UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA	:	**Crim. No. 21-cr-00032 (DLF)**
	:	
v.	:	
	:	
GUY WESLEY REFFITT,	:	
	:	
Defendant.	:	

PARTIES' JOINT FILING REGARDING JURY INSTRUCTIONS

Pursuant to the Court's February 16, 2022, minute order, the parties hereby respond to the Court's questions:

1. **Proposed Instruction No. 20 (Definitions), Entering or Remaining in a Restricted Building or Grounds with a Deadly or Dangerous Weapon – Definition of "Deadly or Dangerous Weapon"**

The parties' proposed definition for a "deadly or dangerous weapon" in 18 U.S.C. § 1752 refers to "any object that can be used to inflict severe bodily harm or injury," noting that the "object need not actually be capable of inflicting harm or injury." In *United States v. Arrington*, 309 F.3d 40 (D.C. Cir. 2002), the D.C. Circuit, in considering a challenge to the jury instructions for assaulting a federal officer with a deadly or dangerous weapon in violation 18 U.S.C. § 111(a) and (b), discussed the difference between two types of potentially deadly and dangerous weapons. *Id.* at 45. First, certain objects qualify as "inherently deadly" weapons, including "a gun." *Id.* Second, other objects that are not inherently dangerous, such as the car at issue in that case, "must be capable of causing serious bodily injury or death to another person and the defendant must use it in that manner." *Id.*; *see United States v. Chansley*, 525 F. Supp. 3d 151, 161-62 (D.D.C. 2021) (noting that "courts have consistently defined 'dangerous weapon' as an object that is either inherently dangerous or is used in a way that is likely to endanger life or inflict great bodily harm," and citing cases). In other words, where the "dangerous and deadly" weapon in question is an

inherently dangerous object such as a "gun," the additional language—discussing the object's capability of causing serious bodily injury or death and the defendant's use of the object in that manner—is not required.

As the indictment makes clear in Count Three, the defendant in this case is charged with using and carrying a "semi-automatic handgun." A semi-automatic handgun is an inherently dangerous weapon regardless of whether it is in fact capable of causing death or serious bodily injury. *See Chansley*, 525 F. Supp. 3d at 162 (noting that "guns" are "obviously" and "inherently" dangerous) (citation omitted); *United States v. Martin*, 562 F.2d 673, 680 (D.C. Cir. 1977) (describing a machine gun as an "inherently dangerous object"); *McLaughlin v. United States*, 476 U.S. 16, 17-18 (1986) (holding that an unloaded handgun constitutes a "dangerous weapon" because "a gun is typically and characteristically dangerous" and "the display of a gun instills fear in the average citizen"). The decision in *Arrington* did not consider inherently dangerous weapons such as the gun charged in this case. Accordingly, the parties' proposed definition is not inconsistent with *Arrington*.

2. **Proposed Instruction No. 20 (Elements), Entering or Remaining in a Restricted Building or Grounds with a Deadly or Dangerous Weapon – Use of Word "Firearm"**

The statute at issue, 18 U.S.C. § 1752(b)(1)(A), criminalizes a person who, "during and in relation to the offense, uses or carries a deadly or dangerous weapon or firearm." And Count Three of the Second Superseding Indictment charges that the defendant, "during and in relation to the offense, did use and carry a deadly and dangerous weapon and firearm, that is, a semi-automatic handgun." Accordingly, it would be appropriate to revise the fourth element in the parties' joint proposed jury instruction to read as follows: "Fourth, that the defendant used or carried a deadly or dangerous weapon or firearm during and in relation to the offense."

3. **Proposed Instruction No. 20 (Elements), Entering or Remaining in a Restricted Building or Grounds with a Deadly or Dangerous Weapon – Use of Term "Vice President Elect"**

A. The Indictment

The government moves to strike references in Count Three of the Indictment to the "Vice President Elect." The defense does not oppose the motion.

In 18 U.S.C. § 1752, Congress prohibited certain types of conduct in any "restricted building or grounds." As relevant here, Section 1752 defines a "restricted building and grounds" as "any posted, cordoned off, or otherwise restricted area . . . of a building or grounds where the President or other person protected by the Secret Service is or will be temporarily visiting." 18 U.S.C. § 1752(c)(1)(B). An individual violates Section 1752 by, among other things, "knowingly entering without lawful authority to do so in any posted, cordoned off, or otherwise restricted area of a building or grounds where a person protected by the Secret Service is or will be temporarily visiting," or if that individual "intends to and does impede government business through disorderly or disruptive conduct while in the restricted area." *United States v. Griffin*, No. 21-cr-92 (TNM), --- F.Supp.3d ---, 2021 WL 27778557, at *3 (D.D.C. July 2, 2021) (cleaned up). The list of individuals whom the United States Secret Service is authorized to protect includes the Vice President and the Vice President-elect. 18 U.S.C. § 3056(a)(1).

Here, Count Three alleges that the defendant violated Section 1752(a)(1) when he "did knowingly enter and remain in a restricted building and grounds, that is, any posted, cordoned-off, and otherwise restricted area within the United States Capitol and its grounds, *where the Vice President and Vice President-elect were temporarily visiting*, without lawful authority to do so." ECF No. 34 (emphasis added).

Further investigation has shed light on the whereabouts of the Vice President-elect during January 6, 2021. *See* Exhibit A, Declaration of Jason Jolly, Staff Assistant, United States Secret Service. The Vice President-elect, although present at the Capitol on the morning of January 6, had left and was planning to return to the Capitol until her travel there "was delayed when the Joint Session was interrupted by the riot." *Id.* at ¶ 3. The Vice President-elect thus did not return to the Capitol until approximately 7 pm to participate in the Certification of the Electoral College vote. *Id.* at ¶ 4.

Based on these factual developments, the government moves the Court to amend the charging language in Count Three from "where the Vice President and Vice President-elect were temporarily visiting" to "where the Vice President was temporarily visiting."[1]

The Fifth Amendment of the Constitution requires that the prosecution of a criminal defendant facing a felony charge "be begun by indictment." *Stirone v. United States*, 361 U.S. 212, 215 (1960). Once an indictment has issued, that charge "may not be broadened through amendment except by the grand jury itself." *Id.* at 216. By contrast, where the indictment "fully and clearly" charges an offense's elements, no constitutional infirmity arises if that indictment "alleges more crimes or other means of committing the same crime." *United States v. Miller*, 471 U.S. 130, 136 (1985). Thus, language in the indictment that is "unnecessary to and independent of" the offense's allegations "may normally be treated as 'a useless averment' that 'may be ignored.'" *Id.* (quoting *Ford v. United States*, 273 U.S. 593, 602 (1927)).

[1] As noted above, Section 1752 defines a "restricted building and grounds" to include a building or grounds where a protected person "is or *will be* temporarily visiting." 18 U.S.C. § 1752(c)(1)(B) (emphasis added). The government does not request the Court to amend the indictment to include the future tense—"would be"—verb.

A court therefore has the authority "to drop from an indictment those allegations that are unnecessary to an offense that is clearly contained within it." *Miller*, 471 U.S. at 144; *see United States v. Quinn*, 401 F. Supp. 2d 80, 90 (D.D.C. 2005) (granting government motion to strike from an indictment language that referred not to "essential elements" but instead to "different means by which the defendants committed an alleged offense (any one which alone could support a conviction)"); *see also United States v. Holland*, 117 F.3d 589, 594-95 (D.C. Cir. 1997) ("Paring down the conspiracy's time frame added no new charges to the indictment" and thus did not require re-submission to the grand jury).[2] In *United States v. Poindexter*, 719 F. Supp. 6 (D.D.C. 1989) (Greene, J.), the government sought to narrow a conspiracy charge by dropping all language referring to one object of the alleged scheme. *Id.* at 7. In granting that motion, Judge Greene concluded that striking language from an indictment was consistent with the Constitution because "(1) the indictment as so narrowed constitute[d] a completed criminal offense, and (2) the offense [wa]s contained in the indictment as originally returned." *Id.* at 9.

Here, after removal of the language that the government seeks to strike, the indictment continues to state a viable offense that has been in the charging document since the date of its return by the grand jury. In Count Three, the key language on which the Section 1752 charge relies—that a person protected by the Secret Service was temporarily visiting a posted, cordoned-off, or otherwise restricted area within the Capitol—remains. The indictment issued by the grand jury identified the same protected person—the Vice President—on which the amended language relies. Deleting reference to the Vice President-elect "simply 'narrows' the scope of the charges,

[2] The Court's authority under *Miller* to strike language from an indictment at the government's request is distinct from the government's authority—with leave of the Court—to dismiss all or part of an indictment, information, or complaint under Rule 48(a) of the Federal Rules of Criminal Procedure.

which 'adds nothing new to the grand jury's indictment and constitutes no impermissible broadening.'" *Quinn*, 401 F. Supp. 2d at 90 (quoting *Holland*, 117 F.3d at 595) (brackets from quotation omitted).[3]

With the language about the Vice President-elect stricken, Count Three of the Indictment would read:

> On or about January 6, 2021, within the District of Columbia, **GUY WESLEY REFFITT** did knowingly enter and remain in a restricted building and grounds, that is, any posted, cordoned-off, and otherwise restricted area within the United States Capitol and its grounds, where the Vice President was temporarily visiting, without lawful authority to do so, and, during and in relation to the offense, did use and carry a deadly and dangerous weapon and firearm, that is, a semi-automatic handgun.

B. The Proposed Jury Instructions

There are no references to the Vice President-elect in the *elements* for the proposed jury instruction for Count Three. The operative element is the first one: "that the defendant entered or remained in a restricted building or grounds." The term "restricted building or grounds" is then defined by reference to a place "where a person protected by the Secret Service is or will be temporarily visiting." And the Secret Service protectee is then separately defined.

Within the proposed jury instructions, that separate definition of Secret Service protectees contains the only reference to the Vice President-elect: "The term 'person protected by the Secret Service' includes the Vice President, the immediate family of the Vice President, and the Vice President Elect." That is a correct statement of law. *See* 18 U.S.C. § 3056(a)(1). And it is

[3] Amending the subject-verb agreement—from the "Vice President and Vice President-elect *were* temporarily visiting" to the "Vice President *was* temporarily visiting"—is an "insignificant" correction that does not require resubmission to the grand jury. *See United States v. Bush*, 659 F.2d 163, 167 (D.C. Cir. 1981).

legally correct to instruct the jury with this definition irrespective of whether the term "Vice President-elect" is included in the charging language in the indictment.

Nevertheless, because the government does not presently intend to introduce evidence about the Vice President-elect's plans to visit the Capitol on the afternoon of January 6, 2021, for the sake of simplicity, the parties agree that the definition of Secret Service protectees in the jury instructions can be modified as follows: "The term 'person protected by the Secret Service' includes the Vice President and the immediate family of the Vice President."

4. **Proposed Instruction No. 19 (Definitions), Transporting a Firearm in Furtherance of a Civil Disorder – Use of Term "Commerce"**

The definition of the term "commerce" for purposes of 18 U.S.C. § 231 listed in the proposed jury instruction refers to "commerce or travel between one state, including the District of Columbia, and any other state, including the District of Columbia." Consistent with the government's recommendation in *United States v. Pugh*, No. 20-cr-73 (S.D. Ala, May 19, 2021), the district court in that case instructed the jury that commerce "means commerce or travel between one state, territory, or possession of the United States and any other state, territory, or possession of the United States, including the District of Columbia." *See* Exhibit B (*Pugh* jury instructions transcript).

Notwithstanding that instruction, the parties do not object to omitting the phrase "or travel" in this instruction. Accordingly, the revised instruction would read: "The term 'commerce' means commerce between one state, including the District of Columbia, and any other state, including the District of Columbia. It also means commerce wholly within the District of Columbia."

Respectfully submitted,

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DECLARATION OF JASON JOLLY, STAFF ASSISTANT, UNITED STATES SECRET SERVICE

1. My name is Jason Jolly. I have worked as a Special Agent for the US Secret Service since 1999. During that time, I have held numerous positions supporting the agency's investigative and protective missions, including several years on full-time protective details. I am currently assigned as a Staff Assistant to the Secret Service's Liaison Division at the U.S. Capitol. In that role, I work with U.S. Capitol personnel to facilitate the visits of Secret Service protectees to Capitol Hill.

2. On January 6, 2021, I was assigned to provide protection for Vice President Elect Kamala Harris for her visit to the United States Capitol for the Joint Session of Congress to certify the results of the Electoral College vote.

3. On the morning of January 6, 2021, before the commencement of the Joint Session of Congress, Vice President Elect Harris was present at the United States Capitol. She left the Capitol later that morning. Vice President Elect Harris was planning to return to the U.S. Capitol Building on the afternoon of January 6, 2021, for the Joint Session of Congress; however, her travel to the Capitol was delayed when the Joint Session was interrupted by the riot.

4. At approximately 7 p.m., on January 6, 2021, Vice President Elect Harris travelled to the U.S. Capitol where she participated in the Joint Session of Congress to certify the results of the Electoral College vote.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on November 4, 2021, in Washington, D.C.

Jason L Jolly

JASON JOLLY
Staff Assistant
U.S. Secret Service

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF ALABAMA

UNITED STATES OF AMERICA

v.

TIA DEYON PUGH,

Defendant.

CASE NO. 20-CR-00073

COURTROOM 3B

MOBILE, ALABAMA

WEDNESDAY, MAY 19, 2021

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EXCERPT FROM DAY 3 OF TRIAL
BEFORE THE HONORABLE TERRY F. MOORER,
UNITED STATES DISTRICT JUDGE, AND JURY

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Proceedings recorded by OFFICIAL COURT REPORTER
Qualified pursuant to 28 U.S.C. 753(a) & Guide to
Judiciary Policies and Procedures Vol. VI, Chapter III, D.2.
Transcript produced with computerized stenotype.

* * *

(In open court, defendant and jury present.)

THE COURT: Now, the indictment in this case charges one crime -- it's called a count -- against the defendant. And you will have a copy of the indictment to refer to during your deliberations.

Count one charges the defendant committed what is called a substantive offense; specifically, a violation of Title 18, United States Code, Section 231(a)(3). Specifically, it alleges that the defendant knowingly obstructed, impeded, or interfered with a law enforcement officer or attempted to do so while the law enforcement officer was engaged in the lawful performance of their official duties incident to or during a civil disorder which in any way or degree obstructs, delays, or adversely affects interstate commerce.

So I will now explain to you the law governing the substantive offense.

It is a federal crime for anyone to knowingly and intentionally obstruct, impede, or interfere with or to attempt to obstruct, impede, or interfere with a law enforcement officer while they are engaged in the lawful performance of their official duties incident to or during a civil disorder which in any way or degree obstructs, delays, or adversely affects interstate commerce.

The term "civil disorder," as used in this statute,

means any public disturbance involving acts of violence by a group of three or more persons which causes an immediate danger of or results in damage or injury to the property or the person of any other individual.

Interstate commerce means commerce or travel between one state, territory, or possession of the United States and any other state, territory, or possession of the United States, including the District of Columbia.

The defendant can be found guilty of count one only if all of the following facts are proven beyond a reasonable doubt: First, the defendant knowingly committed an act or attempted to commit an act with the intended purpose of obstructing, impeding, or interfering with one or more law enforcement officers; secondly, at the time of the defendant's actual or attempted act, the law enforcement officer or officers were engaged in the lawful performance of their official duties incident to and during a civil disorder, as that term was defined above; and, third, the civil disorder obstructed, delayed, or adversely affected interstate commerce or the movement of any article or commodity in interstate commerce in any way or to any degree.

As to attempt. In some cases it is a crime to attempt to commit an offense, even if the attempt fails. In this case the defendant is charged in count one with knowingly committing an act or attempting to commit an act to obstruct, impede, or

interfere with law enforcement officers during the course of or incident to a civil disorder.

The defendant can be found guilty of an attempt to commit that offense only if both of the following facts are proven beyond a reasonable doubt: First, that the defendant knowingly intended to commit the crime of obstructing, impeding, or interfering with a law enforcement officer during the course of and incident to a civil disorder; and, secondly, the defendant's intent was strongly corroborated by her taking a substantial step toward committing the crime.

A substantial step is an important action leading up to the committing of an offense, not just an inconsequential act. It must be more than simply preparing. It must be an act that would normally result in the commission of the offense.

Now, where a statute specifies multiple ways, multiple alternative ways, in which an offense may be committed, the indictment may then allege the multiple ways in the conjunctive; that is, by using the "word." If only one of the alternatives is proven beyond a reasonable doubt, that is sufficient for a conviction so long as you agree unanimously as to that specific alternative.

You will see that the indictment charges that the crime was committed on or about a certain date. The government does not have to prove that the offense occurred on an exact date. The government only has to prove beyond a reasonable

doubt that the crime was committed on a date reasonably close to the date alleged in the indictment.

The word "knowingly" means that an act was done voluntarily and intentionally and not because of mistake or by accident.

Now, in this case there were some stipulations or there was an occasion where I took judicial notice. Sometimes the parties agree that certain facts are true and in those cases they may enter into a stipulation. And they did in this case. So you must treat those facts as proven for this case. And they did stipulate to several matters during the course of the trial.

* * *

C E R T I F I C A T E

STATE OF ALABAMA)

COUNTY OF BALDWIN)

I do hereby certify that the foregoing proceedings were taken down by me and transcribed using computer-aided transcription and that the foregoing is a true and correct transcript of said proceedings.

I further certify that I am neither of counsel nor of kin to any of the parties, nor am I in anywise interested in the result of said cause.

I further certify that I am duly licensed by the Alabama Board of Court Reporting as a Certified Court Reporter as evidenced by the ACCR number following my name found below.

s/ Roy Isbell 9/15/2021

ROY ISBELL, CCR, RDR, RMR, RPR, CRR
ALABAMA CCR #22, EXP. 9/30/2021
LOUISIANA CCR #2014002, EXP. 12/31/2021
COURT REPORTER, NOTARY PUBLIC
STATE OF ALABAMA AT LARGE

My Commission Expires: 10/25/2021

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