IN THE UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA vs. **WILMAR MONTANO-ALVARADO** Defendant	**USDC Case: 21-0154(RJL)**

MOTION TO STAY

TO THE HONORABLE RICHARD J. LEON,
UNITED STATES DISTRICT JUDGE
FOR THE DISTRICT OF COLUMBIA:

COMES NOW the appearing defendant, through the undersigned counsel who, very respectfully, **STATES** and **PRAYS** as follows**:**

I. INTRODUCTION

This Honorable Court held a status conference on the case at bar on July 14th, 2022. On that date, the undersigned verbally requested that this Honorable Court stay the proceedings in this case until the U.S. Court Of Appeals of the D.C. Circuit issues its ruling on *U.S. v. Miller* on the constitutionality of 18 U.S.C. § 1512(c)(2)(2021). At the time, it was our contention that the Court of Appeals ruling would provide some guidance into an issue that would directly impact the litigation in the present prosecution: whether there would be a need to litigate the legitimacy of Mr. Montano-Alvarado's prosecution on obstructing a Congressional proceeding; namely, the Certification of the Electoral Vote of the 2020 presidential election.

In response to that request, this Honorable Court issued an order to Mr. Montano-Alvarado to brief the nature of his request. In compliance with that order, the undersigned files this brief in support of our request to stay the proceedings in the case at bar until there is a final resolution in *Miller*.

II. FACTUAL BACKGROUND

Wilmar Montano-Alvarado was indicted on several counts related to the January 6th, 2021 event that transpired on or around Congress grounds as a result of the preceding presidential election. Relevant to this case, count 2 of the indictment – and of the two (2) superseding indictments that followed – charged Mr. Montano-Alvarado with obstructing the certification of the Electoral College vote that confirmed Joseph Biden as president of the United States, in violation of 18 U.S.C. § 1512(c)(2)(2021).

The 1512 count has been the subject and crux of most pretrial litigation on the cases related to January 6th event. Therefore, the 1512 litigation became ripe and adjudicated on several other cases that numerically preceded Mr. Montano-Alvarado's indictment. Specifically, several U.S. District Court judges presiding over proceedings on other cases have deemed that 1512 is constitutional, both in its plain language, and as applied.[1]

Contrarily, Honorable U.S. District Judge Carl Nichols issued an opinion on *U.S. v. Miller,* concluding that 1512(c)(2) is unconstitutional, since there was

[1] *See, for example U.S. v. McHugh*, ("McHugh II"), 2022 WL 1302880 (D.D.C. May 2, 2022; *U.S. v. Reffit*, 2022 WL 1404247, (D.D.C. May 4, 2022); *U.S. v. McHugh*, ("McHugh I"), 2022 WL 296304 (D.D.C. Feb. 1, 2022) *U.S. v. Nordean*, 2021 WL 6134595 (D.D.C. Dec. 28, 2021); *U.S. v. Caldwell*, 2021 WL 6062718, (D.D.C. Dec. 20, 2021); *U.S. v. Sandlin*, 2021 WL 5865006, (D.D.C. Dec. 10, 2021).

a marked ambiguity in the conduct proscribed by the statute. *See* 2022 WL 823070 at *15. (D.D.C. Mar. 7, 2022). Subsequently, District Judge Nichols dismissed 1512(c)(2) counts against two additional defendants, predicated on his ruling on *Miller*. *See U.S. v. Lang,* 1:21-cr-0053; *U.S. v. Fischer,* 1:21-cr-0234. The Government moved to reconsider District Judge Nichols order in *Miller*. *See 1:21-cr-00119 at DE 75.* Judge Nichols denied the reconsideration in a Memorandum Opinion issued on May 27, 2022. *See 1:21-cr-00119 at DE 86.* A motion for reconsideration was also denied on *Fischer*. Lastly, District Judge Nichols issued a minute order in *U.S. v. Lang*, dismissing the 1512(c)(2) count for the same reasons than in *Miller*. . *See 1:21-cr-00053* (June 7th, 2022).

As a result, the Government filed a notice of appeal of the dismissal of the 1512(c)(2) count on *Miller, Fischer and Lang*. United States Court Of Appeals For The District Of Columbia Circuit Appeals Nos. 22-3038, 22-3039, & 22-3041. On July 21, 2022, the Government moved to consolidate the appeals mentioned herein. On its request, the Government averred that:

> Consolidation of the opening brief and reply briefs in these appeals before a single panel of this Court will conserve judicial and government resources and simplify the resolution of these cases. As a result, considerations of equity and judicial economy support consolidation of the three appeals for purposes of oral argument and the government's opening and reply briefs.

See USCA Case 22-3041, Document #1956008 at p. 5

In the case at bar, the parties have informed this Honorable Court that most of the pretrial discussions have centered on the extent of discovery, as well as the applicability of 1512(c)(2) to Mr. Montano-Alvarado's conduct. Although

Mr. Montano-Alvarado has not filed any pretrial motion related to that count to date, the undersigned has informed this Honorable Court that there will be litigation on the subject at the appropriate time. Due to the pendency of the appeals on *Miller, Fischer* and *Lang*, the undersigned proposed that this Honorable Court stay this matter until the Court of Appeals provides guidance as to the viability of prosecuting defendant on that count for identical reasons than the ones offered by the Government: to avoid unnecessary litigation and overuse of governmental and judicial resources.

Accordingly, this Honorable Court ordered Mr. Montano-Alvarado to submit briefing on the viability of staying this proceeding until the appellate resolution of Miller.

III. APPLICABLE LAW

The Speedy Trial Act, 18 U.S.C. §§ 3161 *et. seq.* (2020), provides that a criminal defendant must be brought to trial within seventy (70) days of either the date charges were filed or the date of defendant's first appearance on the case, whichever is later. 18 U.S.C. §§ 3161(c)(1), 3162(a)(2) (2020). However, a defendant may request an extension of the seventy-day time limit, and if granted, the extension is excluded from the 70-day speedy trial period. 18 U.S.C. § 3161(h)(7)(A)(2020). Several "enumerated events" are excluded from the Speedy Trial Act's prescribed 70-day period, thus tolling the speedy trial clock. *Bloate v. United States*, 559 U.S. 196, 199 (2010).

Of relevance to this case, 18 U.S.C. § 3161(h) establishes that:

a. (h) The following periods of delay shall be excluded in computing the time within which an information or an indictment must be filed, or in computing the time within which the trial of any such offense must commence:
    i. (1) Any period of delay resulting from other proceedings concerning the defendant, including but not limited to—
        1. (B) delay resulting from trial with respect to other charges against the defendant;
        2. ….
        3. (D) delay resulting from any pretrial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion

Moreover, The Court may exclude from the Speedy Trial clock:

> "[a]ny period of delay resulting from a continuance granted by any judge on his own motion or at the request of the defendant or his counsel, or at the request of the attorney for the Government, if the judge granted such continuance on the basis of his findings that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial.
>
> 18 U.S.C. § 3161(h)(7)(A)(2020).

This is frequently referred to as an "ends-of-justice continuance." The statute enumerates a four (4) factor prong that the court must consider issuing an ends of justice continuance. Only the first two (2) components of the analysis are relevant to the proceeding herein:

b. (i) Whether the failure to grant such a continuance in the proceeding would be likely to make a continuation of such proceeding impossible, or result in a miscarriage of justice.
c. (ii) Whether the case is so unusual or so complex, due to the number of defendants, the nature of the prosecution, or the existence of novel questions of fact or law, that it is unreasonable to expect adequate preparation for pretrial proceedings or for the trial itself within the time limits established by this section.

18 U.S.C. 3161(h)(7)(B)(i-ii)(2020)

In interpreting the ends of justice speedy trial extension, the Supreme Court has determined that a District Court bears a "modicum of flexibility" in managing particularly complex or difficult cases. *See Zedner*, 547 U.S. 489, 508 (2006). Notwithstanding, the Tenth Circuit Court of Appeals has admonished that "an ends-of-justice continuance is 'meant to be a rarely used tool for those cases demanding more flexible treatment.", and that such continuances "should not be granted cavalierly." *United States v. Margheim*, 770 F.3d 1312, 1318 (10th Cir. 2014)(internal citations omitted)

IV. ARGUMENT

Although the undersigned has not found any jurisprudential authority on the subject of stays on a 1512(c)(2), the Speedy Trial statute, in its plain terms, requires a consideration of the existence a novel question of law behind the defendant's request for stay. 18 U.S.C. § 3161(h)(7)(2020). It is our position that Mr. Montano-Alvarado's request is within the "novel question of law" prong of the ends of justice analysis of the Speedy Trial Act. There is pending litigation in the Court of Appeals regarding the question the constitutionality of 18 U.S.C. § 1512(c)(2). What is more, there is conflicting decisions within this District about the vagueness of 1512(c)(2). Therefore, a ruling on *Miller et. al.,* will provided guidance to the parties as to the need to litigate the statute on its language, or to proceed to trial on its elements. To date, there is a reasonable doubt as to its legitimacy.

Continuing with the litigation on this case under the qualms of the statute's reach would force to parties – and this Honorable Court – to spend substantial time and resources litigating an issue that might be moot. In a case where both parties appear on behalf of different branches of the Government, the resources spent on litigation would raise exponentially. Mr. Montano-Alvarado is also required to preserve the right to litigate the matter in all stages. Continuing the prosecution in this case before *Miller* is adjudicated entails the risk of his case being adjudicated before a ruling on *Miller* is issued, limiting his rights to challenge the conviction under retroactivity limitations.

Moreover, the parties do not seem to disagree on the need of clarification of the extent of 1512(c)(2) after *Miller*. As the Government emphasized in their request for consolidation of *Miller, Fischer* and *Lang*: equity moves the balance in favor of the stay, as clarity is needed to litigate 1512(c)(2). After all, there is no appeal court ruling on the constitutionality of the statute that Mr. Montano-Alvarado is accused of violating, and there will not be one before *Miller*, *Fisher*, and *Lang,* are adjudicated.

Our position is that for the sake of both governmental and judicial economy, time, and resources, this Honorable Court should issue a stay in order to suspend Mr. Montano-Alvarado's case until the pending litigation in *Miller* is resolved and clarifies the constitutionality of 18 U.S.C. § 1512(c)(2). Granting the stay will conserve time and resources for the Court and defense counsel since re-litigation on the constitutionality of the statute will not be necessary following the issuance of *Miller*, *Fisher*, and *Lang*. That is, if the Court of Appeals

determines that 1512(c)(2) is constitutional, Mr. Montano-Alvarado will not move to dismiss that count during the pretrial stage.

On the other hand, the undersigned is aware that this Honorable Court is overloaded with pending trials due to the compounded effect of the COVID pandemic and the influx of cases relating to the Jan 6th event. In accordance with this Honorable Court's inquiry, we requested that our brethren representing other defendants in these cases notify if they would be moving to stay on behalf of their clients until the Court of Appeals rules on *Miller*. Only seven (7) attorneys replied that they are interested in a similar request. Of those seven (7), three (3) are before District Judge Nichols and were detailed by the Government in their status report in this case. *See DE 40, at pp 1-2.*

Holding this matter in abeyance – at the defendant's request – will allow this Honorable Court to better allocate its resources by prosecuting cases of defendants on pretrial detention, those who are not charged with 1512(c)(2) and those who want to continue with their proceedings. In sum, the amount of pending cases related to January 6th also militate in favor of stay in this case.

WHEREFORE, and for the reasons expressed herein, the appearing defendant respectfully requests that this Honorable Court to issue a stay on Mr. Montano-Alvarado's case.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this date, I electronically filed an exact copy of the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the parties of record, or in some other

authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

RESPECTFULLY SUBMITTED.

In Houston, Texas, this 28th day of July, 2022.

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