

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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| UNITED STATES OF AMERICA, |) | |
| |) | |
| v. |) | Case No. 1:21-cr-138-JEB |
| |) | |
| AARON MOSTOFSKY, |) | |
| |) | |
| Defendant. |) | |
| |) | |

**DEFENDANT MOSTOFSKY’S NOTICE OF RECENT GOVERNMENT OFFER TO
DROP CHARGES UNDER § 1512(c)(2) IN JANUARY 6 CASE**

Defendant Mostofsky has filed a chart showing that, over 85 times, the government has been a party to agreements pursuant to which January 6 defendants pled guilty to Title 40 misdemeanor-in-the-Capitol-Building offenses but not to a felony offense under 18 U.S.C. § 1512(c)(2). ECF No. 63. He pointed out that many of those 85 cases, which all concerned defendants who entered the Capitol Building, involved conduct more serious than Mostofsky’s. *Id.* These examples went to his vagueness doctrine argument that the government’s interpretation of § 1512(c)(2) provides no notice as to when conduct that constitutes a six-month-maximum Title 40 misdemeanor offense somehow transforms into a 20-year-maximum obstruction-of-justice felony offense. *Id.*

Yesterday, AUSA Lindberg, the prosecutor assigned to Mostofsky’s case, advised another judge in this Court that the government has offered to drop § 1512(c)(2) charges against two more January 6 defendants if they agree to plead guilty to Title 40 misdemeanor offenses. *United States v. Marissa Suarez, Patricia Todisco*, 21-cr-205-DLF (D.D.C. 2021). As the Court knows, current DOJ policy is that the prosecutor should seek a plea to the most serious readily provable offense charged. Justice Manual, § 9-27.400. Yet AUSA Lindberg’s offer to dismiss

the § 1512(c)(2) charges in *Suarez* and *Todisco* marked nearly the twentieth occasion in the January 6 cases in which the government has proposed abandoning its novel theory of obstruction of justice. In merits briefing the government says this is an unambiguously correct reading of § 1512(c)(2).

Here is what the criminal complaint alleged about defendants Suarez and Todisco. The defendants entered the Capitol Building together on January 6. 21-cr-205, ECF No. 1-1, p. 7. Throughout the intrusion they are captured on film. *Id.* Entering the building through the same door as Mostofsky, Suarez said, “Oh [Todisco], oh shit, oh shit, yo, this is what they fucking wanted, this is what they fucking wanted, this is what they get.” *Id.* The defendants chanted, “Stop the steal!” and “Our house!”

Video footage depicts Todisco walking around the office of Senator Jeffrey Merkley. 21-cr-205, ECF No. 1-1, p. 14. Items were stolen, damaged and destroyed in the senator’s office that day. *Id.*

The defendants sent the following texts from their phones on January 6:

- “So we’ve stormed Capitol Hill lol” (3:20 p.m.);
- “We’re inside hahaha” (3:26 p.m.);
- “This is insane” (5:40 p.m.).

The next day, on January 7, the defendants sent the following texts:

- “When we found out Pence fucked us, we all stormed the Capitol building and everyone forced entry and started breaking shit.”
- “The metro police blocked off the statues and tried pushing us out but most of them were cool. I had words with a dick cop.”
- “The smoke alarms were going off bc everyone was smoking pot and then people started drinking.”
- “Pelosi and Pence snuck out via Secret Service and everyone else was ducking in their

lounge like we had guns even though we didn't.”

On October 25, Mostofsky's counsel asked AUSA Lindberg why the § 1512(c)(2) charge would be dismissed in *United States v. Marissa Suarez, Patricia Todisco* but not in Mostofsky's case. The government did not respond.

Dated: October 26, 2021

Respectfully submitted,

/s/ David B. Smith

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Certificate of Service

I hereby certify that on the 26th day of October, 2021, I filed the foregoing notice with the Clerk of Court using the CM/ECF system, which will send a notification of such filing (NEF) to the following CM/ECF user(s):

Graciela Lindberg
Assistant United States Attorney
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Washington, D.C. 20530

And I hereby certify that I have mailed the document by United States mail, first class postage prepaid, to the following non-CM/ECF participant(s), addressed as follows: [none].

/s/ David B. Smith

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