UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA	:	
	:	
v.	:	**No. 21-cr-626 (PLF)**
	:	
DEREK COOPER GUNBY,	:	
	:	
Defendant.	:	

GOVERNMENT'S OPPOSITION TO
DEFENDANT'S MOTION TO STAY SENTENCING

On December 22, 2023, this Court directed the parties to submit joint or individual status reports "advising the Court how each party wishes to proceed with sentencing in view of the Supreme Court's grant of certiorari in *United States v. Fischer*." Minute Order (Dec. 22, 2023). On January 16, 2024, Defendant filed a "Motion to Stay Proceedings Pending U.S. Supreme Court Decision in United States v. Fischer" ("Motion to Stay"). ECF 124. The United States of America respectfully opposes Defendant Derek Cooper Gunby's Motion to Stay and submits that the sentencing of Defendant Gunby should proceed as scheduled on March 1, 2024, on all counts.

In *United States v. Fischer*, 64 F.4th 329 (D.C. Cir. 2023), *cert. granted* 23-4472, the Supreme Court will consider the interpretation of the statute criminalizing obstruction of an official proceeding, 18 U.S.C. § 1512(c)(2), which is one of the five crimes for which Gunby was convicted by jury trial on November 13, 2023. As discussed below, a stay in this case is not warranted. Accordingly, this Court should deny Gunby's Motion to Stay and proceed with the March 1, 2024 sentencing date and accompanying deadlines for sentencing memoranda set out in this Court's November 13, 2023 Minute Entry. *See* Minute Entry (November 13, 2023).

I. Procedural History

Gunby joined a crowd of rioters that stormed the U.S. Capitol on January 6, 2021, and interrupted a Joint Session of the United States Congress assembled to certify the Electoral College vote regarding the 2020 Presidential Election. The FBI arrested Gunby on August 10, 2021, in South Carolina. In October 2021, the government filed a four-count information against Gunby. On August 30, 2023, the grand jury returned a five-count superseding indictment, including one count of obstruction of an official proceeding, in violation of 18 U.S.C. § 1512(c)(2). On October 31, 2023, jury selection for Gunby's jury trial before this Court began. On November 13, 2023, the jury returned a verdict finding Gunby guilty of all five charged counts.

On December 13, 2023, the United States Supreme Court granted certiorari in *United States v. Fischer*, 64 F.4th 329 (D.C. Cir. 2023), *cert. granted* 23-5572. On December 22, 2023, this Court directed the parties to submit joint or individual status reports by January 16, 2024 "advising the Court how each party wishes to proceed with sentencing in view of the Supreme Court's grant of certiorari in *United States v. Fischer*." Minute Order (Dec. 22, 2023). On January 16, 2024, Gunby filed the Motion to Stay. ECF 124. Accordingly, the government hereby submits this opposition to the Defendant's motion to stay the proceedings, and requests that this opposition also serve as the government's status report.

II. Legal Standard

When evaluating whether to issue a stay, "a court considers four factors: '(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.'" *Nken v. Holder*, 556 U.S. 418, 426 (2009) (quoting *Hilton v. Braunskill*, 481 U.S. 770, 776

(1987)). The third and fourth factors "merge" when a party moves for a stay against the government. *Id.* at 435. A stay "'is not a matter of right, even if irreparable injury might otherwise result.'" *Id.* at 433 (quoting *Virginian Ry. Co. v. United States*, 272 U.S. 658, 672 (1926)). The party seeking the stay bears the burden of "mak[ing] out a clear case of hardship or inequity in being required to go forward, if there is even a fair possibility that the stay for which he prays will work damage to some one else." *Landis v. North American Co.*, 299 U.S. 248, 255 (1936).

III. Argument

The Court should proceed with sentencing as scheduled on March 1, 2024 because the relevant factors all weigh against staying the proceedings. First, the fact that the Supreme Court granted certiorari in *Fischer* does not establish that Gunby is likely to succeed on the merits of any challenge to his Section 1512(c)(2) conviction. At this time, a panel of the D.C. Circuit and every district court judge but one has agreed with the government's interpretation of that statute. *See Fischer*, 64 F.4th at 338 ("Although the opinions of those district judges are not binding on us, the near unanimity of the rulings is striking, as well as the thorough and persuasive reasoning in the decisions. . . . The district judge in the instant case stands alone in ruling that § 1512(c)(2) cannot reach the conduct of January 6 defendants."). The mere fact that the Supreme Court agreed to hear *Fischer* does not indicate that those opinions were wrongly decided. *See, e.g.*, *Heath v. Jones*, 941 F.2d 1126, 1131 (11th Cir. 1991) ("[T]he grant of certiorari does not necessarily indicate that the position advocated by Heath has any merit, only that it is an important question."). Moreover, one Circuit judge has explained how, even were the Supreme Court to require proof of tampering with evidence or documents, defendants who obstructed the certification could still be convicted. *See Brock v. United States*, No. 23-3045, 2023 WL 3671002, at *2–3 (D.C. Cir. May 25, 2023) (per curiam) (Millet, J., concurring) (Defendant's "conduct necessarily obstructed the handling,

submission, processing, and congressional consideration of the evidence of each State's electoral votes" because it interfered with the counting of ballots.). Were every criminal case stayed while a potentially applicable issue was litigated on appeal in a separate case, the criminal justice system would grind to a halt. *Fischer* and other cases challenging the application of 18 U.S.C. § 1512(c)(2) have been pending for some time, and such developments did not previously merit a broad stay. Nothing has changed by virtue of the Supreme Court's decision to grant certiorari in *Fischer*.

Additionally, it is unlikely that any decision in *Fischer* would be issued by the Supreme Court before the end of its term in June of 2024. That would be nearly three-and-a-half years after the commission of the offenses on which Gunby was convicted, and more than seven months after the jury found Gunby guilty in November 2023. Delaying the sentencing for another three months or more would undermine the interests of the public in the timely adjudication of a case of great significance.

A further lengthy delay of sentencing for Gunby would also afford him an unfair advantage not granted to other similar January 6 defendants, many of whom were also convicted of obstruction of Congress and whose Sentencing Guidelines calculations and sentences were heavily influenced by the fact that they were convicted of that offense.

Gunby will not suffer any irreparable injury by proceeding with sentencing as scheduled for March 1, 2024. Even were the Supreme Court to decide *Fischer* adversely to the government, it is not clear that the Court's interpretation of Section 1512(c)(2) would necessarily invalidate Gunby's conviction in this case. *See* discussion of *Brock v. United States*, *supra*. And even if it did, the appropriate venue for challenging such a sentence would be a post-sentencing appeal, and not a motion to set aside the verdict. Indeed, a motion for a new trial under Federal Rule of Criminal Procedure 33 would be untimely, as more than 14 days have passed since the verdict in this case,

and changes in the law do not constitute newly discovered evidence for purposes of Rule 33(b)(1)'s three-year timing requirement. *See, e.g.*, *United States v. King*, 735 F.3d 1098, 1108-09 (9th Cir. 2013) ("As we held in *United States v. Shelton*, 459 F.2d 1005 (9th Cir. 1972), a change in the law does not constitute newly discovered evidence for purposes of Rule 33."); *United States v. Olender*, 338 F.3d 629, 635 (6th Cir. 2003) ("Newly discovered evidence does not include new legal theories or new interpretations of the legal significance of the evidence."); *United States v. Bailgey*, No. 92-3845, 1994 U.S. App. LEXIS 29946, at *4 (7th Cir. Oct. 24, 1994) ("A new legal theory does not qualify as newly discovered evidence under Rule 33. . . . We dismiss Bailey's claim as untimely because it does not qualify as newly discovered evidence and it was filed more than seven [now 14] days after his verdict."); *United States v. Blake*, No. 10 CR 349(RPP), 2011 WL 3463030, at *5 (S.D.N.Y. Aug. 5, 2011) ("New legal arguments are not considered newly discovered evidence under Rule 33. . . . Therefore, according to Rule 33, such claims must be brought within fourteen days after the verdict."). Gunby "stands in no different position than any other criminal defendant who loses a pretrial motion attacking an indictment on the ground that the underlying criminal statute is unconstitutional. The district court's order in such a case . . . would be fully reviewable on appeal should the defendant be convicted." *United States v. Cisneros*, 169 F.3d 763, 768-69 (D.C. Cir. 1999).

Moreover, obstruction of Congress was not Gunby's only conviction. Gunby will also be sentenced for entering and remaining in a restricted building or grounds, in violation of 18 U.S.C. § 1752(a)(1); disorderly and disruptive conduct in a restricted building or grounds, in violation of 18 U.S.C. § 1752(a)(2); disorderly conduct in a Capitol building, in violation of 40 U.S.C. § 5104(e)(2)(D); and parading, demonstrating, or picketing in a Capitol building, in violation of 40 U.S.C. § 5104(e)(2)(G), which are all outside the scope of the *Fischer* appeal. Even if the Court

were to assume that Gunby's conviction on Count One is reversed, the Court must still fashion a sentence under the 3553(a) factors for the remaining counts of conviction that addresses the defendant's conduct on that day, including consideration of aggravating circumstances not taken into account by the Sentencing Commission in formulating guidelines for the particular statute. 18 U.S.C. § 3553(a) and (b)(1). As Judge Kelly recently explained, "even if it doesn't meet 1512, wouldn't I be quite entitled -- it would be almost crazy if I didn't, in my view, vary up significantly because there would be no – it's still, I think we can agree, very bad -- a very bad thing if someone tried to obstruct that proceeding." *United States v. Gilbert Fonticoba*, 21-cr-638 (TJK) Sentencing Tr. at 48:6 - 22 (Jan. 11, 2024). Gunby was, in fact, convicted of obstruction of the proceeding *beyond a reasonable doubt* based on trial evidence that included Gunby bluntly stating, "[W]e are trying to storm the Capitol Building. We're taking the country back. You don't get to do this to my country and not suffer consequences" and later, "… enough is enough… We're depending on Mike Pence to do the right thing in certifying this vote? No."

After considering the aggravating circumstances surrounding this crime, the Court should impose a higher sentence well beyond the sentences received by defendants who, for example, pled guilty, accepted responsibility, and were convicted of a sole misdemeanor count for entering into the restricted building or grounds. Indeed, in the event of a reversal on §1512, the government could nonetheless seek a sentence commensurate with the defendant's conduct, which features the defendant's intent and actions to obstruct Congress during a Joint Session to determine the next democratically-elected President of the United States.

Moreover, as a practical matter, assuming that the Court permits Gunby to self-report after sentencing in March, and further assuming that the Court denies a motion for bail pending appeal, Gunby would have only served approximately three months of time before the Supreme Court's

expected decision in mid to late June. Even if the Supreme Court issues an adverse ruling to the government's position, and Gunby were only to be sentenced on the 18 U.S.C. §§ 1752(a)(1) and (a)(2) and 40 U.S.C. §§ 5104(e)(2)(D) and (e)(2)(G) offenses, the government maintains that his guidelines range would be at least 6-12 months[1] (based on offense level 10 and current estimated Criminal History Category I). Accordingly, it is unlikely that Gunby would have served his full sentence on just the §§ 1752(a)(1) and (a)(2) and §§ 5104(e)(2)(D) and (e)(2)(G) convictions by mid-June. And if it does somehow happen that Gunby serves his full sentence on the remaining counts of conviction before the Supreme Court resolves *Fischer*, Gunby could move for release pending appeal at that point under 18 U.S.C. § 3143(b). *See, e.g., United States v. Donovan Crowl,* 21-cr-208 (APM) Dec. 20, 2023 Minute Order (denying motion to stay sentencing pending ruling in *Fischer* and noting that defendant was also set to be sentenced for violation of 18 U.S.C. § 231(a)(3)).

Finally, any potential irreparable injury to Gunby can be addressed via a motion for release pending appeal under 18 U.S.C. § 3143(b)(1). Under that statute, a defendant who has been sentenced to a term of imprisonment "shall . . . be detained" unless the court finds that two separate requirements are met:

> (A) "clear and convincing evidence that the person is not likely to flee or pose a danger to the safety of any other person or the community if released," and
>
> (B) that the appeal "raises a substantial question of fact or law likely to result in—(i) reversal, (ii) an order for a new trial, (iii) a sentence that does not include a term of imprisonment, or (iv) a reduced sentence to a term of

[1] While a reversal of his 1512 conviction would affect the statutory maximum sentence here, it is possible that Gunby's guidelines could remain unchanged. Depending on the ruling in *Fischer,* the government may still be able to argue that Gunby's conviction under 18 U.S.C. § 1752(a)(1) cross references to the obstruction guideline, U.S.S.G. § 2J1.2, because, by a preponderance, Gunby acted with the intent to commit obstruction of an official proceeding. *See* U.S.S.G. 2B2.3(c) (trespass guideline containing cross reference where "the offense was committed with the intent to commit a felony offense").

> imprisonment less than the total of the time already served plus the expected duration of the appeal process."

18 U.S.C. § 3143(b)(1)(A)-(B). A "substantial question" is one that is "a close question or one that very well could be decided the other way." *United States v. Peholtz*, 836 F.2d 554, 555 (D.C. Cir. 1987). Although the government would likely oppose such a motion, the possibility for release pending appeal is another factor favoring keeping the March 1, 2024 sentencing date. The Bail Reform Act – not a stay of the proceedings – is the proper mechanism under which to address any potential prejudice to Gunby. And when considering release under Section 3143(b)(1)(iv) of the Bail Reform Act, the statute directs the Court to order the defendant released only once he has served the amount of time he is likely to serve on the remaining counts of conviction. 18 U.S.C. § 3143(b)(1)(B) ("in the circumstance described in subparagraph (B)(iv) of this paragraph, the judicial officer shall order the detention terminated *at the expiration of the likely reduced sentence*") (emphasis supplied).

For all these reasons, the Court should deny Defendant's Motion to Stay and should proceed with sentencing on March 1, 2024.

Respectfully submitted,

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