

Obstruction of Justice: Witness Tampering (*18 U.S.C. §§ 1512, 1503*)

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6.18.1512A2 Obstruction of Justice - Witness Tampering Through Physical Force or Threat of Physical Force (18 U.S.C. § 1512(a)(2)(A) or (B))

Count *(No.)* **of the indictment charges the defendant** *(name)* **with** *(briefly state offense; e.g., tampering with a witness)*, **which is a violation of federal law.**

In order to find the defendant guilty of this offense, you must find that the government proved each of the following four elements beyond a reasonable doubt:

First: That *(name)* **knowingly used** *(attempted to use)* **physical force or the threat of physical force against** *(name of person)*,

Second: That *(name)* **acted with intent to**

[Include language that applies:

(influence)(delay)(prevent) the testimony of (name of person) in (specify proceeding), an official proceeding,

or

cause or induce (name of person) to (withhold testimony) (withhold a (record) (document) (specify object)) from (specify proceeding), an official proceeding,

or

cause or induce (name of person) to alter, destroy, mutilate or conceal an object with intent to impair the object's integrity or availability for use in (specify proceeding), an official proceeding,

or

cause or induce (name of person) to evade legal process summoning (name of person)

(to appear as a witness) (to produce a (record) (document) (specify object)) in (specify proceeding), an official proceeding,

or

cause or induce (name of person) to be absent from (specify proceeding), an official proceeding to which (name of person) had been summoned by legal process],

Third: That (name) knew or should have known that (specify proceeding) was pending or was likely to be instituted. *[However, the government does not need to prove that an official proceeding was actually pending or about to be instituted at the time of the alleged offense.]*

Fourth: That (specify proceeding), the official proceeding, was a federal proceeding. *[However, the government does not need to prove that the defendant knew that the proceeding was a federal proceeding.]*

Comment

18 U.S.C. § 1512(a)(2)(A) and (B) provide:

Whoever uses physical force or the threat of physical force against any person, or attempts to do so, with intent to--

(A) influence, delay, or prevent the testimony of any person in an official proceeding;

(B) cause or induce any person to--

(I) withhold testimony, or withhold a record, document, or other object, from an official proceeding;

(ii) alter, destroy, mutilate, or conceal an object with intent to impair the integrity or availability of the object for use in an official proceeding;

(iii) evade legal process summoning that person to appear as a witness, or to produce a record, document, or other object, in an official proceeding; or

(iv) be absent from an official proceeding to which that person has been summoned by legal process; * * *

commits a crime.

This instruction should be used only if the defendant is charged under 18 U.S.C. § 1512(a)(2)(A) or (B). If the defendant is charged with a violation of 18 U.S.C. § 1512(a)(2)(C), the court should give Instruction 6.18.1512A2-1 (Obstruction of Justice - Hindering Communication Through Physical Force or Threat of Physical Force (18 U.S.C. § 1512(a)(2)(C))). If the defendant is charged with a violation of 18 U.S.C. § 1512(b)(1) or (2), the court should give Instruction 6.18.1512B (Obstruction of Justice - Witness Tampering Through Intimidation, Threats, or Corrupt Persuasion (18 U.S.C. § 1512(b)(1) and (2))). If the defendant is charged with a violation of 18 U.S.C. § 1512(b)(3), the court should give Instruction 6.18.1512B-1 (Obstruction of Justice - Hindering Communication Through Intimidation, Threats, or Corrupt Persuasion (18 U.S.C. § 1512(b)(3))). These instructions do not cover all the subsections of § 1512. Section 1512(a)(1) addresses killing or attempting to kill another to prevent him or her from attending or testifying at an official proceeding, from producing evidence in an official proceeding, or from communicating certain information to a law enforcement officer or judge. Section 1512(c) addresses corrupt tampering with records, documents or other objects. Section 1512(d) creates a misdemeanor offense for harassing witnesses. If the indictment charges the defendant under one of these other provisions of section 1512, the instructions should be modified accordingly.

Under this statute, the force or threat of force does not have to be against the person testifying; that is, the defendant need not have direct contact with the witness. All that is required is that the defendant use physical force or the threat of physical force to tamper with a witness. *United States v. Davis*, 183 F.3d 231, 250 (3d Cir. 1999). The statute encompasses cases in which the defendant used force against, for example, a family member in order to silence a witness. *See United States v. Bell*, 113 F.3d 1345, 1349 n.3 (3d Cir. 1997). Alternatively, the use of force or threat of force may be directed at a number of potential victims, as, for example, a case where the defendant blew up a courtroom. If the government alleges a violation of the statute by using physical force or the threat of physical force against a third person and without direct contact with the witness, the court may want to instruct the jury that direct contact is not required.

In addition, the government is not required to prove that the defendant succeeded in the effort to tamper with the witness; the government need not prove that the witness changed or withheld his or her testimony. *United States v. Davis*, 183 F.3d 231, 250 (3d Cir. 1999). If there is a question as to whether the defendant's effort to tamper with the witness was successful, the court may want to instruct the jury that success is not a prerequisite to conviction and that what the government must prove beyond a reasonable doubt is that the defendant acted with intent to influence a witness' testimony.

18 U.S.C. § 1515(a)(2) defines the term "physical force" as "physical action against another, and includes confinement."

18 U.S.C. § 1512(f) provides:

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; 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) provides:

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.

Despite the language of § 1512(g), in *Arthur Andersen L.L.P. v. United States*, 544 U.S. 696 (2005), a prosecution under § 1512(b)(2), the Court held that the government must establish a nexus between the defendant's acts and a particular proceeding. The instruction directs the court to specify the particular proceeding. In *Arthur Andersen*, the Court stated:

The instructions also were infirm for another reason. They led the jury to believe that it did not have to find any nexus between the “persua [sion]” to destroy documents and any particular proceeding. In resisting any type of nexus element, the Government relies heavily on § 1512(e)(1)[now § 1512(f)(1)], which states that an official proceeding “need not be pending or about to be instituted at the time of the offense.” It is, however, 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. A “knowingly ... corrup[t] persuade[r]” cannot be someone who persuades others to shred documents under a document retention policy when he does not have in contemplation any particular official proceeding in which those documents might be material.

544 U.S. at 707-08. Like § 1512(b)(2), subsections 1512(a)(2)(A) and (B) address conduct that affects an official proceeding. As a result, it appears that the nexus requirement applies equally to these provisions of the statute.

In *United States v. Vampire Nation*, 451 F.3d 189, 205-06 (3d Cir. 2006), discussing the

nexus requirement under 1512(b)(2)(A), the Third Circuit quoted the Second Circuit's assessment of *Arthur Andersen*:

“[T]he touchstone for the nexus requirement, therefore, is an act taken that would have the natural and probable effect of interfering with a judicial or grand jury proceeding that constitutes the administration of justice; that is, the act must have a relationship in time, causation, or logic with the judicial proceedings.” *United States v. Quattrone*, 441 F.3d 153, 171 (2d Cir. 2006).

The Third Circuit held that the trial court had not committed plain error when it instructed the jury that the defendant could not be convicted unless he intended to persuade his target to impede an official proceeding given that the evidence established that the target had informed the defendant that he had received a subpoena to appear before the grand jury. *See also United States v. Aguilar*, 515 U.S. 593, 599-600 (1995) (holding under the omnibus obstruction of justice provision of 18 U.S.C. § 1503 that the government must prove not only that the defendant made false statements to the federal agents but also that the defendant “knew his actions [were] likely to affect” the proceeding).

Arthur Anderson does not settle the question of whether the defendant must also know that the proceeding was federal. In *United States v. Bell*, 113 F.3d 1345, 1351 (3d Cir. 1997), decided before *Arthur Andersen*, the Third Circuit considered that question. Bell was prosecuted for murder of a witness in violation of 18 U.S.C. § 1512(a)(1)(A) and (C) and use of physical force and threats against a witness, in violation of 18 U.S.C. § 1512(b)(1), (2), and (3). He complained of the following supplemental instruction:

[Y]ou would have to find beyond a reasonable doubt that the defendant intended to frustrate a future judicial proceeding. You would also have to conclude that that proceeding would be a federal proceeding, but you don't have to find that the defendant knew that it would be a federal proceeding.

The Third Circuit rejected the challenge, stating:

The quoted instruction did nothing more than explain 18 U.S.C. § 1512(f)(1) and (2)'s express provision that the government need not prove any state of mind on the part of the defendant with respect to the federal character of the proceeding or law-enforcement-officer communication that it alleges she intended to interfere with or prevent.

Bell, 113 F.3d at 1351.

Section 1515(a)(1) provides that, as used in section 1512 the term “official proceeding” means:

(A) a proceeding before a judge or court of the United States, a United States

magistrate judge, a bankruptcy judge, a judge of the United States Tax Court, a special trial judge of the Tax Court, a judge of the United States Court of Federal Claims, or a Federal grand jury;
(B) a proceeding before the Congress;
(C) a proceeding before a Federal Government agency which is authorized by law; or
(D) a proceeding involving the business of insurance whose activities affect interstate commerce before any insurance regulatory official or agency or any agent or examiner appointed by such official or agency to examine the affairs of any person engaged in the business of insurance whose activities affect interstate commerce.

The question of whether the proceeding alleged and proved by the government is an official proceeding is for the judge.

18 U.S.C. § 1512(j) provides:

(j) If the offense under this section occurs in connection with a trial of a criminal case, the maximum term of imprisonment which may be imposed for the offense shall be the higher of that otherwise provided by law or the maximum term that could have been imposed for any offense charged in such case.

If the maximum sentence for an offense charged in the criminal trial exceeds the maximum set forth in § 1512(a)(3), the higher sentence can be imposed only if the jury finds that the tampering offense occurred in connection with a criminal trial. In such cases, the court should instruct the jury to determine whether the offense occurred in connection with the trial of the criminal case.

**6.18.1512A2-1 Obstruction of Justice - Hindering Communication Through
Physical Force or Threat of Physical Force (18 U.S.C. §
1512(a)(2)(C))**

Count (No.) of the indictment charges the defendant (name) with (briefly state offense; e.g., tampering with a witness), which is a violation of federal law.

In order to find the defendant guilty of this offense, you must find that the government proved each of the following four elements beyond a reasonable doubt:

First: That (name) knowingly used (attempted to use) physical force or the threat of physical force against (name of person against whom defendant used or threatened force);

Second: That (name) acted with intent to hinder, delay or prevent (name of person whose communication was targeted) from communicating to (law enforcement authorities) (a judge) information relating to the commission or possible commission of an offense;

Third: That the offense was a federal offense; and

Fourth: That (name) believed that (name of person whose communication was targeted) might communicate with federal authorities. [However, the government does not need to prove that an official proceeding was actually pending or about to be instituted at the time of the alleged offense.]

Comment

18 U.S.C. § 1512(a)(2)(C) provides:

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

commits a crime. If the defendant is prosecuted for attempt, the court may want to give Instruction 7.01 (Attempt).

18 U.S.C. § 1512(f) provides:

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; 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) provides:

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. § 1515(a)(4) defines "law enforcement officer" to mean

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--

- (A) authorized under law to engage in or supervise the prevention, detection, investigation, or prosecution of an offense; or
- (B) serving as a probation or pretrial services officer under this title.

18 U.S.C. § 1515(a)(2) defines "physical force" as "physical action against another, and

includes confinement.”

The Third Circuit has not specifically resolved how to charge the jury on this offense and has not addressed the specific requirements for conviction under this section. However, in *United States v. Guadalupe*, 402 F.3d 409 (3d Cir. 2005), the Third Circuit listed the elements necessary for a conviction under 18 U.S.C. § 1512(b)(3), which addresses the use of corrupt persuasion, intimidation, or threats to accomplish the same goal:

To obtain a conviction pursuant to 18 U.S.C. § 1512(b)(3), the government must prove that: (1) the defendant attempted to corruptly persuade a person; (2) the defendant was motivated by a desire to prevent the communication between that person and law enforcement authorities concerning the commission or possible commission of an offense; (3) the offense was actually a federal offense; and (4) the defendant believed that the person he attempted to corruptly persuade might communicate with federal authorities.

402 F.3d at 412. The statute does not require proof that the defendant addressed the force or threatened force to a witness or potential witness. It encompasses cases in which the defendant used force against, for example, a family member in order to silence a witness. In such cases, the court may modify the language of the second element accordingly. See *United States v. Bell*, 113 F.3d 1345, 1349 n.3 (3d Cir. 1997).

The instruction includes as the fourth element the requirement that the defendant believed that the person influenced would communicate with a federal official. In *Guadalupe*, the Third Circuit wrestled with the question whether the defendant who interferes with communication to a law enforcement officer must know that the law enforcement officer is a *federal* officer. 402 F.3d at 413-14. The court recognized that, despite the language of § 1512(g), *United States v. Stansfield*, 101 F.3d 909 (3d Cir. 1996), requires some level of awareness that the communication interfered with would otherwise reach federal authorities. In *Stansfield*, the court explained:

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.

101 F.3d at 918. The court held that in order to obtain a conviction for tampering with a witness by killing or attempting to kill another pursuant to 18 U.S.C. § 1512(a)(1)(C),

the government must prove: (1) the defendant killed or attempted to kill a person; (2) 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; (3) that offense was actually a federal offense; and (4) the

defendant believed that the person in (2) above might communicate with the federal authorities. This last element may be inferred by the jury from the fact that the offense was federal in nature, plus additional appropriate evidence. For example, it is sufficient (but not necessary) that the government prove that the defendant had actual knowledge of the federal nature of the offense in order for the jury to infer the last element.

101 F.3d at 918. The court further stated:

[T]his framework is an appropriate reconciliation between the constraint that the government must prove the defendant's specific intent to hinder a federal investigation and the fact that, by virtue of [§1512(g)], it need not prove that the defendant knew the federal status of any particular law enforcement officer involved in an investigation.

101 F.3d at 919.

In *Guadalupe*, the court also discussed *Bell*. In *Bell*, the court stated:

In view of the statute's clear command that the government need not prove any “state of mind” on the part of the defendant with respect to the federal character of the proceeding or officer, 18 U.S.C. [§1512(g)], we do not read the italicized passage 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. Rather, we read this sentence as recognizing that what the statute mandates is proof that the officers with *whom the defendant believed the victim might communicate would in fact be federal officers*.

Bell, 113 F.3d at 1349 (emphasis in original).

The court then explained:

[W]e believe that the law of this circuit after *Stansfield* is 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. As *Stansfield* explained, the government may carry this burden by showing that the conduct which the defendant believed would be discussed in these communications constitutes a federal offense, so long as the government also presents “additional appropriate evidence.”

Bell, 113 F.3d at 1349.

The *Bell* court further explained:

[This conclusion] respects fully the statute's requirement that the defendant intend to prevent a communication to a law enforcement officer, as well as its requirement that such officer be, in fact, a federal officer. What our analysis renders irrelevant is the defendant's "mental state" regarding the fact that the officer is a federal officer—a fact which [§1512(g)(2)] by its terms declares irrelevant.

Bell, 113 F.3d at 1350-51. In *Guadalupe*, the court noted that "[a]n example of this 'additional appropriate evidence' is that the defendant had actual knowledge of the federal nature of the offense." 402 F.3d at 412.

Finally, the court rejected Bell's complaint about the following supplemental instruction:

[Y]ou would have to find beyond a reasonable doubt that the defendant intended to frustrate a future judicial proceeding. You would also have to conclude that that proceeding would be a federal proceeding, but you don't have to find that the defendant knew that it would be a federal proceeding.

The Third Circuit stated:

The quoted instruction did nothing more than explain 18 U.S.C. [§1512(g)(1) and (2)'s] express provision that the government need not prove any state of mind on the part of the defendant with respect to the federal character of the proceeding or law-enforcement-officer communication that it alleges she intended to interfere with or prevent.

Bell, 113 F.3d at 1351. Thus, *Bell* defined a less exacting standard and held it was consistent with *Stansfield*.

In *Guadalupe*, the court also recognized that *United States v. Applewhaite*, 195 F.3d 679, 687 (3d Cir. 1999), suggests that the government does *not* need to prove that the defendant knew or should have known that the officer was a federal officer. 195 F.3d at 687. The court in *Guadalupe* further noted:

The teachings of *Applewhaite* lessened the government's burden of proof in federal obstruction of justice cases because we did not require any "additional appropriate evidence" that the defendant believed the person he attempted to corruptly persuade might communicate with federal officials.

402 F.3d at 413.

The court in *Guadalupe* stated:

We conclude that proving a violation of 18 U.S.C. § 1512(b)(3) does not depend on the existence or imminency of a federal investigation but rather on the possible

existence of a federal crime and a defendant's intention to thwart an inquiry into that crime by officials who happen to be federal.

402 F.3d at 411.

Ultimately, the court held that the evidence in *Guadalupe* was sufficient to satisfy either standard but did not reconcile the cases:

Here, the government met its burden of proof as most recently articulated in *Applewhaite* because Guadalupe intended to influence an investigation which later became federal. We also stay faithful to the teachings of *Stansfield* and *Bell* because there is “additional appropriate evidence” that Guadalupe knew or should have known that Burnette might communicate with federal officials based on his position and experience as a prison administrator.

402 F.3d at 413-14. Some question therefore exists as to the requirement that the defendant know the communication would extend to a federal official.

18 U.S.C. § 1512(j) provides:

(j) If the offense under this section occurs in connection with a trial of a criminal case, the maximum term of imprisonment which may be imposed for the offense shall be the higher of that otherwise provided by law or the maximum term that could have been imposed for any offense charged in such case.

If the maximum sentence for a offense charged in the criminal trial exceeds the maximum set forth in § 1512(a)(3), the higher sentence can be imposed only if the jury finds that the tampering offense occurred in connection with a criminal trial. In such cases, the court should instruct the jury to determine whether the offense occurred in connection with the trial of the criminal case.

6.18.1512B Obstruction of Justice - Witness Tampering Through Intimidation, Threats, or Corrupt Persuasion (18 U.S.C. § 1512(b)(1) and (2))

Count *(No.)* of the indictment charges the defendant *(name)* with *(briefly state offense; e.g., tampering with a witness)*, which is a violation of federal law.

In order to find the defendant guilty of this offense, you must find that the government proved each of the following four elements beyond a reasonable doubt:

First: That *(name)* **knowingly** [*(used intimidation)* *(threatened)* *(corruptly persuaded)*] *(name of person)*, *(or attempted to do so)*, *(or engaged in misleading conduct toward (name of person))*;

Second: That *(name)* **acted with intent to**

[Include language that applies:

(influence)(delay)(prevent) the testimony of (name of person) in (specify proceeding), an official proceeding,

or

cause or induce (name of person) to [(withhold testimony) (withhold a (record) (document) (specify object))] from (specify proceeding), an official proceeding,

or

cause or induce (name of person) to alter, destroy, mutilate or conceal an object with intent to impair the object's integrity or availability for use in (specify proceeding), an official proceeding,

or

cause or induce (name of person) to evade legal process summoning (name of person) [(to appear as a witness) (to produce a (record) (document) (specify object))] in (specify proceeding), an official proceeding,

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cause or induce (name of person) to be absent from (specify proceeding), an official proceeding, to which (name of person) had been summoned by legal process];

Third: That (name) knew or should have known that (specify proceeding) was pending or was likely to be instituted. *[However, the government does not need to prove that an official proceeding was actually pending or about to be instituted at the time of the alleged offense.];*

Fourth: That (specify proceeding), the official proceeding, was a federal proceeding. *[However, the government does not need to prove that the defendant knew that the proceeding was a federal proceeding.]*

[To “corruptly persuade” means to corrupt another person by persuading (him)(her) to violate a legal duty, to accomplish an unlawful end or unlawful result, or to accomplish some otherwise lawful end or lawful result in an unlawful manner.]

Comment

18 U.S.C. § 1512(b)(1) and (2) provide:

(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--

(1) influence, delay, or prevent the testimony of any person in an official proceeding;

- (2) cause or induce any person to--
 - (A) withhold testimony, or withhold a record, document, or other object, from an official proceeding;
 - (B) alter, destroy, mutilate, or conceal an object with intent to impair the object's integrity or availability for use in an official proceeding;
 - (C) evade legal process summoning that person to appear as a witness, or to produce a record, document, or other object, in an official proceeding; or
 - (D) be absent from an official proceeding to which such person has been summoned by legal process; or

* * *

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

Under this statute, the force or threat of force does not have to be against the person testifying; that is, the defendant need not have direct contact with the witness. All that is required is that the defendant use physical force or the threat of physical force to tamper with a witness. *United States v. Davis*, 183 F.3d 231, 250 (3d Cir. 1999). The statute encompasses cases in which the defendant used force against, for example, a family member in order to silence a witness. *See United States v. Bell*, 113 F.3d 1345, 1349 n.3 (3d Cir. 1997). Alternatively, the use of force or threat of force may be directed at a number of potential victims, as, for example, a case where the defendant blew up a courtroom. If the government alleges a violation of the statute by using physical force or the threat of physical force against a third person and without direct contact with the witness, the court may want to instruct the jury that direct contact is not required.

In addition, the government is not required to prove that the defendant succeeded in the effort to tamper with the witness; the government need not prove that the witness changed or withheld his or her testimony. *Davis*, 183 F.3d at 250. If there is a question as to whether the defendant's effort to tamper with the witness was successful, the court may want to instruct the jury that success is not a prerequisite to conviction and that what the government must prove beyond a reasonable doubt is that the defendant acted with intent to influence a witness' testimony.

18 U.S.C. § 1512(f) provides:

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- (1) an official proceeding need not be pending or about to be instituted at the time of the offense; and
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18 U.S.C. § 1512(g) provides:

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- (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.

Despite the language of § 1512(g), in *Arthur Andersen L.L.P. v. United States*, 544 U.S. 696 (2005), a prosecution under § 1512(b)(2), the Court held that the government must establish a nexus between the defendant's acts and a particular proceeding. The instruction directs the court to specify the particular proceeding. In *Arthur Andersen*, the Court stated:

The instructions also were infirm for another reason. They led the jury to believe that it did not have to find any nexus between the “persua [sion]” to destroy documents and any particular proceeding. In resisting any type of nexus element, the Government relies heavily on § 1512(e)(1)[now § 1512(f)(1)], which states that an official proceeding “need not be pending or about to be instituted at the time of the offense.” It is, however, 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. A “knowingly . . . corrup[t] persuade[r]” cannot be someone who persuades others to shred documents under a document retention policy when he does not have in contemplation any particular official proceeding in which those documents might be material.

544 U.S. at 707-08. Like § 1512(b)(2), § 1512(b)(1) addresses conduct that affects an official proceeding. As a result, it appears that the nexus requirement applies equally to both provisions of the statute.

In *United States v. Vampire Nation*, 451 F.3d 189, 205-06 (3d Cir. 2006), discussing the nexus requirement under § 1512(b)(2)(A), the Third Circuit quoted the Second Circuit's assessment of *Arthur Andersen*:

“[T]he touchstone for the nexus requirement, therefore, is an act taken that would have the natural and probable effect of interfering with a judicial or grand jury proceeding that constitutes the administration of justice; that is, the act must have a relationship in time, causation, or logic with the judicial proceedings.” *United States v. Quattrone*, 441 F.3d 153, 171 (2d Cir. 2006).

The Third Circuit held that the trial court had not committed plain error when it instructed the jury that the defendant could not be convicted unless he intended to persuade his target to impede an official proceeding given that the evidence established that the target had informed the defendant that he had received a subpoena to appear before the grand jury. In *United States v. Kaplan*, 490 F.3d

110 (2d Cir. 2007), the Second Circuit concluded that the nexus requirement applies to § 1512(b)(1) and commented that it “would have been more prudent for the district judge to identify the ‘particular’ federal proceeding that the defendant intended to obstruct.” *See also United States v. Aguilar*, 515 U.S. 593, 599-600 (1995) (holding under the omnibus obstruction of justice provision of 18 U.S.C. § 1503 that the government must prove not only that the defendant made false statements to the federal agents but also that the defendant “knew his actions [were] likely to affect” the proceeding).

Arthur Andersen does not settle the question of whether the defendant must also know that the proceeding is federal. In *United States v. Bell*, 113 F.3d 1345, 1351 (3d Cir. 1997), decided before *Arthur Andersen*, the Third Circuit considered that question. Bell was prosecuted for murder of a witness in violation of 18 U.S.C. § 1512(a)(1)(A) and (C) and use of physical force and threats against a witness, in violation of 18 U.S.C. § 1512(b)(1), (2), and (3). She complained of the following supplemental instruction:

[Y]ou would have to find beyond a reasonable doubt that the defendant intended to frustrate a future judicial proceeding. You would also have to conclude that that proceeding would be a federal proceeding, but you don't have to find that the defendant knew that it would be a federal proceeding.

The Third Circuit rejected the challenge, stating:

The quoted instruction did nothing more than explain 18 U.S.C.[§1512(g)(1) and (2)'s] express provision that the government need not prove any state of mind on the part of the defendant with respect to the federal character of the proceeding or law-enforcement-officer communication that it alleges she intended to interfere with or prevent.

Bell, 113 F.3d at 1351.

If the defendant is charged with corrupt persuasion, the jury must be told that it must find that the defendant acted knowingly, dishonestly, and with intent to hinder, delay, or prevent the communication. This language is intended to respond to the Supreme Court's decision in *Arthur Andersen* and the Third Circuit's decision in *United States v. Farrell*, 126 F.3d 484 (3d Cir. 1997).

In *Arthur Andersen*, the defendant was prosecuted under § 1512(b)(2). The Supreme Court reversed the convictions because the jury instructions did not properly convey the statutory requirement of corrupt persuasion. The Court emphasized that non-corrupt persuasion could be perfectly lawful. *Arthur Andersen*, 544 U.S. at 703-04. The Court read the statute as requiring proof that the defendant “knowingly corruptly persuades,” stating “[o]nly persons conscious of wrongdoing can be said to ‘knowingly . . . corruptly persuad[e].’” 544 U.S. at 704-06. In *Arthur Andersen*, the trial court had modified the pattern instruction from the Fifth Circuit for corruptly obstructing the administration of justice in violation of 18 U.S.C. § 1503. The instruction “defined ‘corruptly’ as ‘knowingly and dishonestly, with the specific intent to subvert or undermine the integrity’ of a

proceeding.” 544 U.S. at 706-07. At the urging of the government, the trial court eliminated the word “dishonestly” and added “impede,” instructing the jury that “it could convict if it found petitioner intended to ‘subvert, undermine, or impede’ governmental factfinding.” 544 U.S. at 706-07. The result was an erroneous instruction that did not convey to the jury the “requisite consciousness of wrongdoing.” 544 U.S. at 706.

Before *Arthur Andersen* was decided, the Third Circuit interpreted the phrase “corruptly persuades” in *Farrell*. Like *Arthur Andersen*, *Farrell* signaled that proof of “corrupt persuasion” requires a high level of culpability, but did not articulate a specific standard. In *Farrell*, the court stated:

[W]e are confident that both attempting to bribe someone to withhold information and attempting to persuade someone to provide false information to federal investigators constitute “corrupt persuasion” punishable under § 1512(b). Nonetheless, we are hesitant to define in more abstract terms the boundaries of the conduct punishable under the somewhat ambiguous “corruptly persuades” clause. However, we do not think it necessary to provide such a definition here because we are similarly confident that the “culpable conduct” that violates § 1512(b)(3)’s “corruptly persuades” clause does not include a coercive attempt to persuade a coconspirator who enjoys a Fifth Amendment right not to disclose self incriminating information about the conspiracy to refrain, in accordance with that right, from volunteering information to investigators.

126 F.3d at 488.

The court further elaborated:

We read the inclusion of “corruptly” in § 1512(b) as necessarily implying that an individual can “persuade” another not to disclose information to a law enforcement official with the intent of hindering an investigation without violating the statute, i.e., without doing so “corruptly.” Thus, more culpability is required for a statutory violation than that involved in the act of attempting to discourage disclosure in order to hinder an investigation.

Farrell, 126 F.3d at 489. In *United States v. Davis*, 183 F.3d 231, 250 n.6 (3d Cir. 1999), the Third Circuit noted:

[T]he District Court’s instruction on corrupt persuasion does not track *Farrell*. The Court instructed the jury that “[t]he word ‘corruptly’ means having improper motive or purpose of obstructing justice.” *Farrell* and *Poindexter* suggest that this instruction provides insufficient guidance to the jury, as anyone with the intent to interfere with an investigation has “improper” motives. On remand, the Court should clarify that “corrupt persuasion” involves more than an improper motive, and includes inducements to violence.

See also United States v. Vega, 184 F. App'x. 236, 234 (3d Cir. 2006) (non-precedential) ("[N]oncoercive statements may constitute corrupt persuasion if they advocate illegal behavior.").

18 U.S.C. § 1515(a)(3) provides that "misleading conduct" means:

- (A) knowingly making a false statement;
- (B) intentionally omitting information from a statement and thereby causing a portion of such statement to be misleading, or intentionally concealing a material fact, and thereby creating a false impression by such statement;
- (C) with intent to mislead, knowingly submitting or inviting reliance on a writing or recording that is false, forged, altered, or otherwise lacking in authenticity;
- (D) with intent to mislead, knowingly submitting or inviting reliance on a sample, specimen, map, photograph, boundary mark, or other object that is misleading in a material respect; or
- (E) knowingly using a trick, scheme, or device with intent to mislead.

Section 1515(a)(1) provides that, as used in section 1512 the term "official proceeding" means:

- (A) a proceeding before a judge or court of the United States, a United States magistrate judge, a bankruptcy judge, a judge of the United States Tax Court, a special trial judge of the Tax Court, a judge of the United States Court of Federal Claims, or a Federal grand jury;
- (B) a proceeding before the Congress;
- (C) a proceeding before a Federal Government agency which is authorized by law; or
- (D) a proceeding involving the business of insurance whose activities affect interstate commerce before any insurance regulatory official or agency or any agent or examiner appointed by such official or agency to examine the affairs of any person engaged in the business of insurance whose activities affect interstate commerce.

The question of whether the proceeding alleged and proved by the government is an official proceeding is for the judge.

18 U.S.C. § 1512(j) provides:

- (j) If the offense under this section occurs in connection with a trial of a criminal case, the maximum term of imprisonment which may be imposed for the offense shall be the higher of that otherwise provided by law or the maximum term that could have been imposed for any offense charged in such case.

If the maximum sentence for an offense charged in the criminal trial exceeds the maximum set forth in § 1512(a)(3), the higher sentence can be imposed only if the jury finds that the tampering offense occurred in connection with a criminal trial. In such cases, the court should instruct the jury to determine whether the offense occurred in connection with the trial of the criminal case.

6.18.1512B-1 Obstruction of Justice - Hindering Communication Through Intimidation, Threats, or Corrupt Persuasion (18 U.S.C. § 1512(b)(3))

Count (No.) of the indictment charges the defendant (name) with (briefly state offense; e.g., tampering with a witness), which is a violation of federal law.

In order to find the defendant guilty of this offense, you must find that the government proved each of the following four elements beyond a reasonable doubt:

First: That (name) knowingly [(used intimidation) (threatened) (corruptly persuaded)] (name of person), or attempted to do so (or engaged in misleading conduct toward (name of person));

Second: That (name) acted with intent to hinder, delay or prevent (name of person whose communication was targeted) from communicating to (law enforcement authorities) (a judge) information relating to the commission or possible commission of an offense;

Third: That the offense was a federal offense.

Fourth: That (name) believed that (name of person whose communication was targeted) might communicate with federal authorities. [However, the government does not need to prove that an official proceeding was actually pending or about to be instituted at the time of the alleged offense.]

[To “corruptly persuade” means to corrupt another person by persuading (him)(her) to violate a legal duty, to accomplish an unlawful end or unlawful result, or to accomplish some

otherwise lawful end or lawful result in an unlawful manner.]

Comment

18 U.S.C. § 1512(b)(3) provides:

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

The government is not required to prove that the defendant succeeded in the effort to tamper with the witness; the government need not prove that the witness changed or withheld his or her testimony. *United States v. Davis*, 183 F.3d 231, 250 (3d Cir. 1999). If there is a question as to whether the defendant's effort to tamper with the witness was successful, the court may want to instruct the jury that success is not a prerequisite to conviction and that what the government must prove beyond a reasonable doubt is that the defendant acted with intent to influence a witness' testimony. If the defendant is prosecuted for attempt, the court may want to give Instruction 7.01 (Attempt).

18 U.S.C. § 1512(f) provides:

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; 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) provides:

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. § 1515(a)(4) provides that "law enforcement officer" means:

[A]n 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--

(A) authorized under law to engage in or supervise the prevention, detection, investigation, or prosecution of an offense; or

(B) serving as a probation or pretrial services officer under this title.

In *United States v. Guadalupe*, 402 F.3d 409 (3d Cir. 2005), the Third Circuit explained:

To obtain a conviction pursuant to 18 U.S.C. § 1512(b)(3), the government must prove that: (1) the defendant attempted to corruptly persuade a person; (2) the defendant was motivated by a desire to prevent the communication between that person and law enforcement authorities concerning the commission or possible commission of an offense; (3) the offense was actually a federal offense; and (4) the defendant believed that the person he attempted to corruptly persuade might communicate with federal authorities.

402 F.3d at 412. *See also United States v. Cooper*, 121 F.3d 130, 133 (3d Cir. 1997) (discussing elements). The statute does not require proof that the defendant addressed the force or threatened force to a witness or potential witness. It encompasses cases in which the defendant used force against, for example, a family member in order to silence a witness. In such cases, the court may modify the language of the second element accordingly. *See United States v. Bell*, 113 F.3d 1345, 1349 n.3 (3d Cir. 1997).

If the defendant is charged with corrupt persuasion, the jury must be told that it must find that the defendant acted knowingly, dishonestly, and with intent to hinder, delay or prevent the communication. This language is intended to respond to the Supreme Court's decision in *Arthur Andersen L.L.P. v. United States*, 544 U.S. 696 (2005), and the Third Circuit's decision in *United States v. Farrell*, 126 F.3d 484 (3d Cir. 1997).

In *Arthur Andersen*, the defendant was prosecuted under § 1512(b)(2). The Supreme Court reversed the convictions because the jury instructions did not properly convey the statutory requirement of corrupt persuasion. The Court emphasized that non-corrupt persuasion could be perfectly lawful. *Arthur Andersen*, 544 U.S. at 703-04. The Court read the statute as requiring proof

that the defendant “knowingly corruptly persuades,” stating “[o]nly persons conscious of wrongdoing can be said to ‘knowingly ... corruptly persuad[e].’” 544 U.S. at 704-06. In *Arthur Andersen*, the trial court had modified the pattern instruction from the Fifth Circuit for corruptly obstructing the administration of justice in violation of 18 U.S.C. § 1503. The instruction “defined ‘corruptly’ as ‘knowingly and dishonestly, with the specific intent to subvert or undermine the integrity’ of a proceeding.” 544 U.S. at 706-07. At the urging of the government, the trial court eliminated the word “dishonestly” and added “impede,” instructing the jury that “it could convict if it found petitioner intended to ‘subvert, undermine, or impede’ governmental factfinding.” 544 U.S. at 706-07. The result was an erroneous instruction that did not convey to the jury the “requisite consciousness of wrongdoing.” 544 U.S. at 706.

Before *Arthur Andersen* was decided, the Third Circuit interpreted the phrase “corruptly persuades” in *Farrell*. Like *Arthur Andersen*, *Farrell* signaled that proof of “corrupt persuasion” requires a high level of culpability, but did not articulate a specific standard. In *Farrell*, the court stated:

[W]e are confident that both attempting to bribe someone to withhold information and attempting to persuade someone to provide false information to federal investigators constitute “corrupt persuasion” punishable under § 1512(b). Nonetheless, we are hesitant to define in more abstract terms the boundaries of the conduct punishable under the somewhat ambiguous “corruptly persuades” clause. However, we do not think it necessary to provide such a definition here because we are similarly confident that the “culpable conduct” that violates § 1512(b)(3)’s “corruptly persuades” clause does not include a coercive attempt to persuade a coconspirator who enjoys a Fifth Amendment right not to disclose self incriminating information about the conspiracy to refrain, in accordance with that right, from volunteering information to investigators.

126 F.3d at 488.

The court further elaborated:

We read the inclusion of “corruptly” in § 1512(b) as necessarily implying that an individual can “persuade” another not to disclose information to a law enforcement official with the intent of hindering an investigation without violating the statute, i.e., without doing so “corruptly.” Thus, more culpability is required for a statutory violation than that involved in the act of attempting to discourage disclosure in order to hinder an investigation.

Farrell, 126 F.3d at 489. In *United States v. Davis*, 183 F.3d 231, 250 n.6 (3d Cir. 1999), the Third Circuit noted:

[T]he District Court’s instruction on corrupt persuasion does not track *Farrell*. The Court instructed the jury that “[t]he word ‘corruptly’ means having improper motive

or purpose of obstructing justice.” *Farrell* and *Poindexter* suggest that this instruction provides insufficient guidance to the jury, as anyone with the intent to interfere with an investigation has “improper” motives. On remand, the Court should clarify that “corrupt persuasion” involves more than an improper motive, and includes inducements to violence.

See also United States v. Vega, 184 F. App’x. 236, 234 (3d Cir. 2006) (non-precedential) (“[N]oncoercive statements may constitute corrupt persuasion if they advocate illegal behavior.”).

The government need not prove that a federal investigation was either underway or imminent. In *United States v. Guadalupe*, 402 F.3d 409, 411 (3d Cir. 2005), the Third Circuit stated:

[P]roving a violation of 18 U.S.C. § 1512(b)(3) does not depend on the existence or imminency of a federal investigation but rather on the possible existence of a federal crime and a defendant's intention to thwart an inquiry into that crime by officials who happen to be federal.

The instruction includes as the fourth element the requirement that the defendant believed that the person influenced would communicate with a federal official. In *Guadalupe*, the Third Circuit wrestled with the question whether the defendant who interferes with communication to a law enforcement officer must know that the law enforcement officer is a *federal* officer. 402 F.3d at 413-14. The court recognized that, despite the language of § 1512(g), *United States v. Stansfield*, 101 F.3d 909 (3d Cir. 1996), requires some level of awareness that the communication interfered with would otherwise reach federal authorities. In *Stansfield*, the court explained:

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.

101 F.3d at 918. The court held that in order to obtain a conviction for tampering with a witness by killing or attempting to kill another pursuant to 18 U.S.C. § 1512(a)(1)(C),

the government must prove: (1) the defendant killed or attempted to kill a person; (2) 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; (3) that offense was actually a federal offense; and (4) the defendant believed that the person in (2) above might communicate with the federal authorities. This last element may be inferred by the jury from the fact that the offense was federal in nature, plus additional appropriate evidence. For example, it is sufficient (but not necessary) that the government prove that the defendant had actual knowledge of the federal nature of the offense in order for the jury to infer the last

element.

101 F.3d at 918. The court further stated:

[T]his framework is an appropriate reconciliation between the constraint that the government must prove the defendant's specific intent to hinder a federal investigation and the fact that, by virtue of [§1512(g)], it need not prove that the defendant knew the federal status of any particular law enforcement officer involved in an investigation.

101 F.3d at 919.

In *United States v. Bell*, 113 F.3d 1345 (3d Cir. 1997), also discussed in *Guadalupe*, the court stated:

In view of the statute's clear command that the government need not prove any “state of mind” on the part of the defendant with respect to the federal character of the proceeding or officer, 18 U.S.C. [§1512(g)], we do not read the italicized passage 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. Rather, we read this sentence as recognizing that what the statute mandates is proof that the officers with *whom the defendant believed the victim might communicate would in fact be federal officers*.

Bell, 113 F.3d at 1349 (emphasis in original).

The court then explained:

[W]e believe that the law of this circuit after *Stansfield* is 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. As *Stansfield* explained, the government may carry this burden by showing that the conduct which the defendant believed would be discussed in these communications constitutes a federal offense, so long as the government also presents “additional appropriate evidence.”

Bell, 113 F.3d at 1349.

The court further explained:

[This conclusion] respects fully the statute's requirement that the defendant intend to prevent a communication to a law enforcement officer, as well as its requirement that such officer be, in fact, a federal officer. What our analysis renders irrelevant is the

defendant's "mental state" regarding the fact that the officer is a federal officer-a fact which [§1512(g)(2)] by its terms declares irrelevant.

Bell, 113 F.3d at 1350-51. In *Guadalupe*, the court noted that "[a]n example of this 'additional appropriate evidence' is that the defendant had actual knowledge of the federal nature of the offense." 402 F.3d at 412.

Finally, the court rejected *Bell*'s complaint about the following supplemental instruction:

[Y]ou would have to find beyond a reasonable doubt that the defendant intended to frustrate a future judicial proceeding. You would also have to conclude that that proceeding would be a federal proceeding, but you don't have to find that the defendant knew that it would be a federal proceeding.

The Third Circuit stated:

The quoted instruction did nothing more than explain 18 U.S.C. [§1512(g)(1) and (2)'s] express provision that the government need not prove any state of mind on the part of the defendant with respect to the federal character of the proceeding or law-enforcement-officer communication that it alleges she intended to interfere with or prevent.

Bell, 113 F.3d at 1351. Thus, *Bell* defined a less exacting standard and held it was consistent with *Stansfield*.

In *Guadalupe*, the court also recognized that *United States v. Applewhaite*, 195 F.3d 679, 687 (3d Cir. 1999), suggests that the government does *not* need to prove that the defendant knew or should have known that the officer was a federal officer. 195 F.3d at 687. The court in *Guadalupe* further noted:

The teachings of *Applewhaite* lessened the government's burden of proof in federal obstruction of justice cases because we did not require any "additional appropriate evidence" that the defendant believed the person he attempted to corruptly persuade might communicate with federal officials.

402 F.3d at 413.

The court in *Guadalupe* stated:

We conclude that proving a violation of 18 U.S.C. § 1512(b)(3) does not depend on the existence or imminency of a federal investigation but rather on the possible existence of a federal crime and a defendant's intention to thwart an inquiry into that crime by officials who happen to be federal.

402 F.3d at 411.

Ultimately, the court held that the evidence in *Guadalupe* was sufficient to satisfy either standard but did not reconcile the cases:

Here, the government met its burden of proof as most recently articulated in *Applewhaite* because Guadalupe intended to influence an investigation which later became federal. We also stay faithful to the teachings of *Stansfield* and *Bell* because there is “additional appropriate evidence” that Guadalupe knew or should have known that Burnette might communicate with federal officials based on his position and experience as a prison administrator.

402 F.3d at 413-14. Some question therefore exists as to the requirement that the defendant know the communication would extend to a federal official.

18 U.S.C. § 1515(a)(3) provides that "misleading conduct" means:

- (A) knowingly making a false statement;
- (B) intentionally omitting information from a statement and thereby causing a portion of such statement to be misleading, or intentionally concealing a material fact, and thereby creating a false impression by such statement;
- (C) with intent to mislead, knowingly submitting or inviting reliance on a writing or recording that is false, forged, altered, or otherwise lacking in authenticity;
- (D) with intent to mislead, knowingly submitting or inviting reliance on a sample, specimen, map, photograph, boundary mark, or other object that is misleading in a material respect; or
- (E) knowingly using a trick, scheme, or device with intent to mislead.

18 U.S.C. § 1512(j) provides:

- (j) If the offense under this section occurs in connection with a trial of a criminal case, the maximum term of imprisonment which may be imposed for the offense shall be the higher of that otherwise provided by law or the maximum term that could have been imposed for any offense charged in such case.

If the maximum sentence for an offense charged in the criminal trial exceeds the maximum set forth in § 1512(a)(3), the higher sentence can be imposed only if the jury finds that the tampering offense occurred in connection with a criminal trial. In such cases, the court should instruct the jury to determine whether the offense occurred in connection with the trial of the criminal case.

6.18.1512E Affirmative Defense - Truth-Seeking Lawful Conduct

It is a defense to Count (No.) if (name)'s sole intention was to encourage, induce, or cause (name of person) to testify truthfully and if (name)'s conduct toward (name of person) consisted solely of lawful conduct; that is, that (name) did not engage in any unlawful acts in (his)(her) efforts to encourage, induce or cause (name of person) to testify truthfully.

[The court may clarify the positions of the parties; e.g., The government contends that by his words, tone and gestures, the defendant threatened physical force and that such threats of physical force constitute unlawful conduct. A threat of physical force is unlawful if (describe applicable law)].

This defense does not relieve the government of its burden of proving all of the elements of the crime as I have defined them. The government must prove all the elements of the offense beyond a reasonable doubt in order for you to convict (name). The Government must also prove beyond a reasonable doubt either that (name)'s intention was not solely to encourage, induce, or cause (name of person) to testify truthfully, or that (name)'s conduct toward (name of person) was not solely lawful conduct.

Comment

18 U.S.C. § 1512(e) provides:

In a prosecution for an offense under this section, it is an affirmative defense, as to which the defendant has the burden of proof by a preponderance of the evidence, that the conduct consisted solely of lawful conduct and that the defendant's sole intention

was to encourage, induce, or cause the other person to testify truthfully.

This instruction should be given only if the defendant requests it and there is evidence to support it. Although the statute defines an affirmative defense, the Third Circuit has expressed concern about the constitutionality of an instruction that places the burden of proof for this defense on the defendant. Because of this uncertainty, the recommended instruction explains the defense but does not place the burden on the defendant.

In *United States v. Clemons*, 843 F.2d 741, 752-53 (3d Cir. 1988), the Third Circuit expressed its doubt about this defense, stating, “[m]erely labeling something an affirmative defense does not mean the statute is constitutional.” In *Clemons*, the Third Circuit rejected the defendant’s challenge to the trial court’s instruction on the defense, concluding it was harmless error.¹ The court was satisfied both that the government’s evidence established the defendant’s guilt beyond a reasonable doubt and that the instructions to the jury required the jury to find beyond a reasonable doubt that the defendant’s conduct was not lawful. 843 F.2d at 754.

In *United States v. Johnson*, 968 F.2d 208 (2d Cir. 1992), the Second Circuit upheld an instruction that placed the burden on the defendant to establish the truth-seeking defense and rejected the defendant’s argument that it was unconstitutional. A sample instruction based on *Johnson* may be found in *Sand, et al.*, *supra*, 46-32.1.

¹ The trial court had given the following instruction:

[I]t is a defense to that count if Oscar Clemons' conduct toward Greg Dennis consisted solely of lawful conduct, and that Oscar Clemons' sole intention was to encourage, induce, or cause Greg Dennis to testify truthfully rather than to testify falsely or not at all.

Now, the defendant-I want to emphasize this-the defendant has no duty or burden to advance this defense. His failure to advance or prove such a defense shall not be held against him under any circumstances because, as I said earlier, and I will repeat again for the third, fourth, or fifth or however many times, the defendant has no burden to prove anything. The defendant has no burden to advance any evidence at all. He has no duty to testify.

But, however, if you're of the belief from all the evidence you heard in this case that Oscar Clemons' conduct towards Greg Dennis was lawful conduct, that his intention was to encourage, induce or cause Greg Dennis to testify truthfully, you will find the defendant not guilty on that charge. . . .

. . . So the government always has the burden. Mr. Clemons has no burden of proving anything of any kind. However, if it is proved that his conduct consisted solely of lawful conduct and that his sole intention was to encourage, induce or cause Greg Dennis to testify truthfully, then he would be found not guilty of that charge.

But again I repeat that the defendant has no burden or duty to advance any defenses. He has no duty or burden to testify. He has no duty or burden to put forth witnesses or evidence. He has no duty to testify on his own behalf

Clemons, 843 F.2d at 750 n.10.

6.18.1513B Retaliating Against a Witness, Victim, or Informant (18 U.S.C. § 1513(b))

Count *(No.)* **of the indictment charges the defendant** *(name)* **with** *(briefly state offense; e.g., retaliating against a witness)*, **which is a violation of federal law.**

In order to find the defendant guilty of this offense, you must find that the government proved each of the following three elements beyond a reasonable doubt:

First: That *(name)* **knowingly engaged in conduct;**

Second: That *(name)*'s **conduct caused** *(bodily injury to (name of person)) (damage to the property of (name of person)), (or threatened to do so);*

Third: That *(name)* **acted with specific intent to retaliate against** *(name of person)* **for** *(include appropriate language; e.g., their attendance as a witness at an official proceeding).*

Fourth: That *(specify proceeding)*, **the official proceeding, was a federal proceeding.**

Comment

18 U.S.C. § 1513(b) provides:

Whoever knowingly engages in any conduct and thereby causes bodily injury to another person or damages the tangible property of another person, or threatens to do so, with intent to retaliate against any person for--

- (1) the attendance of a witness or party at an official proceeding, or any testimony given or any record, document, or other object produced by a witness in an official proceeding; or
- (2) any 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 given by a person to a law enforcement officer;

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

18 U.S.C. § 1513 further provides:

(c) If the retaliation occurred because of attendance at or testimony in a criminal case, the maximum term of imprisonment which may be imposed for the offense under this section shall be the higher of that otherwise provided by law or the maximum term that could have been imposed for any offense charged in such case.

* * * *

(e) Whoever knowingly, with the intent to retaliate, takes any action harmful to any person, including interference with the lawful employment or livelihood of any person, for providing to a law enforcement officer any truthful information relating to the commission or possible commission of any Federal offense, shall be fined under this title or imprisoned not more than 10 years, or both.

In *United States v. Cummiskey*, 728 F.2d 200, 206-07 (3d Cir. 1984), the court stated that 18 U.S.C. § 1513(a)(1) “defines an offense with three elements: (1) knowing engagement in conduct (2) either causing, or threatening to cause, bodily injury to another person (3) with the intent to retaliate for, inter alia, the attendance or testimony of a witness at an official proceeding” and further noted that an attempt to commit these acts is also a violation of the statute. In *Cummiskey*, the court also held that the trial court’s instruction “that the jury must find whether ‘these defendants actually engaged in conduct which threatened to cause bodily injury’” was correct.

Under this statute, the force or threat of force does not have to be against the person testifying; that is, the defendant need not have direct contact with the witness. All that is required is that the defendant use physical force or the threat of physical force to tamper with a witness. *United States v. Davis*, 183 F.3d 231, 250 (3d Cir. 1999). The statute encompasses cases in which the defendant used force against, for example, a family member in order to silence a witness. *See United States v. Bell*, 113 F.3d 1345, 1349 n.3 (3d Cir. 1997). Alternatively, the use of force or threat of force may be directed at a number of potential victims, as, for example, a case where the defendant blew up a courtroom. If the government alleges a violation of the statute by using physical force or the threat of physical force against a third person and without direct contact with the witness, the court may want to instruct the jury that direct contact is not required.

Section 1515(a)(1) provides that, as used in section 1512 the term “official proceeding” means:

(A) a proceeding before a judge or court of the United States, a United States magistrate judge, a bankruptcy judge, a judge of the United States Tax Court, a special trial judge of the Tax Court, a judge of the United States Court of Federal Claims, or a Federal grand jury;

- (B) a proceeding before the Congress;
- (C) a proceeding before a Federal Government agency which is authorized by law; or
- (D) a proceeding involving the business of insurance whose activities affect interstate commerce before any insurance regulatory official or agency or any agent or examiner appointed by such official or agency to examine the affairs of any person engaged in the business of insurance whose activities affect interstate commerce.

The question of whether the proceeding alleged and proved by the government is an official proceeding is for the judge.

Section 1515(a)(5) defines the term “bodily injury” to mean any of the following:

- (A) a cut, abrasion, bruise, burn, or disfigurement;
- (B) physical pain;
- (C) illness;
- (D) impairment of the function of a bodily member, organ, or mental faculty; or
- (E) any other injury to the body, no matter how temporary.

18 U.S.C. § 1512(j) provides:

- (j) If the offense under this section occurs in connection with a trial of a criminal case, the maximum term of imprisonment which may be imposed for the offense shall be the higher of that otherwise provided by law or the maximum term that could have been imposed for any offense charged in such case.

If the maximum sentence for a offense charged in the criminal trial exceeds the maximum set forth in § 1512(a)(3), the higher sentence can be imposed only if the jury finds that the tampering offense occurred in connection with a criminal trial. In such cases, the court should instruct the jury to determine whether the offense occurred in connection with the trial of the criminal case.

If the defendant is charged with retaliating against another person through use of a proxy, the court should also give Instruction 7.02 (Accomplice Liability; Aiding and Abetting).