UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, v. DEBORAH LYNN LEE Defendant.	CRIMINAL CASE NO. **CASE NO. 21-CR-00303-ABJ** **MOTION TO TREAT AND TO INSTRUCT JURY A LESSER INCLUDED OFFENSE**

NOW COMES Defendant DEBORAH LYNN LEE, by and through her counsel of record, John M. Pierce, Esq., and respectfully request this Honorable Court instruct the jury and to treat for all purposes Counts III and Counts IV as lesser included offenses of Count I. As grounds for this motion counsel would state:

I. PRINCIPLES OF LAW

The Supreme Court commented in *Beck v. Alabama*, 447 U.S. 625, 634 (1980):

> At common law the jury was permitted to find the defendant guilty of any lesser offense necessarily included in the offense charged. 9 This rule originally developed as an aid to the prosecution in cases in which the proof failed to establish some element of the crime charged. See 2 C. Wright, Federal Practice and Procedure 515, n. 54 (1969). But it has long been recognized that it can also be beneficial to the defendant because it affords the jury a less drastic alternative than the choice between conviction of the offense charged and acquittal. As MR. JUSTICE BRENNAN explained in his opinion for the Court in Keeble v. United States, 412 U.S. 205, 208 , providing the jury with the "third option" of convicting on a lesser included offense ensures that the jury will accord the defendant the full benefit of the reasonable-doubt standard

The U.S. Supreme Court further explained:

> **II**
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> Federal Rule of Criminal Procedure 31(c) provides in relevant part: "The defendant may be found guilty of an offense necessarily included in the offense charged." As noted above, the Courts of Appeals have adopted different tests to determine when, under this Rule, a defendant is entitled to a lesser included offense instruction. The Seventh Circuit's original panel opinion applied the "inherent relationship" approach formulated in United States v. Whitaker, 144 U.S. App. D.C. 344, 447 F.2d 314 (1971):
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> > "[D]efendant is entitled to invoke Rule 31(c) when a lesser offense is established by the evidence adduced at [489 U.S. 705, 716] trial in proof of the greater offense, with the caveat that there must also be an `inherent' relationship between the greater and lesser offenses, i. e., they must relate to the protection of the same interests, and must be so related that in the general nature of these crimes, though not necessarily invariably, proof of the lesser offense is necessarily presented as part of the showing of the commission of the greater offense." Id., at 349, 447 F.2d, at 319.
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> The en banc Seventh Circuit rejected this approach in favor of the "traditional," or "elements" test. Under this test, one offense is not "necessarily included" in another unless the elements of the lesser offense are a subset of the elements of the charged offense. Where the lesser offense requires an element not required for the greater offense, no instruction is to be given under Rule 31(c).
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> We now adopt the elements approach to Rule 31(c). As the Court of Appeals noted, this approach is grounded in the language and history of the Rule and provides for greater certainty in its application. It, moreover, is consistent with past decisions of this Court which, though not specifically endorsing a particular test, employed the elements approach in cases involving lesser included offense instructions. **8**

Schmuck v. United States , 489 U.S. *705 (1989)*

II. INTRODUCTIONS: CHARGES

1. The Defendant is charged by indictment with:

   A. Count 1 - 18 U.S.C. §1512(c)(2) and 2 (Obstruction of an Official Proceeding and Aiding and Abetting Obstruction of an Official Proceeding)

   B. Count 2 – 18 U.S.C. § 1752(a)(1) (Entering or Remaining in any Restricted Building or Grounds).

   C. Count 3 – 18 U.S.C. §1752(a)(2) (Disorderly and Disruptive Conduct in a Restricted Building).

   D. Count 4 - 40 U.S.C. §5104(e)(2)(D) (Disorderly Conduct in a Capitol Building)

   E. Count 5 - 18 U.S.C. §5104(e)(2)(G) (Parading, Demonstrating, or Picketing in a Capitol Building)

2. Details of the statutes charged in the Counts are:

A. COUNT I: 18 U.S.C. § 1512(c)(2)

18 U.S.C. § 1512(c)

Whoever corruptly

(1) alters, destroys, mutilates, or conceals a record, document, or other object, or attempts to do so, with the intent to impair the object's integrity or availability for use in an official proceeding; or

(2) otherwise obstructs, influences, or impedes any official proceeding, or attempts to do so . . .

shall be fined . . . or imprisoned. . . .

B. COUNT II: 18 U.S.C. § 1752(a)(1)

18 U.S.C. § 1752. Restricted building or grounds states:

(a) Whoever—

(1) knowingly enters or remains in any restricted building or grounds without lawful authority to do so;

(2) knowingly, and with intent to impede or disrupt the orderly conduct of Government business or official functions, engages in disorderly or

disruptive conduct in, or within such proximity to, any restricted building or grounds when, or so that, such conduct, in fact, impedes or disrupts the orderly conduct of Government business or official functions

* * *

C. COUNT III: 18 U.S.C. § 1752(a)(2)

18 U.S.C. § 1752(a)(2). Restricted building or grounds states:

(a) Whoever—

* * *

(2) knowingly, and with intent to impede or disrupt the orderly conduct of Government business or official functions, engages in disorderly or disruptive conduct in, or within such proximity to, any restricted building or grounds when, or so that, such conduct, in fact, impedes or disrupts the orderly conduct of Government business or official functions

* * *

D. **COUNT IV: 40 U.S. Code § 5104 - Unlawful activities**

* * *

(e)CAPITOL GROUNDS AND BUILDINGS SECURITY.—

* * *

(2)VIOLENT ENTRY AND DISORDERLY CONDUCT.—An individual or group of individuals may not willfully and knowingly—

* * *

(D) utter loud, threatening, or abusive language, or engage in disorderly or disruptive conduct, at any place in the Grounds or in any of the Capitol Buildings with the intent to impede, disrupt, or disturb the orderly conduct of a session of Congress or either House of Congress, or the orderly conduct in that building of a hearing before, or any deliberations of, a committee of Congress or either House of Congress;

* * *

> **(G)** parade, demonstrate, or picket in any of the Capitol Buildings.

E. **COUNT IV: 40 U.S. Code § 5104 - Unlawful activities**

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> **(e)CAPITOL GROUNDS AND BUILDINGS SECURITY.—**
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> * * *
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> **(2)VIOLENT ENTRY AND DISORDERLY CONDUCT.—**An individual or group of individuals may not willfully and knowingly—
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> * * *
>
> **(D)** utter loud, threatening, or abusive language, or engage in disorderly or disruptive conduct, at any place in the Grounds or in any of the Capitol Buildings with the intent to impede, disrupt, or disturb the orderly conduct of a session of Congress or either House of Congress, or the orderly conduct in that building of a hearing before, or any deliberations of, a committee of Congress or either House of Congress;
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> * * *
>
> **(G)** parade, demonstrate, or picket in any of the Capitol Buildings.

III. NO FACTUAL ALLEGATIONS OF ANY OF THE COUNTS CHARGES

3. There are no factual allegations to support any of these charges stated by the Government's charging documents.

4. If one may strain to guess and speculate at the factual basis for these counts, all five (5) counts are merely 5 different legal theories for the exact same conduct, actions, and sequence of events.

IV. IS ALL TRESPASSING AUTOMATICALLY *PER SE* OBSTRUCTION OF THE JOINT SESSION OF CONGRESS ON JANUARY 6, 2021?

5. Moreover, across all January 6 cases, the Government is arguing that "disorderly" and "disruptive" is simply being physically present.

6. That is, the Government draws no distinction between trespassing and disorderly or disruptive conduct because the Government maintains that trespassing is disorderly and disruptive.

7. The Government's position across all January 6 cases, at least lately – which gains the binding position of *judicial estoppel* – is that a Defendant automatically, as an unconstitutional *irrebuttable* presumption, by being inside the U.S. Capitol was necessarily disorderly and disruptive and therefore obstructed the Joint Session of Congress on January 6, 2021, by being merely in existence inside the U.S. Capitol, without actually doing anything to be disorderly or disruptive.

8. Simultaneously and in self-contradiction, the Government also maintains that disorderly and/or disruptive conduct – i.e., the same as mere trespassing – necessarily by its nature is obstruction of an official proceeding under 18 U.S.C. 1512(c)(2).

9. Therefore, the Government itself erases all distinction between disorderly and/or disruptive conduct under 40 U.S.C. §5104(e)(2)(D) and obstruction of an official proceeding under 18 U.S.C. 1512(c)(2), by arguing that all disorderly or disruptive conduct necessarily obstructs a Congressional proceeding *vel non.*

V. MISDEMEANOR VERSION OF "OBSTRUCTION OF OFFICIAL PROCEEDING" OF 18 U.S.C. § 1512(C)(2) – LESSER INCLUDED OFFENSE

10. Here, 40 U.S.C. § 5104(e)(2)(D) is a lesser included offense of 18 U.S.C. 1512(c)(2), because:

a) "willfully and knowingly" is a subset of "corruptly." While all acts committed "corruptly" are done "willfully and knowingly," not all "willfully and knowingly" acts are done "corruptly." Moreover, "corruptly is problematic and confused.

b) "disruptive conduct" is a subset of "obstruction of an official proceeding." 18 U.S.C. 1512(c)(2) addresses "obstructed, influenced, or impeded" which is broader and less specific than "disruptive."

c) "a session of Congress or either House of Congress, or the orderly conduct in that building of a hearing before, or any deliberations of, a committee of Congress or either House of Congress" is more specific and less broad than the broad "any official proceeding."

11. Therefore, using the elements test adopted by the U.S. Supreme Court, conduct violating 40 U.S.C. § 5104(e)(2)(D) would necessarily also violate 18 U.S.C. 1512(c)(2).

12. However, the reverse is not true. Conduct that violates 18 U.S.C. 1512(c)(2) might not violate 40 U.S.C. § 5104(e)(2)(D).

13. Therefore, Defendant is entitled to a jury instruction that the jury may convict of the misdemeanor charge of 40 U.S.C. § 5104(e)(2)(D), whether officially charged or not.

14. Of course, 18 U.S.C. 1512(c)(2) is compound like many (too many) statutes. Therefore, there are multiple options within the statute. Here, the one that is of concern is:

> **… willfully and knowingly … engage in disorderly or disruptive conduct, at any place in the Grounds or in any of the Capitol Buildings with the intent to impede, disrupt, or disturb the orderly conduct of a session of Congress or either House of Congress, or the orderly conduct in that building of a hearing before, or any deliberations of, a committee of Congress or either House of Congress**

15. Here, 18 U.S.C. 1512(c)(2)[1] requires proof beyond a reasonable doubt that a Defendant:

a) Corruptly

[1] This being the Government's interpretation, so this assumes the interpretation holds through many expected appeals.

b) Obstructed, influenced, or impeded

c) Any official proceeding

d) It must be implied in any such crime the *mens rea* of acting knowingly and intentionally, not accidentally or unawares or by reflex action.[2]

By contrast, 40 U.S.C. § 5104(e)(2)(D) requires proof beyond a reasonable doubt that a Defendant:

a) willfully and knowingly

b) engaged in disorderly or disruptive conduct (more specific and narrowly targeted than the sweeping language of 1512)

c) at any place in the Grounds or in any of the Capitol (more specific and narrowly targeted than the sweeping language of 1512)

d) with the intent to impede, disrupt, or disturb the orderly conduct of (more specifically than culpable *mens rea)*

e) a session of Congress or either House of Congress, or the orderly conduct in that building of a hearing before, or any deliberations of, a committee of Congress or either House of Congress (more specific and narrowly targeted than the sweeping language of 1512 to any official proceeding).

16. All differences between the statutes are increased specificity in 40 U.S.C. § 5104(e)(2)(D), not difference in kind. Without any different in the nature of the elements of the crime, 40 U.S.C. § 5104(e)(2)(D) more precisely and more narrowly targets the exact scenario charged in this case at bar.

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[2] *Morissette v. United States*, 342 U.S. 246 (1952) ("We hold that mere omission from § 641 of any mention of intent will not be construed as eliminating that element from the crimes denounced.")

CONCLUSION

Defendant Lee respectfully requests that the Court instruct the jury that Counts III and Count IV are lesser-included offenses of Count I and for example if the jury cannot make sense of the qualifier "corruptly" the jury could address Count III and/or IV instead. The jury should be further instructed that because of this, the jury need not address all of these Counts but only one.

Dated: June 9, 2023

Respectfully submitted,

/s/ John M. Pierce
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CERTIFICATE OF SERVICE

I, John M. Pierce, hereby certify that on this day, June 9, 2023, I caused a copy of the foregoing document to be served on all counsel through the Court's CM/ECF case filing system.

/s/ John M. Pierce
John M. Pierce