UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA	:	
	:	
v.	:	**Case No. 1:21-cr-508 (BAH)**
	:	
LANDON BRYCE MITCHELL,	:	
	:	
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 Landon Bryce Mitchell's motion, ECF 148, 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). Mitchell 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. Mitchell cannot do so, so his motion should be denied.

BACKGROUND

After Defendant Landon Mitchell 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). Mitchell proceeded to a stipulated trial, where this Court found him guilty on all counts. ECF 134. Rejecting Mitchell's request for a sentence of "12 months and a day or something less than 18 months," Sentc'g Hrg. Tr. at 39:3-4, 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 32, he already attained a Criminal History Category of IV. The Court explained at sentencing that a term of imprisonment was warranted because Mitchell 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, Mitchell was sentenced to concurrent terms of imprisonment: 27 months on Count One; 12 months on each of Counts Two and Three; and 6 months on each of Counts Four, Five, and Six. ECF 134.

Mitchell filed a notice of appeal on May 1, 2023. *United States v. Mitchell*, No. 23-3060 (D.C. Cir.). Following his unopposed motions to extend the time to file his opening brief, the U.S. Court of Appeals for the District of Columbia Circuit, on Mitchell's unopposed motion, suspended the briefing schedule and then issued an order on January 30, 2024, holding the appeal in abeyance pending resolution of *United States v. Fischer*, No. 22-3038 (cert. granted Dec. 13, 2023).

According to Mitchell's motion, he self-surrendered to serve his 27-month sentence on November 1, 2023. ECF 148 at 5.

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," Mitchell still fails to overcome the high barrier to justify his release from prison. Congress requires that a person like Mitchell, 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, Mitchell must show by clear and convincing evidence that he is not a flight risk or a danger to the community. In what seems to be an understatement, Mitchell concedes that he "did not have ideal compliance with his conditions of release" in this case. ECF 148 at 5. In fact, his supervising probation officer reported before sentencing that his adjustment to supervision was "minimal." During the pendency of this case, Mitchell tested positive for amphetamines on at least four occasions, failed to check in with his probation officer on twelve occasions, and failed to attend substance use treatment as directed. Probation requested removal from supervision on three occasions, and he was arrested and charged in Texas with the possession of a controlled substance. Mitchell's compliance with the Court's conditions was so poor that the Court essentially placed him on house arrest, only denying pre-trial detention so that he could continue to attend drug treatment and counseling.

Prior to this case, Mitchell had been convicted on six prior occasions and committed violations of his probationary periods in those cases numerous times, resulting in a Criminal History Category of IV. Moreover, nearly all of his 27-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, Mitchell 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, Mitchell must show by clear and convincing evidence that he is not a danger to the community. At sentencing, the Court recognized that Mitchell, finally, "seems to have matured over the course of supervision by this Court since his arrest in this case." Sentc'g Hrg. Tr. at 110:24 – 111:1. However, we are now in a presidential election year, and during the last such election cycle, Mitchell demonstrated his approval of violence and mob action to challenge the peaceful transfer of power. Leading up to January 6, Mitchell's rhetoric showed an actual anticipation of violence—he posted a message that "I am down for it. If Biden wins, civil war it will be." Later, he commented that "we need to become the law" and posted a meme that stated, "If we don't fight now, there is no point in ever voting again." Afterward, Mitchell was proud of his actions and those of others, posting on social media that he was "absolutely proud" of those who "made their voices heard at the Capitol" on January 6. Under 18 U.S.C. § 3143(b), *Mitchell* 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 Mitchell, 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 Mitchell has met his burden here.

In addition, release pending appeal is not appropriate because Mitchell 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"). Mitchell'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," Mitchell has not established that a reversal in *Fischer* would "likely" result in reversal of Mitchell'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, Mitchell'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). Mitchell'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 [Mitchell] 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 Mitchell shown that vacatur is likely to lead to a new trial. *See* 18 U.S.C. § 3143(b)(1)(B)(ii).

Mitchell 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). Even assuming that his § 1512(c)(2) conviction was entirely invalidated and no Guidelines cross-reference would become newly applicable, Mitchell has served very little of his resulting sentence.[1] Based on this Court's prior calculations, as to Count Two, U.S.S.G. § 2B2.3(a) 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 IV (*id.* at 17), the Court's calculated Guidelines range likely would have been 10 to 16 months.[2] Thus, assuming this Court wholly disregarded Mitchell's § 1512(c)(2)

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

[2] Mitchell states in his motion (ECF 148 at 9 n. 3) that he plans to file a motion for a reduction in sentence based on U.S.S.G. § 4A1.1(e). The government intends to oppose this motion.

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, Mitchell 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. This Court already sentenced Mitchell for his misdemeanors, imposing a total sentence of 12 months of imprisonment. ECF 134. He self-reported to the Bureau of Prisons on or about November 1, 2023, ECF 148 at 5, around three 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, Mitchell had prior convictions resulting in a Criminal History Category of IV. 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 to show that he has been a "model inmate" since self-surrendering. In fact, he routinely violated this Court's conditions of release. At any resentencing, this Court would be entitled to consider his history and all of Mitchell'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 Mitchell'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).[3] Mitchell'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 Mitchell similarly situated to January 6 misdemeanants. Mitchell'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, Mitchell stormed the United States Capitol and penetrated the building all the way to the Senate dais. *See* ECF 95 (Statement of Facts for Stipulated Trial).

Even if a reduced sentence was likely, the remedy is not to release Mitchell 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

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[3] 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).

terminated *at the expiration of the likely reduced sentence*" (emphasis added)). Mitchell has served just over three 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, Mitchell 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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