

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

UNITED STATES OF AMERICA	:	
	:	
v.	:	No. 22-cr-15 (APM)
	:	
THOMAS CALDWELL,	:	
	:	
Defendant.	:	

**GOVERNMENT’S RESPONSE TO DEFENDANT’S NOTICE OF NEW AUTHORITY
AND SUPPLEMENTAL ARGUMENT AS TO CALDWELL’S
MOTIONS FOR JUDGMENT OF ACQUITTAL AND NEW TRIAL**

The United States of America respectfully files this response to Defendant Thomas Caldwell’s Notice of New Authority and Supplemental Argument as to Caldwell’s Motions for Judgment of Acquittal and New Trial (ECF No. 521), which has been joined by co-Defendants Joseph Hackett (ECF No. 524) and Edward Vallejo (ECF No. 528). Defendant Caldwell supplements his prior motions in light of the D.C. Circuit’s opinion in *United States v. Fischer*, No. 22-3038 (D.C. Cir. Apr. 7, 2023). This Court’s instruction to the jury during Defendant Caldwell’s trial regarding 18 U.S.C. § 1512(c)(2) was legally sufficient and does not necessitate a new trial, notwithstanding Circuit Judge Walker’s concurring opinion regarding the definition of “corruptly.”

I. THE CONCURRING OPINION IS NOT BINDING.

In *United States v. Fischer*, No. 22-3038, __ F.4th __, 2023 WL 2817988 (D.C. Cir. Apr. 7, 2023), the D.C. Circuit held that 18 U.S.C. § 1512(c)(2) “encompasses all forms of obstructive conduct, including . . . efforts to stop Congress from certifying the results of the 2020 presidential election.” *Id.* at *3. The court explained that “the meaning of the statute is unambiguous . . . § 1512(c)(2) applies to all forms of corrupt obstruction of an official proceeding, other than the conduct that is already covered by § 1512(c)(1).” *Id.* at *4. This “broad interpretation of the

statute — encompassing all forms of obstructive acts — is unambiguous and natural, as confirmed by the ‘ordinary, contemporary, common meaning’ of the provision’s text and structure.” *Id.* at *5 (quoting *Perrin v. United States*, 444 U.S. 37, 42 (1979)). This portion of the opinion was authored by Judge Pan and joined by Judge Walker, and thus constitutes *Fischer*’s binding holding.

Fischer’s holding regarding the type of obstructive acts that may satisfy § 1512(c)(2) does not resolve the scope of that statute’s separate *mens rea* requirement—specifically, the meaning of the word “corruptly” as it is used in § 1512(c). That issue is pending before the D.C. Circuit in a different case, *United States v. Robertson*, No. 22-3062, which is scheduled to be argued on May 11, 2023.

As explained in both the majority and dissenting opinions in *Fischer*, the definition of “corruptly” was not squarely presented in that case and therefore was not resolved. *See* 2023 WL 2817988, at *7 (opinion of Pan, J.) (“expressing [no] preference for any particular definition of ‘corruptly’” because “the allegations against appellees appear to be sufficient to meet any proposed definition of ‘corrupt’ intent); *id.* at *8 (noting that the dissent also “declines to settle on a precise meaning of ‘corruptly’ at this time” and thus “share[s] much common ground” with Judge Pan’s opinion “on the issue of *mens rea*”); *Id.* at *42-*43 (Katsas, J., dissenting) (surveying possible definitions of “corruptly” but declining to adopt any particular one). Although Judge Walker would have determined that “corruptly” means “a criminal intent to procure an unlawful benefit,” *id.* at *22 (Walker, J., concurring), the resolution of that *mens rea* issue was not necessary to the court’s holding concerning the *actus reus* of the offense—which Judge Walker joined—and his views on the meaning of “corruptly” were not adopted by the other judges on the panel.

Accordingly, there is no reason for this Court to turn to *United States v. Marks*, 430 U.S. 188 (1977), for guidance on how to interpret *Fischer*’s holding. In *Marks*, the Supreme Court held

that, “[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, ‘the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds[.]’” 430 U.S. at 193 (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976) (plurality op.)). *Marks* is inapposite for a number of reasons.

First, there is a “single rationale explaining the result” in *Fischer* that a majority of the court adopted: all but Section I.C.1 (declining to interpret “corruptly”) and footnote 8 of Judge Pan’s majority opinion. That opinion held in Section I.A that § 1512(c)(2) was “unambiguous”: it “applies to all forms of corrupt obstruction of an official proceeding, other than the conduct that is already covered by § 1512(c)(1).” *Fischer*, 2023 WL 2817988, at *4. Thus, unlike the situation described in *Marks*—where more than five Justices agreed on a result, but no five Justices agreed on a rationale—here, a majority of the court did agree on a rationale explaining the result: § 1512(c)(2)’s unambiguous statutory text. Thus, *Marks* has no applicability.

In this respect, the *Fischer* majority opinion is like those that have commanded a five-Justice majority in the Supreme Court, with one Justice writing a concurring opinion explaining his or her disagreement with aspects of the majority opinion but joining it anyway. See, e.g., *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 352-53 (2011) (Thomas, J., concurring); *Arizona v. Gant*, 556 U.S. 332, 354 (2009) (Scalia, J., concurring); *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391, 408 (2002) (O’Connor, J., concurring). In such a case, it is the majority opinion that controls, and *Marks* has no applicability. See Richard M. Re, *Beyond the Marks Rule*, 132 Harv. L. Rev. 1942, 2001-02 nn.311, 322 (2019) (noting that appellate courts have never applied the *Marks* rule to *Concepcion* and *Gant*). Here, Judge Walker joined the portion of Judge Pan’s opinion holding that § 1512(c)(2) encompasses all forms of obstructive conduct. That is *Fischer*’s clear holding.

The fact that Judge Walker’s understanding of the statute’s *mens rea* requirement informed his decision to join the majority opinion does not make that understanding a holding of the court.

Second, any discussion of § 1512(c)(2)’s *mens rea* requirement in *Fischer* is necessarily *dicta*. In that case, the district court dismissed the indictments’ § 1512(c)(2) counts, finding that they failed to state a claim because they “d[id] not allege that they violated § 1512(c)(2) by committing obstructive acts related to ‘a document, record, or other object[.]’” *Fischer*, 2023 WL 2817988, at *3. In reversing that dismissal, the court of appeals had no occasion to interpret the meaning of the word “corruptly” as it is used in § 1512(c). An indictment is sufficient if it “contains the elements of the offense charged and fairly informs a defendant of the charge against which he must defend,” *Hamling v. United States*, 418 U.S. 87, 117 (1974), which may be accomplished by “echo[ing] the operative statutory text while also specifying the time and place of the offense.” *United States v. Williamson*, 903 F.3d 124, 130 (D.C. Cir. 2018). The indictments at issue in *Fischer* all alleged that the defendants acted “corruptly,” as the statute requires. *See Fischer*, 2023 WL 2817988, at *2. Any dispute about the meaning of that term could have no bearing on the sufficiency of the indictment for purposes of a motion to dismiss.

Third, as both Judge Pan and Judge Walker recognized, the D.C. Circuit has never applied *Marks* to its own cases. *See Fischer*, 2023 WL 2817988, at *8 n.5; *id.* at *27 n.10 (Walker, J., concurring). Indeed, “only one federal appellate court has done so.” *Id.* at *8 n.5 (citing *Binderup v. U.S. Att’y Gen.*, 836 F.3d 336, 356 (3d Cir. 2016) (en banc)). Insofar as this Court “needs *some* rule to decide the holding” of *Fischer*, 2023 WL 2817988, at *27 n.10 (Walker, J., concurring), that rule is apparent: it should follow the parts of the opinion agreed upon by a majority of the panel, as it would with any other opinion. As discussed above, that holding is clear: § 1512(c)(2)’s plain language encompasses all forms of obstructive conduct.

Fourth, even were this Court to apply a *Marks* analysis to *Fischer*, it would not require the Court to adopt Judge Walker’s view of the meaning of “corruptly” as it is used in § 1512(c)(2). In *King v. Palmer*, the *en banc* D.C. Circuit held that “*Marks* is workable—one opinion can be meaningfully regarded as ‘narrower’ than another—only when one opinion is a logical subset of other, broader opinions. In essence, the narrowest opinion must represent a common denominator of the Court’s reasoning; it must embody a position implicitly approved by at least five Justices who support the judgment.” 950 F.2d 771, 781 (D.C. Cir. 1991) (*en banc*); *see generally Beyond the Marks Rule, supra*, at 1994-95 (noting that the D.C. Circuit has adopted a narrower reading of *Marks* than other courts of appeals). But Judge Walker’s reading of “corruptly” does not “embody a position implicitly approved by at least [two judges] who support the judgment”; to the contrary, a “majority of the panel . . . expressly declined to endorse the concurrence’s definition of ‘corruptly.’” *Fischer*, 2023 WL 2817988, at *8 n.5. Moreover, Judge Walker’s definition was “not one with which [the majority] opinion ‘must necessarily agree as a logical consequence of its own, broader position’ because [the majority] opinion t[ook] no position on the exact meaning of ‘corruptly.’” *Id.* (quoting *King*, 950 F.2d at 782). Indeed, insofar as Judge Walker pitched his opinion as “narrower” than Judge Pan’s because he “read[s] [§ 1512](c)(2) to cover only *some* of the conceivable defendants the lead opinion might allow a court to convict,” *Fischer*, 2023 WL 2817988, at *27 n.10 (Walker, J., concurring), that assertion again highlights the fact that any discussion of the meaning of the term “corruptly” in *Fischer* is *dicta*. The question on appeal in that case was whether the indictments at issue properly alleged an offense under § 1512(c)(2). Answering that question did not require the court to delineate the world of “conceivable defendants” that could be convicted under the statute. Indeed, attempting to do so would be entirely

inappropriate at the motion to dismiss stage, which merely evaluated whether “the indictment fairly informed [the defendant] of the charge against him[.]” *Williamson*, 903 F.3d at 132.

There can be no doubt about *Fischer*’s clear holding: § 1512(c)(2) “encompasses all forms of obstructive conduct, including . . . efforts to stop Congress from certifying the results of the 2020 presidential election.” 2023 WL 2817988, at *3. That holding is binding on this Court. The discussion in Judge Walker’s concurring opinion about the meaning of “corruptly” as it is used in § 1512(c)(2) is not.

II. THE SECTION 1512(c) JURY INSTRUCTION GIVEN DURING DEFENDANT CALDWELL’S TRIAL WAS LEGALLY SUFFICIENT AND WAS NOT OBJECTED TO DURING TRIAL.

At the outset, the government would note that Defendant Caldwell never requested a jury instruction along the lines of that suggested by Judge Walker, nor did he object to the Court’s proposed instruction during the charging conference held on November 10, 2021. Moreover, the definition of “corruptly” set forth in the Court’s Section 1512(c)(2) Jury Instruction was legally sufficient and appropriate in the context of congressional obstruction.

To violate Section 1512(c)(2), a defendant must act “corruptly.” Because that term is not statutorily defined, it is “understood . . . to have its ordinary meaning.” *United States v. North*, 910 F.2d 843, 881 (D.C. 1990) (per curiam), *opinion withdrawn and superseded in part on reh’g*, 920 F.2d 940 (D.C. Cir. 1990). As a matter of plain language, “corruptly” is “normally associated with wrongful, immoral, depraved, or evil.” *Arthur Andersen LLP v. United States*, 544 U.S. 696, 705 (2005); *see North*, 910 F.2d at 881 (“corruptly” means “depraved, evil: perverted into a state of moral weakness or wickedness”).

Acknowledging that “the plain meaning of ‘corruptly’ encompasses both corrupt (improper) *means* and corrupt (morally debased) *purposes*,” *United States v. Sandlin*, 575 F. Supp.

3d 16, 31 (D.D.C. 2021), the instructions required the government to prove that each defendant either “use[d] unlawful means” or “ha[d] an unlawful purpose.” *See Court’s Final Jury Instructions*, ECF No. 396 at 27. Section 1512(c) Jury Instruction¹; *see North*, 910 F.2d at 942-43 (Silberman, J., concurring in part and dissenting in part). And drawing from *Andersen*, *see* 544 U.S. at 706, the Court’s instructions also required proof that each defendant acted with “consciousness of wrongdoing,” which the instructions defined as acting “with an understanding or awareness that what the person is doing is wrong.” ECF No. 396 at 27.

The inclusion of a narrative paragraph in the instruction further ensured that the jury instructions “convey[ed] the requisite consciousness of wrongdoing.” *Arthur Andersen*, 544 U.S. at 706. In essence, that paragraph explained that a person who acts intentionally to influence or impede a congressional proceeding has not violated the obstruction statute unless that person acts corruptly such as by engaging in bribery or “other independently unlawful conduct.” ECF No. 396 at 27. The narrative paragraph thus both clarified that intent to obstruct the proceeding in question is not, at least in the context of congressional obstruction, sufficient to prove that a

¹ The Court’s Section 1512(c) Jury Instruction read as follows:

To act “corruptly,” the defendant must use unlawful means or have an improper purpose, or both. The defendant must also act with “consciousness of wrongdoing.” “Consciousness of wrongdoing” means with an understanding or awareness that what the person is doing is wrong.

Not all attempts to obstruct or impede an official proceeding involve acting corruptly. For example, a witness in a court proceeding may refuse to testify by invoking his constitutional privilege against self-incrimination, thereby obstructing or impeding the proceeding, but he does not act corruptly. In contrast, an individual who obstructs or impedes a court proceeding by engaging in conduct such as offering illegal bribes, engaging in violence, committing fraud, or through other independently unlawful conduct, is acting corruptly.

While the defendant must act with intent to obstruct the official proceeding, this need not be the defendant’s sole purpose. A defendant’s unlawful intent to obstruct justice is not negated by the simultaneous presence of another purpose for the defendant’s conduct.

ECF No. 396 at 27.

defendant acted “corruptly,” *see North*, 910 F.2d at 882, and underscored that such a person can act corruptly for purposes of Section 1512(c)(2) if he employs “independently corrupt means,” at 942-43 (Silberman, J., concurring in part and dissenting in part).

The definition of “corruptly” contained in the Court’s Section 1512(c) Jury Instruction was also consistent with, though more demanding than, definitions of “corruptly” applied to Section 1512(c)(2) by other courts of appeals. Since Section 1512(c)(2)’s enactment in 2002, courts have interpreted “corruptly” in Section 1512(c)(2) to require intent to obstruct and some degree of wrongfulness. *See United States v. Delgado*, 984 F.3d 435, 452 (5th Cir. 2021); *United States v. Watters*, 717 F.3d 733, 735 (9th Cir. 2013) (upholding jury instruction defining “corruptly” as acting with “consciousness of wrongdoing”) (internal quotation marks omitted); *United States v. Friske*, 640 F.3d 1288, 1291 (11th Cir. 2011) (to act “corruptly” is to act “with an improper purpose” and “to engage in conduct knowingly and dishonestly with the specific intent to subvert, impede or obstruct”) (quoting *United States v. Mintmire*, 507 F.3d 1273, 1289 (11th Cir. 2007)); *United States v. Gordon*, 710 F.3d 1124, 1151 (10th Cir. 2013) (same); *United States v. Mann*, 701 F.3d 274, 307 (8th Cir. 2012) (same). Courts interpreting the neighboring provision, Section 1512(c)(1), have reached similar conclusions. *See United States v. Bedoy*, 827 F.3d 495, 510 (5th Cir. 2016) (a “proper definition” of “corruptly” for purposes of Section 1512(c)(1) is to act “knowingly and dishonestly, with the specific intent to subvert or undermine the due administration of justice”) (internal quotation marks omitted); *United States v. Matthews*, 505 F.3d 698, 705 (7th Cir. 2007) (upholding instruction defining “[c]orruptly” in Section 1512(c)(1) as acting “with the purpose of wrongfully impeding the due administration of justice”).

III. THE EVIDENCE INTRODUCED AT TRIAL WAS SUFFICIENT TO ESTABLISH A CORRUPT INTENT UNDER EITHER STANDARD

The government's evidence was sufficient for a reasonable jury to conclude that defendant Caldwell possessed a corrupt intent under both the definition in this Court's jury instructions and the definition proposed by Judge Walker's concurrence in *Fischer*. As set forth in greater detail in the government's initial opposition to Defendant Caldwell's and his co-defendants' motions for judgments of acquittal, ECF No. 383, which is incorporated herein by reference, Defendant Caldwell came to the Capitol grounds with the intent to stop Congress' certification to stop Joseph Biden from becoming President. As Caldwell posted in a comment on Facebook on December 31, "It begins for real Jan 5 and 6 on Washington D.C. when we mobilize in the streets. Let them try to certify some crud on capitol hill with a million or more patriots in the streets. This kettle is set to boil..." Gov. Exh. 6923 (Msg. 2001.C.2). In another post, Caldwell made clear that the purpose of this was to alter the results of the election: "I swore to support and defend the Constitution of the United States against all enemies foreign and domestic. I did the former, I have done the latter peacefully but they have morphed into pure evil even blatantly rigging an election and paying off the political caste. We must smite them now and drive them down." *Id.* (Msg. 2001.C.2.B). Caldwell coordinated with his co-defendants and other alleged co-conspirators to organize an armed force to support the Oath Keepers' operation in connection with January 6. And then, on the afternoon of January 6, Caldwell joined the mob on the west side of the Capitol that broke past barricades, climbed up the inaugural stage scaffolding, and breached the lower west terrace of the Capitol. ECF No. 383. In his own words, Caldwell took these actions because he "heard that Pence fucked us" so, "I grabbed up my American flag and said let's take the damn capitol so people started surging forward and climbing the scaffolding outside so I said lets storm the place and hang the traitors." Gov. Exh. 6734 (Msg. 22.T.27.2883).

These words and actions established Defendant Caldwell’s desire to stop Congress from certifying the election and to use whatever means necessary—including force, intimidation, and violence—to instead procure the election victory for Donald Trump. Such evidence establishes both that Defendant Caldwell “used unlawful means” and “had an unlawful purpose,” and that he had “a criminal intent to procure an unlawful benefit”—that benefit being his own desired election outcome.

IV. CONCLUSION

As stated above, the current Section 1512(c)(2) instruction given at Defendant Caldwell’s trial was legally sufficient and does not necessitate the granting of a new trial, notwithstanding Circuit Judge Walker’s non-binding concurring opinion regarding the definition of “corruptly.”

Respectfully Submitted,

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