

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

UNITED STATES OF AMERICA	:	
	:	No. 21-cr-508-01-BAH
	:	
v.	:	
	:	
LUKE WESSLEY BENDER,	:	
	:	
<i>Defendant.</i>	:	

**DEFENDANT’S REPLY TO GOVERNMENT’S OPPOSITION TO
DEFENDANT’S MOTION TO DISMISS COUNT ONE OF THE INDICTMENT**

Defendant Luke Wesley Bender’s Motion to Dismiss raised a specific challenge to Count One of the Indictment, Obstruction of an Official Proceeding, in violation of 18 U.S.C. § 1512(c)(2), and follows the analysis of the district courts in *United States v. Miller*, ___ F. Supp. 3d ___, No. 21-cr-00119 (CJN), 2022 WL 823070 (D.D.C. Mar. 7, 2022), *reconsideration denied*, 2022 WL 1718984 (D.D.C. May 27, 2022), *United States v. Singleton*, No. H-06-cr-080, 2006 WL 1984467 (S.D. Tex. Jul. 14, 2006), and *United States v. Hutcherson*, No. 6:05-cr-00039, 2006 WL 270019 (W.D. Va. Feb. 3, 2006). *See* Def.’s Motion to Dismiss at 2 (D.E. 52). As set forth in the Motion, the conduct Mr. Bender is alleged to have undertaken on January 6, 2021 does not fall within the confines proscribed by § 1512(c)(2) because he did not take any action with respect to a document, record, or other object for the purpose of “corruptly” obstructing, influencing, or impeding an official proceeding. *See Miller*, 2022 WL 823070, at *15. Mr. Bender’s codefendant, Landon Mitchell, also moved to dismiss his identical obstruction charge. *See* D.E. 50.

In response, the Government submitted a joint opposition to both defendants’ separate motions to dismiss and incorporated all arguments previously raised by the Government in responding to similar motions filed by defendants charged with offenses arising from January 6,

2021. Unique to this case, the Government claims that even under the authority cited by Mr. Bender and Mr. Mitchell, defendants' conduct still constitutes obstruction (or rather "evidence tampering") as the statute was intended to prohibit because defendants' purportedly "tamper[ed] with Senate records or documents." *See* Gov't Opp'n at 8 (D.E. 59). The Government points to the allegations that defendants "actively leafed through and took photographs of documents they found on the desks of senators and Senate staff," and identifies surveillance video showing Mr. Bender "taking cell phone photographs of the documents Mitchell is holding and leafing through." *Id.* at 7-8. According to the Government, the "defendants' obstructive conduct plainly has a nexus to a document, record, or other object," and thus is covered by § 1512(c), "because it specifically involved tampering with Senate records or documents." The Government further asserts that a nexus to documents exists because the defendants "corruptly stopped Members of Congress from reviewing" the documents present in the U.S. Capitol.

As an initial matter, the Government's indictment charges Mr. Bender with no such conduct. Moreover, the language of the statute refers to whoever "corruptly" "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.*" 15 U.S.C. § 1512(c)(1) (emphasis added). The Government's allegations do not demonstrate any conduct or intent consistent with the tampering sought to be criminalized by the charged statute. Even if there is a "nexus" to a document, nothing about the defendants photographing or even reviewing Senate documents falls within the type of conduct proscribed by the statute, as photographing and handling documents does not demonstrate an intent to impair their integrity or availability for use in a proceeding.

Finally, the Government simply misses the point. As Judge Nichols reasoned in *Miller*, the other subsections of the statute at issue “criminalize fairly discrete conduct in narrow contexts,” suggesting that (c)(2) also has a “narrow focus.” 2022 WL 823070, at *11. Indeed, “if subsection (c)(2) is not limited by subsection (c)(1), then the majority of § 1512 would be unnecessary.” *Id.* at *12. As Judge Nichols acknowledged, “superfluity is not typically, by itself, sufficient to require a particular statutory interpretation,” *id.*, but the “substantial overlap” here suggests that Congress did not intend for subsection (c)(2) to act as a broad, catchall for § 1512.

CONCLUSION

For all these reasons, Defendant Luke Wessley Bender respectfully requests that this Court enter an Order dismissing Count One of the Indictment in this matter.

Dated: October 28, 2022

Respectfully submitted,

SILVERMAN|THOMPSON|SLUTKIN|WHITE, LLC

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