

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

UNITED STATES OF AMERICA)

)

)

v.

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Case No. 21-cr-226 (CRC)

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CHRISTOPHER MOYNIHAN)

Defendant.)

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**REPLY TO GOVERNMENT’S OPPOSITION
TO DEFENDANT’S MOTION FOR RELEASE PENDING APPEAL**

Defendant Christopher Moynihan respectfully submits this reply supporting his motion for release pending appeal. As noted in his original motion, Mr. Moynihan should be granted release on appeal given the Supreme Court’s decision to grant a petition for a writ of certiorari in *Fischer v. United States*, No. 23-5572, 2023 WL 8605748 (U.S. Dec. 13, 2023). In his filing, Mr. Moynihan explained in detail why he satisfies the criteria for release on appeal—he poses no flight or safety risk, his appeal is not for the purpose of delay, and his appeal now raises a substantial question of law that, if decided in his favor, would likely result in a reduced sentence that would expire before his appeal concludes.

The government, however, has filed an opposition making two arguments: First, it argues that *Fischer* will have no affect on Mr. Moynihan’s conviction under 18 U.S.C. § 1512(c)(2). He is guilty of obstructing justice under any interpretation

of (c)(2)’s “otherwise” provision, the government argues, because he obstructed justice by “taking action ‘with respect to a document, record, or other object.’” ECF 69 at 3. Alternatively, the government argues that Mr. Moynihan has failed to show that a reversal in *Fischer* would likely result in a reduced sentence because the Court “could” impose consecutive sentences on his misdemeanor convictions up to 21 months’ imprisonment or would be “justified” in imposing a 14-month sentence (the approximate time Mr. Moynihan would have served if he remained incarcerated and the Supreme Court decides *Fischer* on June 1, 2024). *Id.* at 5-7. Neither argument is compelling.

A. A reversal in *Fischer v. United States* would require Mr. Moynihan’s conviction under 18 U.S.C. § 1512(c)(2) to be vacated.

If the Supreme Court decides in *Fischer* that the “otherwise” provision in § 1512(c)(2) requires “acts of evidence impairment,” *Fischer* Pet. for Writ of Cert. at 13, as Judges’ Nichols and Katsas determined and as the defendant in *Fischer* has argued, *id.* at 17-18, Mr. Moynihan will be not be guilty of a violation of § 1512(c)(2) because he did not undertake any acts of evidence impairment. On January 6, 2021, he “rifled” through papers in a Senator’s desk and used his cellphone to take pictures of two pages. ECF 43 at 8 (Statement of Facts for Stipulated Trial); ECF 50 at 2, 17 (Government’s Sentencing Memorandum). Rifling through and photographing the two documents did not impair them, however; he did not steal, alter, destroy, mutilate, conceal, falsify, or impair the documents in any manner. Because he did

not impair any evidence, the anti-shredding provisions of the Corporate Fraud and Accountability Act of 2002, 18 U.S.C. § 1512(c), do not apply to him.

Nor did the government allege in the indictment, or at the stipulated trial, or at sentencing, that Mr. Moynihan impaired evidence. If it had believed that he impaired evidence by looking at documents in a Senator's desk, or photographing two pages from the desk, it would have charged him under § 1512(c)(1) (penalizing those who alter, destroy, mutilate, or conceal a record, document, or other object) and it would have sought a sentencing enhancement under USSG § 2J1.2(b)(3) for an offense involving the "destruction, alteration, or fabrication" of records or documents. Instead, the government sought and obtained a conviction for the same conduct that it sought and obtained convictions for hundreds of other January 6 defendants: Disorderly (and, as to others but not Mr. Moynihan, sometimes violent) behavior that caused the vote-counting to be delayed. *See* ECF 52 at 13 (Government's Response to Defendant's Memorandum in Aid of Sentencing) (Moynihan obstructed justice by "willfully and knowingly caused a significant delay in the certification").

B. The Court should reject the government's argument that a reversal in *Fischer* would not likely lead to a reduced sentence for Mr. Moynihan.

Mr. Moynihan is entitled to an appeal bond because the *Fischer* issues, if they prevail, are likely to result in a reduced sentence to a term of imprisonment less than

the term of imprisonment already served plus the expected duration of the appeal process.

The government does not dispute that if *Fischer* is reversed, Mr. Moynihan's new Sentencing Guideline range would be 4-10 months and that Mr. Moynihan has already served more than ten months after having surrendered on March 29, 2023.

The government argues that even if the Supreme Court reverses in *Fischer*, Mr. Moynihan "cannot show this would be 'likely' to lead to 'a reduced sentence to a term of imprisonment less than the total of the time already served plus the expected duration of the appeal process,'" because "the Court *could* readily find at a resentencing, in light of the aggravating facts, that it would be appropriate to run defendant's sentences on his other Counts at least partially consecutively." ECF 69 at 5 (emphasis supplied). This argument has several flaws.

First, "could" is not the standard. The Court "could" resentence Mr. Moynihan to a term of imprisonment at the bottom of the guideline range (4 months) or to no term of imprisonment at all. What matters is whether after his sole felony conviction is vacated, his new sentence on the remaining misdemeanors would "likely to result in" a reduced sentence less than the time already served plus the expected duration of the appeal process. 18 U.S.C. § 3143(b)(2)(B).

Second, there are no "aggravating facts." Mr. Moynihan did not himself breach any police line. He was not among the first to enter the Capitol building when

it was breached at 2:00 p.m.; he entered at 2:40 p.m. PSR ¶¶ 10, 15. He did not commit any act of violence. He did not damage any property. He did not taunt, harass, threaten, or harm law enforcement officers. For those reasons, the PSR, the parties, and the Court agreed that he could not be assessed an 8-level enhancement under USSG § 2J1.2(b)(1)(B) for an offense that “involved causing or threatening to cause physical injury to a person, or property damage, in order to obstruct the administration of justice.” ECF 50 at 23 (Government’s Sentencing Memorandum); PSR ¶¶ 34-42. Mr. Moynihan did not steal any property. He did not carry a dangerous weapon. He was not part of any organization promoting falsehoods about the 2020 election or advocating violence. He did not use social media platforms to incite unrest before or after January 6, 2021, or to claim that he was unfairly prosecuted. He accepted responsibility by pleading guilty to Counts 2-5, and agreeing to a stipulated trial on Count One for the purpose of preserving the § 1512(c)(2) issue for appeal. He did not thereafter repudiate his guilty plea.

This is not a defendant for whom a 210% increase above the top of the guideline range to 21 months is appropriate. Nor is it a defendant for whom a 40% increase above the top of the guideline range to 14 months is appropriate. See ECF 69 at 6.

Third, it is “likely” that the Court would *not* impose an above-guideline sentence. In fact, the opposite is true: Nationwide, statistics reveal that only a tiny

percentage of federal sentences are the result of upward departures or variances. *See* USSG 2022 Sourcebook, at Table 29 (upward departures are only 0.6% of federal sentences, while upward variances are only 2.3%) *available online at* <https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2022/Table29.pdf>. There are no aggravating facts here that would cause the Court sentence Mr. Moynihan above the guideline range.

Finally, as of June 1, 2024, when the government apparently expects the Supreme Court to issue a decision in *Fischer*, Mr. Moynihan will have served 14 months and 9 days' imprisonment.¹ The government's estimation that a 14-month sentence until *Fischer* is decided would be "justified" fails to account for "the expected duration of the appeal process" as required by § 3143((b)(2)(B)(iv). ECF 69 at 6. Mr. Moynihan's appellate issues cannot be briefed overnight. In the usual course, an appellant is given 60 days from the date on which the transcripts are completed or an issue is decided in which to file an opening brief, the government is given 30 days to respond, and the appellant is give 21 days to reply. Then the case is set for oral argument on a date between September and mid-May, and is decided sometime thereafter. Even if Mr. Moynihan can "renew this motion," after a

¹ The government offers no support for its assumption that the Supreme Court will decide *Fischer* on the first day of June, 2024. In any event, Mr. Moynihan will have served 14 months and 9 days' imprisonment on the first day of June and 15 months and 8 days' imprisonment on the last day of June.

favorable decision in *Fischer*, ECF 69 at 6 n.1, briefing such a motion post-*Fischer* will take time, especially because the government appears poised to argue that a reversal in *Fischer* on any ground will not affect Mr. Moynihan's § 1512(c)(2) conviction.

The purpose of an appeal bond derives from society's recognition that a person should not have to serve out imposed prison time that ultimately may not be required, because once served, it can never be given back. If a substantial question of law or fact exists on appeal that carries a likelihood that a person may serve unnecessary time in prison, an appeal bond is appropriate to prevent that. And indeed, it is not only appropriate, but also mandatory. 18 U.S.C. § 3143(b)(1). For these reasons, Mr. Moynihan respectfully moves for release pending appeal.

Respectfully submitted,
A. J. KRAMER
FEDERAL PUBLIC DEFENDER

/s/

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