UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

REPLY MEMORANDUM IN SUPPORT OF DEFENDANT'S FIRST MOTION TO DISMISS THE SUPERSEDING INFORMATION

ARGUMENT

The Government first asserts that the Prices' arguments are "scattershot," and that the Prices principally contend that each of the four misdemeanor charges of the Superseding Information (SI) should be dismissed for failure to include "a laundry list of factual details" about the Price's alleged crimes. Government Opposition (Gov. Opp.) at 1 The Government incorrectly states that the Prices do not "claim that the absence in the Superseding Information and Affidavit from their laundry list prevent them from preparing their defense or will prevent them from pleading double jeopardy" [Citation omitted]. Gov. Opp. at 5. Yet, the motion to dismiss [ECF 54] 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 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 fails that test. Moreover, read against the allegations in the Statement of Facts and Affidavit of Special Agent Belcher with the Federal Bureau of Investigation (FBI) [ECF1, Attachment 1] (Affidavit), the Government fails to state an offense based on those allegations of fact.

The Government argues in three layers. First, and primarily, the Government takes the position that for each count no additional allegations of essential fact are necessary beyond the bare recitation of the statutory terms. As discussed below, the Government ignores Supreme Court case law on Fifth and Sixth Amendment requirements. Further, the Government cites to case law where the prosecutors provided essential allegations of fact beyond the statutory language. Second, the Government, in the alternative argues, that it has provided essential allegations of fact, not just through the statutory language but by other means. These latter contentions are sparse and inaccurate. Finally, the Government resorts to various permutations of statements that the Prices "joined a riot." As discussed in greater detail below, this approach is obfuscation to avoid identifying specific conduct of the Prices. After cutting through the irrelevant and inappropriate arguments, the SI&A and the Government allege no more than the Prices were present in the Capitol with no allegation beyond walking, standing, taking pictures or texting as actual conduct. The texting is only alleged for Chris Price and not Cynthia Price.

The allegations in paragraph (¶) 18 of the Affidavit show pictures and describe that the Prices had turned back within 3 minutes of entry to start the process of exiting through the same Senate Wing Door they entered. This was a total of 7 peaceful minutes in the small right-side foyer of the Senate wing door with many police officers who blocked movement to the left-side and many other police present. As discussed below, there is no indication that anyone, much less the Prices, are challenging the police or crossing a police cordon at this time and location.

I. The Government Dismisses Relevant and Important Fifth and Sixth Amendment Case Law and Several Cases Submitted by the Government Does Not Rely on the Bare Recitation of Statutory Language

The Prices generally agree with the point made in footnote 1 of the Government's Opposition (Gov. Opp.) that "[w]hen considering a challenge to the indictment, a district court is limited to reviewing the face of the indictment." [citation omitted]. The Prices have provided context and, potentially, the benefit of the doubt, by considering certain allegations of fact made in the Affidavit. Fifth and Sixth Amendment concerns are certainly better addressed by placing essential allegations of fact in the charging language of the SI. The Prices argue that even accepting allegations of fact from the Affidavit, the Government has still failed to state an offense and fails to satisfy Fifth and Sixth Amendment requirements.

The Prices understand that the law does not require allegations of fact for non-essential elements and does not require non-essential detail. The SI, however, 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 attempts to minimize and ignores the relevant Supreme Court and other case discussions by claiming the fact-patterns of cases are different. As explained in the Prices' initial motion to dismiss the Supreme Court states as a matter of principles:

> Where guilt depends so crucially upon . . . a specific identification of fact, our cases have uniformly held that an indictment must do more than simply repeat the language of the criminal statute.
>
> "It is an elementary principle of criminal pleading, that where the definition of an offence, whether it be at common law or by statute, `includes generic terms, it is not sufficient that the indictment shall charge the offence in the same generic terms as in the definition; but it must state the species, — *it must descend to particulars.'"* [Emphasis added.] *United States v. Cruikshank,* 92 U.S. 542, 558, 23 L.Ed. 588. An indictment not framed to apprise the defendant "with reasonable certainty, of the nature of the accusation against him * * * is defective, although it may follow the language of the statute." *United States v. Simmons,* 96 U.S. 360, 362, 24 L.Ed. 819. "In an indictment upon a statute, it is

> not sufficient to set forth the offence in the words of the statute, unless those words of themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offence intended to be punished; * * *" *United States v. Carll,* 105 U.S. 611, 612, 26 L.Ed. 1135. "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." *United States v. Hess,* 124 U.S. 483, 487, 8 S.Ct. 571, 573, 31 L.Ed. 516. [additional citations omitted].

Russell v. United States, 369 U.S.749, 764-66, 82 S.Ct. at 1047-48, 8 L.Ed.2d at 251-52 (1962). *See also United States v. Hillie*, 227 F. Supp. 3d 57, 69-71 (D.D.C. 2017).

The Government also ignores the Prices' reference to *United States v. Miller*, 1:21-cr-00119 (CJN) (D.D.C. May. 27, 2022), where Judge Nichols addresses the cases cited by the Government but (a) distinguishes their application and (b) identifies a full range of relevant case law discussion. *See Miller* at 3-12. 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.

Notably, the formulation of parts of the indictment in several cases the Government provides go beyond the statutory language and add additional allegations of fact about the conduct or circumstances of the defendants in those cases. For example, in *United States v. Verrusio*, 762 F.3d 1, 10-11 (D.C. Cir. 2014) Count I stated: "Verrusio and Blackann "agreed to provide favorable official action to aid [United Rentals] by, among other things, inserting, or causing others to insert, and protecting from removal, the three legislative amendments sought by" United Rentals. Indictment ¶ 13(b)." (emphasis added) (See also discussion of Count 2). *United States v. Williams*, 679 F.2d 504, 508 footnote 5(5th Cir. 1982) also has detail beyond statutory language. (Reciting Count 1 and 2 in *Williams*).

In the instant case, the following examples illustrate the type of allegation of facts that are missing, among other necessary allegations of fact in the instant case.

1) The Prices, each individually, engaged in disorderly or disruptive conduct under 18 USC §1752(a)(2) and/or 40 USC §5104(e)(2)(D) by doing X and Y at a location and time.
2) The Prices, each individually, engaged in demonstration under 40 USC §5104(e)(2)(G) by conduct X and Y at a location and time.
3) There was a combination of postings at X locations and/or police cordons at Y locations which defined a restricted area under 18 USC §1752(a)(1) and (2) and (c) at the time the Prices entered that area.

These are just examples, and the examples may require further detail to meet Fifth and Sixth Amendment standards. However, anything less does not. The Gov. Opp. at 5-6 also points out that the Government has provided discovery. Even assuming it is appropriate to include government discovery as material to consider in the analysis, the government has still failed to state an offense or provide requisite specificity. The Government simply asks that the availability of discovery to be a cure all for a motion to dismiss without identifying anything relevant in the discovery that provides the requisite essential allegations of fact.

II. Counts I and II Must Be Dismissed Because, Among Other Reasons, The SI&A Fail to Allege the Elements Required to Identify a Relevant "Restricted Area" Under 18 USC §1752(a)(1) By Not Identifying, Or Even Stating Whether, the Necessary Posting, Cordon or Other Restriction Were Present at the Time of the Prices' Alleged Offense

The Government states:

> Citing nothing, they contend, the specific sign postings, the cordons, or other specific method of restriction at specific time and location are necessary allegations of facts,

> critical to claiming a restricted area…..Nothing in the statutory text or any decision construing § 1752 suggests that the precise manner in which an area is restricted is an element of § 1752(a)(1). (emphasis added) Gov. Opp. at 8-9.

On the contrary, the Prices cite to the statutory text, which has a definition of restricted area. 18 U.S.C. § 1752(c)(1) defines restricted buildings or grounds, in part, to mean any posted, cordoned off, or otherwise restricted area. It does not appear that the statutory text dismisses the definition of restricted area as a non-essential detail. The Affidavit does not define the restricted area and does not state the elements of 18 U.S.C. § 1752(c)(1) existed in a position to restrict the Prices at the time of their walk on the Upper Terrace or through the Senate Wing Door.

The Prices cannot be held legally responsible based on the ghost of a perimeter past. ¶ 4 of the Affidavit states that "[r]estrictions around the U.S. Capitol include permanent and temporary security barriers and posts manned by the U.S. Capitol Police." The circumstances changed over the course of the day and the sentence in the Affidavit provides no information relative to the circumstances the Prices faced. ¶ 18 show the Prices standing at the Upper North East terrace and claim that location was "restricted grounds" at 3:51. However, there is no indication of any barrier or cordoned off area or police. The picture looks like a wide-open pedestrian walkway. The Court may take judicial notice that this walkway leads to the Upper West Terrace, which is where the Senate Wing Door is located. It appears that the Government and Affidavit base their statements on a claim of the ghost of a perimeter past and has no allegation of fact that the perimeter barricades existed at the time of the Prices entry to the Upper Terrace.

In *U.S. v. Bursey*, 416 F.3d 301 (4th Cir. 2005), the Secret Service designated an area near the hangar as a restricted area. The *Bursey* Court identified the restricted area by saying: "The restricted area extended approximately 100 yards on each side of the hangar along Airport

Boulevard and approximately one-half mile from the hangar toward Highway 302." The Court further noted that "on the day of the political rally, law enforcement officers were stationed at the perimeter of the restricted area and were patrolling inside of it…". "A Secret Service Agent, Holly Abel, and a state law enforcement officer, Tamara Baker, then approached Bursey and informed him that he could not remain in the restricted area." *Id*. at 304. "Law enforcement officers thereafter advised Bursey that the northwestern corner of the intersection was also restricted." [Citation omitted] *Id*. at 305. The Court also stated:

> …[C]ontrary to Bursey's assertions of fact, the boundaries of this restricted area were visibly marked….. Stationing agents along an area's perimeter squarely falls within the plain meaning of the term "cordoned off," *Id.*

The Government also tries to distinguish *Bursey's* addressing the actions of police officers. *See* Gov. Opp. at 9. However, the Prices are not arguing that *Bursey* inserts that specific requirement into the statute. However, if officers let a person in without saying anything, that is not a cordoned-off area for that person. In the case of the Prices, the police inside the Senate Wing Door were clearly blocking entry to the left-side hallway and not the small right-side foyer. These officers are not alleged to say anything to the Prices.

The Prices also argue that the Secret Service must designate the restricted area for purposes of 18 U.S.C.§1752 [ECF 54-1 at 16-19] and that the Capitol is not a place where the Vice President can "temporarily visit" [Id. At 19-21]. These are issue of statutory interpretation and the Prices make the following points. The Government, backed by recent U.S. District Court for the District of Columbia case law, argue that the failure to specify the Secret Service as the agency required to designate, is not relevant since the language is written in passive voice. Here is a quote from an opinion the Government claims helps their argument: "Congress's failure to specify how an area becomes restricted just means that the statute does not require any particular

method for restricting a building or grounds." See United States v. McHugh, No. 21-cr-453, 2022 WL 296304 at *18 (D.D.C. Feb 1, 2022)(Bates, J.). This passive voice interpretation creates Constitutional and operational problems. The interpretation is not rational.

The Secret Service is the only agency with direct authority and responsibility to protect persons under 18 U.S.C § 1752, as stated in 18 U.S.C § 1752(c)(1)(B) and 18 U.S.C § 1752(c)(2). No other agency is mentioned in 18 U.S.C § 1752(c) which is the provision defining a restricted area. With no restriction on the contrary interpretation—any individual or group with any operational or enforcement control of an area could designate it a restricted area under 18 U.S.C § 1752 under the passive voice argument. Presumably, this includes an owner or manager of any building or area visited by the Vice President or, possibly, other police forces.

The Government's reading creates an open-ended delegation of authority to any property owner, manager, or enforcement agency with any jurisdiction. Indeed, postings, cordons or other restrictions from any combination of those with authority to create a restricted area under the Government's passive voice argument. Such an approach is effectively delegating the authority to create a Federal crime to many people. 18 U.S.C § 1752 is a criminal statute and, accordingly, the Government urges a broad reading that expands the universe of potential criminal conduct. Indeed, according to the Government's passive voice reading, whether the Secret Service thought a restricted area was a useful tool or not would be irrelevant to the creation of a restricted area by any other party. Such a vague, confusing, and conflicting delegation of authority is not Constitutionally permissible failing Article I delegation standards and Fifth Amendment Due Process, Vagueness, and Fair Notice.

18 U.S.C § 1752 already suffers from vague language concerning such as the reference to "otherwise restricted area" under 1752(c)(1). Or the reference to "or within such proximity" in

1752(a)(2). There is no evidence Congress provided 18 U.S.C § 1752 authority to designate a restricted area to the U.S. Capitol Police.

A designation of a restricted area is a tool under 18 U.S.C § 1752 for a purpose and with a consequence under criminal law. Designating a restricted area is not a self-executing occurrence and requires specific actions to define such an area. There is nothing in 18 U.S.C § 1752 referring to the U.S. Capitol Police or to 2 U.S.C. § 1961 *et. seq*. 2 USC §1966 provides authority to the Capitol Police to Protect Members of Congress and others. The enforcement of this provision is in 2 U.S.C §1966 (d). There is nothing in 2 U.S.C § 1961 et. seq that refers directly to 18 U.S.C §1752. Enforcement can occur with respect to Capitol Police like a police force – for any violation of any law of the United States. See 2 U.S.C. § 1961 (a). Nothing refers to the authority to designate a restricted area under 18 U.S.C § 1752.

With respect to the "temporarily visiting" argument, the Government does not respond to Prices argument, which is that the Capitol is a place of work for Vice President. In his capacity as the "President of the Senate," he had a permanent office "within the United States Capitol and its grounds" and was not temporarily visiting.

III. Counts II and III Must Be Dismissed Because, Among Other Reasons, the SI Does Not Allege Essential Facts About the Prices' Conduct That the Government Claims Constitute "Disorderly or Disruptive Conduct" Under Either 18 U.S.C.§1752(a)(2) or 40 USC §5104(e)(2)(D)

Admittedly, the Prices are setting aside the language of 40 USC §5104(e)(2)(D) concerning uttering loud, threatening or abusive language. The Government has not alleged facts concerning the Prices and such conduct either. Outside of that alternative, an allegation of fact of disorderly or disorderly conduct is essential for Count II and Count III. Without such allegation there is no criminal charge under 18 U.S.C.§1752(a)(2) and 40 USC §5104(e)(2)(D). The *mens rea* requirements must also be about the conduct because the statutes require either

that the Prices knowingly engaged in the conduct under 18 U.S.C.§1752(a)(2) or willfully and knowingly engaged in the conduct under 40 USC §5104(e)(2)(D) . In other words, to evaluate the *mens rea* allegations, the Prices must understand the alleged conduct the Government is claiming is disorderly and disruptive. The Government must also show "…such conduct, in fact, impedes or disrupts the orderly conduct of Government business or official functions." (emphasis added). "Such conduct" refers to "disorderly or disruptive conduct". For example, the argument that the Prices were additional bodies that needed to be removed from the Capitol is irrelevant to the criminal charge unless there is disorderly or disruptive conduct. If the Prices went into the Capitol, even as a trespass, but did not engage in disorderly and disruptive conduct, that is not a violation of 18 U.S.C.§1752(a)(2). In such case, the required elements of disorderly or disruptive conduct, the impact of the said disorderly or disruptive conduct, and the *mens rea* concerning such disorderly or disruptive conduct are not satisfied.

The Government offers no argument that disorderly or disruptive conduct is not an essential element of the charges under 18 U.S.C.§1752(a)(2) and 40 USC §5104(e)(2)(D). The Government simply says "[s]uch specificity is not required." The Government fails to ask whether "disorderly or disruptive conduct" is a generic term as described by the Supreme Court or whether the terms meet the standards described in Argument Section I.

A. The Government Opposition Falsely States Christopher Prices Climbed Through a Window – A Claim Not Made in the SI&A and A Claim that Is False

The Government falsely states: "The Affidavit alleges that [Christopher] Price stated that he was "climbing through the window." Gov. Opp. at 14. The Government should correct the record on this point. ¶ 18 of the Affidavit states:

> At approximately 3:22 p.m., BALLENGER and PRICE can be seen entering the U.S. Capitol through the Senate Carriage Door….BALLENGER and PRICE can be seen exiting the U.S. Capitol building via the Senate Carriage Door at approximately 3:29.

The Prices have already corrected that it was the Senate Wing Door not the Senate Carriage Door. Regardless, the Prices both walked in the Senate Wing Door and exited out of the same door. The Affidavit does not state Christopher Price climbed through a window. "Climbing through the window" is a text attached to a picture Christopher Price sent to his friend. The picture of the text is in paragraph ¶ 24(b). That picture of text sits above half of the picture. The full picture is the first picture under ¶ 24(c). ¶ 24(b) claims the text was sent "a few minutes later" than approximately 3:24 pm. It is clear, Christopher Price took a picture and texted to his friend with the text "climbing through a window" after he was well inside, which clearly means the phrase has to do with the picture of someone else, not Christopher Price.

The Prices further notes that the observation that there was glass everywhere was made AFTER Mr. Price had entered the Senate Wing Door. Such an observation is not disorderly or disruptive conduct. Moreover, the observation made after entry provides no knowledge before entry.

B. The Government Improperly Highlights and Quotes the Term "Breach" Which Is Not Stated Anywhere In the SI&A; The Webster's Definition of "Breach" Has No Relevance to Defining the Statutory Charges

The Government states with regard to 18 U.S.C § 1752(a)(2):

> Regardless of whether the "ordinary understanding" of "disorderly" or "disruptive: conduct embraces "peacefully standing" in an area that is restricted against any entry whatsoever, as Defendants claim they did, Def. Mot. At 22, *breaching* the Capitol on January 6 while it was restricted by signs and barriers certainly does. A "breach" is an "infraction or violation of law, obligation, tier or standard." https://www.merriam-webster.com/dictionary/breach (visited August 24, 2022). (emphasis in original). *See* Gov. Opp. at 14.

In an analogous statement regarding 40 USC §5104(e)(2)(D) the Government states:

> As explained in Point III(B), supra, the Superseding Information and Affidavit sufficiently allege disruptive conduct, i.e., "breaching the Capitol." Gov. Opp. at 16.

Neither the SI nor the Affidavit use the terms "breaching the Capitol." Neither the term "breach" nor "breaching" is used at all. The Government proceeds to articulate the dictionary definition of "breach" to define a violation of law. Tax evasion and jay walking are violation of law but would not constitute "disorderly or disruptive conduct" under the statutory charges.

C. The Government Falsely Claims the Affidavit Alleges that "Both Defendants Can Be Seen on Camera Inside the Capitol Building Among a Mob of Rioters"

In ¶ 24(c), the Affidavit states "PRICE also sent a photo depicting a large number of people inside the U.S. Capitol." The term "people" is not the same as a "mob of rioters" and the Government should take care to cite to the actual language of the statutes and the Affidavit. ¶¶ 18(a) and (b) also shows the Prices among people in the Capital. and there is no indication of any mob or rioting in front of the at least 13 policemen in the pictures. ¶ 18(c) shows a picture of the Prices and there is neither a mob nor a riot in the picture. The words "mob" and "rioters" are not used in the Affidavit. The Miriam Websters definition of "riot" is 1 (a): a violent public disorder, specifically: a tumultuous disturbance of the public peace by three or more persons assembled together and acting with comment intent. See https://www.merriam-webster.com/dictionary/riot. None of the pictures with the Prices in the Affidavit show any violence of anyone in the pictures.

Violence is alleged in ¶ 7 of the Affidavit but the Prices are not alleged to fall under ¶7 and it would be false to make such allegation. The Prices were not present during that time period and were not witness to any of those events described in ¶ 7. The Prices alleged conduct is under ¶ 18. Presence among other people is not "disorderly or disruptive conduct."

D. The Affidavit Neither States the Crowd that Forced Entry "Would Have Included Defendants" Nor That the Prices "Were Acting in Concert With Hundreds of Other

Rioters During the Recess" Nor that the Prices "Joined a Riot That Caused the Certification Vote to Be Disrupted For Hours"

The Government continues with more false assertions, not based on the Affidavit and not connected to statutory language:

> But the Affidavit alleges that the joint session of Congress was effectively suspended form approximately 2:20 pm until shortly after 8:00 pm., because the crowd, which would have included Defendants, forced entry int the U.S. Capitol. Those allegations are sufficient to put Defendants on notice to put Defendants on notice that their presence in the Capitol, acting in concert with hundreds of other rioters during the recess, disrupted, at least for a time, the certification vote. Indeed, it was the sufficient and necessary cause of that disruption. (Citation omitted) (emphasis added) Gov. Opp. at 14-15.

The Governments three sentences of claim here are a lot to unpack. First, ¶7 of the Affidavit is the allegation regarding forced entry by a crowd at the time. As stated above and in the Prices original memorandum, nothing in ¶7 refers to the Prices. Claiming the Prices are included in any aspect of ¶7 is false statement and the Government should correct the record. Second, there is no allegation that the Prices acted "in concert" with anyone, much less "hundreds of rioters." Indeed, the Government appears to concede that all the Government can claim with respect to the Prices is "presence" in the Capitol. Third, the Government's "sufficient" and "necessary" statement defies both the Affidavit and logic. The actions in ¶7, which the Prices had no part in, were "sufficient" to disrupt the certification proceeding. There is no statement or logic that presence of the Prices under ¶18 of the Affidavit was "sufficient" or "necessary" for anything.

The Government continues with the false claim that: "The Superseding Information and Affidavit allege that Defendants joined a riot that caused the certification vote to be suspended for hours." (emphasis added) Gov. Opp. at 15. Again, nothing in the Affidavit says the Prices "joined a riot." There is no allegation the Prices joined anything. There is no explanation of what conduct was the "joining." There is no allegation that the people in the right-side foyer pictured in ¶ 18 (a), (b) or (c) of the Affidavit were rioting. All that is stated in ¶ 24 (b) and (c) is

that Christopher Price sent photos depicting a large number of people or large crowds. Texting pictures is neither disorderly nor disruptive conduct. Being in the presence of people is not disruptive or disorderly conduct.

The Government also states that "[d]efendant's do not show how the statutory language or any case construing it requires that the government prove that their conduct was a 'but for' cause of the disruption. Gov. Opp. at 15. The Government further states that "[t]he degree to which their own participation contributed to the disruption may be a relevant consideration if and when they are sentenced but is not a basis to dismiss the 18 U.S.C § 1752(a)(2). Gov. Opp. at 15. The Government must provide allegations of fact addressing how alleged disorderly or disruptive conduct "in fact" disrupted a proceeding. Just saying "joining" means nothing and was not used in the SI&A anyway. What conduct constituted "participation" and participation in what and what conduct constituted disorderly or disruptive conduct? The Government, apparently, cannot fathom that some people at certain times and locations may not engage in the same conduct as people at a different location and time on January 6, 2021 at the Capitol.

Just because there may have been signs and barriers present in some locations at other times does not mean that the area was restricted when the Prices arrived. Furthermore, the government misunderstands the definition of "disorderly and disruptive conduct" if it believes that simply committing §1752(a)(1) means you automatically violate §1752(a)(2).

In a related point, the Government misleadingly characterizes the Prices' original motion by stated "it alleges only that they were inside the Capitol <u>when the certification was disrupted</u>" Def. Mot. at 24. (emphasis added). Gov. Opp. at 15. Quite the contrary the Prices state "[t]he Prices could not, in any manner, disrupt government business or official functions that were not

occurring, and which may have been previously disrupted by other parties or issues. ECF 54-1 at 24.

E. Courts do not Properly Attribute the Actions of Others to Defendants Under Disorderly or Disruptive Conduct Charges

In *U.S. v Matthew Martin* Case No. 1:21-cr-00394-TNM the Court said:

> With respect to Count 2, "Disorderly conduct occurs when a person a person is unreasonably loud and disruptive under the circumstances, or interferes with another person by jostling against or unnecessarily … I do not think his mere presence in a crowd entering the Capitol building would qualify as disorderly…To be certain, there many instances of disorderly conduct in the rotunda shown in the government's evidence. I saw yelling, people confronting the officers, and even assaultive conduct toward the officers. The defendant engaged in none of that….I find that the proceedings had been halted well before he entered the Capitol building and they did not resume until long after he left. There's no evidence that he intended to disrupt the proceedings or that his presence alone in fact did so. *Matthew Martin* ECF 41, Transcript 268- 271.
> The court used the same reasons to acquit both Count 2 and Count 3.

In *United States v Cuoy Griffin* Case No. 1:21-cr-92 (TNM) the court states:

> …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 18 U.S.C § 1752(a)(2). *Griffin* ECF 106 Transcript at 336.

IV. Count IV Must Be Dismissed Because, Among Other Reasons, the SI Does Not Allege Essential Facts About the Conduct of the Prices That Can Constitute "Parade, Demonstrate or Picket USC §5104(e)(2)(G)

The Government's first line of argument in their Opposition is that the specific conduct of the Prices that constitute the charge is not necessary to provide in the SI and that recitation to the terms parade, demonstrate, or picket are sufficient for the SI. The Government does not explicitly address the Prices' argument that walking, texting or taking pictures is not parading, demonstrating or picketing.

The Government makes the claim:

> Moreover, the Affidavit contains photographs that Price sent inside the Capitol with Ballenger while the riot was underway. That is sufficient to allege, at this stage at least, "demonstrating." See Point I, supra. Gov. Opp. at 17.

No, sending photographs to a friend is not "demonstrating", at any stage of a case. Yet, that is the best the Government can claim from the allegations of facts in the Affidavit. Nor is there any evidence that Cynthia Price (Ballenger) sent anything to anyone while in the Capitol. ¶18 shows the circumstance in the Capitol – standing and walking—and does not refer to a "riot". No one in the picture is "rioting" in the face of the numerous police officers standing right there. And "rioting" is not a statutory term in question. Moreover, being present if other people are "demonstrating" is not a crime under 40 USC §5104(e)(2)(G).

The Prices agree that the Government is allowed to allege essential facts that may support any of the terms –parade, picket, or demonstrate—or any combination of those terms. *See* Gov. Opp. at 18. The Prices argue that the Government has provided no allegation of essential facts for any of the terms.

The Government has little but the circular statements to the statutory terms:

> He contends the government must allege specific conduct inside the Capitol that is more than walking or standing among people at the Capitol." Id. The Superseding Information alleges the Defendants knowingly and willfully paraded, demonstrated or picketed, See ECF 38, Count Four. It therefore charges conduct that would be illegal at all times…Gov. Opp. at 18.

The Government specifically states that "Count Four Sufficiently Alleges that Defendants did More that Walked and Talked Inside the Capitol." Gov. Opp. at 18. While the header makes this claim, there is no allegation of fact other than walking, standing, taking pictures and texting. What the Government seeks to do is to transform walking, standing, taking pictures and texting into parading, demonstrating, and picketing. That does not work as a matter of law and the charge should be dismissed.

The Government states "[t]he prosecution of Defendants for their own conduct—which involved physically trespassing into the restricted Capitol on the heels of others who had forcibly

breached the building—is illustrative of the numerous constitutionally legitimate applications of the statute to conduct and unprotected speech." Gov. Opp. at 24.

Even if one lawfully enters the Capitol, §5104(e)(2)(G) prohibits demonstrating. Even if one unlawfully enters the Capitol, that unlawful entry is not the definition of "demonstrate." §5104(e)(2)(G) is not a provision about trespassing. The Government then states: "Defendants contend that § 5104(e)(2)(G) prohibits only entering or remaining in "specific locations within the Capitol Building." Gov. Opp. at 17. However, the Prices' original memorandum actually states:

> 40 USC §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. If Congress had meant entering or remaining in other locations was a violation under the 40 USC §5104(e)(2) series, it would have said so. "Enter or remain" cannot be transformed to "parade, demonstrate, or picket" which must mean discretely different conduct." ECF 54-1 at 26.

The point of the Prices' analysis from *United States v. Bradley*, 418, F. 2d 688 (4th Cir. 1969) [ECF 54-1 at 28], *Bynum v United States Capitol Police Board*, 93 F. Supp. 2d 50 (D.D.C. 2000) [Id at 29-30], the "Tourist" standard cases [Id. at 30-32], and the First Amendment analysis [Id at 32-36] is that broad interpretations are infirm under the First and Fifth Amendment.

In *Bradley* the court stated:

> Fortifying our interpretation is the venerable principle that a provision should be construed, if possible, to avoid doubts about its constitutionality. [footnote omitted] Should we accept the more expansive interpretation urged by the prosecution, we would confront substantial constitutional issues. *Bradley* at 691.

The limitations in *Bynum* and the "Tourist" standard cases come from the same Constitutional concerns. Walking, standing, texting and taking pictures is not conduct that can constitute a crime under § 5104(e)(2)(G) and rise above the Constitutional concerns. § 5104(e)(2)(G) is a

criminal statute that is using First Amendment terms. How Chris Price articulated his thoughts to a friend by texting is not conduct that is "demonstrating" in the Capitol. The conduct requirements prevent thought police. The conduct of walking, standing, taking pictures or texting cannot satisfy *Bradley*, *Bynum* or the Tourist standard cases which require that the conduct itself be both expressive, obvious to people watching, and significantly disruptive.

Furthermore, the Government's attempt to distinguish the tourist standard line of cases is particularly incorrect. *See* Gov. Opp. at 20-21. The tourist standard is not about whether someone is a tourist or not. The Government refers to the Honorable Judge Lamberth's statement at a sentencing in response to Congress members referring to some defendants as "tourists." The government recapped this statement by saying:

> As Judge Lamberth stated in the sentencing hearing in *United States v. Anna Morgan Lloyd*, 1:21-cr-164 on June 23, 2021, "I'm especially troubled by the accounts of some members of Congress that January 6th was just a day of tourists walking through the Capitol. I don't know what planet they were on." Transcript at p. 19. See *id*. at p. 20 ("the attempt of some congressmen to rewrite history and say this was all just tourists walking through the Capitol is utter nonsense."). Gov. Opp. at 20.

With respect to the instant case, this statement made at a sentencing hearing has nothing to do with the Prices, the Tourist Standard, the First Amendment, or §5104(e)(2)(G).

For Count IV for the *Martin* court stated:

> 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. *Martin* ECF 41, Transcript at 271.

The Prices again note, that in the instant motion, the Prices argue the Governments interpretation that merely standing, walking, texting or taking pictures in the Capitol as a parade,

demonstration or picket would be infirm as applied under the First and Fifth Amendment. By separate motion, the Prices are facially challenging 18 U.S.C. §5104(e)(2)(G). *See* ECF 55 and ECF 55-1.

V. The Prices Properly Applied the Blockburger Test to Argue that the SI is Multiplicitous

In its opposition, the Government states:

> Section 1752(a)(1) requires proof that the defendant enters or remains in any restricted building or grounds "without lawful authority to do so." 18 U.S.C. § 1752(a)(1). Section 1752(a)(2) contains no such requirement, so the Prices' claim flunks the *Blockburger* test. Gov. Opp. at 27.

However, the Government is incorrect. In *Brown v. Ohio*, 432 U.S. 161, 97 S. Ct. 2221 (1977), the Court further interprets *Blockburger* v. *United States*, 284, U.S. 299, 304 (1932). *Brown* states, in relevant part:

> It has long been understood that separate statutory crimes need not be identical — either in constituent elements or in actual proof — in order to be the same within the meaning of the constitutional prohibition. [Citations omitted]. *Brown* at 164.

The *Brown* court easily found a lesser included offense between joyriding and auto theft:

> Applying the *Blockburger* test, we agree with the Ohio Court of Appeals that joyriding and auto theft, as defined by that court, constitute "the same statutory offense" within the meaning of the Double Jeopardy Clause….As is invariably true of a greater and lesser included offense, the lesser offense — joyriding — requires no proof beyond that which is required for conviction of the greater — auto theft. *Id* at 168.

The *Brown* court further notes that in *In re Nielsen* the Court endorsed the rule that "where . . . a person has been tried and convicted for a crime which has various incidents included in it, he cannot be a second time tried for one of those incidents without being twice put in jeopardy for the same offense." [Citing *Nielsen*, 131 U.S. 176, 9 S. Ct. 672 (1889)] Id at 168.

Despite the prevalent use of the *Blockburger* formula, however, it "is not the only standard for determining whether successive prosecutions impermissibly involve the same offense." *Brown* at 166 note 6 (1977)(See also cases cited therein); *See also United States v. Allen*, 539 F. Supp. 296 (C.D. Cal. 1982). The Ninth Circuit has also stated: "There is `no bright line . . . dividing charges comprising a single offense from those comprising separate and distinct offenses.'" *United States v. Kennedy,* 726 F. 2d 546, 547 (9th Cir. 1984) (quoting *United States v. UCO Oil Co.,* 546 F. 2d 833, 835 (9th Cir. 1976), *cert. denied,* 430 U.S. 966, 97 S. Ct. 1646, 52 L.Ed.2d 357 (1977)). *Brown* is a Supreme Court case applying *Blockburger* and Double Jeopardy directly. It is cited as the main source of authority by the Prices and completely ignored by the Government. The Prices contend that, under *Brown,* the test is not so superficial.

The government appears to suggest those who are authorized to be in a restricted area have a different status as a point of distinction between 18 USC §1752(a)(1) and (2). Nothing says that signs, postings, or areas cannot differentiate who may be in an area or not under §1752(a)(1) or (2). The without "lawful authority language" 18 USC §1752(a)(1) would create such a distinction. One is lawful unless a restriction applies. Moreover, the distinction has no weight in the instant case, unless the Government claimed the Prices were authorized, which the Government does not. Under *Brown* the terms joyriding and auto theft do not map perfectly through a language bridge. The Supreme Court properly reasoned joyriding is a lesser included offense of auto theft. Analogously 18 USC §1752(a)(1) is a lesser included offense of 18 USC §1752(a)(2).

The same approach holds for the relationship of §1752(a)(2) and 18 U.S.C. § 5104(e)(2)(G). A simple comparison of 18 USC §1752(a)(2) and 40 USC §5104(e)(2)(D),

particularly with respect to the allegations in the Affidavit, indicate the Government is seeking to apply functionally similar language under two statutes to a single offense. These elements involve "disruptive or disorderly conduct" and disrupting official proceeding and a similar *mens rea* test. This is also yet another reason that it is important for the Government to specify what the specific conduct of the Prices under each offense.

CONCLUSION

For the forgoing reasons, The Prices respectfully request that the Court enter an order dismissing the Superseding Information as detailed in the Motion to Dismiss and for the reasons described in the Memorandum of Points and Authorities in Support and this Reply Memorandum.

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Respectfully submitted,

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