CHAPTER SEVENTEEN

DELETION OF AUDIO RECORDINGS BY MARK ZWONITZER, MR. BIDEN'S GHOSTWRITER

At some point after learning of Special Counsel Hur's appointment, Mr. Biden's ghostwriter, Mark Zwonitzer, deleted digital audio recordings of his conversations with Mr. Biden during the writing of the book, *Promise Me, Dad.*[1345] The recordings had significant evidentiary value. But Zwonitzer turned over his laptop computer and external hard drive and gave consent for investigators to search the devices. As a result, FBI technicians were able to recover deleted recordings relating to *Promise Me, Dad*. Zwonitzer kept, and did not delete or attempt to delete, near-verbatim transcripts he made of some of the recordings.[1346] He also produced those detailed notes to investigators.

After reviewing available facts, analyzing governing law, and considering the Principles of Federal Prosecution, we decline to bring charges against Zwonitzer related to his deletion of the audio recordings. Charges against Zwonitzer are not appropriate both because the available evidence is insufficient to obtain and sustain a conviction, and because, even if the evidence were sufficient, the Principles of Federal Prosecution do not support any charge in these circumstances.

[1345] "[T]o ensure a full and thorough investigation," the Attorney General's appointment order authorized us to investigate and prosecute "federal crimes committed in the course of, and with the intent to interfere with, the Special Counsel's investigation, such as perjury, obstruction of justice, destruction of evidence, and intimidation of witnesses." 28 C.F.R. § 600.4(a).

[1346] Most of these files were essentially transcripts of the conversations, and Zwonitzer intended and viewed them as such. Zwonitzer 7/31/23 Tr. 74, 96. But in some instances, the files included portions that were more akin to Zwonitzer's notes of conversations rather than near-verbatim transcripts. For simplicity's sake, we refer to these files as transcripts.

I. FACTUAL BACKGROUND

FBI agents contacted Zwonitzer to request an interview and to seek records related to his work ghostwriting two of Mr. Biden's memoirs, *Promise Me, Dad* and *Promises to Keep*. Zwonitzer provided investigators records that included near-verbatim transcripts and some audio recordings. When reviewing these materials, investigators noticed that there were some transcripts for which there was no corresponding audio recording. They then learned from Zwonitzer's attorneys that, before the FBI contacted Zwonitzer, he deleted the recordings of his conversations with Mr. Biden. Zwonitzer then provided all electronic devices that contained or were used to create the recordings and transcripts related to *Promise Me, Dad*.

Zwonitzer stated that at some point he deleted the audio files subfolder from his laptop and external hard drive.[1347] No relevant deleted files were recovered from the laptop. Deleted audio files were recovered from a subfolder on the external hard drive labeled "Audio." Based on the available evidence from the forensic review, we assess that all deleted audio files were recovered from that subfolder.[1348] For three of the recovered files, portions of the audio appeared to be missing, and a fourth file appeared to have portions overwritten with a separate recording.[1349] These results are possible when forensic tools are used to recover deleted files.[1350] For each of these

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[1347] Zwonitzer 7/31/23 Tr. 14-15.

[1348] FBI Operational Technology Division Report, FBI Serial 700.

[1349] FBI Serial 684.

[1350] File carving is a digital forensic process of extracting data from a storage device by scanning the entire storage device at the byte level, including areas not assigned to the file system. Carving can retrieve files that are no longer known to the file system, such as those a user has deleted.

four incomplete or overwritten files, Zwonitzer produced his corresponding transcripts to investigators.[1351] These notes summarized the content of the conversations, two of which were with Mr. Biden and two of which were with Beau Biden's doctor.[1352]

After producing the materials to investigators, Zwonitzer gave two consensual interviews during which he provided relevant information without seeking immunity or any protections or assurances (such as a proffer agreement). Zwonitzer was forthright that he had deleted recordings.[1353] In his words, "I simply took the audio files subfolder from both the G drive and my laptop and slid them into the trash. I saved all the transcripts . . ."[1354] Zwonitzer believed he did this at some point during the period between the end of January 2023 and the end of February 2023.[1355] He took this action before the FBI contacted him about the investigation and requested that he produce evidence.[1356] Zwonitzer explained that at the time he did so, he was "aware" of the Department of Justice investigation of Mr. Biden's potential mishandling of classified materials.[1357] As for why he deleted the audio recordings, Zwonitzer gave the following reasons:

- As a practice, while he saved transcripts of recorded conversations indefinitely, he deleted audio recordings after completing a written work to

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[1351] FBI Serials 315, 336; JRB-07; JRB_02_16_2017; Doctor-02-16-2017; Doctor-03-16-2017.

[1352] FBI Serials 315, 336; JRB-07; JRB_02_16_2017; Doctor-02-16-2017; Doctor-03-16-2017.

[1353] Zwonitzer 7/31/23 Tr. at 14-15.

[1354] *Id.*

[1355] *Id.* at 15.

[1356] *Id.* at 15-16.

[1357] *Id.* at 16.

protect his interviewee's privacy.[1358] Zwonitzer explained that he did not have an established practice as to when he deleted audio recordings; rather, he would do so at convenient points in time, such as when he moved to a new residence or when he happened to notice that he still had audio recordings from past interviews.[1359]

- Zwonitzer had received vague but threatening e-mails from groups hostile to Mr. Biden, and private conversations that included Zwonitzer had been published on the Internet.[1360] Accordingly, Zwonitzer was concerned that his computer could be hacked and the audio recordings of his conversations with Mr. Biden published online.[1361] Those recordings contained personal information, including Mr. Biden's reflections on the death of his son Beau.[1362]

- In January 2023, Zwonitzer had finished working on a book about the capabilities of a cyber-surveillance system called Pegasus.[1363] Zwonitzer stated that he had a "heightened sense of awareness" of the capabilities of Pegasus, which he described as "the most . . . frightful cybersurveillance tool . . . on the market out there right now."[1364] The book discussed how Pegasus was used to spy on people around the world—including heads of state, diplomats, and journalists.[1365] The Pegasus tool could be used to "capture all videos, photos, emails, texts, and passwords – encrypted or not."[1366]

Investigators asked Zwonitzer if he had deleted the recordings because of the special counsel's investigation. Zwonitzer replied that he "was aware that there was an investigation" when he deleted the recordings and continued, "I'm not going to say

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[1358] *Id.* at 15.

[1359] Zwonitzer 7/31/23 Tr. at 22.

[1360] *Id.* at 14.

[1361] *Id.*

[1362] *Id.*

[1363] Zwonitzer 1/4/24 Tr. at 77; Laurent Richard & Sandrine Rigaud, PEGASUS: THE STORY OF THE WORLD'S MOST DANGEROUS SPYWARE (2023) (e-book), https://us.macmillan.com/books/9781250858696/pegasus (last visited Jan. 31, 2024).

[1364] Zwonitzer 1/4/24 Tr. at 77.

[1365] Laurent Richard & Sandrine Rigaud, PEGASUS: THE STORY OF THE WORLD'S MOST DANGEROUS SPYWARE (2023) (e-book), https://us.macmillan.com/books/9781250858696/pegasus (last visited Jan. 31, 2024).

[1366] *Id.*

how much of the percentage it was of my motivation."[1367] When asked whether he deleted the recordings to try and prevent investigators from obtaining them, Zwonitzer said that he did not and further explained, "when I got the subpoena and when I realized that I still had audio that I did not know I had on the laptop, I made sure to preserve that for this investigation."[1368] Zwonitzer also explained that at the time he deleted the recordings, he did not expect the investigation to involve him[1369] and that he did not think the audio recordings contained information relevant to classified information.[1370]

According to Zwonitzer, he decided to delete the recordings on his own; no one told him to do so.[1371] Nor had he been in contact with anyone from Mr. Biden's circle of staff, friends, and confidants about his participation in an interview with the Special Counsel's Office.[1372] Our investigation—which included witness interviews and review of phone and e-mail records—did not uncover any evidence that Zwonitzer had been in contact with anyone about his decision to delete the recordings.

II. THE EVIDENCE IS INSUFFICIENT TO OBTAIN A CONVICTION FOR OBSTRUCTION OF JUSTICE

A. Legal Standard

The two relevant statutory provisions that criminalize the destruction of evidence are 18 U.S.C. § 1512(c)(1) and 18 U.S.C. § 1519. While in practice the proof

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[1367] Zwonitzer 7/31/23 Tr. at 17.
[1368] Zwonitzer 1/4/24 Tr. at 68.
[1369] Zwonitzer 7/31/23 Tr. at 16.
[1370] Zwonitzer 1/4/24 Tr. at 66.
[1371] Zwonitzer 7/31/23 Tr. at 17-22.
[1372] *Id.*

needed to sustain a conviction under either statute is often very similar, the two provisions differ in their elements.[1373]

Section 1512(c)(1), like most federal obstruction statutes, requires proof of a "nexus" or "link" to a specified pending or foreseeable official proceeding.[1374] What constitutes an "official proceeding" is enumerated in a statutory list and includes proceedings before (1) a federal judge or federal court, (2) a federal grand jury, or (3) the United States Congress.[1375] Section 1512(c)(1) also requires proof that the defendant acted "corruptly." And while courts have given slightly different definitions to that term, it generally requires proof that the defendant acted with the purpose of wrongfully impeding the due administration of justice.[1376] Under any formulation, "corruptly" is a heightened *mens rea*.[1377]

[1373] *Compare* 18 U.S.C. § 1512(c)(1); *with* 18 U.S.C. § 1519.

[1374] *United States v. White Horse*, 35 F.4th 1119, 1121-23 (8th Cir. 2022) ("§ 1512(c)(1) requires proof of a nexus between the defendant's action and an official proceeding"); *United States v. Matthews*, 505 F.3d 698, 707-08 (7th Cir. 2007) (applying the nexus requirement to § 1512(c)(1)).

[1375] 18 U.S.C. § 1515(a)(1); *see, e.g.*, *United States v. Young*, 916 F.3d 368, 384-85 (4th Cir. 2019) (applying § 1512(c)(1) to federal grand jury proceeding).

[1376] *See United States v. Akiti*, 701 F.3d 883, 887-88 (8th Cir. 2012); *Matthews*, 505 F.3d at 704-06; Leonard B. Sand & John S. Siffert, MODERN FEDERAL JURY INSTRUCTIONS - CRIMINAL ¶ 46.10 (Matthew Bender & Company, Inc., Release No. 83B 2023).

[1377] The Supreme Court has held that the word is "normally associated with wrongful, immoral, depraved, or evil." *Arthur Andersen LLP v. United States*, 544 U.S. 696, 705 (2005). The various formulations of corruptly amount to the same general requirement of proving a bad purpose. *See, e.g.*, *United States v. Robertson*, 86 F.4th 355, 359-63 (D.C. Cir. 2023) (affirming jury instruction for § 1512(c)(2) charge that defined corruptly as requiring "unlawful means, or act[ing] with an unlawful purpose, or both" and "consciousness of wrongdoing"); *Matthews*, 505 F.3d at 704-06 (purposefully and wrongfully impeding the due administration of justice); *United States v. Delgado*, 984 F.3d 435, 452 (5th Cir. 2021) ("knowingly and dishonestly, with specific intent to subvert or undermine the due administration of justice"); *United States v. Gordon*, 710 F.3d 1124, 1151 (10th Cir. 2013) ("with an improper purpose and to engage in conduct knowingly and dishonestly with the specific intent to subvert, impede or obstruct").

By contrast, Section 1519 permits prosecutions in broader circumstances. For a Section 1519 prosecution, the government need not show a link to a specified proceeding, it need only show the commission of an obstructive act with the intent to impede, obstruct, or influence an investigation that is within the federal government's jurisdiction.[1378] Additionally, Section 1519 does not require proof of corrupt intent, and instead requires proving that the defendant acted "knowingly . . . with the intent to impede, obstruct, or influence." While a defendant must commit the obstructive act knowingly, the defendant does not need to know whether the investigation he intends to obstruct falls under the jurisdiction of the federal government.[1379]

Thus, Section 1519 criminalizes (1) knowingly; (2) altering, falsifying, destroying, mutilating, concealing, covering up, or making a false entry in any record, document, or tangible object; (3) with the intent to impede, obstruct, or influence the investigation or the proper administration of any matter within the jurisdiction of a department or agency of the United States.[1380]

[1378] *United States v. Moyer*, 674 F.3d 192, 209-10 (3d Cir. 2012) (government only required to prove an intent to impede an investigation into "any matter" that is "ultimately proven to be within the federal government's jurisdiction"); *United States v. Gray*, 692 F.3d 514, 519 (6th Cir. 2012) ("[T]he plain language of the statute only requires the Government to prove that [the defendant] intended to obstruct the investigation of *any* matter that happens to be within the federal government's jurisdiction." (alteration in original)); *United States v. Gray*, 642 F.3d 371, 376-377 (2d Cir. 2011) ("[I]n enacting § 1519, Congress rejected any requirement that the government prove a link between a defendant's conduct and an imminent or pending official proceeding.").

[1379] *United States v. Hassler*, 992 F.3d 243, 246-47 (4th Cir. 2021) (so holding and collecting cases).

[1380] *See Hassler*, 992 F.3d at 246-47; *United States v. Hunt*, 526 F.3d 739, 743 (11th Cir. 2008); *United States v. Kernell*, 667 F.3d 746, 756-57 (6th Cir. 2012); Sand & Siffert, above, at ¶ 46.13.

Given that Section 1519 is less burdensome because it does not require proving a nexus requirement or a corrupt intent, we evaluated Zwonitzer's conduct under that provision. A prosecution under Section 1512(c)(1) would fail for the same reasons.

B. The evidence does not support a charge under Section 1519

Zwonitzer admitted, in a consensual, recorded interview, "I simply took the audio files subfolder from both the [external hard] drive and my laptop and slid them into the trash."[1381] Therefore, Zwonitzer knowingly deleted audio files,[1382] but the available evidence cannot establish beyond a reasonable doubt that Zwonitzer did so with the intent to impede, obstruct, or influence this federal investigation.

In his interviews, Zwonitzer offered plausible, innocent reasons for why he deleted the recordings. First, out of concern for privacy, he had a practice of deleting all audio recordings of interviewees in his possession and had done so previously. Second, Zwonitzer was concerned that the materials could be hacked and published online. This concern was increased by his recent work on a book discussing a powerful cyber-surveillance system known to target journalists, among other groups. While Zwonitzer admitted to being aware of the special counsel investigation, he did not say that his goal was to keep evidence from being uncovered by that investigation. Instead, Zwonitzer explained that "when I got the subpoena and when I realized that

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[1381] Zwonitzer 7/31/23 Tr. at 14-15.

[1382] *See Kernell*, 667 F.3d at 756-57 (affirming sufficiency of evidence in Section 1519 conviction where defendant deleted files from his computer and ran a defragmentation program); *United States v. Wortman*, 488 F.3d 752, 753-55 (7th Cir. 2007) (affirming sufficiency of evidence in Section 1519 conviction where woman destroyed a CD containing child pornography that belonged to her boyfriend).

I still had audio that I did not know I had on the laptop, I made sure to preserve that for this investigation."[1383]

Zwonitzer's later actions—including the production to the special counsel of transcripts that mention classified information—suggest that his decision to delete the recordings was not aimed at concealing those materials from investigators. Significantly, Zwonitzer voluntarily consented to two interviews and could have, but did not, invoke the Fifth Amendment to decline to produce the transcripts, his laptop, and the external hard drive. And when FBI agents contacted Zwonitzer, they were unaware that audio recordings existed or where Zwonitzer's electronic devices were located.

Therefore, agents did not have probable cause for a warrant to search those devices and recover the recordings. Investigators only learned of the evidence because Zwonitzer was forthright, explained his actions, produced the relevant electronic devices, and consented to the search of those devices. Zwonitzer's own consensual statement is the only evidence of when he deleted the recordings; without it, investigators would not have learned whether he did so before or after learning of the special counsel's appointment and federal criminal investigation. And while Zwonitzer admitted to being aware of the investigation at the time he deleted the files, the context in which this statement was made—during a consensual and voluntary interview—supports the conclusion that Zwonitzer acted with good faith and did not intend to impede, obstruct, or influence this investigation.

[1383] Zwonitzer 1/4/24 Tr. at 68.

Perhaps most significantly, Zwonitzer preserved near-verbatim transcripts that contain incriminating information about Mr. Biden, including transcripts of the February 16, 2017 conversation where Mr. Biden said he "just found all the classified stuff downstairs." Preserving these transcripts was inconsistent with a motive aimed at impeding the investigation. While there is unique evidentiary value in a subject's own voice as captured on an audio recording, we would expect a person intending to obstruct justice to also conceal or delete the notes that memorialized the same probative information. Zwonitzer could have just as easily "slid" the files containing the notes into the trash as he had done with the audio recordings. Instead, he preserved the transcripts and produced them to investigators. And he later produced the devices on which the recordings had been stored and consented to a search of those devices. None of this is consistent with intent to obstruct justice or the investigation.

For these reasons, we believe that the admissible evidence would not suffice to obtain and sustain a conviction of Mark Zwonitzer for obstruction of justice.

III. Declination is Also Appropriate Because on Balance, Relevant Aggravating and Mitigating Factors Do Not Support Zwonitzer's Prosecution

Even if the evidence available were sufficient to obtain and sustain Zwonitzer's conviction for obstruction of justice, we would decline prosecution because on balance, relevant aggravating and mitigating factors do not support his prosecution.[1384] Zwonitzer willingly provided significant cooperation to the investigation without

[1384] U.S. Dep't of Just., Just. Manual § 9-27.230 (2023).

seeking or receiving any protections or assurances. He was forthright in describing his conduct and working with investigators to obtain all relevant evidence in his possession. And his cooperation was uniquely valuable as the evidence that he provided was highly probative and not otherwise obtainable. Finally, prosecuting Zwonitzer under these circumstances would deter others from cooperating as he did.

CONCLUSION

For the foregoing reasons, we conclude that no criminal charges are warranted in this matter.