

Winter 2009

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Recommended Citation

Pamela E. Hart, *Falling Through the Cracks: The Shortcomings of Victim and Witness Protection Under § 1512 of the Federal Victim and Witness Protection Act*, 43 Val. U. L. Rev. 771 (2009).

Available at: <https://scholar.valpo.edu/vulr/vol43/iss2/8>

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FALLING THROUGH THE CRACKS: THE SHORTCOMINGS OF VICTIM AND WITNESS PROTECTION UNDER § 1512 OF THE FEDERAL VICTIM AND WITNESS PROTECTION ACT

I. INTRODUCTION

In the complicated world of criminal law, federal, state, and local officials must often cooperate to ensure proper investigation and potential prosecution of federal crimes.¹ Local authorities often rely on federal agencies to provide assistance during investigations of the commission of federal crimes.² Essential to these investigations and prosecutions is the cooperation of victims and witnesses.³ In turn, victims and witnesses of federal crimes are entitled to be adequately protected throughout the entire process.⁴ Congress enacted the federal Victim and Witness Protection Act of 1982 (“VWPA”) to better ensure such protection.⁵ However, many victims continue to fall through the cracks and are not adequately protected against intimidation and witness tampering. This is especially true when a person is a victim or a witness of a federal crime that initially is reported to local officials, upon which federal authorities eventually investigate. In such a scenario, United States Courts of Appeals disagree as to whether victims and witnesses are covered under the VWPA.⁶

To illustrate, consider Mark Sponslor, a family man with a wife and two children.⁷ One morning, while walking to the bus stop, he witnesses two men acting suspiciously. Before the two men become aware that Mark is approaching the bus stop, one removes a firearm and shoots the other, making Mark a witness of a violent crime involving a firearm. The perpetrator flees the scene before local police arrive. Mark cooperates fully with the officials and agrees to assist them in the future if needed.

¹ Victim and Witness Protection Act of 1982, Pub. L. No. 97-291, 96 Stat. 1248 (Oct. 12, 1982) [“VWPA”]. See also President’s Task Force on Victims of Crime: Final Report 114, (1982), available at <http://www.ojp.usdoj.gov/ovc/publications/presdntstskforcrprt/87299.pdf> [hereinafter *President’s Task Force*].

² Brendan Kearney, *Federal Appeals Court Affirms Witness Intimidation Convictions*, DAILY REC., Aug. 23, 2007.

³ S. Rep. No. 97-532, at 9 (1982), as reprinted in 1982 U.S.C.C.A.N. 2515-16. See also VWPA, *supra* note 1.

⁴ Federal Bureau of Investigation, *Victim Assistance: Rights of Federal Crime Victims*, <http://www.fbi.gov/hq/cid/victimassist/crimevictims.htm> (last visited Aug. 26, 2008). See also S. Rep. No. 97-532, *supra* note 3; *President’s Task Force*, *supra* note 1, at 11.

⁵ 18 U.S.C. § 1512 (2006). See also VWPA, *supra* note 1; S. Rep. No. 97-532, *supra* note 3.

⁶ See *infra* Part III (analyzing the interpretation of § 1512 to preclude protection in some cases where state and local authorities initiate the investigation).

⁷ The hypothetical is the contribution of the author of this Note.

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During the initial investigation, local police discover evidence linking the shooting to gang facilitated drug trafficking—a larger epidemic in the area. Investigators are able to identify the victim of the shooting as a prominent member in a gang known for distributing drugs throughout the area. The victim is unconscious, and police are therefore unable to question him regarding the shooting. However, other evidence points to another prominent gang member, Max Rissen, and police recover evidence suggesting that the shooting was possibly related to drug activity. Local investigators begin to anticipate the need to request federal assistance in the matter and contact federal officials in anticipation of such need.

Meanwhile, local investigators contact Mark to request that he help them identify the perpetrator of the shooting at a police lineup later that week. Before local police are able to detain Max, Max discovers the identity of Mark and firebombs Mark's house in an effort to prevent Mark from identifying him as the shooter. This attack occurs before federal officials become officially involved in investigating the shooting. A short time later, federal authorities begin to investigate the shooting and related drug activity. Local and federal investigators are able to determine, through a joint investigation, that drugs were a major cause of the shooting. Also, federal officials discover that Max is a convicted felon, making his possession of a firearm a federal offense. Mark continues to communicate with local authorities throughout the entire joint investigation. Based significantly on Mark's testimony, the federal prosecutor then takes the case to a grand jury. Max is later convicted of possession of a firearm by a convicted felon and several federal drug crimes.⁸ The prosecutor decides to also charge Max with witness intimidation under § 1512 of the VWPA.⁹

The proper test to determine when to provide protection to victims and witnesses of federal crimes is whether a sufficient federal nexus exists.¹⁰ This hypothetical illustrates the situation that led to the circuit

⁸ See, e.g., 18 U.S.C. § 841 (2006) (proscribing certain drug related offenses); 18 U.S.C. § 844 (2006) (proscribing simple possession of a controlled substance); 18 U.S.C. § 846 (2006) (proscribing conspiracy to commit drug crimes); 18 U.S.C. § 931 (2006) (proscribing possession of a firearm by a convicted felon).

⁹ See *infra* Part II.B (discussing why the scope of the VWPA includes such acts as the firebombing of Mark's house). Many states have also adopted statutes which provide for victim and witness protection and some have passed amendments to their constitutions providing for victims' rights. Richard Barajas & Scott Alexander Nelson, *The Proposed Crime Victims' Federal Constitutional Amendment: Working Toward a Proper Balance*, 49 BAYLOR L. REV. 1 (1997); Davya B. Gewurz & Maria A. Mercurio, *The Victims' Bill of Rights: Are Victims all Dressed UP With No Place to Go?*, 8 ST. JOHN'S J. LEGAL COMMENT. 251, 267 (1992).

¹⁰ See *infra* Part III (analyzing the current confusion surrounding the federal nexus requirement of the Act).

split regarding whether such a nexus exists. While Congress may have enacted the VWPA to ensure protection for people like Mark, some courts would conclude that Mark is not entitled to protection under the Act.¹¹ Those same courts would find that a sufficient federal nexus to bring Mark under the protection of the Act did not exist at the time when the perpetrator attacked and threatened Mark in order to prevent his further cooperation with the authorities investigating the crime, because the acts of intimidation occurred prior to the determination that federal crimes were involved.¹² However, other courts would find a federal nexus and convict the defendant for witness intimidation under the Act because federal crimes were involved and information shared by Mark with local authorities was likely to be communicated to a federal officer.¹³

This lack of uniformity among the circuits indicates the need for an amendment to § 1512 of the VWPA which provides for: (1) protection of witnesses and victims whose information regarding the commission of a federal crime was transferred to federal officers, and (2) a balancing of factors in determining what constitutes a sufficient nexus so as to supply protection to victims of most federal crimes regardless of the authorities to whom those victims initially reported the crime.¹⁴

The purpose of this Note is to advocate an amendment to § 1512 of the VWPA in order to comport with the stated intent of Congress to ensure integrity throughout the entire criminal justice process and provide adequate protection to victims and witnesses of federal crimes.¹⁵ Part II discusses the history of the VWPA and the different approaches used by courts to determine what constitutes a sufficient federal nexus.¹⁶ Specifically, Part II discusses the scope of § 1512 of the Act as it pertains to the intent and jurisdictional elements of § 1512 and the current circuit split regarding the federal nexus requirement of the Act.¹⁷ Next, Part III discusses the inefficiency of approaches by circuit courts today to determine whether a defendant may be prosecuted under § 1512.¹⁸

¹¹ See *infra* Part II.D (discussing decisions of the Third Circuit Court of Appeals regarding § 1512 of the VWPA).

¹² See *infra* Part II.D.

¹³ See *infra* Part II.D (discussing decisions of the Eleventh and Fourth Circuits Courts of Appeals regarding the federal nexus requirement of § 1512).

¹⁴ See *infra* Part IV (proposing an amendment to § 1512 of the VWPA).

¹⁵ See *infra* Part IV (proposing an amendment to § 1512 of the VWPA). See also *infra* notes 29–31 and accompanying text (discussing the legislative purpose behind the enactment of the VWPA).

¹⁶ See *infra* Part II.A (discussing the history of the VWPA).

¹⁷ See *infra* Part II.

¹⁸ See *infra* Part III (analyzing the current problems associated with the differing interpretations of the federal nexus requirement of § 1512).

Finally, Part IV proposes an amendment to the current statute that comports more fully with the intent of the statute.¹⁹

II. BACKGROUND: WITNESS PROTECTION UNDER § 1512 OF THE FEDERAL VICTIM AND WITNESS PROTECTION ACT

Congress enacted the VWPA to broaden protection provided to victims and witnesses of federal crimes.²⁰ Initially, due to the restructuring and revision of earlier witness protection statutes because of the passage of the VWPA, courts disagreed about the scope of § 1512 of the Act in relation to the former statutes.²¹ Once the courts determined the scope of § 1512, the focus shifted to interpreting specific elements within the Section.²² Part II.A first discusses the history of the VWPA.²³ Part II.B then discusses the scope of § 1512 of the VWPA in relation to the former witness protection statute.²⁴ Part II.C discusses the intent and jurisdictional elements of § 1512.²⁵ Finally, Part II.D discusses the current circuit split regarding the VWPA's federal nexus requirement.²⁶

A. Restructuring and Expanding the Protection of Federal Victims and Witnesses

During a period of increasing public awareness of victims' rights, brought forth by the "Victims' Rights Movement,"²⁷ Congress enacted

¹⁹ See *infra* Part IV.

²⁰ See *infra* Part II.A (discussing the purpose of § 1512).

²¹ See *infra* Part II.B (discussing the scope of § 1512 in relation to § 1503).

²² See *infra* Part II.C (discussing the intent and jurisdictional elements of § 1512).

²³ See *infra* Part II.A.

²⁴ See *infra* Part II.B.

²⁵ See *infra* Part II.C.

²⁶ See *infra* Part II.D.

²⁷ See generally VWPA, *supra* note 1 (noting national awareness of the plight of victims' and the need for legislation to provide protection for these victims); *President's Task Force*, *supra* note 1, at 5 (reporting on victim disillusionment with the criminal justice system); ABA Criminal Justice Section, *Reducing Victim/Witness Intimidation: A Package 1* (1981) (proposing a model statute protecting victims' rights in criminal proceedings); Barajas & Alexander Nelson, *supra* note 9 (discussing the historical role of victims and victims' rights amendments to state constitutions); Andrew J. Karmen, *Who's Against Victims' Right? The Nature of the Opposition to Pro-Victim Initiatives in Criminal Justice*, 8 ST. JOHN'S J. LEGAL COMMENT. 157 (1992); Karyn Ellen Polito, *The Rights of Crime Victims in the Criminal Justice System: Is Justice Blind to the Victims of Crime?*, 16 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 241 (1990) (discussing the rights of victims in criminal investigations and proceedings); Steven D. Walker, *History of the Victims' Movement in the United States*, <http://aabss.org/journal2000/f04Walker.jmm.html> (last visited Aug. 26, 2008) (discussing the emergence of the Victims' Movement in the United States); Marlene A. Young, *The Victims Movement: A Confluence of Forces*, National Symposium on Victims of Federal

the VWPA of 1982.²⁸ In response to findings indicating that victims and witnesses of federal crimes were not afforded proper protection under then-existing law, Congress passed the VWPA in order to provide better protection and assistance to victims and witnesses of criminal activity.²⁹ Specifically, recognizing that witness cooperation and participation is essential to effectiveness of the criminal justice system, Congress added 18 U.S.C. § 1512 to then-existing federal witness tampering law, namely 18 U.S.C. § 1503, which broadened the definition of witness tampering and extended protection to a broader range of persons in order to safeguard the integrity of the judicial system and encourage witness participation in all stages of federal investigations and proceedings.³⁰

Crime, <http://www.trynova.org/victiminfo/readings/VictimsMovement.pdf> (last visited Jan. 7, 2008) (discussing the development of the victim protection laws).

²⁸ See S. Rep. No. 97-532, *supra* note 3, at 9 (1982), (noting President Regan's effort to bring national attention to victims' rights). See also Barajas & Nelson, *supra* note 9, at 2 (discussing how increased public awareness of victims' rights starting in the 1970s, President Regan's focus on victims' rights in the early 1980s and the formation of national organizations in support of victims brought about suggestions for a constitutional amendment protecting victims' rights in criminal proceedings and discussing state constitutional amendments passed in twenty-nine states); Gewurz & Mercurio, *supra* note 9 (discussing the need for a constitutional amendment securing victims' rights in criminal proceedings); Jeremy McLaughlin & Joshua M. Nahum, *Obstruction of Justice*, 44 AM. CRIM. L. REV. 793, 812 (2007) (noting that Congress enacted the VWPA in response to growing concerns that the judicial system did not provide sufficient protection to victims and witnesses of crimes); Teresa Anne Pesce, *Defining Witness Tampering Under 18 U.S.C., Section 1512*, 86 COLUM. L. REV. 1417 (1986) (noting that Congress passed the VWPA in response to growing concerns that previous witness tampering statutes did not provide sufficient protection to victims).

²⁹ S. Rep. No. 97-532, *supra* note 3, at 9. See also VWPA, *supra* note 1. The Senate Report also recognized that most serious violent crimes fall under state and local jurisdiction. S. Rep. No. 97-532, *supra* note 3, at 9. Thus, the purpose of the VWPA is to supplement state and local laws and provide protection to victims of and witnesses to the commission or possible commission of federal crimes. *Id.* One of the main purposes of § 1512, outside of the desire to provide broader protection to victims and witnesses, is to protect the integrity of the federal judicial system and any investigations ancillary to that system. *Id.*

For purposes of the rights and services provided to victims and witness of federal crimes, the Federal Bureau of Investigation has defined "crime victim" as "a person who has been directly and proximately harmed (physically, emotionally, or financially) as a result of the commission of a federal offense . . ." Federal Bureau of Investigation, *Victim Assistance: Rights of Federal Crime Victims*, <http://www.fbi.gov/hq/cid/victimassist/crimevictims.htm> (last visited Aug. 26, 2008).

³⁰ See 18 U.S.C. § 1512 (2006); 18 U.S.C. § 1503. See also VWPA, *supra* note 1 (noting that "the Federal government . . . has an important leadership role to assume in ensuring that victims of crime, whether at the Federal, State, or local level[]" are adequately protected in order to facilitate the cooperation of the victim in the criminal justice system). The Senate Report determined that "[w]ithout the cooperation of victims and witnesses, the criminal justice system would simply cease to function and few criminals, if any, would be brought to justice." S. Rep. No. 97-532, *supra* note 3, at 9. The VWPA also includes additional provisions providing, among other things, punishment for retaliation against victims,

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When first passed, the VWPA came under harsh criticism from opponents claiming the Act impinged on defendants' due process rights.³¹ However, § 1512 has withstood constitutional attack in federal courts.³² Federal courts have held that the statute is not unconstitutionally vague or overbroad and is consistent with the Necessary and Proper Clause of the United States Constitution.³³ Additionally, because the Act provides fair notice to potential

victim restitution, and guidelines for the fair treatment of witnesses in the system. VWPA, *supra* note 1

In addition to federal legislative action to broaden protection provided to victims and witnesses, many states have passed constitutional amendments providing rights to victims. Barajas & Nelson, *supra* note 9, at 11; National Organization for Victim Assistance, *Crime Victim & Witness Rights: NOVA Promotion of Crime Victim Rights*, <http://www.trynova.org/about/victimrights.html>. Also, many states have passed legislation to ensure protection to victims and witnesses of crimes. Gewurz & Mercurio, *supra* note 9, at 251-252. See also National Center for Victims of Crimes, *Victims and Crimes Included in the Victims' Rights Laws*, <http://www.ncvc.org/ncvc/AGP.Net/Components/documentviewer/Download.aspxnz?DocumentID=32568> (last visited Aug 26, 2008) (listing various state legislative enactments of victims' rights laws passed before 1995).

³¹ See generally William H. Jeffress, Jr., *The New Federal Witness Tampering Statute*, 22 AM. CRIM. L. REV. 1, 17 (1984) (arguing that § 1512 is unconstitutional because it is overbroad in that it may encompass lawful behavior and also arguing that the section impermissibly shifts the burden of proof to the defendant to prove that he acted lawfully under the statute); Karmen, *supra* note 27 (discussing opposition to the Victims' Rights Movement). Other commentators suggest that the Victims' Rights Movement exacerbates class and racial divisions and ignores an accused person's right to be presumed innocent. See Kenneth Henley, *The Role of the Victim in Criminal Law*, Fla. Int'l U. Faculty Lunchtime Symposium Presentation, at 2 (Feb. 22, 2001), <http://www.fiu.edu/~ippcs/henley.htm>.

³² Cheryl Anne Adams, *White-Collar Crime: Fourth Survey of Law: Substantive Crimes: Witness Tampering*, 24 AM. CRIM. L. REV. 755, 755-56 (1987). See generally Eric C. Surette, Annotation, *Construction and Application of Federal Witness Tampering Statute*, 185 A.L.R. FED. 1 (2003).

³³ Many cases have decided that § 1512 is not unconstitutionally vague. *United States v. Tyler*, 281 F.3d 84 (3d Cir. 2002), *cert. denied*, 537 U.S. 858 (2002); *United States v. Shotts*, 145 F.3d 1289, 1300 (11th Cir. 1998), *cert. denied*, 534 U.S. 896 (2001); *United States v. Jackson*, 986 F.Supp. 829 (S.D.N.Y. 1997), *cert. denied*, 530 U.S. 1267 (2000); *United States v. Porter*, 977 F.Supp. 679, 682 (M.D. Pa. 1997); *United States v. Bergerstock*, 1994 WL 449019, 3 (N.D.N.Y. 1994) (holding that § 1512 is not facially vague); *United States v. Kalevas*, 622 F.Supp. 1523, 1527 (D.C.N.Y. 1985).

Several cases have held that § 1512 is not overbroad. *United States v. Thompson*, 76 F.3d 442 (2d Cir. 1996) (holding that § 1512 is not unconstitutionally overbroad); *United States v. Bergerstock*, 1994 WL 449019, at *3 (N.D.N.Y. 1994) (holding that § 1512 is not facially overbroad or vague); *United States v. Wilson*, 565 F.Supp. 1416 (D.C.N.Y. 1983) (holding that § 1512 is not unconstitutionally overbroad).

Also, the circuits have held that § 1512 does not violate the Necessary and Proper Clause. *United States v. Tyler*, 281 F.3d 84 (3d Cir. 2002) (holding that § 1512 does not violate the Necessary and Proper Clause of the United States Constitution because it is consistent with Congress's authority to punish crimes and regulate court procedures); *United States v. Bell*, 113 F.3d 1345 (3d Cir. 1997) (holding that § 1512 did not exceed Congress' power in violation of the Necessary and Proper Clause).

defendants, in that its plain language sets forth the prohibition of preventing witnesses from providing information or testifying regarding federal crimes or in federal proceedings, courts have held that the VWPA does not violate a defendant's Fifth Amendment due process rights.³⁴ In addition to resolving the constitutionality of the Act, courts have addressed its scope.³⁵

B. Scope of § 1512 of the VWPA

Before the passage of the VWPA, Congress provided for witness protection primarily through 18 U.S.C. § 1503.³⁶ Section 1503 required a specific intent to intimidate a person who would actually be a witness in a pending proceeding.³⁷ Thus, § 1503 provided protection to a small number of persons involved in investigations and proceedings.³⁸ However, § 1512 was added to VWPA to extend protection to a broader range of witnesses and prohibit a broader range of actions.³⁹

³⁴ See *Tyler*, 281 F.3d at 94 (holding that even though "Congress plainly intended to omit a state-of-mind requirement with regard to the federal connection[,] the statute is not unconstitutional because it clearly states the conduct which would fall within the purview of the statute), *cert. denied*, 537 U.S. 858 (2002); *Shotts*, 145 F.3d at 1300 (holding that the word "corrupt" provides adequate notice to defendants of what conduct is prohibited), *cert. denied* 525 U.S. 1177 (1998); *Kalevas*, 622 F.Supp. at 1527 (holding that § 1512 provides adequate notice to possible defendants because it defines with sufficient clarity conduct which would constitute intimidation and misleading conduct that would violate the Act) (citing *Wilson*, 565 F.Supp. at 1430-31).

³⁵ See *infra* Part II.B (discussing the scope of § 1512).

³⁶ *Pesce*, *supra* note 28, at 1420 (stating that prior to 1982, § 1503 provided the primary protection for witnesses). See also Tina M. Riley, *Tampering with Witness Tampering: Resolving the Quandary Surrounding 18 U.S.C. §§ 1503, 1512*, 77 WASH. U. L.Q. 249 (1999) (stating that prior to 1982, § 1503 was the most frequently invoked statute for prosecution of witness tampering).

³⁷ 18 U.S.C. § 1503 (2006). See also *United States v. Aguilar*, 515 U.S. 593 (1995); *infra* Part II.C.2; *Pesce*, *supra* note 28, at 1419-20. Prior to 1982, the government had to prove a defendant acted with the specific intent to influence a witness and that the witness was actually participating in a pending judicial proceeding. *Pesce*, *supra* note 28, at 1419-20.

³⁸ *Id.* at 1420. In order to be prosecuted under § 1503 prior to 1982, a "defendant must have sought to influence a person who actually would be, or who the defendant believed would be, a witness in the pending proceeding." *Id.* Currently, § 1503 requires that the government establish that a defendant "endeavors to influence, intimidate, or impede" a juror, officer or judge from fulfilling her official obligations at "any examination or other proceeding . . ." 18 U.S.C. § 1503(a) (2006). Thus, current witness protection under § 1503 is still limited to persons participating in pending proceedings. *Pesce*, *supra* note 28, at 1420.

³⁹ *Id.* Section 1512 of VWPA protects "any person" who may communicate information regarding a federal offense even prior to the commencement of an official proceeding. 18 U.S.C. § 1512 (2006). After the enactment of § 1512, Congress revised § 1503 by removing the term witness from that section. Brian M. Haney, *Contrasting the Prosecution of Witness Tampering Under 18 U.S.C. § 1503 and 18 U.S.C. § 1512: Why § 1512 Better Serves the*

The witness tampering provisions of § 1512 of the VWPA set forth punishment for anyone who knowingly attempts—through murder, attempted murder, physical force, threat of physical force, or through intimidation—to prevent any person from communicating or providing information relating to the commission or possible commission of a federal crime to a law enforcement officer.⁴⁰ The government establishes

Government at Trial, 9 SUFFOLK J. TRIAL & APP. ADVOC. 57, 63 (2004). Congress left § 1503's residual omnibus intact, however, which initially caused courts to grapple with the exact scope of the newly enacted § 1512. Pesce, *supra* note 28, at 1422-23.

Congress enacted VWPA to "clarify ambiguities and cure deficiencies" of witness protection under § 1503. *Id.* at 1418. See also Haney, *supra* note 39, at 63 (discussing § 1503's limitations as a method to adequately prosecute defendants accused of witness tampering); McLaughlin & Nahum, *supra* note 28, at 810 (noting that Congress enacted VWPA to provide better protection than that provided under § 1503 prior to 1982).

⁴⁰ 18 U.S.C. § 1512 (2006). The statute states:

(a)(1) Whoever kills or attempts to kill another person, with intent to— . . .

(C) prevent the communication by any person to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense or a violation of conditions of probation, parole, or release pending judicial proceedings; shall be punished as provided in paragraph (3).

(2) Whoever uses physical force or the threat of physical force against any person, or attempts to do so, with intent to— . . .

(C) hinder, delay, or prevent the communication to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense or a violation of conditions of probation, supervised release, parole, or release pending judicial proceedings; shall be punished as provided in paragraph (3). . .

(b) Whoever knowingly uses intimidation or physical force, threatens, or corruptly persuades another person, or attempts to do so, or engages in misleading conduct toward another person, with intent to— . . .

(3) hinder, delay, or prevent the communication to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense or a violation of conditions of probation, supervised release [sic], parole, or release pending judicial proceedings; shall be fined under this title or imprisoned not more than 20 years, or both.

(c) Whoever corruptly—

(1) alters, destroys, mutilates, or conceals a record, document, or other object, or attempts to do so, with the intent to impair the object's integrity or availability for use in an official proceeding; or

(2) otherwise obstructs, influences, or impedes any official proceeding, or attempts to do so, shall be fined under this title or imprisoned

intent by proving that the defendant knowingly attempted to use or threaten to use force with the intent to prevent communication with a federal officer regarding a federal crime or proceeding, regardless of whether the defendant specifically knew that the proceeding was federal in nature or that the officer was a federal agent.⁴¹ Also, the government

(d) Whoever intentionally harasses another person and thereby hinders, delays, prevents, or dissuades any person from — . . .

(2) reporting to a law enforcement officer or judge of the United States the commission or possible commission of a Federal offense or a violation of conditions of probation supervised release [sic], parole, or release pending judicial proceedings; . . .

or attempts to do so, shall be fined under this title or imprisoned not more than 3 years, or both.

18 U.S.C. §§ 1512(a)(1)(C), (a)(2)(C), (b)(3), (c)(1)–(2), (d)(2) (2006).

While debating the passage of this act, Congress recognized that “a criminal case often involves people who will never testify in open court, but who act as confidential informants, provide background information, or give hearsay statements.” Haney, *supra* note 39, at 62. Congress passed § 1512 of the VWPA with the intent to extend protection to those people intertwined with the witness function. *Id.* at 59. The original enactment did not provide for protection for victims against murder; but in 1986, Congress enacted an amendment which added killing and attempting killing to prohibited acts used to intimidate witnesses. Criminal Law and Procedural Technical Amendments Act of 1986, Pub. L. No. 99-646, 1986 Stat. 1236 (codified as 18 U.S.C. § 1512(a)). The 1986 enactment also added technical amendments. *Id.*

At the time of publication several proposed amendments § 1512 were pending in Congress. See S. 1946, 110th Cong. (2007); H.R. 3887, 110th Cong. (2007); S. 456, 110th Cong. (2007); S. 1946, 110th Cong. (2007); S. 378, 110th Cong. (2007); S. 447, 110th Cong. (2007). A few of the proposed amendments merely make technical or conforming changes to the language of § 1512 and do not affect the substance of the Act. S. 456, 110th Cong. (2007). Two proposals would change the sentencing provisions of the Act, increasing the maximum penalty and striking the death penalty. S. 378, 110th Cong. (2007); S. 447, 110th Cong. (2007). The Public Corruption Prosecution Act would amend § 1512(i) to state that any prosecution under the Chapter could be brought in the district in which the act occurred, instead of simply providing for §§ 1512 and 1503. S. 1946, 110th Cong. (2007). Finally, William Wilberforce Trafficking Victims Protection Reauthorization Act of 2007 would provide several provisions related to the disclosure of information regarding a violation of an employment visa or labor and employment law. H.R. 3887, 110th Cong. (2007).

⁴¹ 18 U.S.C. § 1512(g) (2006). The section states:

(g) [i]n a prosecution for an offense under this section, no state of mind need be proved with respect to the circumstance—

(1) that the official proceeding before a judge . . . or government agency is before a judge or court of United States . . . or a Federal Government Agency; or

(2) that the judge is a judge of the United States or that the law enforcement officer is an officer or employee of the Federal Government or a person authorized to act for or on the behalf of the Federal Government or serving the Federal Government as an adviser or consultant.

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need not show that an official proceeding was pending or that one was about to be instituted at the time of the attempted intimidation.⁴² However, the government must prove that the defendant acted with knowledge that his actions *could* affect a witness' communication regarding a current or future federal proceeding.⁴³

Congress revised former § 1503 by removing the word "witness" in order to provide a comprehensive scheme for witness protection under § 1512.⁴⁴ However, Congress did not delete § 1503's omnibus clause, which provided a general prohibition against obstruction of justice.⁴⁵

18 U.S.C. § 1512(g) (2006). This language is consistent with Congressional intent to provide broader protection to victims and witnesses from conduct not protected under § 1503. S. Rep. No. 97-532, *supra* note 3, at 9 (stating the purpose of the VWPA "is to strengthen existing legal protections for victims and witnesses of Federal crimes"). *See also* United States v. Veal, 153 F.3d 1233, 1247 (11th Cir. 1998) (discussing legislative intent to "expand the existing 'obstruction of justice' statutory scheme by enacting § 1512[]").

⁴² 18 U.S.C. § 1512(f) (2006). This section of the Act states: "For purposes of this section—(1) an official proceeding need not be pending or about to be instated at the time of the offense; and (2) the testimony, or the record, document, or other object need not be admissible in evidence or free of a claim of privilege." 18 U.S.C. § 1512(g) (2006).

⁴³ *See* 18 U.S.C. § 1512(a)(1)(C) (2006) (stating that a defendant must have acted with the intent to "prevent the communication by any person" to federal law enforcement or judges regarding a federal crime); 18 U.S.C. § 1512(a)(2)(C) (2006) (stating a defendant must act with the intent to "hinder, delay, or prevent" communication to federal authorities regarding a federal offense); 18 U.S.C. § 1512(b)(3) (2006) (stating that a defendant must knowingly use intimidation, threats, corrupt persuasion, or misleading conduct toward someone with then intent to obstruct a federal investigation or proceeding); and 18 U.S.C. § 1512(d)(2) (2006) (stating that a defendant must intend to harass a person resulting in obstruction to federal proceedings or investigations).

⁴⁴ Haney, *supra* note 39, at 63. Congress recognized a need to simplify and streamline prosecutions of witness tampering under one comprehensive act. *Id.* However, the Supreme Court has not specifically stated that the change in the language of § 1503 removed all protection against witness tampering from that Section. Shelby A.D. Moore, *Who is Keeping the Gate? What do we do when Prosecutors Breach the Ethical Responsibilities They Have Sworn to Uphold?*, 47 S. TEX. L. REV. 801, 842 (2006) (noting that Congress has clearly stated in the respective statutes what it intended to criminalize).

⁴⁵ 18 U.S.C. § 1503 (2006). The current statute reads:

Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any grand or petit juror, or officer in or of any court of the United States . . . or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be punished . . .

18 U.S.C. § 1503 (2006) (emphasis added). However, the pre-VWPA version of § 1503 read:

Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any witness, in any court of the United States . . . or endeavors to influence, obstruct or impede, the due administration of justice, shall be [punished].

18 U.S.C. § 1503 (1948) (amended 1982) (emphasis added). *See also* Pesce, *supra* note 28, at 1422. The current Omnibus Clause of § 1503 is most typically used in white-collar cases which do not usually involve the type of witness tampering conduct specifically proscribed

Initial judicial interpretation of § 1512 focused on its scope in reference to § 1503's omnibus clause.⁴⁶ Some courts interpreted § 1512 to provide exclusive protection for witnesses.⁴⁷ Other courts held that § 1512 provided protection for only that conduct enumerated in the statute and did not preclude some forms of witness tampering from being prosecuted under § 1503.⁴⁸ Congress responded to this ambiguity by amending § 1512 in 1988 to add to the Act a prohibition against corruptly persuading a witness.⁴⁹ Thus, Congress provided a mechanism for the government to prosecute conduct not specifically enumerated in the original enactment of § 1512 which also fell outside the reach of the omnibus clause of § 1503.⁵⁰ Since the enactment of the 1988 amendment,

under § 1512. Julie R. O'Sullivan, *The Federal Criminal "Code" Is a Disgrace: Obstruction Statutes as a Case Study*, 96 J. CRIM. L. & CRIMINOLOGY 643, 686 (2006).

⁴⁶ E.g., *United States v. Risken*, 788 F.2d 1361 (8th Cir. 1986) (discussing congressional enactment of § 1512 and revisions of § 1503); *United States v. King*, 762 F.2d 232, 237 (2d Cir. 1985) (stating § 1512 reached only specified means of intimidation); *United States v. Wesley*, 748 F.2d 962, 964 (5th Cir. 1984) (holding that prosecutions for witness tampering can be brought under both §§ 1503 and 1512). See also *Pesce*, *supra* note 28, at 1422 (arguing that Congress meant § 1512 to be the exclusive protection for witnesses against intimidation and tampering).

⁴⁷ E.g., *United States v. Hernandez*, 730 F.2d 895, 898 (2d Cir. 1984) (holding that prosecutions for witness tampering must be brought under § 1512 exclusively). See also *Pesce*, *supra* note 28, at 1423 (listing three approaches courts used to interpret § 1512 in relation to § 1503); *Riley*, *supra* note 36, at 259-65 (discussing different approaches of Circuit Courts of Appeals regarding whether prosecutions for witness tampering fell exclusively under § 1512 and arguing that Congress intended that § 1512 be the sole remedy for witness tampering).

⁴⁸ E.g., *United States v. Kenny*, 973 F.2d 339, 342 (4th Cir. 1992) (holding that enactment of § 1512 does not preclude application of § 1503 to acts that obstruct justice as long as the defendant is not prosecuted on both statutes.); *United States v. Shively*, 927 F.2d 804, 811 (5th Cir. 1991) (holding that § 1512 reaches only those acts specifically enumerated in the Act); *Risken*, 788 F.2d 1361 (holding that prosecutions for witness tampering could be brought under §§ 1503 or 1512) (citing *United States v. Lester*, 749 F.2d 1288 (9th Cir. 1984)); *Wesley*, 748 F.2d 962 (holding that prosecutions for witness tampering can be brought under both §§ 1503 and 1512). But see also *Pesce*, *supra* note 28, at 1423 (rejecting the reasoning of the Fourth, Eighth, and Ninth Circuits holding that prosecutions for witness tampering can be brought under both § 1503 and § 1512).

⁴⁹ 18 U.S.C. § 1512(b) (2006) (as amended 1988). The relevant section of the pre-1988 version of § 1512(b) reads: "Whoever intentionally harasses another person and thereby hinders, delays, prevents or dissuades any person" from participating in federal proceedings or from communicating to a federal officer shall be punished. 18 U.S.C. § 1512(b) (1986). See also *United States v. Aguilar*, 515 U.S. 593, 597 (1995) (discussing the appellate courts application of the pre-1988 version of § 1512). See also *supra* note 41 (quoting the current language of § 1512 relevant to this Note).

⁵⁰ *Haney*, *supra* note 39, at 66 (stating that, by enacting this 1988 amendment, Congress intended to provide witness and victim protection exclusively under § 1512). Most circuit courts still allow prosecution of witness tampering under both §§ 1512 and 1503. See *United States v. Ladum*, 141 F.3d 1328, 1338 (9th Cir. 1998) (discussing that the 1988 amendment to § 1512 did not repeal the omnibus clause of § 1503 and that both sections are

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courts have generally limited the applicability of § 1512 to conduct specifically enumerated within the statute.⁵¹ Therefore, defendants can be prosecuted only for conduct enumerated within the statute.⁵² Moreover, in order for the government to prosecute such conduct, it must also establish the requisite intent and jurisdiction.⁵³

C. *Intent and Jurisdiction Under § 1512*

While Congress and the courts settled the issue of the general scope of § 1512 in conjunction with § 1503, courts also focused on discussion of the requisite elements needed for a successful prosecution under § 1512.⁵⁴ The language of two major elements of § 1512 have consistently presented questions for courts since the enactment of the VWPA.⁵⁵ First, the Act requires the government to establish that the defendant performed any of the proscribed conduct with the intent to interfere with

coexistent); *United States v. Tackett*, 113 F.3d 603, 609 (6th Cir. 1997) (finding that Congress did not intend to preclude the use of § 1503 when it passed § 1512); *United States v. Maloney*, 71 F.3d 645, 659 (7th Cir. 1995) (holding that, so long as a defendant is not prosecuted under both sections, Congress's enactment of § 1512 does not preclude prosecution for witness tampering under § 1503); *United States v. Moody*, 977 F.2d 1420, 1424 (11th Cir. 1992) (holding that witness tampering prosecutions can be brought under §§ 1503 or 1512).

Some circuits consider the 1988 amendment to the Act to conclusively establish that witness tampering should no longer be prosecuted under the omnibus clause of § 1503, but solely under § 1512. *See United States v. Masterpol*, 940 F.2d 760 (2d Cir. 1991). *See also Haney*, *supra* note 39, at 66 (discussing that while Congressional intent seems to be that § 1512 provides the exclusive mechanism for prosecuting a defendant for witness tampering, some courts continue to allow witness tampering prosecutions under § 1503). However, the majority of courts hold "that § 1512 is not the exclusive vehicle for prosecution for witness tampering." *Moody*, 977 F.2d at 1424.

⁵¹ *United States v. Khatami*, 280 F.3d 907, 912 (9th Cir. 2002) (stating that by its terms, the Act prohibited those acts specifically listed); *King*, 762 F.2d 232 (holding that § 1512 reaches only conduct enumerated within the Act). *See generally* McLaughlin & Nahum, *supra* note 28, at 814.

⁵² *Khatami*, 280 F.3d at 912; *King*, 762 F.2d at 237. *See also* McLaughlin & Nahum, *supra* note 28, at 814.

⁵³ *See infra* Part II.C (discussing the intent and jurisdictional elements of § 1512).

⁵⁴ *Surette*, *supra* note 32, at 14. One of the first major cases to address a specific element of § 1512 addressed the intent element of the Act. *See United States v. Scaife*, 749 F.2d 338, 348 (6th Cir. 1984). *See also United States v. Leisure*, 844 F.2d 1347 (8th Cir. 1988). Later cases began to interpret the language of the statute which required that the witness or victim communicate with a law enforcement officer. *See United States v. Edwards*, 36 F.3d 639, 645 (7th Cir. 1994); *United States v. Stansfield*, 101 F.3d 909, 917 (3d Cir. 1996); *United States v. Bell*, 113 F.3d 1345, 1349 (3d Cir. 1997).

⁵⁵ *See Scaife*, 749 F.2d at 348 (discussing the intent element of § 1512); *Stansfield*, 101 F.3d at 918 (discussing the requirement that the government prove the defendant believed his conduct would prevent communication with a federal officer); *Bell*, 113 F.3d 1345 (clarifying the decision in *Stansfield*).

a proceeding or investigation.⁵⁶ Second, the government must establish that the proceeding or investigation with which the defendant intended to interfere was federal in nature.⁵⁷ The intent element has been addressed by the United States Supreme Court.⁵⁸ However, the language of the jurisdictional element remains debated among the Circuits as indicated by the recent decision of the Fourth Circuit Court of Appeals in *United States v. Harris*.⁵⁹ First, Part II.C.1 discusses the intent element of the Act.⁶⁰ Parts II.C.2 and II.C.3 then discuss the federal nexus requirement.⁶¹ Finally, Part II.C.3 discusses the current split regarding the nexus requirement.⁶²

1. *Arthur Andersen* – Settling Intent, but Leaving Open Federal Nexus

Although different subsections of § 1512 proscribe different conduct, the element of intent is analyzed in the same manner for each.⁶³ Under

⁵⁶ 18 U.S.C. § 1512 (2006). *See also Scaife*, 749 F.2d at 348; Surette, *supra* note 32, at 14; and McLaughlin & Nahum, *supra* note 28, at 814.

⁵⁷ 18 U.S.C. § 1512 (2006). *See also* Surette, *supra* note 32, at 14; and McLaughlin & Nahum, *supra* note 28, at 814. Section 1512 has many subsections which proscribe different conduct, but the analysis regarding whether the proceeding or investigation is federal in nature applies in equal force to all subsections. *United States v. Baldyga*, 233 F.3d 674, 680 n.5 (1st Cir. 2000); *United States v. Diaz*, 176 F.3d 52, 91 (2d Cir. 1999); *Veal*, 153 F.3d at 1245.

⁵⁸ *See Arthur Andersen LLP v. United States*, 544 U.S. 696 (2005).

⁵⁹ *Kearney*, *supra* note 2. *See also United States v. Harris*, 498 F.3d 278, 286–87 (4th Cir. 2007) (holding that the government can establish a sufficient federal nexus by establishing that the communication relates to the commission or possible commission of a federal offense); *United States v. Causey*, 185 F.3d 407 (5th Cir. 1999) ; *Veal*, 153 F.3d at 1251 (holding that the government can establish a sufficient federal nexus by establishing the information provide by a witness related to a possible federal offense and the possibility existed that the information would be transferred to federal authorities). *See infra generally* Part II.D.

⁶⁰ *See infra* Part II.C.1 (discussing the Supreme Court’s decision in *Arthur Andersen* defining the intent element of § 1512).

⁶¹ *See infra* Parts II.C.2–3 (discussing the federal nexus requirement of § 1512).

⁶² *See infra* Part II.C.4 (discussing the current circuit split regarding what constitutes a proper federal nexus for purposes of § 1512).

⁶³ 18 U.S.C. § 1512 (2006). In order for the government to prosecute a defendant for any conduct proscribed under § 1512, it must establish that the defendant acted with the intent to interfere with or influence a person’s involvement in an investigation or official proceeding. 18 U.S.C. § 1512 (2006). *See also* McLaughlin & Nahum, *supra* note 28, at 818; *supra* note 58 (discussing that the analysis regarding the federal nexus is the same for all subsections). Because the intent elements are analyzed in the same general manner for all subsections of § 1512, this Note will focus on the subsection used most often to prosecute under this section, § 1512(b). Section 1512(b) states that a defendant must “knowingly” perform any of the specified conduct enumerated in the section with the intent to influence, interfere with or obstruct an investigation or official proceeding. 18 U.S.C. § 1512(b) (2006). *See also supra* note 41 (citing relevant parts of § 1512(b)). While the courts have addressed what constitutes “corrupt persuasion,” “misleading conduct,” and other such conduct that

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the Act, the government must establish that the defendant acted knowingly to commit conduct enumerated within the Act.⁶⁴ In 2005, the United States Supreme Court granted certiorari in *Arthur Andersen LLP v. United States* to specifically decide the knowledge requirement under § 1512.⁶⁵

In that case, the defendant instructed its employees to destroy documents according to its corporate document retention policy both prior to and after the Security Exchange Commission (“SEC”) opened an official investigation into the financial condition of one of the defendant’s major clients.⁶⁶ The government brought an indictment

falls within the purview of the Act, the courts’ analysis as to the definition and scope of such conduct is beyond the scope of this Note.

⁶⁴ 18 U.S.C. § 1512(b) (2006). See *Guadalupe*, 402 F.3d 409; *Khatami*, 280 F.3d at 912; *King*, 762 F.2d 232. See also *McLaughlin & Nahum*, *supra* note 28, at 813.

⁶⁵ *Arthur Andersen LLP*, 544 U.S. 696. At issue in the case was whether the instructions given to the jury adequately conveyed the elements required under the Act to convict the defendant of knowingly using intimidation to corruptly persuade witnesses with the intent to tamper with a federal proceeding. *Id.* at 698. Specifically, the Court considered the requisite intent under § 1512 and held that a person could not be found to have acted “knowingly” if he lacked awareness of any wrongdoing on his part. *Id.* at 706. In *Arthur Andersen*, the court’s analysis focused on the requisite intent needed to show a defendant acted knowingly to interfere with a proceeding. *Id.* at 706. The defendant was convicted of corruptly persuading employees to tamper with evidence under § 1512(b)(2) of the VWPA when the company’s auditors instructed its employees to destroy documents according to company policy. *Id.* The Court remanded the case because it found that the jury instructions failed to instruct the jury to find specifically that the auditors acted with knowledge that the destruction of the documents would corruptly interfere with a proceeding. *Id.* Thus, in order to convict a defendant under § 1512, the government must establish that the defendant knowingly acted to interfere with an investigation or proceeding. *Id.* See generally Harold S. Bloomenthal & Samuel Wolff, *Definition of Securities and Exempt Offerings*, 3 SEC. & FED. CORP. L. § 1:188 (2d ed. 2007) (discussing the factual background of *Arthur Andersen* and the trial judge’s handling of the case); John Hasnas, *The Significant Meaninglessness of Arthur Andersen LLP v. United States*, 2005 CATO SUP. CT. REV. 187 (2005) (discussing the factual background and effect of the Court’s decision in *Arthur Andersen*); O’Sullivan, *supra* note 46, at 694-96 (discussing the factual and procedural background of *Arthur Andersen*).

⁶⁶ *Arthur Andersen LLP*, 544 U.S. at 701-02. The defendant, Arthur Andersen provided auditing services to the Enron Corporation, a major energy conglomerate. *Id.* at 699. After Enron’s financial performance began to decline, the public became aware of possible improprieties within the corporation. *Id.* In anticipation of future litigation, Enron retained outside counsel to represent the corporation in any possible litigation. *Id.* After the SEC notified Enron that it would most likely investigate any improprieties, the defendant instructed its employees at a general training meeting and in subsequent e-mails and notifications to conform to Enron’s document retention policy. *Id.* at 701. The SEC opened an official investigation into the matter one week after the final notification to Enron’s employees. *Id.* at 702. However, document destruction continued for an additional week until the SEC subpoenaed the documents. *Id.* at 699.

The Enron scandal was not Arthur Andersen’s only debacle during the time period preceding the SEC investigation. Elizabeth K. Ainslie, *Indicting Corporations Revisited:*

against the defendant for tampering with witnesses. A jury found Arthur Andersen guilty of tampering with witnesses by corruptly persuading them to alter, destroy, or withhold documents needed in an official proceeding under the Act.⁶⁷ The Fifth Circuit Court of Appeals affirmed, holding that the jury did not need to find any “conscious wrongdoing” in order to convict the defendant under the Act.⁶⁸

The United States Supreme Court granted certiorari to determine the meaning of “knowingly” within § 1512.⁶⁹ The Court noted that it

Lessons of the Arthur Andersen Prosecution, 43 AM. CRIM. L. REV. 107 (2006) (discussing Arthur Andersen’s downfall and the resulting repercussions). See also Jonathon M. Redgrave, R. Christopher Cook & Charles R. Ragan, *Looking Beyond Arthur Andersen: The Impact on Corporate Records and Information Management Policies and Practices*, 52 FED. LAW. 32, 33 (2005) (discussing Arthur Andersen’s involvement in other scandals and the facts leading up to the SEC investigation into Enron). Several other cases arose from Arthur Andersen’s accounting and auditing services of other large corporations, such as Waste Management Corporation and Sunbeam Corporation. Ainslie, *supra*, at 107.

⁶⁷ *Arthur Andersen LLP*, 544 U.S. at 699. Specifically, the federal government charged defendant under §§ 1512(b)(2)(A) and (B). *Id.* at 698. These sections of the Act proscribe anyone from intimidating, threatening or corruptly persuading another person to withhold records or “alter, destroy, mutilate, or conceal an object...for use in an official proceeding[.]” 18 U.S.C. § 1512(b)(2)(B) (2006). In order to reach its decision, the jury required additional instructions from the judge clarifying the requisite elements under the Act. Bloomenthal & Wolff, *supra* note 65. Post-verdict interviews indicate that the jurors’ findings may have been faulty and confused despite these further instructions. *Id.*

⁶⁸ *Arthur Andersen LLP*, 544 U.S. at 698. Specifically, the jury found the defendant guilty of violating § 1512(b)(2)(A) which prohibits tampering with documents that a witness may provide to authorities for use in official proceedings. *Id.* Currently, in factual circumstances such as those in *Arthur Andersen*, the government would most likely bring the action under § 1512(c)(1) because Congress enacted the Sarbanes-Oxley Act shortly after the decision to amend § 1512(c) in order to address specifically corrupt document destruction. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745, 800 (2002) (amending § 1512(c)(1)). The Amendment proscribes alteration, destruction, mutilation or concealment of documents or objects. *Id.* See also *supra* note 41 (citing the current language of the statute). In addition to broadening the scope of § 1512(c), the Sarbanes-Oxley Act made, among other things, falsification of documents meant to be used in federal investigations a crime. 18 U.S.C. § 1519 (2006). See also Albert D. Spalding, Jr. & Mary Ashby Morrison, *Criminal Liability for Document Shredding after Arthur Andersen LLP*, 43 AM. BUS. L.J. 647, 648 (2006).

⁶⁹ *Arthur Andersen LLP*, 544 U.S. at 702. A split developed in the circuits regarding the requisite intent needed to show that a defendant acted knowingly to corruptly persuade a witness. *United States v. Shotts*, 145 F.3d 1289, 1301 (11th Cir. 1998) (discussing several circuits’ interpretation of the intent element of § 1512(b)); *Khatami*, 280 F.3d at 913 (discussing the differing interpretations § 1512(b)). The Second and Eleventh Circuits Courts of Appeals interpreted “‘corruptly persuade’” to encompass conduct meant to persuade out of motivation for an improper purpose. *Shotts*, 145 F.3d at 1301; *United States v. Thompson*, 76 F.3d 442 (2d Cir. 1996). However, the Third Circuit Court of Appeals expressly rejected this definition and held that a defendant must do more than attempt to discourage a witness’ participation in an official proceeding. *United States v. Farrell*, 126 F.3d 484, 489-490 (3d Cir. 1997). While the court specifically addressed the meaning of “knowingly . . . corruptly persuade[.]” *Arthur Andersen* has been cited to repeatedly in

generally exercises restraint in interpreting a federal criminal statute for two reasons: (1) the prerogatives of Congress deserve due deference from the judiciary, and (2) individuals deserve fair warning of whether certain conduct is punishable under the law.⁷⁰ Therefore, the Court limited its interpretation to the plain language of the statute and found that “knowingly” implies “awareness, understanding, or consciousness.”⁷¹ Thus, the Court held that, in order for a conviction under § 1512, the government must establish a person was conscious of wrongdoing when he acted to affect a proceeding or investigation.⁷²

Although the Court in *Arthur Andersen* specifically addressed the requirement that a defendant consciously act to interfere with an official proceeding, the Court only briefly addressed what was needed to satisfy the jurisdictional requirement of the Act.⁷³ The Court held that, in order

later cases to elucidate more generally the meaning of “knowingly[.]” See *United States v. Quattrone*, 441 F.3d 153, 176 (2d Cir. 2006) (citing *Arthur Andersen* to hold that “§ 1512(b) requires proof of a mental state that is knowingly corrupt with respect to the action taken”); *Harris*, 498 F.3d at 288–89 (citing *Arthur Andersen* to note that § 1512(b) requires that the government show that the defendant acted with some knowledge that his actions would interfere with an official proceeding). However, courts have not extended *Arthur Andersen* to negate § 1512(g), which states that the government need not prove state of mind with regard to the federal nature of official proceeding or the judge of law enforcement officer. *Id.* at 288.

⁷⁰ *Arthur Andersen LLP*, 544 U.S. at 703. The court went on to explain that persuasion by itself can manifest itself in many innocuous situations, such as a mother persuading her child to keep confidences or an attorney persuading his client not to turn over documents that fall within attorney-client privilege. *Id.* at 704.

⁷¹ *Id.* at 705. The Court stated that it “traditionally [has] exercised restraint in assessing the reach of a federal criminal statute, both out of deference to the prerogatives of Congress . . . and out of concern that ‘a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed[.]’” *Id.* at 703 (citing *United States v. Dowling*, 473 U.S. 207 (1985) and *United States v. McBoyle*, 515 U.S. 593 (1931)). The Court analyzed the language within the Act and concluded that “corruptly” is “normally associated with wrongful, immoral, depraved, or evil.” *Id.* at 705. Thus, the Court concluded that persons must be conscious of wrongdoing to have the required culpability under § 1512(b). *Id.*

⁷² *Id.* The Court remanded the case for further findings on whether the defendant acted with knowledge that advising employees to comply with company document retention programs would wrongly interfere with a future official proceeding. *Id.* Specifically, the Supreme Court held that the jury instructions did not adequately state the mens rea required under the statute. *Bloomenthal & Wolff*, *supra* note 65. On remand, a court sentenced Arthur Andersen to five years probation and fined the firm \$500,000. *Ainslie*, *supra* note 66. Also, the firm agreed to cease operation of its public auditing companies which in effect ended all business for Arthur Andersen. *Id.* As a result of the cessation of business, 28,000 of the firm’s employees were left unemployed. *Id.*

⁷³ *Arthur Andersen LLP*, 544 U.S. at 707–08. The Court’s main finding was that the jury instructions improperly defined the requisite intent required under the Act. *Id.* at 706. However, the Court also found the jury instructions infirm because the instructions did not instruct the jury to find any relationship between the federal investigation and the

to establish a federal nexus, the government must show both a defendant could foresee that his actions were likely to obstruct federal proceedings and the defendant acted with the intent to do so.⁷⁴ However, the Court did not enunciate a test that would determine exactly what constituted a federal nexus in order to bring the defendant under § 1512 of the VWPA.⁷⁵

Prior to the Supreme Court's decision in *Arthur Andersen*, a disagreement among the circuits developed regarding what constituted a sufficient nexus to bring a defendant under the jurisdiction of the VWPA.⁷⁶ However, the specific issue in *Arthur Andersen* did not concern this nexus requirement; therefore, the Court held only that *some* nexus was required in order for a defendant to be convicted under the federal statute.⁷⁷ In contrast, in *United States v. Aguilar*, the Supreme Court addressed the nexus requirement of a similar statute.⁷⁸

defendant's destruction of the documents. *Id.* at 707. The Court found that the jury instructions improperly led the jury to conclude that it was not required to find any nexus between the persuasion to destroy documents and any proceeding and held that a nexus must be found to exist between the act to influence testimony and a particular official proceeding. *Id.*

⁷⁴ *Id.* at 707–08 (stating that “[i]t is . . . one thing to say that a proceeding ‘need not be pending or about to be instituted at the time of the offense,’ and quite another to say a proceeding need not even be foreseen.”).

⁷⁵ *Id.* at 708. When discussing the federal nexus requirement, the Court referred to its decision interpreting the nexus requirement of § 1503. *Id.* (citing to *Aguilar*, 515 U.S. 593). The Court in *Arthur Andersen* stated that with regard to § 1503, the statute “required something more—specifically, a nexus between the obstructive act and the proceeding.” *Id.* Thus, the Court would also require that the government establish that some ‘nexus’ exists between a defendant’s conduct and a federal investigation or proceeding in prosecutions under § 1512. *Id.*

⁷⁶ *United States v. Perry*, 335 F.3d 316, 321 n.7 (4th Cir. 2003). The Fourth Circuit Court of Appeals in *Perry* noted that the Eleventh Circuit Court of Appeals in *Veal* had established a nexus requirement which deviated from the test enunciated in other circuits. *Id.* See also *United States v. Applewhaite*, 195 F.3d 679 (3d Cir. 1999); *Veal*, 153 F.3d 1233; *United States v. Causey*, 185 F.3d 407 (5th Cir. 1999); *Bell*, 113 F.3d 1345; *United States v. Stansfield*, 101 F.3d 909 (3d Cir. 1996); *United States v. Edwards*, 36 F.3d 639 (7th Cir. 1994).

⁷⁷ *Arthur Andersen*, 544 U.S. at 708. The Court held that “‘if the defendant lacks knowledge that his actions are likely to affect the judicial proceeding’ . . . ‘he lacks the requisite intent to obstruct.’” *Id.* The Court’s focus in the case rested on the meaning of “‘knowingly . . . corruptly persuade[.]’” See *supra* note 69 and accompanying text (discussing the Court’s analysis of the intent element).

⁷⁸ 515 U.S. 593 (1995). See discussion *infra* Part II.C.2.

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2. *United States v. Aguilar*: Federal Nexus Under 18 U.S.C. § 1503

The United States Supreme Court addressed the federal nexus requirement of the omnibus clause of § 1503 in *United States v. Aguilar*.⁷⁹ During an interview conducted prior to the commencement of grand jury proceedings against an individual suspected of embezzling funds from a union, Judge Robert P. Aguilar lied to Federal Bureau of Investigation (“FBI”) agents about his involvement in the crime.⁸⁰ Later, after trial and appeal, the United States Supreme Court affirmed the Ninth Circuit’s reversal of Judge Aguilar’s conviction of obstruction of justice.⁸¹

The Supreme Court reasoned that a defendant must act with the intent to influence grand jury or judicial proceedings and not simply to

⁷⁹ *Id.* In that case, a jury convicted Judge Robert P. Aguilar of illegally disclosing a wiretap under 18 U.S.C. § 2232(c) and of obstruction of justice under § 1503. *Id.* at 595. The Ninth Circuit reversed both convictions because it found neither statute proscribed his conduct. *United States v. Aguilar*, 21 F.3d 1475 (9th Cir. 1994), *rev’d in part, aff’d in part*, 515 U.S. 593 (1995). The Supreme Court subsequently reversed the decision of the Ninth Circuit Court of Appeals regarding the § 2232(c) conviction and affirmed the Court of Appeals for the Ninth Circuit’s reversal of Judge Aguilar’s conviction under § 1503. *Aguilar*, 515 U.S. at 596.

The Court granted certiorari to specifically address the issues of “whether § 1503 punishes false statements made to potential grand jury witnesses[.]” and to answer a question regarding another federal statute. *Id.* at 595. The Court found that § 1503 protected only those persons listed in the statute, grand or petit jurors or officers of federal courts. *Id.* While discussing who constituted a person protected under § 1503, the Court also addressed the scope of conduct prohibited under the statute. *Id.* at 599.

⁸⁰ *Id.* at 597. The timing of the interview proved to be the decisive factor for the United States Supreme Court. *Id.* at 599. The Court held that a defendant could not be convicted under § 1503 for obstructing an ancillary proceeding to a grand jury proceeding because § 1503 protects only witnesses and grand or petit jurors in pending proceedings and not possible witnesses or jurors who might testify in a future proceeding. *Id.* at 601. Conversely, an FBI agent is merely an investigatory official of the government, and FBI investigations are not judicial or quasi-judicial proceedings as defined by § 1503. *Id.* Thus, the interview conducted by the FBI to the commencement of any such proceedings did not fall within the protection of § 1503. *Id.* See also CORPORATE COUNSEL’S GUIDE TO WHITE-COLLAR CRIME § 1:32 (2007) (discussing the findings and holding of the Supreme Court’s decision in *Aguilar*); James K. Fitzpatrick, *The Supreme Court’s Bipolar Approach to the Interpretation of 18 U.S.C. § 1503 and 18 U.S.C. § 2232(c)*, 86 J. CRIM. L. & CRIMINOLOGY 1383, 1383-84 (1996) (discussing the facts and procedural history of *Aguilar*); O’Sullivan, *supra* note 45, at 691-93 (discussing the facts and rationale of the Court in *Aguilar*).

⁸¹ *Aguilar*, 515 U.S. at 597. A jury convicted Aguilar of “endeavoring to obstruct the due administration of justice in violation of § 1503.” *Id.* at 595. The Ninth Circuit Court of Appeals reversed the conviction on a hearing en banc, holding that the statutory language of § 1503 did not cover Aguilar’s conduct in the FBI interview because Aguilar had not interfered with a pending proceeding. *Id.* In finding § 1503 inapplicable in the situation, the Court noted that the FBI had not been authorized by a grand jury to conduct the interview. *Id.*

affect an ancillary proceeding independent of the court's or grand jury's authority.⁸² The Court also held that a defendant must act with the knowledge that his conduct will have the "natural and probable" effect of interfering with a grand jury or judicial proceeding.⁸³ Justices Scalia, Kennedy, and Thomas concurred in part and dissented in part in the decision, finding that the omnibus clause of § 1503 extended to ancillary proceedings because the clause makes "endeavor[ing]" to interfere with

⁸² *Id.* at 599 (stating that the actions of "the accused must be with an intent to influence judicial or grand jury proceedings[>"). The Supreme Court affirmed the finding of the Ninth Circuit of Appeals that an interview conducted before the commencement of grand jury proceedings is ancillary to those proceedings and does not fall within the protection of § 1503. *Id.* at 597. Also, the Court found that the government's assertions were too speculative to support a conviction because the agent to whom Judge Aguilar lied to had not been subpoenaed nor was there any indication he would be. *Id.* at 601. See also David D. Jividen, *Charging Post-Offense Obstructive Actions*, A.F.L. REV. 113 (1996) (discussing obstruction of justice within the military justice system). However, a later opinion of the Eighth Circuit Court of Appeals questions whether the statute's text requires a finding that a proceeding is pending. *United States v. Novak*, 217 F.3d 566 (8th Cir. 2000). See also O'Sullivan, *supra* note 45, at 687.

⁸³ *Aguilar*, 515 U.S. at 601 (stating that the defendant must act with the knowledge that his conduct will "have the 'natural and probable effect' of interfering with the due administration of justice."). Thus, the Court interpreted an endeavor to influence as anything that has "'the natural and probable effect' of interfering with the due administration of justice." *Id.* See also Mark Mermelsetin & Charlotte Decker, *Walk the Line: Attorneys Will Find Statutory Language of Limited Use in Determining What Constitutes Obstruction of Justice*, LOS ANGELES LAW., Dec. 2006, at 27, 30 (discussing the implications of the Court's decision in *Aguilar* to practicing attorneys). However, the Court clarified that the defendant could still be convicted under § 1503 even though the subpoenaed witness was ultimately not called to testify, as long as the defendant acted with the intent to influence the proceedings. *Aguilar*, 515 U.S. at 602. The example given by the Court was that:

Were a defendant with the requisite intent to lie to a subpoenaed witness who is ultimately not called to testify, or who testifies but does not transmit the defendant's version of the story, the defendant has endeavored to obstruct, but has not actually obstructed, justice. Under our approach, a jury could find such defendant guilty.

Id.

The Court's decision to enunciate a nexus requirement for § 1503 has met some criticism. See Fitzpatrick, *supra* note 80, at 1383-84; O'Sullivan, *supra* note 45, at 687. Commentators argue that the plain language of the statute and prior case law adequately support the Court's holding in *Aguilar* without requiring the Court to establish the natural and probable effect test set forth in the decision. *Id.* Also, they argue that legislative history of the statute shows that Congress did not intend the statute to be construed as narrowly as the Court read it in *Aguilar*. Fitzpatrick, *supra* note 80, at 1403. These arguments find some support in Justice Scalia's dissent in the case, in which he criticizes the majority's distortion of the natural and probable effects test set forth in a prior decision interpreting the predecessor statute to § 1503. *Aguilar*, 515 U.S. at 611 (1995) (Scalia, J., Kennedy, J., and Thomas, J., concurring in part and dissenting in part).

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the due administration of justice a crime.⁸⁴ Thus, according to Justice Scalia, any act the defendant commits with the intent to obstruct a proceeding is sufficient to establish a sufficient nexus under § 1503.⁸⁵

While *Aguilar* has been cited several times in reference to § 1512, courts cite *Aguilar* only to elucidate the fact that a nexus must be shown between a statutorily forbidden act and a federal proceeding.⁸⁶ Section 1503 protection extends only to grand jury members and court officials; on the other hand, § 1512 extends to any person who might participate in an investigation or proceeding.⁸⁷ Because different jurisdictional

⁸⁴ *Aguilar*, 515 U.S. at 610 (Scalia, J., Kennedy, J., and Thomas, J., concurring in part and dissenting in part). While the dissent did argue that § 1503 did extend to ancillary proceedings, they did note that the clause is not unlimited, because the government is required to prove that the defendant acted with the purpose to interfere. *Id.* at 611 (Scalia, J., dissenting). The dissent states that § 1503 is limited by its own language because it only reaches “purposeful efforts to obstruct the due administration of justice, *i.e.*, acts performed with that very object in mind.” *Id.* (Scalia, J., dissenting) (emphasis in original). The dissent noted that specific intent to obstruct justice could be shown where the defendant intentionally committed a “wrongful act that had obstruction of justice as its ‘natural and probable consequence.’” *Id.* (Scalia, J., dissenting). See also Fitzpatrick, *supra* note 80, at 1399 (discussing Justice Scalia’s interpretation of § 1503). Thus, Scalia argued that Judge Aguilar’s actions did violate the Omnibus Clause of § 1503, and the jury properly convicted him of obstruction of justice under the statute. *Id.*

Regarding the dissent’s disposition on the rest of the issues in the case, the three Justices concurred in the holding regarding violations of other statutes but disagreed with the majority’s affirmation of the Ninth Circuit’s reversal of the § 1503 conviction. *Id.* at 609 (Scalia, J., Kennedy, J., Thomas, J., concurring in part and dissenting in part). Justice Stevens concurred in the Court’s disposition of § 15103 but dissented regarding the defendant’s conviction under another statute. *Id.* at 607 (Stevens, J., concurring in part and dissenting in part).

⁸⁵ *Id.* at 613 (Scalia, J., dissenting) (stating that “an act committed *with the intent to obstruct* is all that matters[.]”) (emphasis in original). See also Fitzpatrick, *supra* note 80, at 1402 (stating that Congress did not intend the Omnibus Clause of § 1503 to be narrowly construed).

⁸⁶ See *Harris*, 498 F.3d at 286 (citing *Aguilar* to hold that “[s]o long as the information the defendant seeks to suppress actually relates to the commission or possible commission of a federal offense, the federal nexus requirement is established.”).

⁸⁷ 18 U.S.C. § 1503 (2006). The relevant part of § 1503 states:

Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States magistrate judge or other committing magistrate, in the discharge of his duty, or injures any such grand or petit juror in his person or property on account of any verdict or indictment assented to by him, or on account of his being or having been such juror, or injures any such officer, magistrate judge, or other committing magistrate in his person or property on account of the performance of his official duties

18 U.S.C. § 1503(a) (2006) (emphasis added). See also *supra* note 46 (contrasting the current statute with its predecessor). Protection under § 1512 extends to “any person” who may

prerequisites are required under each separate section, lower courts find *Aguilar* persuasive but do not find it controlling with regard to § 1512(g)'s jurisdictional element.⁸⁸

The Supreme Court has held and circuit courts agree that a federal nexus must exist before a defendant may be prosecuted under § 1512 of the VWPA, but the circuit courts disagree as to what satisfies this requirement with regard to § 1512.⁸⁹ Several courts have interpreted § 1512 to require that a victim communicate directly to a federal officer.⁹⁰ However, other courts require only that the acts reported by a witness constitute a federal crime and that a possibility exists that the witness' information would be transferred to a federal officer.⁹¹

communicate to a federal officer regarding a federal offense regardless of the conduct used to intimidate. 18 U.S.C. § 1512 (2006). Under § 1512(a)(1), a defendant is prohibited from killing or attempting to kill another person with the intent to "prevent the attendance or testimony of *any person* in an official proceeding[.]" 18 U.S.C. § 1512(a)(1)(A) (2006) (emphasis added). Also, the statute prohibits an individual from using "physical force or the threat of physical force against *any person*, or attempts to do so, with the intent to . . . influence, delay, or prevent the testimony of *any person* in an official proceeding[.]" 18 U.S.C. § 1512(a)(2)(A) (2006) (emphasis added). Finally, § 1512(b) prohibits an individual from knowingly intimidating, threatening "another person[.]" with the intent to "influence, delay, or prevent the testimony of *any person* in an official proceeding[.]" 18 U.S.C. § 1512(b)(1) (2006) (emphasis added).

⁸⁸ *Veal*, 153 F.3d at 1249 (stating that the numerous obstruction of justice statutes "contain distinct jurisdictional prerequisites necessary for invoking federal authority to prosecute specific conduct."). The Eleventh Circuit, in *Veal*, held that the Supreme Court's decision in *Aguilar* was controlling because § 1503 implicates the "government's interest in preserving the integrity of a judicial proceeding[.]" while § 1512(b) implicates other government interest outside a federal judicial proceeding. *Id.* at 1250. *But see* *United States v. Quattrone*, 441 F.3d 153, 176 (2d Cir. 2006) (stating that "the evidence that was sufficient to establish the nexus element for the section 1503 charge applies with equal force to establishing that element of the witness tampering charge" and that "*Aguilar's* nexus requirement applies to some degree to section 1512(b)[.]").

⁸⁹ *Kearney*, *supra* note 2. *See also* *Guadalupe*, 402 F.3d 409 (discussing the disagreement between the Fifth and Eleventh Circuits); *Veal*, 153 F.3d 1233 (extending the reach of § 1512); *Causey*, 185 F.3d 407 (refusing to apply the reasoning of the Eleventh Circuit Court of Appeals).

⁹⁰ *See* *Bell*, 113 F.3d 1345 (finding a sufficient nexus because the witness communicated with members of a joint federal and state investigation); *Stansfield*, 101 F.3d 909 (finding a sufficient nexus because the defendant attacked the witness six months after federal officials took over the investigation); *Scaipe*, 749 F.2d 338 (finding a nexus because the informants communicated directly with federal authorities). *See also* discussion *infra* Parts II.C.3 (discussing the *Scaipe* decision); Part II.D (discussing the *Bell* and *Stansfield* decisions).

⁹¹ *See* *Harris*, 498 F.3d 278 (finding a sufficient nexus because local officials later turned the investigation over to federal authorities); *Guadalupe*, 402 F.3d 409 (finding a federal nexus when the initial investigators later reported the witness' testimony to federal officials); *United States v. Baldyga*, 233 F.3d 674 (1st Cir. 2000) (finding a sufficient nexus where federal officials joined an investigation initially begun by local and state authorities); and *Veal*, 153 F.3d 1233 (finding a sufficient federal nexus when the witness communicated to local authorities who later relayed this communication to federal authorities).

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3. Knowledge of the Federal Nature of the Proceeding Not Required

Several courts have adjudicated the question of what is sufficient to provide jurisdiction under § 1512 of the VWPA.⁹² Courts often refer to two subsections of § 1512 when analyzing whether a defendant's conduct falls within the purview of the Act.⁹³ According to the Act, the government does not have to establish that, at the time the defendant acted to interfere with the statute, an official proceeding was pending or about to be instituted.⁹⁴ Also, the government does not have to establish that the defendant possessed knowledge that the proceeding or investigation he meant to interfere with was federal in nature.⁹⁵ Early cases discussing whether the government must establish that a defendant knew the proceeding was federal in nature at the time he acted to interfere with a proceeding usually involved defendants who acted to interfere with investigations or proceedings that were in fact federal.⁹⁶ The main case illustrating this and interpreting the knowledge requirement under § 1512 is *United States v. Scaife*.⁹⁷

⁹² See, e.g., *Harris*, 498 F.3d 278; *Perry*, 335 F.3d 316; *Veal*, 153 F.3d 1233; *Causey*, 185 F.3d 407; *Bell*, 113 F.3d 1345; *Stansfield*, 101 F.3d 909. See generally *McLaughlin & Nahum*, *supra* note 28, at 817; *Surette*, *supra* note 32, at 48–66; *Brendan Kearney*, *supra* note 2. See also *supra* Part II.D (discussing the current circuit split).

⁹³ 18 U.S.C §§ 1512(f) and (g) (2006). Section 1512(f) states that “[f]or purposes of this section . . . an official proceeding need not be pending or about to be instituted at the time of the offense[.]” 18 U.S.C. § 1512(f)(1) (2006). Section 1512(g) states that:

In a prosecution for an offense under this section, no state of mind need be proved with respect to the circumstance—

(1) that the official proceeding before a judge, court, magistrate judge, grand jury, or government agency is before a judge or court of the United States, a United States magistrate judge, a bankruptcy judge, a Federal grand jury, or a Federal Government agency; or

(2) that the judge is a judge of the United States or that the law enforcement officer is an officer or employee of the Federal Government or a person authorized to act for or on behalf of the Federal Government or serving the Federal Government as an adviser or consultant.

18 U.S.C. § 1512(g) (2006).

⁹⁴ 18 U.S.C. § 1512(f)(1) (West, Westlaw through P.L. 110-317 (excluding P.L. 110-234, 110-246, and 110-315) approved Aug. 29, 2008). The statute specifically reads: “For the purposes of this section . . . an official proceeding need not be pending or about to be instituted at the time of the offense[.]” *Id.* See generally *Surette*, *supra* note 32 (discussing the construction and application of the Act).

⁹⁵ See 18 U.S.C. § 1512(g). See generally *Surette*, *supra* note 32 (discussing the elements of § 1512).

⁹⁶ See *Scaife*, 749 F.2d 338. See also *Davis*, 932 F.2d at 761 (stating that government need not prove the defendant knew the proceeding he was tampering with was federal); *United States v. Gonzalez*, 922 F.2d 1044, 1054 (2d Cir. 1991) (stating that the government is not required to prove “defendant’s state of mind with respect to the elements of the federal nature of the proceeding, the judge, agency, or law enforcement officer.”); *United States v.*

In *Scaife*, FBI informants assisted officials in a federal investigation that eventually led to the defendants' arrests.⁹⁸ After these arrests, the defendants conspired to kill the informants and two co-defendants who had agreed to testify against them in order to prevent the informants and co-defendants from testifying at their trial.⁹⁹ The defendants were subsequently convicted of witness tampering under § 1512, and on appeal argued that the conviction was improper because the government did not establish that the defendants knew the informants would testify before a grand jury nor did the government prove that grand jury proceedings were pending at the time of the attempted interference.¹⁰⁰ However, the court held that the plain language of the Act did not require the government to prove that the defendant knew a federal grand jury or federal law enforcement officers were involved because the Act does not require the government to show that a defendant was

Kelley, 36 F.3d 1118, 1128 (D.C. Cir. 1994) (stating that the Act "does not require explicit proof . . . that such proceedings were pending or were about to be instituted[]" at the time the defendant acted to obstruct the proceedings). "The analysis regarding the federal character of the crime and the relevant authorities applies with equal force to any consideration of a conviction under § 1512." *United States v. Baldyga*, 233 F.3d 674, 680 n.5 (1st Cir. 2000) (citing to *United States v. Diaz*, 176 F.3d 52, 91 (2d Cir. 1999)).

⁹⁷ *Scaife*, 749 F.2d 338. A jury convicted both defendants of conspiring to violate the Hobbs Act, aiding and abetting the use and possession of a firearm during the commission of a felony, and witness tampering. *Id.* at 341. Both defendants argued for reversal based on a multitude of arguments, including violation of the Speedy Trial Act and misjoinder. *Id.* at 343–44. These additional arguments are outside the scope of this Note.

⁹⁸ *Id.* at 341. Defendants recruited two co-conspirators from a previous robbery, but who had since become FBI informants. *Id.* at 341. The FBI monitored the group's conduct and recorded conversations setting forth the plan to rob an Arkansas general store and fur store for three days leading up to the night of the planned robbery. *Id.* at 341–42. The FBI arrested the conspirators as they assembled to accomplish the plan. *Id.* at 342.

⁹⁹ *Id.* Two of the codefendants eventually pled guilty after their arrest and agreed to testify against the two defendants. *Id.* After learning of this, one of the defendants contacted Hosea Moore to ask for help in a plan to kill the two codefendants. *Id.* Moore then contacted the FBI and cooperated with officials in the investigation leading to the defendant's arrest and conviction of witness tampering under the Act. *Id.*

¹⁰⁰ *Id.* at 348. The defendants argued that § 1512 required that the government prove both that the defendants were aware that the informants planned to testify at trial and that the grand jury proceedings had begun prior to the attempted interference. *Id.* Defendants also tried to argue that the government never established proper venue for the witness tampering charge. *Id.* at 346. However, the court held that the government proved proper venue because the grand jury proceeding with which the defendants wished to interfere was located in the district in which the court sat. *Id.* See also Peter Schleck & Gregory S. Wright, *Interference with the Judicial Process*, 30 AM. CRIM. L. REV. 789, 805 (1993) (discussing proper venue in § 1512 prosecutions). Courts initially differed on whether this construction of the statute was proper until Congress amended § 1512. *Id.* Section 1512(i) clarifies that venue is proper "in the district in which the official proceeding (whether or not pending or about to be instituted) was intended to be affected or in the district in which the conduct constituting the alleged offense occurred." *Id.* at 806 (quoting 18 U.S.C. § 1512(h)).

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subjectively aware that the proceeding or investigation, with which he acted to interfere, was federal in nature.¹⁰¹ The rule established in *Scaife* has generally been adopted by all jurisdictions.¹⁰² The government need only establish that a defendant acted with the belief that his conduct would interfere with an investigation or proceeding.¹⁰³ However, a circuit split currently exists regarding the precise level of federal involvement in the investigation or proceeding to establish a sufficient federal nexus.¹⁰⁴

¹⁰¹ *Scaife*, 749 F.2d at 348. See also 18 U.S.C. § 1512(d) (2006). The court stated that it was obvious from the facts that the defendant intended to use intimidation or force against the informant in order to prevent the informant from giving information to any official regarding the underlying offense. *Scaife*, 749 F.2d at 348. Under the plain language of § 1512(d), the government did not need to establish that the officials involved were, in fact, federal officials. *Id.* But see Christopher R. Chase, *To Shred or Not to Shred: Document Retention Policies and Federal Obstruction of Justice Statutes*, 8 *FORDHAM J. CORP. & FIN. L.* 721, 740–41 (2003) (stating that the Fifth Circuit requires some circumstantial proof of a defendant's intent to influence testimony in a pending federal proceeding). The Fifth Circuit Court of Appeals, in *United States v. Shively*, explained that “*Scaife* does not obviate every facet of the government's obligation to prove intent under § 1512.” 927 F.2d 804, 812 (5th Cir. 1991). The Fifth Circuit requires “at least a circumstantial showing of [an] intent to affect testimony at some particular federal proceeding . . .” in order for the conduct to be proscribed under the Act. *Id.* (emphasis added). However, the court acknowledged that § 1512 does not require the government to prove that the proceeding is pending or about to be instituted. *Id.* at 812. See also Kathleen F. Brickey, *Andersen's Fall from Grace*, 81 *WASH U. L.Q.* 917, 932 n.79 (2003).

¹⁰² See, e.g., *United States v. Kelley*, 36 F.3d 1118, 1128 (D.C. Cir. 1994) (citing to *Scaife* in stating that the Act “does not require explicit proof . . . that such proceedings were pending or were about to be instituted[.]” at the time the defendant acted to obstruct the proceedings”); *United States v. Davis*, 932 F.2d 752, 761 (9th Cir. 1991) (citing to *Scaife* in stating that the government need not prove “the defendant knew he was tampering with a federal proceeding[.]”); *United States v. Gonzalez*, 922 F.2d 1044 (2d Cir. 1991) (citing to *Scaife* in stating that the government is not required to prove “defendant's state of mind with respect to the elements of the federal nature of the proceeding, the judge, agency, or law enforcement officer.”). See generally McLaughlin & Nahum, *supra* note 28, at 817; Surette, *supra* note 32, at 15–16. Even the decision of the Fifth Circuit Court of Appeals in *Shively* recognizes that a defendant need not be aware that a particular proceeding is federal, as long as the proceeding is in fact federal. *Shively*, 927 F.2d at 812.

¹⁰³ *United States v. Romero*, 54 F.3d 56 (2d Cir. 1995) (citing *United States v. Leisure*, 844 F.2d 1347, 1364 (8th Cir. 1988)) (stating that the government need only establish that a defendant acted with intent to prevent potential witnesses from giving information to federal officials); *United States v. Edwards*, 36 F.3d 639, 645 (7th Cir. 1994) (stating that “the presence of an investigation or judicial proceedings is immaterial as long as there is evidence that the defendant believed that a person might furnish information to federal officials and that he killed or attempted to kill that person in order to prevent such disclosure[.]” (citing *Leisure*, 844 F.2d at 1364) (emphasis in original) *abrogated on other grounds by U.S. v. Monroe* 73 F.3d 129 (7th Cir. 1995).

¹⁰⁴ See, e.g. *Harris*, 498 F.3d 278; *Guadalupe*, 402 F.3d 409; *Perry*, 335 F.3d 316; *Applewhaite*, 195 F.3d 679; *United States v. Bell*, 113 F.3d 1345; *Causey*, 185 F.3d 407; *Stansfield*, 101 F.3d 909. See also *infra* Part II.D (discussing the current split among the circuits regarding the federal nexus requirement of § 1512).

D. *The Circuit Split*

One of the first circuits to construe the federal nexus requirement of § 1512 was the Third Circuit in *United States v. Stansfield*¹⁰⁵ and *United States v. Bell*.¹⁰⁶ Following these decisions, other circuits, such as the Eleventh and Fourth Circuits, have construed this requirement of the statute broadly to extend the reach of § 1512. The Third Circuit Court of Appeals has recently relied on both its earlier decisions and the Eleventh Circuit's interpretation when applying the federal nexus requirement to prosecutions under § 1512.¹⁰⁷

In *Stansfield*, local officials obtained evidence through a three year investigation of a fire that destroyed the defendant's home and that led local authorities to believe that the defendant had committed several federal crimes related to the suspected arson.¹⁰⁸ Six months after federal officials began to investigate the defendant's involvement in the arson, the defendant attacked and threatened a witness because he believed the witness had given authorities information about his involvement in the arson.¹⁰⁹

In upholding the defendant's conviction of witness tampering, the Third Circuit Court of Appeals held that the government need not establish a federal investigation was pending or about to be instituted and rejected the government's contention that it must only prove that the underlying offense was federal in nature or that the government need only show that the defendant acted with intent to prevent communication with law enforcement in general.¹¹⁰ Instead, the court

¹⁰⁵ 101 F.3d 909 (3d Cir. 1996).

¹⁰⁶ 113 F.3d 1345 (3d Cir. 1997).

¹⁰⁷ *Harris*, 498 F.3d 278; *Veal*, 153 F.3d 1233; *infra* note 126 (noting that the Third Circuit Court of Appeals in recent decisions claims adherence to *Stansfield* and *Bell*, but also appears to enunciate a broader test similar to that set forth by the Eleventh Circuit Court of Appeals in *Veal*).

¹⁰⁸ *Stansfield*, 101 F.3d at 911. The court noted that the investigation began as a local investigation in order to determine the possible causes of the fire. *Id.* Once the local authorities determined that arson could be a possible cause of the fire, they contacted federal authorities to continue the investigation. *Id.* Local authorities also transferred the investigation to federal authorities because of the possibility that the defendant used the federal mail system to perpetrate a fraud. *Id.*

¹⁰⁹ *Id.* at 912. The defendant used physical force against the witness's parents and bound them in their basement while he prepared himself for the witness to appear. *Id.* Once the witness arrived home, the defendant threatened the witness with a loaded shotgun and asked him why he had spoken to the police about the defendant's involvement in the arson. *Id.* After a struggle, the victims were able to gain control of the shotgun and subdue the defendant until the police arrived. *Id.* A grand jury indicted, and a jury later convicted, the defendant of tampering with a witness under § 1512. *Id.* The defendant was also indicted on eleven additional charges which are not relevant to the discussion of § 1512. *Id.*

¹¹⁰ *Id.* at 918. In the case, the court specifically explained:

held that the government must show that the defendant acted with the intent to prevent any person's communication with law enforcement authorities about an offense that was actually federal in nature, or "federal-in-fact," and also that the defendant believed the person might communicate with federal authorities.¹¹¹ Thus, according to the Third Circuit Court of Appeals, the government establishes a sufficient federal nexus by showing that an offense is federal in nature and proving "additional appropriate evidence."¹¹²

The Third Circuit Court of Appeals clarified this holding in *United States v. Bell*, a case which highlights why § 1512 is needed to protect witnesses. In *Bell*, the defendant murdered the informant on the eve of the day that she was to testify against the defendant; the arrangement, whereby the informant was scheduled to testify, was made possible because of a joint federal and state investigation into drug trafficking.¹¹³

[w]ere we to require only that the government prove that the underlying offense is federal and the defendant intended to prevent the witness from communicating with law enforcement officials in general, without also proving the defendant's knowledge of or belief in the possibility that the witness would communicate with *federal* authorities, we would essentially vitiate an important facet of the intent requirement of the statute.

Id.

¹¹¹ *Id.* The court held that

the government must prove . . . the defendant was motivated by a desire to prevent the communication between any person and law enforcement authorities concerning the commission or possible commission of an offense; . . . that offense was actually a federal offense; . . . and [] the defendant believed that the person . . . might communicate with the *federal* authorities.

Id. The court found that the jury in *Stansfield* could reasonably infer the defendant believed Hoffman might communicate with federal authorities because the underlying offense of mail fraud was federal in nature and federal authorities had already begun to investigate, despite the defendant's lack of actual knowledge that federal authorities were then involved in the investigation. *Id.* at 919. The initial crime of arson would not have brought the defendant under the purview of § 1512, but the use of the federal postal system to perpetrate the insurance fraud did. *Id.* at 911. The court held that the involvement of federal Postal Inspectors and the United States Attorney satisfied the requirement for additional appropriate evidence because the witness communicated with actual federal authorities and the government did not have to establish that the defendant knew the officials were federal authorities. *Id.* at 917 (citing 18 U.S.C. § 1512(f) (2006)).

¹¹² *Id.* at 918. The additional evidence that the court in *Stansfield* found appropriate was evidence that, at the time the defendant acted to interfere with the witness's cooperation with the law enforcement officials, the investigation had been turned over to federal officials. *Id.*

¹¹³ *United States v. Bell*, 113 F.3d 1345, 1348 (3d Cir. 1997). The Tri-County Drug Task Force ("Task Force") which consists of local, state and federal investigators operates in three counties within Pennsylvania. *Id.* at 1347. The Task Force, prior to the investigation at issue in *Bell*, had previously developed federal and state criminal cases. *Id.* Similar

In upholding the defendant's conviction of witness tampering under § 1512, the court applied *Stansfield* and clarified that, while a jury may infer that a federal nexus exists from the fact that the underlying offense is actually a federal offense, the government must also prove the defendant believed that the witness might communicate with federal authorities regarding that offense.¹¹⁴ The government is not required to prove the defendant's state of mind with regard to the federal nature of the authorities, but is required to prove that the defendant believed the witness would communicate with federal officers.¹¹⁵ In other words, the

investigatory bodies exist in most states because federal and state cooperation is essential in drug trafficking investigations. Kearney, *supra* note 2.

In *Bell*, the informant had provided information in an investigation of drug offenses in which Bell's boyfriend was the prime suspect. *Bell*, 113 F.3d at 1347. After the informant was scheduled to testify at the resulting trial, defendant and several others kidnapped her, took her to an isolated location and killed her with the express intent to prevent her from testifying. *Id.* After the trial court acquitted the defendant of murder and witness tampering in a state court, federal authorities began their own investigation which led to the defendant's conviction in federal court of murder and witness tampering. *Id.* Bell's boyfriend, David Tyler, was convicted in a separate case. *United States v. Tyler*, 281 F.3d 84 (3d Cir. 2002). See also *United States v. Tyler*, 167 N.J.L. 813, Feb. 25, 2002, at 1 (discussing the underlying facts of the witness tampering charges and both Tyler and Bell's involvement).

¹¹⁴ *Bell*, 113 F.3d at 1349 (3d Cir. 1997) (stating "we do not read [*Stansfield*] as requiring proof that the defendant believed the victim might communicate with law enforcement officers whom the defendant knew or believed to be federal officers.") (emphasis in original). In *Bell*, the court found that, although the Task Force had not begun an investigation specifically into the defendant's conduct, the jury could properly infer that the defendant believed the witness' cooperation with authorities would result in additional communication with the authorities regarding the defendant's illegal drug activity. *Id.* at 1350. The court found that the victim acted as an informant for the Task Force and that the defendant acted with the belief that her conduct would prevent the victim's testifying regarding a federal drug offense. *Id.* at 1347, 1350.

¹¹⁵ *Id.* at 1349 (stating "the statute mandates . . . proof that the officers with whom the defendant believed the victim might communicate would in fact be federal officers."). Though the defendant in *Bell* may not have known the task force consisted of both local and federal authorities, the fact that the underlying drug offense was federal in nature was sufficient to establish a federal nexus because a jury could reasonably infer the defendant wished to prevent the witness' communication with a partially federal law enforcement body regarding possible commission of federal crimes, and that at least one of the communications would have in fact been with a federal officer. *Id.* at 1350.

Several other courts have used the phrase "happened to be federal." See *United States v. Applewhaite*, 195 F.3d 679 (3d Cir. 1999) (stating that all that the government must prove is "that the defendants had the intent to influence an investigation that happened to be federal."); *United States v. Perry*, 335 F.3d 316 (4th Cir. 2003) (quoting *Applewhaite*, 195 F.3d 679) (finding there was sufficient evidence to establish the defendant intended to "influence an investigation that happened to be federal"). Both the Third Circuit and other circuits have labeled this test using two different phrases, federal-in-fact test as enunciated in *Stansfield* or happens-to-be federal as enunciated in *Bell*. See *Stansfield*, 101 F.3d at 918; *Bell*, 113 F.3d at 1349. The two tests seem to be functionally equivalent.

government must prove that at least one officer with whom a defendant wishes to prevent witness communication “happened to be” a federal officer.¹¹⁶

The Third Circuit Court of Appeals later explained its rationale behind its holdings in *Stansfield* and *Bell* in *United States v. Applewhaite*.¹¹⁷ As noted by the court, Congress’s purpose for enacting § 1512 was to provide better protection to witnesses and victims of federal crimes and to protect the integrity of the process; thus, it is consistent with § 1512 to require only that the government establish the defendant intended to influence an investigation that happened to be federal.¹¹⁸ The Fifth

¹¹⁶ *Bell*, 113 F.3d at 1349 (stating that “the government must prove that at least one of the law-enforcement-officer communications which the defendant sought to prevent would have been with a federal officer, but that the government is not obligated to prove that the defendant knew or intended anything with respect to this federal involvement[]”). See also Moore, *supra* note 44, at 843 (stating that § 1512 has been interpreted broadly to include situations in which the government could prove “at least one of the communications would have been with a federal officer[]”).

The government can prove that a sufficient federal nexus existed to convict the defendant under § 1512 if the government establishes that the underlying offense was federal in nature and provided appropriate additional evidence to prove that the defendant believed the witness would communicate to federal authorities. *Bell*, 113 F.3d at 1349 (quoting *Stansfield*, 101 F.3d at 918). The court in *Bell* held that the jury could reasonably infer that the defendant intended to prevent future communications with the Task Force regarding federal drug crimes because the victim continued to provide information to the Task Force on drug related offenses in which the defendant was involved. *Id.* at 1350.

¹¹⁷ 195 F.3d 679 (3d Cir. 1999). The court in *Applewhaite* notes that the fact that the underlying offense is federal in nature creates a substantial likelihood that federal authorities will become involved in the investigation or prosecution of such crimes. *Id.* at 688. The court states that an individual who commits a federal crime’s ignorance of the law is not relevant to whether the government can establish that she violated a federal statute.

¹¹⁸ *Id.* at 688. See *supra* note 28 and accompanying text (discussing S. Rep. No. 97-532, *supra* note 3, at 9, and the Congressional intent behind the enactment of § 1512); see also *Bell*, 113 F.3d at 1350 (holding that the government need only prove that the defendant acted with the intention to interfere with a federal proceeding and not that the defendant knew of the federal nature of such proceeding). The specific facts and the court’s ultimate holding in *Applewhaite* are a bit of an anomaly within cases brought under § 1512. The specific facts of the case are unclear on whether the case was correctly in federal court, but the Third Circuit does speak to the issue. *Id.* at 688. The court holds that, regardless of whether a case is in federal court by accident or mistake, the fact that a case is incorrectly tried in federal court does not render § 1512 inapplicable. *Id.* The court specifically stated that:

A federal prosecution remains federal in character for purposes of the umbrella of § 1512 even if it is in federal court only by accident or mistake. The issue of whether authorities are correct when they select a federal forum over a state forum does not alter the federal nature of the prosecutions brought in federal court insofar as a violation of 18 U.S.C. § 1512 is concerned.

Id. See also Surette, *supra* note 32 (explaining the facts and holding of the court in *Applewhaite*).

Circuit Court of Appeals, in *United States v. Causey*, and the First Circuit Court of Appeals in *United States v. Rodriguez-Marerro* and *United States v. Baldyga*, also apply this reasoning.¹¹⁹ However, other circuits, such as the Fourth and Eleventh Circuits, apply a different analysis that provides victims greater protection under the VWPA.¹²⁰

The Eleventh Circuit Court of Appeals, in *United States v. Veal*, convicted several city police detectives of tampering with witnesses with the intent to hinder or delay communication of a federal offense to federal authorities when they acted to mislead state investigators regarding civil rights violations allegedly committed by the detectives.¹²¹ Noting that the legislative intent of the VWPA was to protect the integrity of federal investigations and proceedings, the court found

¹¹⁹ *United States v. Rodriguez-Marrero*, 390 F.3d 1 (1st Cir. 2004); *Baldyga*, 233 F.3d 674 ; *United States v. Causey*, 185 F.3d 407 (5th Cir. 1999). See also Sarah Roadcap, *Obstruction of Justice*, 41 AM. CRIM. L. REV. 911, 932 n.127 (2004) (discussing the holding of *Applewhite* and *Causey*).

While the Fifth Circuit Court of Appeals claims to expressly reject the reasoning of the Eleventh Circuit Court of Appeals in *Veal*, it also appears to enunciate a test that is broader than the federal-in-fact test set forth by the Third Circuit Court of Appeals. *Causey*, 185 F.3d at 422 (stating “we do not read [the statute] as requiring proof that the defendant believed the victim might communicate with law enforcement officers *whom the defendant knew or believed to be federal officers.*”) (quoting *Bell*, 113 F.3d at 1349) (emphasis added). The First Circuit also appears to follow the federal-in-fact test but also mentions and discusses the decision by the Eleventh Circuit Court of Appeals in *Veal*, 153 F.3d 1233.

¹²⁰ *Veal*, 153 F.3d 1233; *Harris*, 498 F.3d 278. Recently, the Third Circuit cited to *Veal* in *Guadalupe*, 402 F.3d at 413. However, the court did not extend the analysis of the Eleventh Circuit Court of Appeals to the decision in *Guadalupe* because it held that the government had proven sufficient additional evidence to satisfy the nexus requirement as set forth in *Stansfield*. *Guadalupe*, 402 F.3d at 413. Also, the Fifth Circuit Court of Appeals, in *Causey*, expressly declined to follow the reasoning of the Eleventh Circuit. *Causey*, 185 F.3d at 422.

In *Veal*, the Eleventh Circuit Court of Appeals specifically addressed the federal nexus requirement of § 1512(b)(3). *Veal*, 153 F.3d at 1245. The court in *Veal* found that other sections of § 1512 implicate different federal interests. *Id.* at 1250. For example, the federal interest in §§ 1512(a), (b)(1), and (b)(2) was “the status of the targeted person, potential witnesses in ‘official proceedings[.]’” *Id.* at 1250–51 n.24. However, the court did note that in these sections the “statute expressly states that the proceeding ‘need not be pending or about to be instituted at the time of the offense.’” *Id.* However, the federal nexus requirement of other sections have been analyzed in the same manner. See *Diaz*, 176 F.3d at 91; and *Baldyga*, 233 F.3d at 680 n.5 (1st Cir. 2000).

¹²¹ *Veal*, 153 F.3d at 1238. In *Veal*, undercover police officers attacked a drug dealer they were investigating after being informed that the drug dealer had contracted to kill one of the police officers. *Id.* at 1236. The officers attempted to cover up the incident. *Id.* The officers lied to the initial investigators, including the crime-scene technician and Miami City homicide detectives. *Id.* at 1237. Three days after the attack, the FBI began a civil rights investigation into the incident. *Id.* at 1238. See also James P. Fleissner & Jeffrey R. Harris, *Constitutional Criminal Procedure: A Two Year Survey*, 50 MERCER L. REV. 921, 939–41 (1999) (discussing the facts and holding of *Veal* especially in the context of civil rights litigation).

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sufficient evidence that the information, which was later transferred to federal authorities, established a federal nexus under the Act.¹²² Specifically, the court held that the government need only prove the misleading information was “likely” to be transferred to federal authorities, not that the officials who initially received the information were federal officials.¹²³

Recently, the Fourth Circuit Court of Appeals, in *United States v. Harris*, chose to follow the broader interpretation as set forth by the Eleventh Circuit Court of Appeals in *Veal*, requiring only that the government prove the underlying offense was federal in nature and the potential existed for the information to be transferred to federal authorities.¹²⁴ However, other circuits, including the First and Fifth Circuits, follow the reasoning set forth by the Court of Appeals for the Third Circuit in *Stansfield* and *Bell*, requiring that the government must

¹²² *Veal*, 153 F.3d at 1247. The court also concluded that state investigators can, themselves, be considered witnesses under the plain language of § 1512. *Id.* Congressional intent behind enacting the act indicates that the Act encompassed law enforcement officials as witness. *Id.* Also, the Court noted that “the federal interest derives from the character of the affected activity, [i.e.,] the transmission of information to federal law enforcement agents and/or a federal judge concerning a possible federal crime.” *Id.* at 1251 (emphasis in original). The Court went a step farther and stated that the nexus requirement as set forth in *Aguilar* was not controlling because § 1512 protected broader federal interests that § 1503 was not meant to address. *Id.* See also Dana E. Hill, *Anticipatory Obstruction of Justice: Pre-emptive Document Destruction under the Sarbanes-Oxley Anti-Shredding Statute*, 18 U.S.C. § 1519, 89 CORNELL L. REV. 1519, 1531 n.65 (noting *Veal*’s distinguishing the nexus requirements under §§ 1503, 1505, & 1512); O’Sullivan, *supra* note 45, at 692–93 n.204 (noting the determination of the Eleventh Circuit Court of Appeals that the nexus requirement as set forth in *Aguilar* was not controlling).

¹²³ *Veal*, 153 F.3d at 1251. The court found that “the federal interest derives from the character of the affected activity, the transmission of information to federal law enforcement agents and/or a federal judge concerning a possible federal crime.” *Id.* (emphasis in original). Therefore, all the government had to prove was “the possibility or likelihood that . . . information would be transferred to federal authorities irrespective of the governmental authority represented by the initial investigators.” *Id.* at 1251–52 (emphasis in original). The court in *Veal* relied on *Stansfield* and its progeny in elucidating this holding. *Id.* at 1251 n.26 (quoting *Stansfield*, 101 F.3d 909). Specifically, the *Veal* court found that *Stansfield* stated that the possibility that a person “might communicate with the federal authorities” was sufficient to find a federal nexus. *Id.* (emphasis in original).

¹²⁴ *Harris*, 498 F.3d at 286 (holding that “[s]o long as the information the defendant seeks to suppress actually relates to the commission or possible commission of a federal offense, the federal nexus requirement is established.”); *Guadalupe*, 402 F.3d at 413 (discussing the interpretation of the Eleventh Circuit Court of Appeals of the federal nexus requirement, but finding sufficient additional evidence to convict applying the rationale of *Stansfield* and *Bell*); *Perry*, 335 F.3d at 321 n.7 (deciding not to apply the rationale of *Veal* in finding a sufficient showing of intent to interfere with an investigation which “‘happened to be federal[.]’”); *Applewhaite*, 195 F.3d at 687 (discussing that a defendant could be convicted with witness tampering with a showing that the investigation “turns out to be federal[.]” and the underlying offense is a federal crime).

prove additional evidence beyond the mere fact that the underlying offense was federal in nature in order to establish a sufficient federal nexus to prosecute under the VWPA.¹²⁵ Several decisions by the Third Circuit Court of Appeals, such as *United States v. Applewhaite* and *United States v. Guadalupe*, confirm the current tension in this area of the law.¹²⁶

III. ANALYSIS: THE CURRENT CONFUSION REGARDING THE APPLICATION OF THE FEDERAL NEXUS REQUIREMENT UNDER 18 U.S.C. § 1512

While the Supreme Court has addressed the issue of whether a federal nexus must be established to prosecute a defendant under § 1512 of the VWPA, courts disagree as to what evidence sufficiently supports the establishment of a federal nexus.¹²⁷ The Third Circuit Court of Appeals established a standard in its early interpretation of the federal nexus requirement which many courts followed in convicting defendants under § 1512.¹²⁸ Following these decisions, the Eleventh Circuit Court of Appeals interpreted the statute broadly to extend the

¹²⁵ *Rodriguez-Marrero*, 390 F.3d at 13 (citing *Bell*, 113 F.3d at 1350) (finding proof that federal authorities had already begun a federal investigation prior to the defendant's act to tamper with a witness constitutes "appropriate additional evidence" under *Stansfield and Bell*); *Perry*, 335 F.3d at 321 (finding sufficient additional evidence that the defendant intended to influence an investigation that happened to be federal); *Causey*, 185 F.3d at 422 (expressly rejecting the reasoning of *Veal* in holding that the government must prove the defendant acted with the intention to interfere with a federal investigation); *Baldyga*, 233 F.3d at 680 (holding that in joint investigations the possibility exists that communications will eventually occur with federal authorities).

¹²⁶ *Guadalupe*, 402 F.3d at 413. The court in *Guadalupe* discussed both *Stansfield* and *Veal*. *Id.* While the court held that the government may establish a sufficient federal nexus by showing that the investigation later became federal, it also stated it "stay[ed] faithful to the teachings of *Stansfield* and *Bell* because there [was] 'additional appropriate evidence' . . ." which established the federal nexus. *Id.* See also *Applewhaite*, 195 F.3d 679 (convicting the defendant using the rationale of *Stansfield* and *Bell* but elucidating a broader "turns out to be federal" analysis in dicta). The court in *Applewhaite* used such broad language as "turns out to be federal" in stating the required federal nexus under § 1512. *Id.* at 687.

¹²⁷ See *supra* Parts II.C.1 & II.C.4. As a starting point in determining the minimum federal connection required to be prosecuted under § 1512, courts look to the United States Supreme Court's analysis on § 1503 decision in *Aguilar*, 515 U.S. 593. See *supra* Part II.C.2 (discussing the Supreme Court's holding in *Aguilar*). But see *supra* note 122 and accompanying text (discussing why the Eleventh Circuit does not find the nexus requirement as set forth in *Aguilar* controlling in prosecutions brought § 1512).

¹²⁸ See *supra* Part II.C.4. The Court in *Arthur Andersen* established that some nexus must be established in order to convict a defendant under § 1512. *Arthur Andersen LLP*, 544 U.S. at 708. See also *supra* note 73 and accompanying text (noting the Court's holding in *Arthur Andersen*). However, prior to the decision in *Arthur Andersen*, the Third Circuit Court of Appeals established a test to establish the requisite federal nexus under § 1512. See *supra* notes 106-116 and accompanying text (explaining the holdings of the Third Circuit Court of Appeals in *Stansfield*, 101 F.3d 909 and *Bell*, 113 F.3d 1345).

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reach of § 1512.¹²⁹ Recently, the Third Circuit has used both its earlier decisions and the interpretation by the Eleventh Circuit when applying the federal nexus requirement to prosecutions under § 1512.¹³⁰ Finally, to add to the lack of uniformity among the circuits regarding the interpretation of the federal nexus requirement, the Fourth Circuit Court of Appeals recently distinguished its earlier decisions relying on the interpretation of the Third Circuit Court Appeals to enunciate a test which expanded the reach of § 1512.¹³¹

Part III.A first discusses the problems associated with the initial test set forth by the Third Circuit Court of Appeals in its early cases.¹³² While several decisions have attempted to apply the language of *Stansfield* and *Bell*, no court, including the Third Circuit Court of Appeals, has applied the test with much consistency.¹³³ Next, Part III.B will discuss the problems associated with the application of the *Veal* test.¹³⁴

A. *The Practical Inapplicability of the Third Circuit's Test*

The Third Circuit Court of Appeals attempted to set forth a test to establish the jurisdictional requirement under § 1512 of the VWPA by enunciating its federal-in-fact test.¹³⁵ In *Stansfield* and *Bell*, the Third Circuit Court of Appeals in effect limited the reach of § 1512 to only cases that actually involved a full-blown federal investigation.¹³⁶ However, by limiting the jurisdiction of the Act to only those cases, many victims of federal crimes which the VWPA is meant to protect are left unprotected.¹³⁷ Most victims and witnesses do not initially report crimes to federal officials.¹³⁸

¹²⁹ *Veal*, 153 F.3d 1233. The Fifth Circuit expressly rejects the Third Circuit's interpretation of § 1512's nexus requirement and continues to apply the more limited interpretation used by the Third Circuit in its earlier cases. See *Causey*, 185 F.3d 407.

¹³⁰ See *supra* note 126 and accompanying text (noting that the Third Circuit Court of Appeals in recent decisions claims adherence to *Stansfield* and *Bell*, but also appears to enunciate a broader test similar to that set forth by the Eleventh Circuit of Appeals in *Veal*).

¹³¹ *Harris*, 498 F.3d 278.

¹³² *Infra* Part III.A.

¹³³ See *infra* note 117 (discussing the Third Circuit's application of *Stansfield* and *Bell* in *Applewhaite*, 195 F.3d 679; notes 118–19 and accompanying text (discussing the application by the Fifth Circuit Court of Appeals of the test set forth in *Stansfield* and *Bell*).

¹³⁴ *Infra* Part IV.A.

¹³⁵ See *supra* Part II.D. As noted before, the Third Circuit Court of Appeals called its test the federal-in-fact test in *Stansfield* and then the happens-to-be-federal test in *Bell*. See *supra* note 115 and accompanying text. For all purposes, the two tests appear to be applied the same.

¹³⁶ See *supra* notes 106–16 and accompanying text (discussing the Court of Appeals for the Third Circuit's enunciation of its federal-in-fact test in *Stansfield* and *Bell*).

¹³⁷ See *supra* Part II.A (discussing that Congressional intent behind the enactment of § 1512 was to extend protection to a broader range of persons and safeguard the integrity

The federal-in-fact test does not extend protection to victims and witnesses who are attacked prior to federal officials becoming involved in investigations of federal crimes.¹³⁹ The fact that federal officials become involved at a later date regarding the same investigation does not qualify as “additional appropriate evidence” under the test as interpreted by the circuits that follow it.¹⁴⁰ Thus, a witness may not be protected if the government shows only that the offense was federal in nature and that federal officials were later involved.¹⁴¹

However, the federal-in-fact test seems to completely overlook that the federal nature of a crime creates a substantial likelihood that federal agents will eventually investigate the crime.¹⁴² Also, the defendant’s subjective state of mind of whether he is violating a substantive federal law bears no relationship to whether the government can establish that the defendant’s conduct did violate substantive federal law.¹⁴³ Thus, a defendant should not be allowed to declare ignorance of the law in claiming that he only intended to interfere with communications with local or state authorities. The federal nature of the crime, while not dispositive,¹⁴⁴ should be given great weight even when the investigation does not initially begin with federal officials. Though the issue in *Applewhaite* involved officials choosing the wrong forum for the case, the analysis should be extended to witnesses.¹⁴⁵ Simply because a witness may choose the wrong “forum” in which to report a crime, she should

of the criminal justice system). *See also* notes 29–30 and accompanying text (discussing the purpose behind the enactment of § 1512); note 118 and accompanying text (discussing one purpose behind the enactment of § 1512 was to safeguard the integrity of the judicial system).

¹³⁸ *See supra* note 29 and accompanying text (noting that most crimes fall under the jurisdiction of state and local agencies).

¹³⁹ *See supra* notes 106–16 and accompanying text (setting forth the federal-in-fact test of the Court of Appeals for the Third Circuit). Under the reasoning of the Third Circuit in *Stansfield* and *Bell* and the reasoning of the Fifth Circuit in *Causey*, the official the witness is communicating with or might communicate with must in fact be a federal official at the time the witness is attempting to communicate. *See Stansfield*, 101 F.3d 909; *Bell*, 113 F.3d 1345; *Causey*, 185 F.3d 407.

¹⁴⁰ *See Stansfield*, 101 F.3d 909; *Bell*, 113 F.3d 1345.

¹⁴¹ *Stansfield*, 101 F.3d at 918. *See also supra* notes 106–12 and accompanying text (discussing the facts and reasoning underlying the court’s decision in *Stansfield*).

¹⁴² *See supra* note 117 and accompanying text (discussing the reasoning of the Third Circuit Court of Appeals in *United States v. Applewhaite*).

¹⁴³ *Applewhaite*, 195 F.3d at 687. *See supra* note 117 and accompanying text.

¹⁴⁴ *See supra* notes 108–16 and accompanying text (discussing the holdings of the Third Circuit Court of Appeals in *Stansfield* and *Bell*—that the government must prove more than the fact that the underlying offense is federal in nature).

¹⁴⁵ *See supra* note 118 and accompanying text (discussing the court’s finding that a federal prosecution remains federal in nature regardless of whether it is in federal court by mistake). *See also Applewhaite*, 195 F.3d at 688.

not be precluded from protection under a federal statute meant to provide protection to her. This result is entirely apposite to Congress's intent in enacting the VWPA to protect victims of federal crimes.¹⁴⁶

Two Circuits appear to apply the rationale of *Stansfield* and *Bell* when deciding whether a sufficient federal nexus exists to convict a defendant under § 1512.¹⁴⁷ However, both the First and Fifth Circuits distort the test. The First Circuit appears to apply the Third Circuit's federal-in-fact test and also adds the decision of the Eleventh Circuit Court of Appeals in *Veal* to the discussion, whereas the Fifth Circuit has clearly refused to follow the decision in *Veal* and does not appear to adhere to the test set forth by the Third Circuit Court of Appeals in *Bell*.¹⁴⁸ In contradiction to the holding in *Bell*, the Fifth Circuit Court of Appeals held that the defendant's knowledge or belief that the authorities were federal officials is irrelevant.¹⁴⁹

Also, the Third Circuit Court of Appeals in recent cases has lessened the burden on the government in establishing a sufficient federal nexus, in contradiction to its earlier decision.¹⁵⁰ In light of these cases, the Third Circuit Court of Appeals appears to be interpreting § 1512 differently than it did initially.¹⁵¹ In fact, the court stated that the government may establish a sufficient federal nexus by simply showing that a defendant intended to interfere with a communication that was likely to be transferred to federal authorities, regardless of whether the investigation started at the local level.¹⁵² This holding is not entirely consistent with the earlier holdings of the Third Circuit.¹⁵³ Thus, circuit courts have not

¹⁴⁶ See *supra* notes 29–30 and accompanying text (discussing congressional enactment of § 1512 of the VWPA).

¹⁴⁷ See *supra* note 119 and accompanying text. See also *United States v. Rodriguez-Marrero*, 390 F.3d 1, 13 (1st Cir. 2004); *United States v. Baldyga*, 233 F.3d 674 (1st Cir. 2000); *Casey*, 185 F.3d 407 (5th Cir. 1999).

¹⁴⁸ See *supra* note 119 accompanying text (noting the discrepancy in the decision by the Fifth Circuit Court of Appeals). See also *Casey*, 185 F.3d at 422. The Fifth Circuit Court of Appeals cites directly to the decision of the Third Circuit Court of Appeals in *Bell*. *Id.* at 422.

¹⁴⁹ See *supra* note 119 and accompanying text.

¹⁵⁰ *Guadalupe*, 402 F.3d 409. See *supra* note 126 and accompanying text. The court itself stated that its decision in *Applewhaite* was more closely in line with the Eleventh Circuit's decision than with the Third Circuit's earlier decisions. *Guadalupe*, 402 F.3d at 413.

¹⁵¹ See *supra* note 126 and accompanying text (discussing the decisions of the Third Circuit Court of Appeals in *Guadalupe* and *Applewhaite*).

¹⁵² *Guadalupe*, 402 F.3d at 413. The exact language used by the court is:

All that was required [to show a violation of § 1512] was the *possibility* or *likelihood* that [the defendants'] false and misleading information would be transferred to federal authorities irrespective of the governmental authority represented by the initial investigators.

Id. (quoting *Veal*, 153 F.3d at 1251–52) (emphasis in original).

¹⁵³ See *supra* Part II.D. The Third Circuit stated in *Stansfield*:

consistently applied the same standard in determining what constitutes a sufficient federal nexus under § 1512.

The lack of clarity, which exists within the Third Circuit and the circuits which purport to apply its earlier jurisprudence, makes it unclear exactly what the government must show to establish a sufficient federal nexus to satisfy the jurisdictional element of § 1512 in that jurisdiction.¹⁵⁴ Even though § 1512 has been found to not violate the Fifth Amendment due process rights of a defendant, this schizophrenic application of the statute does not provide defendant's with adequate notice of what types of possible investigations would be protected under § 1512.¹⁵⁵

Furthermore, the original interpretation of § 1512 by the Third Circuit, which has been followed by the First and Fifth Circuits, appears too restrictive in requiring that the officer with whom the witness wishes to communicate be a federal officer. This requirement does not truly comport with the purpose of § 1512. The congressional intent for the enactment of § 1512 of the VWPA appears to encompass investigations that may include local authorities investigating federal crimes in cooperation with federal officials.¹⁵⁶ Some of the case law within the First, Third, and Fifth Circuits does not appear to take this intent into consideration and has limited the jurisdiction of § 1512 too severely.

Were we to require only that the government prove that the underlying offense is federal and that the defendant intended to prevent the witness from communicating with law enforcement officials in general, without also proving the defendant's knowledge of or belief in the possibility that the witness would communicate with federal authorities, we would essentially vitiate an important facet of the intent requirement of the statute.

United States v. Stansfield, 101 F.3d 909, 918 (3d Cir. 1996) (emphasis in original). *See also supra* notes 106-116 and accompanying text (discussing the earlier decisions of the Third Circuit in *Stansfield* and *Bell*).

¹⁵⁴ *See supra* notes 106-19 and accompanying text. In *Stansfield*, an investigation which began locally, became protected under § 1512 six months after the investigation began. *See supra* notes 108-09 and accompanying text (discussing the facts underlying the Third Circuit's decision in *Stansfield*). In *Bell*, a joint task force which had regularly consisted of both local and federal authorities provided a sufficient federal connection as to bring the investigation and any witnesses involved under the protection of § 1512. *See supra* notes 113-16 and accompanying text (discussing United States v. *Bell*, 113 F.3d 1345 (3d Cir. 1997)). However, in *Applewhaite*, the court held that a case in federal court by accident or mistake would still be protected under § 1512. *See supra* notes 117-18 and accompanying text (discussing United States v. *Applewhaite*, 195 F.3d 679 (3d Cir. 1999)).

¹⁵⁵ *See supra* notes 32-34 and accompanying text (discussing the constitutionality of § 1512). The fact that a defendant cannot predict what conduct would be proscribed implicates due process concerns.

¹⁵⁶ *See supra* notes 29-30 and accompanying text (discussing congressional intent to provide broad protection to victims and witnesses of federal crimes). *See also supra* note 122 and accompanying text (noting the discussion of the Eleventh Circuit Court of Appeals of the congressional intent behind § 1512).

However, the broader interpretation of the statute enunciated by the Fourth and Eleventh Circuits also presents problems.

B. The Problems Associated With Veal and Harris

The rationale of the Fourth and Eleventh Circuits also presents problems because most serious crimes fall under the jurisdiction of the states.¹⁵⁷ As stated by the Third Circuit Court of Appeals, the purpose for congressional enactment of § 1512 was to provide protection to victims and witnesses of federal crimes while ensuring the integrity of criminal investigations and proceedings.¹⁵⁸ However, courts that apply a more stringent test upon the government to establish a close relationship between the defendant's interference with a witness and a federal investigation or proceeding argue that a lesser standard would infringe upon the jurisdiction of the states.¹⁵⁹ On the other hand, those that apply a lesser standard argue that, on many occasions, state and federal investigators corroborate when investigating criminal conduct that constitutes a federal crime.¹⁶⁰

The analysis of the federal nexus requirement should be conducted in a functional manner so as to cover all conduct which functions to tamper with witnesses "in order to frustrate the ends of justice[.]"¹⁶¹ but also in a way that does not infringe upon the jurisdiction of the states. The Fourth Circuit Court of Appeals asserts that in order to fulfill the objectives of § 1512 and to protect the integrity of the potential federal investigation, prosecutions must be allowed when witness tampering affects the transfer of information regarding a commission or possible commission of a federal crime from state and local authorities to federal law enforcement.¹⁶² However, the method used by both the Fourth and Eleventh Circuits presents the possibility that the federal courts may

¹⁵⁷ S. Rep. No. 97-532, *supra* note 3, at 10 (noting that "the majority of serious violent crimes fall within the jurisdiction of the state and local law enforcement agencies."). *See also supra* notes 29-30 and accompanying text.

¹⁵⁸ *United States v. Applewhaite*, 195 F.3d 679 (3d Cir. 1999).

¹⁵⁹ *See United States v. Causey*, 185 F.3d 407 (5th Cir. 1999).

¹⁶⁰ *See Harris*, 498 F.3d 278. *See also Kearney, supra* note 2.

¹⁶¹ *United States v. Veal*, 153 F.3d 1233, 1247 (11th Cir. 1998).

¹⁶² *Harris*, 498 F.3d at 285 (quoting *Perry*, 335 F.3d at 321) (stating that "'the federal interest of protecting the integrity of potential federal investigations by ensuring that transfers of information to federal law enforcement . . . relating to the possible commission of federal offenses be truthful and unimpeded.'"). This rationale is also supported by the United States Supreme Court's decision in *United States v. Aguilar*, 515 U.S. 593 (1995) (stating in dicta that the fact that the witness may never have communicated the information to any authority is irrelevant in determining that the defendant intended to prevent the witness from doing so). *See supra* Part II.C.2 and accompanying text (discussing the Court's rationale and Justice Scalia's dissent).

intrude upon the jurisdiction of state agencies and courts.¹⁶³ Both sides of the debate claim to be interpreting the plain language of the statute. The differing interpretations indicate that Congress should speak again and amend the statute to provide clear and concise guidelines as to what satisfies the jurisdictional element of § 1512.

Jurisdictions that limit the reach of the statute run the risk of leaving out ancillary investigations that are integral to the integrity of the federal criminal system. However, jurisdictions that interpret the federal nexus requirement broadly run the risk of overstepping state and local jurisdictions.¹⁶⁴ However, Congress should amend the statute to provide clear guidance to courts of its intent—specifically, which proceedings or investigations would fall under the protection of § 1512 of the VWPA.¹⁶⁵

IV. PROPOSED AMENDMENTS TO 18 U.S.C. § 1512

Congress should amend 18 U.S.C. § 1512 because current law is unclear as to which victims and witnesses would qualify for protection under the Act.¹⁶⁶ A victim should not be precluded from the protection of the Act simply for reporting the crime to the wrong authorities. If state or local authorities eventually contact federal authorities regarding information received in an initial investigation, the victim or witness should be protected under the VWPA.¹⁶⁷

Consequently, this Note proposes that § 1512 of the VWPA be amended by adding language to the substantive sections of the statute and by adding an additional subsection to the Act to clarify the federal nexus requirement. These additions will help the current statute better comport with the original congressional intent behind the statute and

¹⁶³ S. Rep. No. 97-532, *supra* note 3. See also *supra* note 9 and accompanying text (discussing the purpose behind the enactment of § 1512 and recognizing the jurisdiction of state and local systems over most serious violent crimes).

¹⁶⁴ See *supra* Part II.D (discussing differing constructions of § 1512). Justice Scalia's dissent in *Aguilar* supports the position that the obstruction statutes should be read broadly to provide protection to all victims and witnesses of federal crimes. *Aguilar*, 515 U.S. 593 (Scalia J., dissenting). Also, some of the language of the majority's decision seems to indicate a disposition to read the jurisdictional elements of the obstruction acts broadly. *Id.*

¹⁶⁵ See *infra* Part IV.

¹⁶⁶ See *supra* Part III (discussing the problems associated with the current state of the law regarding the interpretation of the federal nexus requirement of § 1512).

¹⁶⁷ See *supra* notes 120-23 and accompanying text (discussing *Veal* and its reasoning to interpret § 1512 broadly to provide protection to victims whose communications with local authorities are transferred to federal authorities).

provide protection to all persons who deserve protection under the Act via amendments and adding a new section.¹⁶⁸

First, the Act should be amended to allow protection to victims and witnesses whose communication with local or state authorities is transferred to federal officials to be used in a federal investigation or proceeding. Second, the Act should be amended to set forth relevant factors in determining whether an investigation constitutes a federal investigation as to bring cooperating witnesses or victims under the protection of the Act. Thus, the statute should be amended to read:

(a)(1) Whoever kills or attempts to kill another person, with intent to . . .

(c) prevent the communication *or transmission of the communication* by any person to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense or a violation of conditions of probation, parole, or release pending judicial proceedings;

(2) Whoever uses physical force or the threat of physical force against any person, or attempts to do so, with intent to— . . .

(c) hinder, delay, or prevent the communication *or transmission of the communication* to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense or a violation of conditions of probation, supervised release, parole, or release pending judicial proceedings; shall be punished as provided in paragraph (3) . . .

(b) Whoever knowingly uses intimidation, threatens, or corruptly persuades another person, or attempts to do so, or engages in misleading conduct toward another person, with intent to— . . .

(3) hinder, delay, or prevent the communication *or transmission of the communication* to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of

¹⁶⁸ See *supra* note 40 and accompanying text (citing the current version of § 1512). See also notes 28–30 and accompanying text (discussing the legislative intent behind enactment of § 1512 of the VWPA).

a Federal offense or a violation of conditions of probation, supervised release, parole, or release pending judicial proceedings;

shall be fined under this title or imprisoned not more than ten years, or both . . .

(c) Whoever corruptly—

(1) alters, destroys, mutilates, or conceals a record, document, or other object, or attempts to do so, with the intent to impair the object's integrity or availability for use in an official proceeding; or

(2) otherwise obstructs, influences, or impedes any official proceeding, or attempts to do so,

shall be fined under this title or imprisoned . . .

(d) Whoever intentionally harasses another person and thereby hinders, delays, prevents, or dissuades any person from— . . .

(3) reporting to a law enforcement officer or judge of the United States the commission or possible commission of a Federal offense or a violation of conditions of probation supervised release, parole, or release pending judicial proceedings; . . .

or attempts to do so, shall be fined under this title or imprisoned not more than a year, or both.¹⁶⁹

Commentary

First, several courts already recognize that, in reality, investigations of the commission or possible commission of a federal crime do not exist in a vacuum where victims and witnesses report the crime directly to federal officials.¹⁷⁰ Most crimes are reported directly to local and state officials who then determine whether federal involvement is necessary.¹⁷¹ The information communicated to local and state officials

¹⁶⁹ This proposal is the contribution of the author. The proposed additions are italicized and the language in regular font is taken directly from § 1512. *See generally* 18 U.S.C. § 1512. For purposes of this amendment, transmission shall be defined according to the common legal usage. Black's Law Dictionary defines transmit as "1. To send or transfer (a thing) from one person or place to another. 2. To communicate." BLACK'S LAW DICTIONARY 1537 (8th ed. 2004).

¹⁷⁰ *See supra* note 2 and accompanying text (noting, after the holding of the Fourth Circuit Court of Appeals in *Harris* that federal and local officials recognize the need to cooperate, especially in the area of drug crimes).

¹⁷¹ *See supra* note 29 and accompanying text (discussing federal recognition that most violent crimes are investigated and prosecuted by state officials).

is then transferred to federal officials once they become involved in the investigation or completely take control.¹⁷² Victims and witnesses cannot be expected to determine that a crime is federal in deciding to whom they will report a crime. This does not comport with any rational understanding of how the criminal justice system works.

The proposed amendment recognizes this reality by expressly providing protection under § 1512 to individuals who assist in any federal investigation regardless of when and with whom they first initially communicated. The amendment does not broaden protection beyond that which was originally intended by Congress in 1982, but assures that individuals who fall within the meaning of the statute are provided the protection intended by Congress. The added language also comports with the legislative intent to provide broad protection to individuals who unfortunately become victims or witnesses of federal crimes.¹⁷³

Second, one stated purpose of the VWPA is to protect the integrity of the criminal justice system.¹⁷⁴ Local and state officials must be able to rely on their federal counterparts in order to adequately investigate and prosecute crimes.¹⁷⁵ In turn, victims and witnesses must be able to trust the system to provide them with justice and protection. The proposed amendment better fulfills this purpose of the Act by expressly recognizing that information that is integral to a federal investigation or prosecution may not be communicated directly to federal authorities, but to local or state authorities who work in conjunction with federal authorities.

Finally, the proposed amendment stays true to other language used within § 1512 and language used by several courts interpreting the Act more narrowly.¹⁷⁶ The Act itself states that a proceeding need not be pending in order for the victim or witness to be protected.¹⁷⁷ The proposed amendment extends this rationale to investigations by providing protection to individuals against possible conduct that

¹⁷² See *supra* notes 120–23 and accompanying text (relating the facts of *Veal* and the rationale of the Eleventh Circuit as finding a sufficient federal nexus to prosecute the defendant for witness intimidation).

¹⁷³ See *supra* notes 28–30 and accompanying text (discussing that Congress intended to broaden protection of victims and witnesses and to protect the integrity of the judicial system). See also *supra* note 123 and accompanying text (discussing the reasoning of the Eleventh Circuit Court of Appeals in *United States v. Veal*, 153 F.3d 1233 (11th Cir. 1998)).

¹⁷⁴ See *supra* notes 120–23 and accompanying text (discussing *Veal*).

¹⁷⁵ See *supra* note 2 and accompanying text (referring to one official's reaction to the decision in *Harris*).

¹⁷⁶ See *supra* notes 106–16 and accompanying text (discussing *Stansfield* and *Bell*).

¹⁷⁷ 18 U.S.C. § 1512(f). See also *supra* note 42 and accompanying text (discussing subsection 1512(g)).

occurred before the investigation is turned over to federal authorities.¹⁷⁸ Also, early cases decided by the Third Circuit Court of Appeals enunciated the rule that a sufficient federal nexus could be established by showing that the underlying offense was federal in nature while also showing proof of additional appropriate evidence.¹⁷⁹ The fact that information collected in a local or state investigation is turned over to federal investigators to continue the investigation or prosecution should be sufficient to establish additional appropriate evidence to satisfy the nexus requirement of the Act. In addition, the proposed amendment will provide for greater uniformity in the application of § 1512.¹⁸⁰

In addition to the above proposed amendment, a new subsection should be added to § 1512 regarding factors to be considered when determining whether a victim or witness shall receive protection under the Act. The following should also be added to the Section:

- (f) For the purposes of this section--
 - (1) an official proceeding need not be pending or about to be instituted at the time of the offense;
 - (2) *an investigation regarding the commission or possible commission of a federal falls under the purview of this section if:*
 - (a) *the underlying offense is in fact a federal crime as proscribed by the United States Code; and*
 - (b) *additional factors exist to establish prosecution under this section. Such additional factors to be considered include, but are not limited to:*
 - (i) *the underlying offense is one which both local and federal authorities commonly conduct joint investigations;*
 - (ii) *federal officials have frequently been contacted by local authorities to assist in investigations regarding similar conduct;*
 - (iii) *the underlying investigation resulting in the possible violation of this section did, in fact, result in a federal investigation, whether jointly with local or state officials or solely conducted by federal officials;*

¹⁷⁸ This protection is in the form of any deterrent effect the threat of possible federal prosecution for witness intimidation may have on a defendant.

¹⁷⁹ See *supra* notes 106-16 and accompanying text (discussing the tests set forth by the Third Circuit Court of Appeals in *Stansfield* and *Bell*).

¹⁸⁰ See *supra* Part II.D (discussing the lack of uniformity among the circuits).

(iv) the defendant was subsequently charged with a federal crime; and

(v) the underlying offense the defendant was subsequently convicted of was in fact a federal crime.

(vi) the testimony, or the record, or other object need not be admissible in evidence or free of a claim of privilege.

(3) the testimony, or the record, document, or other object need not be admissible in evidence or free of a claim or privilege.¹⁸¹

Commentary

The proposed amendment to the Act extends the protection of § 1512 to possible investigations. The balancing test, which takes into account the totality of the circumstances surrounding the underlying crime and the alleged witness tampering, protects against federal encroachment on state issues.¹⁸² The factors listed assure that a sufficient federal nexus exists before federal authorities can prosecute defendants under the Act, thus assuaging concerns that the proposed amendment is overbroad.¹⁸³ Victims and witnesses of federal crimes who initially report crimes to local or state officials will only qualify for protection if, and when, the investigation or prosecution is transferred to federal officials. Victims and witnesses should not be expected or required to know which crimes constitute a federal crime. This lack of knowledge should not preclude the victim or witness from protection under the VWPA.

This proposed amendment also restricts the scope of the aforementioned amendment which some may claim extends beyond the reach of federal authorities into the realm of exclusive state authority.¹⁸⁴ Federal prosecutors and judges are limited by the proposed test to situations where a clear federal interest is present. Thus, the proposed amendment alleviates concerns that federal authorities will be able to

¹⁸¹ This proposal is the contribution of the author. The proposed additions are italicized and the language in regular font is taken directly from § 1512. *See generally* 18 U.S.C. § 1512.

¹⁸² *See supra* notes 30–31 and accompanying text (noting congressional federalism concerns regarding the enactment of the VWPA).

¹⁸³ *See supra* note 3 and accompanying text (citing cases which discuss the constitutionality of § 1512 of the VWPA).

¹⁸⁴ *See supra* notes 30–31 and accompanying text.

encroach upon states' rights. This amendment also cures any overbreadth or due process concerns.¹⁸⁵

Finally, this proposed amendment will better ensure uniformity across the several federal jurisdictions by setting forth the specific factors to be considered under the Act. The proposal provides guidance to federal officials, especially federal judges regarding whether specific conduct is proscribed under § 1512.

Ultimately, both proposed amendments work together to provide victims and witnesses with adequate protection while ensuring that the purpose of the statute is met. Also, the proposed amendments limit the reach of the Act to situations where a federal nexus is indeed established. The proposed amendments will also allow for uniformity and certainty within the federal jurisdictions because they provide needed guidance to state and federal courts regarding the protection of victims and witnesses in joint investigations.

V. CONCLUSION

Returning to Mark, the unfortunate witness to a federal crime who was subsequently attacked in order to prevent his cooperation with authorities,¹⁸⁶ had Congress made the jurisdictional aspect of § 1512 more clear at the outset, individuals like Mark would not be experiencing such disparate treatment depending upon which federal circuit in which they reside or in which circuit the crime occurs. Based on the facts as described, Mark would be protected in both jurisdictions because the proposed amendments close the gap which exists in the current statute. Also, amending § 1512 would result in better protection to all persons that the original Act intended to protect. Finally, the proposed amendments would foster cooperation among state and federal authorities in resolving concurrent and joint investigations.

In sum, current law fails to adequately protect individuals when they initially report federal crimes to local authorities. The legislative history underlying the enactment of the VWPA indicates that Congress intended to provide broader protection to victims and witnesses of federal crimes than was provided for under previous obstruction of

¹⁸⁵ See *supra* notes 31-33 and accompanying text (discussing the constitutionality of § 1512).

¹⁸⁶ See *supra* Part I.

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justice statutes. However, courts have struggled in defining the exact scope of this protection and many victims and witnesses are still left unprotected under the Act.

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