UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA	:	
	:	**CASE NO. 21-cr-176 (CJN)**
v.	:	
	:	
STEVE OMAR MALDONADO,	:	
	:	
Defendant.	:	

GOVERNMENT MOTION REGARDING DISTRICT COURT'S JURISDICTION AND PROCEDURE DURING INTERLOCUTORY APPEAL

I. Introduction

Pursuant to the Court's April 20, 2023, minute order, the government submits this pleading addressing the proper procedure for reinstating Count One of the indictment, which charges defendant Steve Omar Maldonado with violating 18 U.S.C. § 1512(c)(2). In sum, the Court lacks jurisdiction to take action with respect to that charge while the government's appeal from the Court's order dismissing Count One remains pending. If and when the appeal is resolved in the government's favor, the Court should enter an order reinstating Count One.

II. Background

On March 3, 2021, a grand jury issued an indictment charging Maldonado with numerous crimes arising from his participation in the January 6, 2021, attack on the United States Capitol (Indictment (ECF No. 9)). As relevant here, Count One of the indictment charged:

> On or about January 6, 2021, within the District of Columbia and elsewhere, **STEVE OMAR MALDONADO**, 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.
>
> (**Obstruction of an Official Proceeding and Aiding and Abetting**, in violation of Title 18, United States Code, Sections 1512(c)(2) and 2)

(*Id.* at 1).

On November 9, 2022, Maldonado moved to dismiss this charge (Motion to Dismiss Obstruction Count (ECF No. 44)). The sole argument advanced by Maldonado was that Count One should be dismissed "for the reasons set forth in the district court's recent opinion" in *United States v. Miller*, 589 F. Supp. 3d 60 (D.D.C. 2022) (Motion Dismiss at 1). On January 12, 2023, the Court granted Maldonado's motion to dismiss "for the reasons set forth in" *Miller* (1/12/23 Order (ECF No. 50)). The United States timely appealed that order on February 7, 2023 (Notice of Appeal (ECF No. 52)). The government's appeal is currently being held in abeyance pending issuance of the mandate in *Fischer*, after which the parties will have 30 days to file motions to govern future proceedings (4/17/23 Order, *United States v. Maldonado*, No. 23-3016 (D.C. Cir.)).

III. Argument

The Court lacks jurisdiction to take any action with respect to Count One. "The filing of a notice of appeal is an event of jurisdictional significance -- it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal." *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982); *see, e.g.*, *United States v. Hallford*, 816 F.3d 850, 855 n.4 (D.C. Cir. 2016) (quoting same). "The district court does not regain jurisdiction over those issues until the court of appeals issues its mandate." *United States v. DeFries*, 129 F.3d 1293, 1302 (D.C. Cir. 1997). Because Count One is the subject of this Court's dismissal order and the government's appeal from that order, the Court lacks jurisdiction to take action with respect to it at this time.

The D.C. Circuit's opinion in *DeFries* underscores the significance of this jurisdictional rule. There, the district court dismissed a mail-fraud count and the government filed an interlocutory appeal. *DeFries*, 129 F.3d at 1302. The court of appeals issued an opinion reversing

the dismissal of the mail-fraud charge but withheld issuance of the mandate. *Id.* The district court nonetheless began trial, and the court of appeals issued the mandate a week later. *Id.* The trial ultimately "took several months, consuming thousands of hours of court and lawyer time." *Id.* at 1303. After being convicted of mail fraud, the defendants appealed and the court of appeals reversed their convictions because "[t]he district court . . . lacked jurisdiction over the . . . mail fraud count when it proceeded to trial[.]" *Id.* The D.C. Circuit explained: "That we ultimately sustained the district court's jurisdiction in this case is of no moment; district court jurisdiction cannot turn on retrospective examination of appeals court action. Where, as here, our mandate had not issued, the district court lacked jurisdiction to proceed with trial whether we later sustained its jurisdiction or not." *Id.*

Functionally, the government's understanding of what will happen procedurally is as follows. The mandate in *United States v. Fischer*, No. 22-3038, __ F.4th __, 2023 WL 2817988 (D.C. Cir. Apr. 7, 2023), will not issue "until seven days after disposition of any timely petition for rehearing or petition for rehearing en banc" (4/7/23 Order, *United States v. Fischer*, No. 22-3038 (D.C. Cir.)). On April 25, 2023, the defendants in *Fischer* filed a petition for panel rehearing; the government's response is due May 11 (4/26/23 Order, *United States v. Fischer*, No. 22-3038 (D.C. Cir.)). Once the mandate in *Fischer* issues, the parties will have 30 days to file motions in the D.C. Circuit to govern future proceedings in the appeal in this case (4/17/23 Order, *United States v. Maldonado*, No. 23-3016 (D.C. Cir.)). Assuming no substantive change to the *Fischer* opinion, the government expects that it will file a motion for summary reversal—this Court's order dismissing Count One was based solely on the reasons set forth in its opinion in *Miller*, which the D.C. Circuit reversed, "conclud[ing] that the district court erred in dismissing the counts charging each [defendant] with Obstruction of an Official Proceeding under 18 U.S.C. § 1512(c)(2). [The

defendants'] alleged conduct falls comfortably within the plain meaning of 'corruptly . . . obstruct[ing], influenc[ing], or imped[ing] [an] official proceeding, or attempt[ing] to do so.'" *Fischer*, 2023 WL 2817988, at *16.

In any event, regardless of what happens in *Fischer*, only after the government's pending appeal in this case is resolved and the mandate in this case issues may the Court take any action with respect to Count One. *See DeFries*, 129 F.3d at 1303 ("Because 'jurisdiction is the power to act,' it is essential that well-defined, predictable rules identify which court has that power at any given time.") (quoting *Kusay v. United States*, 62 F.3d 192, 194 (7th Cir. 1995)); *see also United States v. Anderson*, 545 F.3d 1072, 1080 n.8 (D.C. Cir. 2008) (vacating order reducing defendant's sentence entered after defendant noticed an appeal). If the D.C. Circuit reverses this Court's dismissal of Count One, the Court should issue an order reinstating that charge. *See, e.g.*, *United States v. Espy*, 145 F.3d 1369, 1374 (D.C. Cir. 1998) ("we remand to the district court and order Counts 26-28 reinstated").

At that point, the defense can raise any additional objections to Count One it believes are appropriate at the motion to dismiss stage—if there are any.[1] *See United States v. Munchel*, No.

[1] Any attempt at this time to resolve questions with regard to Count One would be improper, not just because the Court lacks jurisdiction over that (currently dismissed) count, but also because any other questions about Section 1512(c)(2) are not ripe for adjudication. As the Supreme Court has made clear, "[a] claim is not ripe for adjudication if it rests upon 'contingent future events that may not occur as anticipated, or indeed may not occur at all.'" *Texas v. United States*, 523 U.S. 296, 300 (1998) (quoting *Thomas v. Union Carbide Agric. Products Co.*, 473 U.S. 568, 581 (1985)) (some quotation marks omitted). The eventual reinstatement of Count One is just that. Any decisions the Court were to make about Count One at this time would thus be improper advisory opinions. "'[T]he oldest and most consistent thread in the federal law of justiciability is that the federal courts will not give advisory opinions.'" *Flast v. Cohen*, 392 U.S. 83, 96 (1968) (quoting C. Wright, Federal Courts 34 (1963)). Courts "do not sit to decide hypothetical issues or to give advisory opinions about issues as to which there are not adverse parties before [them]." *Princeton Univ. v. Schmid*, 455 U.S. 100, 102 (1982). For all of these reasons, the government requests that the Court take no action to reinstate Count One or to make any other decisions about it until the

1:21-CR-118-RCL, 2023 U.S. Dist. LEXIS 67141, at *15 (D.D.C. April 18, 2023) ("The indictment here uses language tracking the statute and alleges that the defendants 'attempted to, and did, corruptly obstruct, influence, and impede an official proceeding.' . . . That is sufficient."); *United States v. Gossjankowski*, No. 21-0123 (PLF), 2023 WL 130817, at *9 (D.D.C. Jan. 9, 2023) ("Finally, as this Court and other judges in this district have concluded, Section 1512(c)(2) is not unconstitutionally vague on its face."); *United States v. Bingert*, 605 F. Supp. 3d 111, 123 (D.D.C. 2022) ("The district courts have uniformly held that the certification of the Electoral College was an official proceeding and that the term 'corruptly' is not unconstitutionally vague."). If the parties proceed to trial on Count One, the Court can resolve any remaining issues when crafting jury instructions or ruling on a motion for judgment of acquittal. *See, e.g.*, *United States v. McHugh*, 583 F. Supp. 3d 1, 10 (D.D.C. 2022) ("In deciding a motion to dismiss an indictment, the question before the Court is a narrow one, and the court will neither review the sufficiency of the evidence against the defendant nor craft jury instructions on the elements of the crimes charged.") (cleaned up).

Respectfully submitted,

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D.C. Circuit reverses the Court's dismissal of that count and issues its mandate in this case, assuming that occurs.