Defendants were in line waiting to exit.

B. Disorderly or Disruptive Conduct Must Be More Than Entering and Remaining Based on the Rule of Construction to Analyze the Text in the Context of the Other Parts of the Statutory Provisions

The government cannot turn an alleged "entering" violation, potentially covered under 18 U.S.C.§1752(a)(1), or "being" into the "disorderly and disruptive conduct" elements required

under 18 U.S.C.§1752(a)(2). Nor can the Court turn "entering or remaining" or "being" into disorderly or disruptive conduct under 40 U.S.C.§ 5104(e)(2)(D). 40 U.S.C. §5104(e)(2)(A)-(C) use the terms "enter or remain" in specific context. Part of the context involves specific locations within the Capitol Building. For example, 40 U.S.C.§ 5104(e)(2)(C) makes it a violation if a defendant "..with the intent to disrupt the orderly conduct of official business, enters or remains in a room in any of the Capitol Buildings set aside or designated for the use of (i) either House of Congress or a Member, committee, officer, or employee of Congress, or either House of Congress; or (ii) the Library of Congress. Note specifically how entering and remaining can be twined with intent to disrupt the orderly conduct of official business but that is not the case in the charges against the Prices. If Congress had meant entering or remaining in other locations was a violation under the 40 U.S.C. §5104(e)(2) series, Congress would have said so. More specifically "disorderly or disruptive conduct" uses different words and is different than merely entering or remaining. As discussed below, "Enter or remain" also cannot be transformed to "parade, demonstrate, or picket" which must mean discretely different conduct.

Whatever, Court analysis there is as to the above, and it is not clear there is one, this is substantial. Moreover, the term "disruptive conduct" must be read in light of its more well-known neighbor "disorderly conduct" and its other statutory neighbor, the terms "utter loud, threatening or abusive language." Disorderly or disruptive conduct must go to behavior or conduct of the defendant and not any alleged association with a group. Moreover, the term cannot apply to museum-acceptable conduct like walking, standing in line, texting, taking pictures, and obeying police officers. Both "disorderly" and "disruptive" conduct must be of a similar class of conduct.

Disorderly and disruptive conduct must be consistent with ordinary understanding. Ordinary citizens do not understand peacefully walking, standing in line, texting, taking pictures and obeying police officers to be of a criminal class. Nor should the Court. Peaceful walking and standing in a line are acceptable types of conduct at a museum and most every other place. Standing in line is the height of, and most common form of, orderly activity across all civilizations. The interpretation must be such to give ordinary people fair notice.

C. Judge McFadden Ruled Against Such Broad or Novel Interpretations to Find a Certain Defendants Not Guilty

In *United States v Cuoy Griffin* Case No. 21-CR-092 [*Griffin* ECF 106] at 336 the court states:

> In any event, and more fundamentally, nothing showed the defendant engaged in any disorderly conduct above and beyond entering a restricted area. That alone cannot show a violation of 1752(a)(2).

Cuoy Griffin was also present with many other people. That did not make entering a restricted area the same disorderly or disruptive conduct as required under 18 U.S.C.§1752(a).

In *U.S. v Matthew Martin* Case No. 1:21-cr-00394-TNM the transcript *Matthew Martin* [Martin ECF 41] at 269 states among other items:

> Court: ….I saw yelling, people confronting the officers, and even assaultive conduct toward the officers. The defendant engaged in none of that.

Later Judge McFadden states:

> Court: …The government also alleges that his conduct was disruptive in that it had stopped the congressional proceedings. I find that the proceedings had been halted well before he entered the Capitol building and that they did not resume until long after he had

> left… looking at his actions and the time at which they occurred, I find that the government has not proven beyond a reasonable doubt that he disrupted congressional proceedings. Id. at 270.

Later Judge McFadden states:

> Court: …Count 4 is parading, demonstrating, or picketing in a Capitol building. While there is little guidance on the exact meaning of these terms, I do not think the defendant's actions while in the Capitol building are consistent with any of them. He spent almost his entire time in the Capitol building videoing the surroundings and what others were doing. He did not, shout, he did not waive his flag, he did not confront officers he did not engage in violence. ….Id at 271.

Judge McFadden's rulings, without more, make it clear there are substantial questions in the instant case which could result in reversal. It seems clear the McFadden rulings are not consistent with the rulings of this Court.

Perhaps a key, that the Defense will repeat. Drops of water in a storm are basically the same. The conduct of various people at the Capitol or Grounds are not. This Court and the Rivera Court take a position that mere presence is sufficient and differences in conduct do not matter.

D. The Court's Use of *Bingert* is Inapt and Illustrates Defendants' Point About Improperly Grouping People

The Court brings up *United States* v *Bingert* 2023 WL 3613237 (U.S. District Court D.C., May 24, 2023) for the proposition that defendants in *Bingert* "impeded the ability for law enforcement to regain control of the area" as relevant to a 18 U.S.C.§1752(a)(2) claim. *Bingert* shows individual, violent conduct on the part of the *Bingert* Defendants in cooperation with

others:

> At approximately 2:46 p.m., both defendants picked up a bike rack that was being used as a barricade and pushed it into a line of police officers protecting the ongoing proceeding. At least one officer—Officer Gonzalez—was injured when that bike rack pushed him into another barricade…. Id at 1.

It is clear what the *actus reus* is for the *Bingert* defendants. Grouping people who peacefully walked with others who did violent and destructive things is not required nor appropriate under the law. It is not Constitutional as Congress as not directed such a grouping and has not provided statutory direction. Without specific definitions of groupings structures and reasons the Courts are on their own, violating the Constitution.

E. There is a Substantial Question Concerning the Court's Use of "Joined" the "Mob" As Legal Elements Which Have No Clear Definitions and Are Not Found in the Statute

In Counts 2-4, this Court adopted alleged elements of law provided by the Government in the closing statement with no essential facts provided in the Superseding Information [ECF 38], and with these elements not in joint statement of elements of law [ECF-99] and related defense memorandum [ECF-99-1]. The terms "mob", "joined a mob", or "participants in a mob" was not brought up in the government's case in chief or in the trial until government counsel argued those terms in her closing statement. Trial Tr. 3/21/2023 at 135. Here is more:

> But the fact that the mob clearly disrupted, did, in fact, impede and disrupt the orderly conduct of government and that they were part of this mob that did so….. TR2 at 172. (emphasis added)

In the Courts Rule 29 opinion court states:

> At trial, the Government acknowledged that Defendants did not "yell[], break[] things, block[] people, jostl[e]," or "threaten[] in some manner," and that their disruptive conduct consisted of their "being part of th[e] mob" that stormed the Capitol, even if their outward contribution to that mob consisted of little more than "walk[ing] in" with its members. See Tr. II at 137. Opinion at 10.

Note the term "mob" was never once used in testimony nor the opening statement of the government. The first time the term appears is in the Government's closing statement. Nor was the term "mob" used in the joint statement of elements. Nor was the term or construct of "joining" a "mob" or "group" used in the joint statements of elements. Here is the critical passage in the government's closing statement:

> Ms Akers: Next, your Honor, Count 2, 1752 (a)(2), the conduct here, the conduct element is met because these defendants joined a mob. They were participants in the mob. And a mob is not one without participants. (emphasis added) TR2 135
>
> Court: So they did didn't have to do anything disruptive in the Capitol beyond being in there among the other people? That's the argument right? (emphasis added) Id. At 136
>
> Ms. Akers: That's the argument your Honor…Trial Transcript March 21, 2023 (TR 2) at 136.

The same argument is the basis for Count 3.

A similar argument is the basis for Count 4:

> The Court: Isn't that your best argument, that the activities they took inside the building, if they had been by themselves, would you agree, likely would not satisfy the demonstrate prong since it seems like they were largely peacefully walking, standing,

texting, or taking pictures?

Ms. Akers: ….And so I take your Honor's point that it might be different under this particular statute if this weren't January 6 and the defendant's didn't intentionally join a mob and they didn't enter into the building with a group of people intentionally, but they did. And our argument here is that that conduct is sufficient to establish this element.

It is clear by the Court and Government statements that substituting or adding "joined" and "mob" was integral and essential to conviction under Count 2-4.

This key set of rulings, raises several sets of substantial questions. First, how do these findings legally support the individual conduct requirements of the actual statutory terms as required as a matter of law. Second, are the terms and constructs the Government used in the closing argument reasonably definable and defined in the instant case. Third, was there sufficient evidence presented in the case to support this argument. Fourth, is presenting the constructs and elements for the first time in closing argument consistent with Federal Rules of Criminal Procedure and Fifth and Sixth Amendment Rights. All of these are substantial questions.

F. The Court Erred as Matter of Law and Statutory Construction Since the Ordinary Reading "Disorderly or Disruptive Conduct" Focuses on The Specific Conduct of Defendants, And Not Whether That Conduct Was in the Presence of a Crowd

Here the court wants to ignore the ordinary meaning of the term "conduct" and the ordinary meaning of the terms "disorderly or disruptive conduct". The statutory language concerns the individual conduct of the Prices. As a matter of legal interpretation, the court states there is a violation if the …"outward contribution to that mob consisted of little more than "walk[ing] in" with its members."

The Court is uses the construct of "mob" to avoid the proper legal focus on the *actus reus*

of the Prices. The Court belies this reasoning numerous times. For example, the court says—

> Context and circumstances always matter. A person standing on a public sidewalk scanning the street commits no crime, but he certainly does so if he is acting as a lookout for others committing a burglary next door. Opinion at 10-11.

Again, this example is inapt. The Prices had no relationship with anyone other than entering a building together. The Prices did not at any point on January 6 know anyone who entered when they did. They did no planning or consultation on anything. One can bring an aiding and abetting charge with 18 U.S.C.§1752(a)(2). Appropriately, none was brought. Aiding and abetting could not be proved in any event.

The Prices are not charged with association with a group that engaged in disorderly or disruptive conduct. The federal code has provisions regarding riots such as 18 U.S.C.§ 2101." As stated in *Scales v. United States*, 367 U.S. 203, 81 S. Ct. 1469 (1961)

> …. that relationship must be sufficiently substantial to satisfy the concept of personal guilt in order to withstand attack under the Due Process Clause of the Fifth Amendment. 367 U.S. at 224-225.

As stated in *United States v. Lanier*, 520 U.S. 259, 117 S. Ct. 1219 (1997):

> ….due process bars courts from applying a novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope, [citations omitted]. In each of these guises, the touchstone is whether the statute, either standing alone or as construed, made it reasonably clear at the relevant time that the defendant's conduct was criminal. *Lanier*, 520 U.S. at 266-267.

These constructs --the alleged "mob" or conditions for "joining" or "participation in the

mob" or "participation in a riot" are not the legal terms of the statute. These standards do not flow from known rules of statutory construction or case law prior to January 6, 2021. The Courts manufacture and use of the standards, even if borrowed from other J6 district court cases, is not consistent with Separation of Powers or the Ex Post Facto clause.

G. The Court's Interpretations Are Made Based on Alleged Fundamental Legal Elements First Argued by The Government in Closing Argument Which Denies Defendants Fifth and Sixth Amendment Rights

The parties provided a Notice of Joint Proposed Elements of Law [ECF-99] which indicated agreements and disagreements between the parties. Defendant's contemporaneously provided Defendants' Memorandum of Points and Authority Stating Concerns with Certain Government Jury Instruction Requests and Support for Defense Jury Instructions Requests ECF-99-1. The Government added legal elements and constructs that broaden what could be considered disruptive conduct and demonstration in closing arguments. The Court adopted these broadening constructs. These broadening constructs were not even described in the Government proposed definitions identified in ECF-99.

H. The Court Appears to Try to Force Additional Claims That Are Often Late, Inaccurate, Or Insufficient

As a selection of claims about conduct the Defense notes certain points. Taking videos is neither offense conduct nor conduct that transforms peacefully walking into disruptive conduct or joining a mob. Nor is that "actively participating in a riot."

The court claims that Ballenger was armed with bear spray and a pocket-knife. Rule 29 Opinion at 10. That statement is false. The accurate reference is that she brought pepper spray.

There is no evidence of a claim of law, in the instant case that it is illegal to carry pepper spray or a pocket-knife in D.C. and no evidence that Cynthia Price pulled either out. If there is such a law or rule the government should have charged it. The Defense asked Special Agent Belcher when he mentioned the Facebook message containing the pepper spray information whether there was anything illegal about taking pepper spray to Washington D.C. TR 1 at 176. He said "I would have to ask the attorneys". Id. No other government witness commented on this topic. No evidence was provided regarding rules for any location regarding carrying pepper spray or a pocket-knife. Of course, the Prices would comply with any police instruction or actual sign, at any point. Indeed, there was no evidence the Prices were even going to go the Capitol when Cynthia Price decided to bring those items.

The Defense understands that a building security officer can ask anyone not to go further into a building for any reason. There is no evidence the Prices did not comply with any police order. Women may carry things for protection and should not be called criminal for doing so.

There is no law prohibiting coming up to a line of police officers. Nor is walking in front of police officers "actively participating in a riot."

The Court then says the Prices followed the group that pushed through the Senate wing door. There is no evidence that there was pushing of any type to enter the foyer when the Prices were there. The defense proved there was no pushing of any type inside the foyer by going second by second through the relevant government video.

III. The Courts Interpretation of Law Concerning the "In Fact" Causation Standard Under 1752(a)(2) And Insufficient Evidence Raises A Substantial Question Under Count 2

A. The Interpretation Is About Statutory Construction Consistent with Constitutional Requirements and Other Standard Rules to Interpret Criminal Statutes

18 U.S.C. § 1752(a)(2) requires that the government shows beyond a reasonable doubt that the alleged disorderly or disruptive conduct of the Prices in or within such proximity to any restricted building or grounds, "in fact" impedes or disrupts the orderly conduct of Government business or official functions. The Defense gets this from pure statutory language. The text of 18 USC 1752(a)(2) states, in part, that … "such conduct, in fact, impedes or disrupts the orderly conduct of Government business or official functions". There are several points from this text. First, the reference is to "such conduct" clearly means the conduct of the defendant and not others. That means that such conduct of a defendant must be the "in fact' cause. We know as a matter of fact, that others initially disrupted the proceeding and not the Defendants. We know this because Defendants were not there. There is also insufficient evidence presented that the proceedings would have started 1 minute earlier if not for the conduct of the defendants. The Prices could not disrupt government business or official functions that were not occurring. The timing of a restart or new start was, at that point, completely speculative and based on many, many factors.

For further rules of statutory construction, the "in fact" element is unique to 18 U.S.C. §1752(a)(2) and does not apply, for example, to 18 U.S.C. §§ 1752(a)(1) or (3)-(5). The term must be given meaning. Entering or remaining is fully covered under 18 U.S.C. §1752(a)(1). Entering and remaining in certain areas is also listed in 40 U.S.C. §§ 5104(e)(2)(A)-(C). "Disorderly or disruptive" conduct are different terms. 40 U.S.C. §§ 5104(e)(2)(A)-(C). 40 U.S.C. §§ 5104(e)(2)(C) is particularly revealing because it has a parallel phrase "…With the

intent to disrupt the orderly conduct of official business, enter or remain in a room in any of the Capitol building set aside or designated." Congress knows how to separate entering and remaining from disruptive conduct. This series is also revealing in that it can apply to "an individual or group of individuals." In the instant case, the defendants were charged as individuals and not a group. Again, however, Congress knows how to draft language regarding individual conduct and knows how and when to try to address group conduct. When Congress includes particular language in one section of a statute but omits it from a neighbor, we normally understand that difference in language to convey a difference in meaning (*expressio unius est exclusio alterius*). See *Bittner*, 143 S. Ct at 720.

B. Burrage Applies Or, At Least the Discussion of Statutory Construction for Causation Applies

"In fact" is extraordinarily similar to "in fact" causes. In *Burrage,* the Court declined to use the governments approach in that case and concluded the law in that case was "written to require but-for cause." *Id.* at 218. The Supreme Court specifically rejected this argument:

> This consideration leads the Government to urge an interpretation of "results from" under which use of a drug distributed by the defendant need not be a but-for cause of death, nor even independently sufficient to cause death, so long as it contributes to an aggregate force (such as mixed-drug intoxication) that is itself a but-for cause of death. *Id.* at 214.

"In fact" and "results from" are similar terms. The Court noted that: "Results from" imposes, in other words, a requirement of actual causality. *Id* at 211. "In fact" certainly means in actuality. *Burrage* continues:

> The Model Penal Code reflects this traditional understanding; it states that "[c]onduct is

> the cause of a result" if "it is an antecedent but for which the result in question would not have occurred." §2.03(1)(a). That formulation represents " *the minimum* requirement for a finding of causation when a crime is defined in terms of conduct causing a particular result." *Id.*, Explanatory Note (emphasis added); see also *United States* v. *Hatfield*, 591 F. 3d 945, 948 (CA7 2010) (but for "is the minimum concept of cause"); *Callahan* v. *Cardinal Glennon Hospital*, 863 S.W. 2d 852, 862 (Mo. 1993) (same). *Id* at 211.

Burrage further states:

> By contrast, it makes little sense to say that an event resulted from or was the outcome of some earlier action if the action merely played a non-essential contributing role in producing the event. *Id.* at 212.

This last passage is extremely important. Even if were one to apply grouping constructs and hybrid constructs to 1752(a)(2) it will always still make "little sense to say that an event resulted from or was the outcome of some earlier action if the action merely played a non-essential contributing role in producing the event."

Again, Judge McFadden states:

> Court: …The government also alleges that his conduct was disruptive in that it had stopped the congressional proceedings. I find that the proceedings had been halted well before he entered the Capitol building and that they did not resume until long after he had left… looking at his actions and the time at which they occurred, I find that the government has not proven beyond a reasonable doubt that he disrupted congressional proceedings. *Martin* [Martin ECF 41] at 270.

The McFadden analysis is consistent with the de minis contribution point in *Burrage* and the fact

no evidence was presented to tie the actions to the later events.

This Court adopts no de minimis contribution point, let alone but-for-causation. The Court offers no tying evidence other than the argument that every single body, regardless of conduct, meets the standard.

The Court in *Burrage* reviewed other language such as "because of", "based on". And by reason of" and other phrases – all with the result of apply a but-for analysis. *Id* at 213-214. Whether is a pure "but for" causation approach or any approach, the Court in the instant case has done no analysis in the instant case of why the "in fact" clause is not the same as or something close to "in fact" causation. Instead, both the *Rivera* court and this Court dismiss all elements of analysis from Burrage using terms like "gloss".

The Court has a fundamental misstatement of the Defenses position and of the roles of the Court, the Government, the Defense, and the Case. The Court may not first adopt a desired policy outcome and then ask Defendants to show an interpretation meets that policy outcome. It is the role of the legislature to draft clearly. In a criminal matter, any lack of clarity is fatal and goes toward the defendants. As stated in the closing arguments and colloquy with the Court, one has to go through the statutory and Constitutional analysis, which may be different in different cases.

This colloquy from the trial is instructive and reflects, potentially, a different understanding of the Constitutional underpinnings of statutory construction:

The Court:

My point then is that, according to your argument, nobody could be convicted of this

> count in the Capitol because no matter what one of them did, even if one of them was assaulting an officer, even if one of them was breaking windows, that act alone would not have disrupted the certification.

Mr. Kenkeremath: I make no such argument. What I am asking is that—

The Court: But that sounds like what you are making.

Mr. Kenkeremath:

> No. I am saying that, A, we should start with statutory construction. And B, you should consider *Burrage*. *Burrage* doesn't necessarily say that there is one causation standard. In fact, it talks about maybe there's hybrids. *Burrage* may allow for consideration of group issues, things like that….
>
> …. My argument is that we should do statutory construction to determine the result. And if it's not properly drafted to handle the issue—remember 5104(e)(2)(D) does not require this extra clause. Count 2 is a very special thing. And if it fits statutorily use it. If it doesn't fit statutorily, you can't force something if it doesn't fit. You have to abide by the elements. And that's is our only point.

What the Defense Counsel stated at trial is Separation of Powers. It is not the job of the Court or the Defense to make 18 U.S.C. §1752(a)(2) work to convict anyone.

Either the provision does under normal rules of statutory construction, or it does not. It may very well be that Congress did not consider a situation like January 6, 2021. There are still other provisions to rely on.

Regardless, the Court assumes to much when it claims there is only a bimodal analysis under *Burrage*. *Burrage* accepts there may be hybrids. The instant case, however, would fall

under the de minimis statements of *Burrage,* regardless.

The problem with the *Rivera* constructs are manifold. There is no real analysis of the Supreme Court causation discussion. There is only an attempt to argue *Burrage* does not apply. This Court does the same. All Defendants have to do here is to show there is a substantial question that the Court's interpretation—the single drop theory—is not the statutory standard.

Defendant's do not have to solve the full issues for other cases.

There was no attempt to make this case with evidence. Law enforcement faced many steps subsequent to the exit of Chris and Cynthia from the foyer. In Def. Exhibit 201, no one seems to be ushering people out the door. The Prices took no additional time or resources of any police officer. The Prices did not go into a room that needed to be searched. The Prices left nothing behind to clean-up. The evidence in Def. Exhibit 202 shows that at 4:15 many police are still waiting at the Senate Wing Door, presumably before moving on to another step.

The Rule 29 opinion cites specific case law:

> That term requires at most that Defendants' conduct actually disrupt the proceedings, not that the disruption be traceable solely to them. See In Fact, Black's Law Dictionary (8th ed. 2004) ("Actual or real; resulting from the acts of parties rather than by operation of law"). Indeed, under Defendants' reasoning, no one individual who participated in the riot on January 6 could ever be prosecuted for this offense. The actual-causation gloss Burrage calls for need not apply where, as in this case, "[t]he open-endedness of the statutory language allows" the "adoption of a demanding but still practicable causal standard." Maslenjak v. United States, 582 U.S. 335, 351 (2017). Opinion at 14.

The Defense did not and need not state a "sole reason" position for cases. The *de minis* construct or many other constructs would work. "In fact" causation is somewhat different from but-for-causation. The point is the Courts adoptions basically renders actual conduct to a nullity.

What is further clear is the Court fully relied on the single rain drop theory as the standard for the 1752(a)(2) in fact clause. That theory is flawed at many levels.

No one said not to do logical groupings maybe that may work. It is s just that neither the Court nor the Government has tried. The instant court also says "that is all that is required" when that is not true. The Defense asked important questions in regarding the non-statutory "join the mob" arguments. Is this Court telling the Prices that it cannot separate *Bingert* level conduct by grouping *Bingert* level conduct together? If everyone were the Prices, there is no January 6th event. The Prices are peaceful and obey police officers. They walked in for a minute and then got in line to exit. The group of people who were peaceful and obeyed police officers did not in fact cause a delay. Who was the alleged "mob" in the instant case? No witness identified them. Was it the people in the foyer or people anywhere at the Capitol on January 6th. What are the criteria for joining? The Court offers post hoc tidbits that involve political affiliations and beliefs. This does not stand muster.

The drop of rain theory is badly flawed and not Constitutional. For one thing the theory assumes all the drops are the same. It refers to an event – a flood--and not individual conduct. 5104(e) can be brought against an individual or groups of individuals. Issues concerning groups of individuals and how they relate can certainly be raised. However, 5104 (e) was not brought against a group in the instant case.

This Court states:

> Consider what the Court states as the standard—
>
> "Even the presence of one unauthorized person in the Capitol," however, can be "reason to suspend" — and to extend the suspension of — "Congressional proceedings." Rivera, 607 F. Supp. 3d at 9; see also Bingert, 2023 WL 3613237, at *6 (finding § 1752(a)(2) violation where defendants "impeded the ability for law enforcement to regain control of the area"). In this case, regardless of precisely when the proceedings were halted, the Court found that "Congress was not able to reconvene while the rioters," including Defendants, were in and around the Senate Wing. See Tr. II at 167; Tr. I at 48 (Captain Baboulis: "[A]ny individual could present a threat. We had no idea of who was there, what they were in possession of."). No more is required. Rule 29 Opinion at 12-13.

These simplistic assertion does not answer the question required by the statutory language in this case. Obviously, others were there at 4 pm and 5 pm. One can argue other peoples conduct in fact forced delay. Perhaps political considerations contributed to further delay. By the government's own testimony, it was going to take time to address the security situation for those that preceded the defendants. Part of that security situation was in fact that other people had moved barriers and removed signs. The government had an obligation to make a specific case not just say each person present met the standard.

With respect to *Burrage*, the Court in the instant case calls Burrage "gloss" to be dismissive:

> The actual-causation gloss *Burrage* calls for need not apply where, as in this case, "[t]he open-endedness of the statutory language allows" the "adoption of a demanding but still

practicable causal standard." Maslenjak v. United States, 582 U.S. 335, 351 (2017). *Maslenjak* is a favorable case for the Defense. The Court has no supporting case for the single drop of rain in a flood argument.

In *Maslenjak* the Supreme Court ruled in favor of defendants and against the Government to vacate a Sixth Circuit judgment. Maslenjak argued that the relationship must be "causal". The government, on the other hand, proposed "a basically chronological link." In the instant case, the Court wants to apply *Maslenjak* as a reason to take the lower standard that would lower the standard and make conviction easier. There is no authority in *Maslenjak* for such a proposition. *Burrage* and *Maslenjak* are two Supreme Court cases that side for a higher causation standard based on the relevant language. Criminal law requires clear direction from Congress to put someone in jail. The Supreme Court may allow additional court constructions to protect defendants.

The language does not have anything like the statement "..such conduct in fact…" The statutory language in Maslenkak is:

> A federal statute, 18 U.S.C. § 1425(a), makes it a crime to "knowingly procure[ ], contrary to law, the naturalization of any person." And when someone is convicted under § 1425(a) of unlawfully procuring her *own* naturalization, her citizenship is automatically revoked. See 8 U.S.C. § 1451 (e). In this case, we consider what the Government must prove to obtain such a conviction. We hold that the Government must establish that an illegal act by the defendant played some role in her acquisition of citizenship.

IV. There Is A Substantial Question Whether the Superseding Information Properly Alleged Essential Facts as Legally Required

Defendants Memorandum In Support of Motion to Dismiss [ECF 54-1] states, among other points: The counts in the SI and associated allegations of fact (and lack thereof) lack the constitutional sufficiency needed to allow the Prices to mount a defense and to protect their process rights. (emphasis added). ECF 54-1 at 1. The Prices have properly argued that there must be allegations of essential fact that satisfy the requirements of the Fifth and Sixth Amendment as well as Federal Rule of Criminal Procedure 7(c). The SI merely recites the statutory language, and in the instant case, that does not satisfy the Fifth and Sixth amendment or Federal Rule of Criminal Procedure 7(c). The government also does not address the Prices' reference to *Hunter v. District of Columbia*, 47 App. D.C. 406 (D.C. Cir. 1918) both for its holding but also because it involved similar issues about public assembly and a discussion of the need for allegations of overt acts as essential to properly state the offense.

This problem is particularly acute in the instant case because the Court uses key constructs not stated as elements until closing arguments and not even stated in the joint statement of law. These included the ghost of a perimeter and the "joined" the "mob" constructs. No facts were discussed about what where the "joining" criteria. Nothing was discussed as to who was the "mob"? No essential facts were provided regarding these constructs. The Defense was denied the ability to request discovery on these issues, to look for witnesses concerning these issues, to make presentation during trial on these issues.

V. The Court Made Multiple Errors Connected with Fourth Amendment Violations Which, Together, And Separately, Raise A Substantial Question That If Found for the Defense Would Likely Result in Reversal

A. Failure to Follow the Scope Limitations in the Authorizing Statute stated in the Search Warrant Affidavit Is Constitutionally Unreasonable, or A Relevant Part

of an Unreasonableness Analysis under the Fourth Amendment.

1. The finding that the Search Warrant Did Not Violate the Scope Limitation of The Stored Communication Act is A Substantial Question

At the very least the Search Warrant Affidavit chooses the SCA as the source of authority and them fails to comply with the 180-day limitation in the SCA. See Defendants' Memorandum of Points and Authority in Support of Motion to Suppress Data Recovered From Certain Facebook Accounts And Derivative Evidence And To Provide an Other Appropriate Relief. [ECF 81-2 at 9]

The Court states:

> And if it didn't comply, the remedy is not exclusion because that's only a Fourth Amendment remedy, and there's no exclusionary remedy in the act. The remedy is damages. So, any purported violation of the SCA would not lead to suppression. TR 1 at 6.

The Defense stated in the Memorandum in Support of the Motion:

> The SCA does not itself provide a suppression remedy. *See* 18 U.S.C. § 2708 ("The [damages] remedies and sanctions described in this chapter are the only judicial remedies and sanctions for non-constitutional violations of this chapter."). However, in the instant case, the Prices have shown the Search Warrant and search is unreasonable under the Fourth Amendment and threatens activities protected under the First Amendment. These are Constitutional violations. The failure to follow the scope limitations in the authorizing statute makes the Search Warrant invalid in general and part of the unreasonableness analysis of the Fourth Amendment. Memorandum at 21-22.

The Court erred in not taking these issues into consideration under the Fourth Amendment reasonableness analysis.

2. The Court failure to properly assess and errs in reviewing the particularity and overbreadth arguments in the Motion to Suppress is reversible error.

The Court in its cursory analysis, stated at or just before the trial, in part states:

> Second, I believe the warrant for Fourth Amendment purposes was sufficiently particular. There was clearly probable cause to believe the defendants committed crimes on January 6, and it was reasonable to believe that Facebook would have evidence of those crimes given to show their intent in coming to the Capitol that day. TR 1 at 6.

The Court's two sentences here are not viable answers to the overbreadth and particularity arguments in the motion to suppress as set out in [ECF 82-2 at 12-16].

The Court simply fails to address the actual overbreadth and particularity arguments made in the Memorandum. Requiring the Facebook data dump without more is undoubtedly a general warrant prohibited by the Fourth Amendment. The Defense further made arguments that the 1) filter questions were overly broad, not sufficiently particular and too poorly structured, thus, failing to assure Fourth Amendment rights.

3. The Court Failed to Address the Argument That the Search Warrant Process, Combined with the Criteria, Leaves Too Much Discretion in the Hands of Various Government Employees

In responding to Defendant's Rule 33 motion, the Court states it has read the filtering requirement in Search Warrant as it refers to such in the Government's exhibit ECF No. 85-1 at 5 (describing filtering requirement). It is imperative we look at an element of the Government Procedure for warrant execution. See ECF 85-1 at 11 and ECF 82-3 at 11.

Gov't Exhibit 308(B) is 14,673 pages. It is, basically, the complete data dump from Facebook regarding Cynthia Price's messenger service with Facebook. Gov't Exhibit 308A and 309A are similar, though shorter, data dumps. The Search Warrant in Attachment B has a section III called Government Procedures for Warrant Execution which states:

> The United States Government will conduct a search of the information produced by the PROVIDER and determine which information is within the scope to be seized specified in Section II. That information that is within the scope of Section II may be copied and retained by the United States. Law enforcement personnel will then seal any information from the PROVIDER that does not fall within the scope of Section II and will not further review the information absent an order of the Court. Emphasis added.

Gov't Exhibits 308A, 308B, and 309A show the government's approach to the Search Warrant is illegal. These exhibits are covered under Section I of the Search Warrant Affidavit and obviously not the smaller bucket of messages that would exist after filtering.

Law enforcement personnel obviously did not seal any of the information from the prosecution that does not fall within the scope of section II. That is not compliance in good faith with the Search Warrant. The trial proves that point because the government introduced Exhibits 308A, 308B, and 309A. Moreover, the prosecution reviewed the full 14, 637 pages and searched those pages without a warrant allowing such search by the prosecution. The prosecution did so absent an order of the Court authorizing the material that was supposed to be sealed and not further reviewed by law enforcement, let alone the prosecution.

This is both a violation of the Search Warrant and also proof that the terms of the Search Warrant are per se insufficient to protect the Fourth Amendment and that the alleged two-step process, in the instant case, is a sham. Specifically, other cases have made sure that the filtering parties are not on the team doing the investigation or prosecution. Without such a distinction what happened in the instant case—a total search and seizure placed into the judicial record of all Facebook information—will simply recur.

See United States v. Comprehensive Drug Testing, Inc., 621 F.3d 1162, 1168–69 (9th Cir. 2010) (en banc) (per curiam) (describing the search restrictions that the magistrate judge imposed); Preventive Med. Assocs., Inc. v. Commonwealth, 992 N.E.2d 257, 263 (Mass. 2013) (describing the motion judge's order that the search utilize a "taint team" consisting of attorney general's office employees who were not involved in the investigation or prosecution, in order to remove potentially privileged information); In re Search Warrant, 71 A.3d 1158, 1176 (Vt. 2012) (describing a judicial officer's instructions that only the materials deemed relevant should be accessed by the case investigators).

4. The Proper Rule for Both Suppression and New Trial Is Not Limited to Issues Arising from Evidence or Questions From 308A

The Defenses first argument is the exclusionary rule applies to all materials from the Search Warrant. That full exclusionary rule applies to the full set of Facebook returns. There was no legally proper filtering process whatsoever. The search warrant and related promises and operations were completely defective. Any good faith exception does not apply because of the conduct of the FBI and prosecution in violating the terms of the Search Warrant and misrepresenting the planned operation to the magistrate.

The FBI and Government failed to maintain the Fourth Amendment and privacy of the

broader basket of information as required to do so. The prosecution offered misleading questioning, in violation of both the Fourth Amendment and Brady. See Memorandum of Points and Authorities in Support of Defendant's Post Verdict Rule 33 Motion for a New Trial. [ECF 199-2 at 8-13].Not only did the prosecutor use it as an issue in the trial, the prosecutor cited to the issue at sentencing as somehow helpful to the prosecution. *See* Defendant Cynthia Ballenger's (Price's) Supplemental Memorandum Related to Sentencing Hearing. [ECF 143 at 6]. This is even so the Defense clearly identified that the original use was a deception on the court.

The 6th Amendment Right of Cynthia Ballenger was undermined because she was questioned based on a violation of the 4th Amendment and Brady. She was compelled to testify on subject matter that should have never been allowed. Defense counsel also objected to the line of questioning … which is another judicial error.

Finally, the costs of suppression are minimal here. This is not a case where a dangerous defendant is being set free. *See Herring v. United States,* 555 U.S. 135, 144 (2009) ("The principal cost of applying the [exclusionary] rule is, of course, letting [a] guilty and possibly dangerous defendant[ ] go free.").

VI. Conclusion

For these reasons and any others the Court deems just and proper, Cynthia Ballenger (Price) and Christopher Price ask that the Court grant this motion and order Cynthia Ballenger's (Price's) Christopher Prices release pending resolution of his appeal as well as a stay of the execution of their sentences.

Date: November 12, 2023

Respectfully submitted,

/s/ Nandan Kenkeremath

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