DOJ'S REPLY MOTION FOR CARL NICHOLS' RECONSIDERATION ON 1512: OTHER JUDGE OTHER JUDGES OTHER JUDGES

I've written two posts on former Clarence Thomas clerk Carl Nichols' outlier ruling rejecting DOJ's use of 18 USC 1512(c)(2) to January 6. (one, two)

Yesterday, they submitted their reply motion. It reads like this:

> Reconsideration of the substantive ruling in Miller is appropriate because that ruling is inconsistent with decisions from **every other judge on this Court** to have considered the issue. That inconsistency means proving a violation of Section 1512(c)(2) requires additional facts in this case (and other Section 1512(c)(2) cases in front of this Court) but not in any case before **any of the other judges of this Court**. Moreover, with one exception, the Court's ruling in Miller did not address the opinions from **other judges of this Court,** some of whom have explicitly disagreed with this Court after Miller issued.
>
> [snip]
>
> As noted in the government's reconsideration motion, **every other judge of this Court** to consider this issue has concluded that Section 1512(c)(2) "prohibits obstruction by means other than document destruction." United States v. Sandlin, No. 21-cr-88, 2021 WL 5865006, at *5 (D.D.C. Dec. 10,

> 2021) (Friedrich, J.); see ECF 75 at 5-6 (citing cases). At the time the reconsideration motion was filed, **one judge had disagreed** with Miller in a footnote, United States v. Puma, 21-cr-454, 2022 WL 823079, at *12 n.4 (D.D.C. Mar. 19, 2022) (Friedman, J.), and **another judge indicated her disagreement with Miller orally** when delivering a "brief ruling" denying a defendant's post-trial motion for judgment of acquittal, see United States v. Reffitt, 21-cr-32, Trial Tr. 1498, 1502-05 (Mar. 8, 2022) (Friedrich, J.) (attached as Exhibit A to the reconsideration motion). Since the reconsideration motion was filed, **judges have continued to reject Miller's reasoning**. See, e.g., United States v. Hughes, No. 21-cr-106, Minute Order denying motion to dismiss count charging Section 1512 (D.D.C. May 9, 2022) (Kelly, J.) (rejecting the "narrow reading" of Section 1512(c)(2) and agreeing with an opinion that "directly responded to and rejected the logic employed in Miller"); United States v. Hale-Cusanelli, No. 21-cr-37, Transcript of motion to dismiss hearing at 4-8 (D.D.C. May 6, 2022) (McFadden, J.)(attached as Exhibit D);United States v. Reffitt, No. 21-cr-32, 2022 WL 1404247, at *7-*10 (D.D.C. May 4, 2022) (Friedrich, J.); United States v. McHugh, No. 21-cr-453, 2022 WL 1302880, at *2-*13 (D.D.C. May 2, 2022) (Bates, J). Although none of those rulings represents "controlling law," McAllister v. District of Columbia, 53 F. Supp. 3d 55, 59 (D.D.C. 2014) (internal quotation marks omitted), it is surely "significant" that this Court stands as the sole outlier among all the judges on this Court to have ruled on the issue both before and after Miller issued.
>
> Two related factors militate in favor of

> reconsideration of the Court's substantive conclusion about the scope of Section 1512(c)(2). First, the **Court in Miller addressed only one of the contrary opinions from judges on this Court**. See Mem. Op. 16, 18 n.8, 22, 26 (citing United States v. Montgomery, No. 21-cr-46, 2021 WL 6134591(D.D.C. Dec. 28, 2021)). Reconsideration would permit the Court the opportunity to consider in full the "persuasive authority" issued by other judges of this Court. See United States v. Drummond, 98 F. Supp. 2d 44, 50 n.5 (D.D.C. 2000) (noting that within-Circuit district court cases are not binding but "[o]f course" are "persuasive authority"). Second, reconsideration resulting in an interpretation consistent with other judges of this Court would ensure that all defendants charged under Section 1512(c)(2) are treated alike until the court of appeals has an opportunity on post-conviction review to consider the merits of their challenges to the statute's scope.
>
> [snip]
>
> Second, Miller argues (Opp. 10-18) that the government "misunderstands" (id. at 10) this Court's textual analysis of Section 1512(c)(2). But the issue is not one of misapprehension; rather, the government (and **every other judge on this Court** to have considered the issue) understands but disagrees with the Court's (and Miller's) interpretation of Section 1512(c)(2)'s reach. [my emphasis]

It uses Garret Miller's response to implicitly attack Carl Nichols and emphasize the degree to which even Nichols' Trump appointed colleagues — first Dabney Friedrich, then Tim Kelly, and finally, the judge most likely to agree with Nichols, Trevor McFadden — have disagreed with

Nichols' thinking.

Guy Reffitt's prosecution is now ripe for appeal, if he still plans on doing that. Or Nichols will choose to adhere to his outlier opinion.

Here's the current tally on obstruction opinions, with McFadden added.

1. Dabney Friedrich, December 10, 2021, Sandlin*
2. Amit Mehta, December 20, 2021, Caldwell*
3. James Boasberg, December 21, 2021, Mostofsky
4. Tim Kelly, December 28, 2021, Nordean; May 9, 2022, Hughes (by minute order), rejecting Miller
5. Randolph Moss, December 28, 2021, Montgomery
6. Beryl Howell, January 21, 2022, DeCarlo
7. John Bates, February 1, 2022, McHugh; May 2, 2022 [on reconsideration]
8. Colleen Kollar-Kotelly, February 9, 2022, Grider
9. Richard Leon (by minute order), February 24, 2022, Costianes; May 26, 2022, Fitzsimons (post-Miller)
10. Christopher Cooper, February 25, 2022, Robertson
11. Rudolph Contreras, announced March 8, released March 14, Andries
12. Paul Friedman, March 19, Puma

13. Thomas Hogan, March 30, Sargent (opinion forthcoming)
14. Trevor McFadden, May 6, Hale-Cusanelli
15. Royce Lamberth, May 25, Bingert