

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,

v.

ELIAS COSTIANES,

Defendant.

Case No.: 1:21-cr-00180-RJL-1

**DEFENDANT'S SECOND MOTION
TO DISMISS COUNT ONE**

COMES NOW Elias Costianes, by and through undersigned counsel, and, pursuant to Rules 7(c)(1) and 12(b)(3)(B) of the Federal Rules of Criminal Procedure, the Fifth and Sixth Amendments to the United States Constitution and moves this Court to dismiss Count One of the indictment in this case. In support thereof, counsel would state the following.

1. Court One of the indictment against Mr. Costianes alleges that on or about January 6, 2021, he “attempted to, and did, corruptly obstruct, influence, and impede an official proceeding, that is, a proceeding before Congress, by entering and remaining in the United States Capitol without authority and engaging in disorderly and disruptive conduct” in violation of 18 U.S.C. §§ 1512(c)(2) and 2.

2. In *United States v. Miller*, Crim. No. 1:21-cr-00119 (DJN) Judge Nichols of this court dismissed a similar count. In the court’s view, a defendant violates Section 1512(c)(2) only when that individual “take[s] some action with respect to a document, record, or other object in order to corruptly obstruct, impede

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or influence an official proceeding.” Memorandum Opinion (Mem. Op.), ECF 72, at 28.

3. Like *Miller* Mr. Costianes is not alleged to have taken some action with respect to a document, record, or other object in order to corruptly obstruct, impede or influence an official proceeding.

4. Judge Nichols found that there “are two plausible interpretations of the statute: either §1512(c)(1) merely includes examples of conduct that violates §1212(c)(2) or §1512(c)(1) limits the scope of §1512(c)(2). The text, structure, and development of the statute over time suggest that the second reading is the better one. But the first is, at a minimum, plausible.” (Mem. Op. at 28). The Court found a “serious ambiguity” in the statute the court noted that “courts have ‘traditionally exercised restraint in assessing the reach of a federal criminal statute.’” Citing *United States v. Aguilar*, 515 U.S. 593, 600 (1995) and have “constru[d] penal laws strictly and resolve[d] ambiguities in favor of the defendant.” Citing *United States v. Nasir*, 17 F.4th 459, 473 (3rd Cir. 2021) (Bibas, J., concurring) (citing “*Liparota v. United States*, 471 U.S. 419, 427 (1985). The court concluded that §1512(c)(2) must be interpreted as limited by subsection (c)(1), and that the defendant must have taken some action with respect to a document, record, or other object in order to corruptly obstruct, impede or influence an official proceeding.¹

¹ Other members of this court have reached different conclusions. See, for example in *United States v. Caldwell*, No. 21-cr-28, 2021 WL 6062718 (D.D.C. Dec. 20, 2021), the Honorable Amit P. Mehta concluded that Section 1512(c)(2) is not “limited” to conduct “affecting the integrity or availability of evidence in a proceeding.” Id. at *11. *United States v. Mostofsky*, No. 21-cr-138, 2021 WL 6049891 (Dec. 21, 2021), *United States v. Nordean*, 21-cr-175, 2021 WL 6134595 (D.D.C. Dec. 28, 2021), *United States v. Montgomery*, 21-cr-46, 2021 WL 6134591 (D.D.C. Dec. 28, 2021).

WHEREFORE, counsel respectfully requests this Honorable Court dismiss Count One of the indictment against him.

Dated: April 15, 2022

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