

AMY BERMAN JACKSON GETS A TWO-PAGE FOOTNOTE IN FOR THE APPEAL OF CARL NICHOLS

DOJ announced its long-awaited appeal of Carl Nichols' ruling rejecting DOJ's application of 18 USC 1512(c)(2) to January 6 today (he has granted three motions to dismiss the charge, and DOJ is appealing all three). (Initial ruling; Denial of reconsideration)

Just in time, Amy Berman Jackson joined fifteen of her colleagues in upholding DOJ's application of obstruction to January 6. Here's the footnote she included, responding to Nichols' opinion.

13 One court in this district has come to the opposite conclusion, and it dismissed the 1512(c)(2) count in a January 6 indictment. In *United States v. Miller*, the court found that “there are two plausible interpretations of [18 U.S.C. § 1512(c)(2)]: either § 1512(c)(1) merely includes examples of conduct that violates § 1512(c)(2), or § 1512(c)(1) limits the scope of § 1512(c)(2).” 2022 WL 823070, at *15. The more plausible interpretation, the court reasoned, is the latter, and therefore it found that the indictment failed to allege a violation of 18 U.S.C. § 1512(c)(2). *Id.*; see also Fischer, 2022 WL 782413, at *4 (“The Court recently concluded [in *Miller*] that the word ‘otherwise’ links subsection (c)(1) with subsection (c)(2) in that subsection (c)(2) is best read as a catchall for the prohibitions delineated in subsection (c)(1).”).

The *Miller* court relied heavily on *Begay*

v. United States, 553 U.S. 137 (2008), abrogated on other grounds by Johnson, 576 U.S. 591 (2015), and Yates v. United States, 574 U.S. 528 (2015) (plurality opinion). In Begay, the Supreme Court considered whether drunk driving was a “violent felony” for the purposes of the sentencing provision imposing a mandatory minimum term on an offender with three prior convictions “for a violent felony,” as that term was defined in 18 U.S.C. § 924(e)(2)(B)(ii) (“the term ‘violent felony’ means any crime punishable by imprisonment for a term exceeding one year . . . that— . . . is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another”). The Court concluded that the examples listed before “otherwise” limited the scope of the residual clause to similar crimes, and that drunk driving fell “outside the scope” of the ACCA. Begay, 553 U.S. at 142–48.

The Miller court reasoned that, because “the Begay majority opinion rejected the government’s argument ‘that the word ‘otherwise’ is sufficient to demonstrate that the examples [preceding ‘otherwise’] do not limit the scope of the clause [following ‘otherwise’],” Miller, 2022 WL 823070, at *9 (alterations and emphasis in original), section 1512(c)(1) most likely also limits the scope of section 1512(c)(2). Id. at *9–11.

This Court is not basing its determination on a finding that the mere appearance of the word “otherwise” is sufficient to answer the question and establish that the first clause, section 1512(c)(1), was not meant to serve as a limit on the second clause, section 1512(c)(2). Rather, the Court considered

the language and structure of the statute, and it agrees with the reasoning in the other decisions in this district denying motions to dismiss section 1512(c)(2) counts and rejecting the Miller court's application of Begay. See *McHugh II*, 2022 WL 1302880, at *5–6; *Bingert*, 2022 WL 1659163, at *8.

For one thing, the structure of section 1512(c)(2) does not parallel the structure of the ACCA, and “otherwise” in section 1512(c)(2) does not immediately follow a list of examples. And sections 1512(c)(1) and (c)(2) – which prohibit different types of conduct – do not overlap in the same way that the ACCA clauses overlapped, rendering a conclusion that what follows the term “otherwise” is an extension of the prior provision less likely. Compare 18 U.S.C. § 1512(c), with 18 U.S.C. § 924(e)(2)(B). Indeed, the Supreme Court noted in *Begay* that “the word ‘otherwise’ can (we do not say must . . .) refer to a crime that is similar to the listed examples in some respects but different in others” *Begay*, 553 U.S. at 144 (emphasis in original). As the court observed in *McHugh II*, the way Congress drafted the two provisions indicates that they were intended to target different conduct:

Rather than a continuous list with a general term at the end, § 1512(c) contains two separately numbered paragraphs, with a semicolon and a line break separating the “otherwise” clause in paragraph (c)(2) from the preceding terms in paragraph (c)(1). Furthermore, paragraph (c)(2) is grammatically distinct from paragraph (c)(1). Although the two provisions share a subject and adverb (“whoever corruptly”),

paragraph (c)(2) contains an independent list of verbs that take a different object (“any official proceeding”) from the verbs in paragraph (c)(1) (which take the object “a document, record, or other object”). . . . In short, rather than “A, B, C, or otherwise D,” section 1512(c) follows the form “(1) A, B, C, or D; or (2) otherwise E, F, or G.”

2022 WL 1302880, at *5.

As for Miller’s finding that “[r]eading § 1512(c)(2) alone is linguistically awkward,” 2022 WL 823070, at *6, this is not the case if “otherwise” is read to “‘signal[] a shift in emphasis’ . . . from actions directed at evidence to actions directed at the official proceeding itself.” Montgomery, 2021 WL 6134591, at *12, quoting Tex. Dep’t of Hous. & Cmty. Affs. v. Inclusive Cmty. Project, Inc., 576 U.S. 519, 520 (2015). This is also not the case if “otherwise” is taken to mean “in a different way.” See McHugh II, 2022 WL 1302880, at *4. Under either interpretation, the meaning of the statute is clear: a person can violate section 1512(c)(2) through means that differ from document destruction, and the term “otherwise” does not limit the prohibition in section 1512(c)(2) to conduct described in section 1512(c)(1).

On a quick read, there’s nothing otherwise exceptional in this opinion. She did address Williams’ complaint that others haven’t been charged with obstruction.

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
16. Amy Berman Jackson, June 22, Williams