UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA	:	
	:	
v.	:	**Case No. 1:21-cr-508 (BAH)**
	:	
LUKE WESSLEY BENDER,	:	
	:	
Defendant.	:	

GOVERNMENT'S OPPOSITION TO DEFENDANT'S
MOTION FOR RELEASE PENDING APPEAL

The United States, by and through its attorney, the United States Attorney for the District of Columbia, respectfully opposes Defendant Luke Bender's motion, ECF 146, which seeks release pending appeal in light of the Supreme Court's decision to grant certiorari in *United States v. Fischer*, No. 23-5572, 2023 WL 8605748 (Dec. 13, 2023). Bender cannot overcome the high barrier for release pending appeal required by 18 U.S.C. § 3143(b). Under the statute, his continued imprisonment is mandatory unless he can establish both (1) by clear and convincing evidence that he does not pose a danger to the community and is not a flight risk, and (2) that the outcome in *Fischer* likely will result in reversal, an order for a new trial, a sentence that does not include a term of imprisonment, or 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. Bender cannot do so, so his motion should be denied.

BACKGROUND

After Defendant Luke Bender participated in the January 6, 2021, attack on the United States Capitol, a federal grand jury returned an indictment charging him with six counts: Obstruction of an Official Proceeding, in violation of 18 U.S.C. § 1512(c)(2) (Count One); Entering and Remaining in a Restricted Building or Grounds, in violation of 18 U.S.C. § 1752(a)(1) (Count Two); Disorderly and Disruptive Conduct in a Restricted Building or

Grounds, in violation of 18 U.S.C. § 1752(a)(2) (Count Three); Entering and Remaining on the Floor of Congress, in violation of 40 U.S.C. § 5104(e)(2)(A) (Count Four); Disorderly Conduct in a Capitol Building, in violation of 40 U.S.C. § 5104(e)(2)(D) (Count Five); and Parading, Demonstrating, or Picketing in a Capitol Building, in violation of 40 U.S.C. § 5104(e)(2)(G) (Count Six). *See* ECF 7. Bender proceeded to a stipulated trial, where this Court found him guilty on all counts. ECF 132. Rejecting Bender's request for a term of supervision and home confinement, rather than imprisonment, the Court imposed a within-Guidelines sentence to reflect the nature and seriousness of his offenses, the need for general and specific deterrence, and to reflect that, at the age of 23, he already attained a Criminal History Category of III. The Court explained at sentencing that a term of imprisonment was warranted because Bender preplanned his crimes (as reflected on social media), anticipated violence prior to January 6, 2021, breached the Senate Floor and ascended the dais, and celebrated his conduct and that of others in the hours following his breach of the Capitol. Accordingly, on April 20, 2023, Bender was sentenced to concurrent terms of imprisonment: 21 months on Count One; 12 months on each of Counts Two and Three; and 6 months on each of Counts Four, Five, and Six. *Id.*

Bender filed a notice of appeal on April 25, 2023, ECF 138, and his opening brief on appeal was filed on September 5, 2023. He argued that (1) he did not act with corrupt intent and therefore his conviction under 18 U.S.C. § 1512(c) was invalid; (2) the Court erred in applying the "substantial interference with justice" enhancement under USSG § 2J1.2(b)(2); and (3) the Court's sentence was substantively unreasonable. Brief for Appellant, *United States v. Bender*, No. 23-3056 (D.C. Cir.). He also noted his intent to preserve his argument made in this Court that "§ 1512(c)(2) does not encompass the conduct at issue in this case." *Id.* at 18. Thereafter, on the government's motion, the U.S. Court of Appeals for the District of Columbia Circuit suspended the briefing schedule and then issued an order on January 16, 2024, holding the appeal in abeyance

pending resolution of three cases that impact Bender's appeal: *United States v. Fischer*, No. 22-3038 (cert. granted Dec. 13, 2023), *United States v. Brock*, No. 23-3045 (argued Sept. 27, 2023), and *United States v. Robertson*, No. 22-3062 (petition for rehearing filed Nov. 22, 2023). The order noted that Bender may seek to mitigate any prejudice from abeyance by seeking release pending appeal pursuant to 18 U.S.C. § 3143(b).

According to Bender's motion, he self-surrendered to serve his 21-month sentence on July 6, 2023. ECF 146 at 2.

LEGAL STANDARD

Under 18 U.S.C. § 3143(b), a defendant who has been sentenced to a term of imprisonment "shall . . . be detained" unless the court finds:

1. "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

2. that the appeal "is not for the purpose of delay and 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 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). The requirements for "reversal" and "an order for a new trial" encompass all counts, not just a single count. *United States v. Perholtz*, 836 F.2d 554, 557 (D.C. Cir. 1988) (explaining that defendants "cannot be released unless the appeal raises a substantial question likely to result in reversal of *all* counts on which imprisonment is imposed") (emphasis added). If a judicial officer finds that a defendant is eligible for release because the appeal is "likely" to result in "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," the remedy is not immediate release; rather, "the judicial officer shall order the detention terminated at the expiration of the likely reduced sentence." 18 U.S.C. § 3143(b)(1)(B). It is the defendant's burden to make the

requisite showing under 18 U.S.C. § 3143(b)(1). *Perholtz*, 836 F.2d at 555-56 (referring to "the required showing on the part of the defendant"); *United States v. Libby*, 498 F. Supp. 2d 1, 3 (D.D.C. 2007).

ARGUMENT

Even assuming that the issue being considered by the Supreme Court in *Fischer* raises a "substantial question," Bender still fails to overcome the high barrier to justify his release from prison. Congress requires that a person like Bender, who has been found guilty of an offense and sentenced to a term of imprisonment, must be detained unless he establishes by clear and convincing evidence that he is not likely to flee or pose a danger to the safety of any other person or the community if released *and* that the appeal is likely to succeed to his material benefit. He has not done so.

First, Bender must show by clear and convincing evidence that he is not a flight risk or a danger to the community. Prior to his sentencing in this case, Bender committed, or was accused of committing, crimes on four occasions resulting in 16 separate state charges. But before the Court imposed a 21-month sentence of imprisonment here, each of the 16 charges resulted in no jail time, a suspended sentence, or had yet to be sentenced. Now, having been incarcerated for nearly seven months, Bender knows the day-to-day reality of confinement in prison. Moreover, two-thirds of his 21-month sentence remains to be served. Having this time hanging over his head may make it more likely that he will decide to flee. Indeed, Bender would not be the first January 6 defendant to flee, abscond, or fail to appear while facing a hefty charge or sentence. *See, e.g.*, *United States v. Worrell*, 21-cr-292 (RCL), ECF 295 (after being detained pending trial and then released, defendant absconded before sentencing); *United States v. Bru*, 21-cr-352 (JEB), ECF 66, June 26-July 6, 2023 Minute Entries; *United States v. Burlew* (RDM), 21-cr-647 (RDM), Nov. 30, 2023, Dec. 8, 2023 Minute Entries; *United States v. Olivia Pollock*, 21-cr-447-5 (CJN), ECF 208, March

6, 2023, May 19, 2023, August 7, 2023 Minute Entries; *United States v. Hutchinson*, 21-cr-447-2 (CJN), April 6, 2023, May 19, 2023, August 7, 2023 Minute Entries; *United States v. Giustino*, 23-cr-16 (JEB), September 29, 2023 Minute Entry; *United States v. Dennison*, 23-cr-32 (TNM), June 5, 2023 Minute Entry; *United States v. Shawndale and Chilcoat*, 22-cr-299, September 5, 2023, September 9, 2023, October 5, 2023, October 6, 2023, October 13, 2023 Minute Entries.

Further, Bender must show by clear and convincing evidence that he is not a danger to the community. At sentencing, the Court recognized that Bender "seems to have matured and grown up a lot over the last few years since his arrest in this case." Sentc'g Hrg. Tr. at 109:21-23. And the Court stated, "I am heartened to see that he got his life back on track, that he has the support of family, that he has matured. He is in a committed marriage. He has goals in his life." *Id.* at 110:11-15. However, we are now in a presidential election year, and during the last such election cycle, Bender demonstrated his approval of violence and mob action to challenge the peaceful transfer of power. Leading up to January 6, Bender's rhetoric showed an actual anticipation of violence—he came to Washington, D.C. to "fight," Gov't Ex. 4.6, and he wasn't "afraid to get dirty if I have to," Gov't Ex. 5.2. On January 6, Bender posted a photo of himself on the way to the Capitol, accompanied by the song "Go to War." Gov't Exs. 4.9, 5.6, 5.7, 5.8. At the Capitol, he endorsed and expressed excitement over joining the mob that, in his words, had "stormed the gates." Gov't Ex. 5.13. And Bender not only entered the Capitol, but chose to enter the Senate floor and ascend the Senate dais—the very place that senators were supposed to be conducting proceedings on the electoral certification. Afterward, Bender was proud of his actions, posting on social media that "[t]oday was something special" and "[i]t was great to be apart [sic] of it." Gov't Ex. 4.11. Under 18 U.S.C. § 3143(b), *Bender* must show by clear and convincing evidence that he

would not be a danger to the community if released, notwithstanding his past actions and ready willingness to join the January 6 riot.

This case is unlike that of Matthew Bledsoe, whose motion for release pending appeal was recently granted by the Court. *See United States v. Bledsoe*, No. 1:21-cr-204-BAH, ECF 260. The Court there found clear and convincing evidence that Bledsoe is unlikely to flee or reoffend pending resolution of his appeal. *Id.* at 7. But those findings were based on the individual facts and characteristics of Bledsoe: unlike Bender, Bledsoe had no criminal convictions within the last ten years, built a business to support and raise his family, was the sole financial provider for his wife and two daughters, and provided evidence that he has been a "model inmate" since self-surrendering. *Id.* at 7, 11. That Bledsoe established the first prong of the § 3143(b) test does not mean that Bender has met his burden here.

In addition, release pending appeal is not appropriate because Bender fails to satisfy the second prong of the test. The mere fact that the Supreme Court agreed to hear *Fischer* does not indicate that it was 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"). Bender's conviction for his violation of 18 U.S.C. § 1512(c)(2) survives under the analysis of the vast majority of judges in this District and the panel majority in *Fischer*. Even assuming *Fischer* raises a "substantial question of law," Bender has not established that a reversal in *Fischer* would "likely" result in reversal of Bender's own § 1512(c)(2) conviction based on the stipulated trial facts. That is, even if the Supreme Court in *Fischer* disagrees with all but one judge of this District and two of the three D.C. Circuit judges, Bender's conviction under § 1512(c)(2) may stand based on the facts elicited at his trial. As Judge Millet persuasively reasoned in her concurrence to an order denying release in a different case, "even the *Fischer* dissenting opinion's narrow reading of Section 1512(c)(2)'s 'otherwise' clause

would seem to reach … efforts to prevent Congress from receiving, processing, and considering the evidence of each State's electoral votes." *United States v. Brock*, No. 23-3045 (D.C. Cir.) (Millet, J., concurring in order entered May 25, 2023). Bender's conduct in participating in the January 6 riot and invading the Senate floor "necessarily obstructed the handling, submission, processing, and congressional consideration of the evidence of each State's electoral votes. It did so just as much as if [Bender] had grabbed a pile of state certificates and run away with them." *Id.* at 2-3.

Further, the Supreme Court's decision in *Fischer* would not result in reversal here on *all* counts. 18 U.S.C. § 3143(b)(1)(B). To start, even if his conviction under § 1512(c)(2) conviction was vacated, it would not undermine his convictions on the other five counts, which consist of two 12-month sentences and three six-month sentences, all concurrent. *See Perholtz*, 836 F.2d at 557 (release pending appeal requires a substantial question likely to lead to reversal "of all counts on which imprisonment is imposed"). Nor has Bender shown that vacatur is likely to lead to a new trial. *See* 18 U.S.C. § 3143(b)(1)(B)(ii).

Bender also has not shown a likelihood of a sentence without imprisonment or a reduced sentence to a term of imprisonment less than the time already served plus the expected duration of appeal, as required by § 3143(b)(1)(B)(iv). Bender claims that vacatur of his § 1512(c)(2) conviction would result in a maximum period of twelve months' incarceration on "the highest misdemeanor offenses," "with a guidelines range at the bottom half of that period of time." ECF 146 at 5. But even assuming that his § 1512(c)(2) conviction was entirely invalidated and no Guidelines cross-reference would become newly applicable, Bender's suggested Guidelines range is incorrect.[1] Based on this Court's prior calculations, as to Count Two, U.S.S.G. § 2B2.3(a)

[1] Even with a reversal of his § 1512(c)(2) conviction, it is possible that Bender's Guidelines range would remain unchanged. Depending on the ruling in *Fischer*, the government may still be able to

applies with a base offense level of 4, which is increased by 2, pursuant to § 2B2.3(b)(1)(A)(vii). *See* Sentc'g Hrg. Tr. at 35-36. As to Count Three, § 2A2.4 applies with a base offense level of 10 and "no other [special offense characteristics] or adjustments." *Id.* at 36. Assuming a 2-point reduction for acceptance of responsibility (*id.* at 36-37), the Counts would group (*id.* at 35), and the applicable offense level would likely be 8. With a criminal history category of III (*id.* at 16), the Court's calculated Guidelines range likely would have been 6 to 12 months. Thus, assuming this Court wholly disregarded Bender's § 1512(c)(2) conviction and otherwise applied the same Guidelines calculations, the sentence that the Court already has imposed here, 12 months' incarceration on Counts Two and Three, still would be a within-Guidelines sentence.

Moreover, Bender has not shown that vacatur of his § 1512(c)(2) conviction would likely result in a reduced sentence to less than the time he already served plus the expected duration of the appeal process. He baldly asserts that he would likely receive a sentence at the bottom of his Guidelines range, and that in other (unspecified) January 6 cases involving only misdemeanors, defendants "consistently" receive "sentences of three months incarceration or less." ECF 146 at 6. But there is no need for prediction here: this Court already sentenced Bender for his misdemeanors, imposing a total sentence of 12 months of imprisonment. ECF 132. He self-reported to the Bureau of Prisons on or about July 6, 2023, ECF 146 at 2, around seven months ago.

A reversal of the § 1512(c)(2) conviction here also could compel the Court to *increase* the aggregate sentence of his misdemeanors. Unlike Bledsoe, Bender had prior convictions resulting in a Criminal History Category of III. He did not build a business to support and raise his family, is not the sole financial provider for a wife and two daughters, and has not presented any evidence

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argue that Bender'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, Bender acted with the intent to commit another felony. *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").

to show that he has been a "model inmate" since self-surrendering. At any resentencing, this Court would be entitled to consider his history and all of Bender's relevant conduct, including his conduct from the vacated obstruction count. *See United States v. Settles*, 530 F.3d 920, 923 (D.C. Cir. 2008). The Court stated at sentencing that Bender's presence and conduct on the Senate floor, "one of the more sensitive spaces in the Capitol[,] . . . differentiates [his] offense conduct from 90 percent of the defendants connected to the January 6 riot at the U.S. Capitol." Sentc'g Hrg. Tr. at 104:25-105:3. The Court thus would be unlikely to entirely ignore this conduct at any resentencing without the § 1512(c)(2) conviction. And although the government did not seek consecutive sentences at the original sentencing, that does not preclude this Court from considering whether its sentence was influenced by the vacated obstruction conviction, and "reconfigure[ing] the sentencing plan" to "effectuate its sentencing intent." *United States v. Blackson*, 709 F.3d 36, 40 (D.C. Cir. 2013); *see also Dean v. United States*, 137 S. Ct. 1170, 1176 (2017) ("[In cases] involv[ing] multicount indictments and a successful attack by a defendant on some but not all of the counts of conviction . . . the Government routinely argues that an appellate court should vacate the entire sentence so that the district court may increase the sentences for any remaining counts up to the limit set by the original aggregate sentence. And appellate courts routinely agree.").

Indeed, at least one judge in this District has held that even without the § 1512(c)(2) conviction, the Court would vary upward to impose the same sentence because the "intent to obstruct the proceeding and the nature of the proceeding itself is so important and so critical in terms of deterrence and all the rest and in terms of the specific fact pattern here that that would be my sentence." *See United States v. Fonticoba*, No. 21-cr-638, Sentc'g Hrg. Tr. at 66-67 (TJK).[2]

[2] Similarly, on January 24, 2024, Chief Judge Boasberg explained that even if the defendant's § 1512(c)(2) conviction was overturned, the sentence would be the same because the Court would vary upward on other counts of conviction and impose the sentences consecutively to achieve the same period of imprisonment. *See United States v. Bru*, No. 21-cr-352 (JEB).

Bender's assumption that he would receive a reduced sentence simply because his felony conviction is vacated is not enough to carry his burden under 18 U.S.C. § 3143(b)(1)(B)(iv).

Nor (as the Court observed at sentencing) is Bender similarly situated to the January 6 misdemeanants he invokes. Bender's conduct was substantially worse—that is why he faced felony charges. After espousing violent rhetoric and an intent to block the peaceful transfer of power, Bender stormed the United States Capitol and penetrated the building all the way to the Senate dais. *See* ECF 93 (Statement of Facts for Stipulated Trial). A three-month sentence here was neither likely nor appropriate.

Even if a reduced sentence was likely, the remedy is not to release Bender now. Instead, § 3143(b) directs the Court to order the defendant released only once he has served the amount of time he is likely to serve upon resentencing. 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 added)). Bender has served fewer than seven months. This fact distinguishes him from Matthew Bledsoe, whom the Court observed, "has served nearly 14 months' imprisonment . . . more than the amount of time to which he likely would be sentenced, absent the Section 1512(c)(2) conviction in Count One." *United States v. Bledsoe*, No. 1:21-cr-204 (BAH), ECF 260 at 11.

In sum, Bender has failed to carry his heavy burden to rebut the presumption of detention at this stage. *See* 18 U.S.C. § 3143(b). His motion for release pending appeal should be denied.

CONCLUSION

For these reasons, the United States respectfully requests that the Court deny the defendant's motion for release pending appeal.

Respectfully submitted,

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