

NOTE

THE OBSTRUCTION OF JUSTICE NEXUS REQUIREMENT AFTER *ARTHUR ANDERSEN* AND SARBANES-OXLEY

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INTRODUCTION

With its May 31, 2005 decision in *Arthur Andersen LLP v. United States*,¹ the Supreme Court, with one fell swoop, overturned the “poster-child case of all the corporate fraud cases.”² When the dust settled, the result was an injured Department of Justice in one corner and approximately 28,000 lost Arthur Andersen jobs in the other.³ Partly responsible for this result, according to then-Chief Justice William H. Rehnquist, was the “striking[ly] . . . little culpability the [jury] instructions required.”⁴ Not only did the trial court improperly instruct the jury on the meaning of “corruptly”⁵—the statutory mens rea requirement for the crime—the instructions also “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.”⁶ Although the Court clearly indicated that the government must prove some sort of “nexus” between the defendant’s acts and the allegedly obstructed judicial proceeding to convict a defendant in a witness tampering prosecution, the Court ultimately failed to explain exactly what that nexus would entail.⁷

The federal criminal statutes pertaining to obstruction of justice are codified at 18 U.S.C. §§ 1501–1520.⁸ Section 1503, the “Omnibus Clause,”⁹ is the general obstruction of justice provision, which proscribes obstruction of justice toward judicial officers, grand and petit jurors, and witnesses.¹⁰ The witness tampering provisions of the obstruction statutes are broadly codified under § 1512,¹¹ with the provisions at issue in *Arthur Andersen* found in § 1512(b)(2)(A) and (B).¹² The Sarbanes-Oxley Act of 2002 added §§ 1512(c) and 1519, and in-

¹ 544 U.S. 696 (2005).

² Charles Lane, *Justices Overturn Andersen Conviction: Advice to Enron Jury on Accountants’ Intent Is Faulted*, WASH. POST, June 1, 2005, at A1 (quoting William B. Mateja, former member of the corporate fraud task force of the Department of Justice).

³ See *id.* (explaining that as of June 1, 2005, Arthur Andersen employed “a staff of only 200 left out of the 28,000 people who once worked there”).

⁴ *Arthur Andersen*, 544 U.S. at 706.

⁵ See *id.* at 706–07.

⁶ *Id.* at 707 (alteration in original).

⁷ See *id.* at 707–08 (affirming the “nexus” requirement without further explanation or guidance).

⁸ See 18 U.S.C. §§ 1501–1520 (2000 & Supp. IV 2004); see also Alan E. Garfield, *Promises of Silence: Contract Law and Freedom of Speech*, 83 CORNELL L. REV. 261, 307 n.238 (1998) (noting that §§ 1501–1517 define various actions that amount to obstruction of justice).

⁹ See *United States v. Wood*, 6 F.3d 692, 695 (10th Cir. 1993).

¹⁰ See 18 U.S.C. § 1503 (2000) (“Whoever corruptly . . . influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be punished . . .”).

¹¹ See *id.* § 1512 (2000 & Supp. IV 2004).

¹² *Id.* § 1512(b)(2)(A), (B) (2000); *Arthur Andersen*, 544 U.S. at 698. The statute at issue in *Arthur Andersen* states:

creased criminal penalties for witness tampering in the form of document destruction.¹³

Supreme Court decisions have struggled to define the contours of the broad language of the § 1503 Omnibus Clause. One such case, *United States v. Aguilar*, recognized the need to “place metes and bounds on the very broad language of the catchall provision.”¹⁴ In *Aguilar*, a case involving false disclosures during a grand-jury investigation, the Court considered, among other things, the necessary connection between the defendant’s action and the allegedly obstructed judicial proceedings.¹⁵ Specifically, the Court held that the defendant’s act must have a “nexus” with the judicial proceedings or the “‘natural and probable effect’ of interfering with the due administration of justice.”¹⁶ Unfortunately, the Court did not specify whether and how the nexus requirement would apply to witness tampering cases.¹⁷

(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— . . .

(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; . . .

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

§ 1512(b)(2)(A), (B).

¹³ See Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, § 1102, 116 Stat. 745, 807 (codified at 18 U.S.C. § 1512(c) (Supp. IV 2004)). This section of the Sarbanes-Oxley Act provides:

(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 not more than 20 years, or both.

Id.

The Sarbanes-Oxley Act also added:

Whoever knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States or any case filed under title 11, or in relation to or contemplation of any such matter or case, shall be fined under this title, imprisoned not more than 20 years, or both.

Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, § 802(a), 116 Stat. 745, 800 (codified at 18 U.S.C. § 1519 (Supp. IV 2004)).

¹⁴ *United States v. Aguilar*, 515 U.S. 593, 599 (1995).

¹⁵ See *id.* at 599–600.

¹⁶ *Id.* at 599 (quoting *United States v. Wood*, 6 F.3d 692, 695 (10th Cir. 1993)).

¹⁷ See *Arthur Andersen*, 544 U.S. at 707–08.

When *Arthur Andersen* came before the Court, the issue of applying the nexus requirement to witness tampering cases remained unresolved. The Court did offer slightly more guidance in that case, however, by holding that the § 1512 witness tampering jury instructions were faulty in part due to a lack of “any type of nexus element.”¹⁸ Although the Court discussed the *Aguilar* holding,¹⁹ it neglected to clarify precisely how the nexus requirement would apply to witness tampering—as opposed to general obstruction of justice—cases.²⁰

As the Court’s “any type of nexus element”²¹ language implies, there are many possible readings of what “nexus” might be required—the “type” of nexus at issue is not always clear, as proved especially true in *Arthur Andersen*. Courts tend to broadly define “nexus” as requiring “knowledge of a pending proceeding” or as requiring that the defendant’s act have the “natural and probable effect” of interfering with a pending proceeding.²² Unlocking the intricacies of these broad definitions of the “nexus requirement” is a necessary step in determining what the *Arthur Andersen* Court meant in its application of “nexus” to witness tampering cases.

Although the circuit courts of appeals appear to agree that *Arthur Andersen* does require a “nexus,”²³ they have remained unhelpful in clarifying the meaning of the concept. The Eleventh Circuit, without elaborating, has simply restated the *Arthur Andersen* holding.²⁴ When faced with this issue, the Second Circuit declined to answer the question by finding that it was not at issue.²⁵ The First Circuit has gone slightly further by pointing out that *Arthur Andersen* did not address whether the nexus requirement applies to § 1512 with the same force as to § 1503.²⁶ The Third and Seventh Circuits have gone even further by discussing jury instructions that they found to satisfy the *Arthur*

¹⁸ *Id.* at 707.

¹⁹ *See id.* at 708 (acknowledging that the Court in *Aguilar* “held that § 1503 required something more—specifically, a ‘nexus’ between the obstructive act and the proceeding” (citation omitted)).

²⁰ *See id.* at 707–08.

²¹ *Id.* at 707.

²² *See, e.g.*, *United States v. Aguilar*, 515 U.S. 593, 599 (1995).

²³ *See, e.g.*, *United States v. Starks*, 472 F.3d 466, 469–70 (7th Cir. 2006); *United States v. Ronda*, 455 F.3d 1273, 1284–88 (11th Cir. 2006); *United States v. Vampire Nation*, 451 F.3d 189, 205 (3d Cir. 2006); *United States v. Darif*, 446 F.3d 701, 711 (7th Cir. 2006); *United States v. Quattrone*, 441 F.3d 153, 170–71, 176 (2d Cir. 2006); *United States v. Byrne*, 435 F.3d 16, 23–25 (1st Cir. 2006).

²⁴ *See Ronda*, 455 F.3d at 1287–88 (noting that *Arthur Andersen* required that “the acts of obstruction relate to ‘an official proceeding’” but holding that the nexus requirement does not apply with equal force to § 1512(b)(3) (citing *Byrne*, 435 F.3d at 24)).

²⁵ *See Quattrone*, 441 F.3d at 176 n.22 (“The question of whether the nexus requirement applies in the same way to section 1512(b) as it does to sections 1503 and 1505 is not relevant to resolution of this appeal.”).

²⁶ *See Byrne*, 435 F.3d at 25 (“[T]he *Arthur Andersen* court did not elaborate on the particularity required by the nexus requirement in subsection (b)(2).”).

Andersen nexus requirement.²⁷ Thus, although some of the courts of appeals have addressed this issue, none have provided concrete guidance to resolve it.

However the *Arthur Andersen* Court intended to define the nexus requirement, it is necessary to consider the importance of that decision in the first place. The decision reminded one commentator of the Woody Allen line that “[s]ex without love is an empty experience . . . but as empty experiences go, it’s one of the best.”²⁸ John Hasnas argues that the passage of the Sarbanes-Oxley Act in 2002²⁹ rendered the *Arthur Andersen* decision essentially meaningless.³⁰ At the same time, Hasnas asserts that despite this meaninglessness, the case significantly demonstrates the Court’s intent to rein in prosecutorial discretion.³¹ Although the addition of §§ 1512(c) and 1519 by Sarbanes-Oxley seem to provide prosecutors with “greater power, lower requirements of proof, and increased penalties,”³² they remain fresh statutes that do not provide the certainty of § 1512(b), especially given the holding in *Arthur Andersen*. It remains to be seen whether Sarbanes-Oxley will render § 1512(b) “a dead letter.”³³

This Note examines the *Aguilar* obstruction of justice nexus requirement as applied to witness tampering and document destruction statutes in the wake of *Arthur Andersen* and Sarbanes-Oxley. In particular, this Note analyzes the Court’s implicit intention in both *Aguilar* and *Arthur Andersen* to apply stricter constraints on prosecutors and courts that confront document destruction cases. Part I outlines the relevant obstruction of justice, witness tampering, and document destruction statutes. Part II begins by examining the Court’s use of the nexus requirement—particularly in the context of its holdings in *Aguilar* and *Arthur Andersen*—and then considers subsequent opinions by the courts of appeals that have discussed the nexus requirement in light of the *Arthur Andersen* holding. Part III investigates subsequent case law and commentary surrounding the nexus requirement, along with relevant constitutional and practical considerations. The Note

²⁷ See *Vampire Nation*, 451 F.3d at 205 (finding no plain error in jury instructions under *Arthur Andersen* where trial court instructed the jury “that [the defendant] could be found guilty of witness tampering only if he acted with the specific intent to induce [another person] to withhold evidence from an official proceeding”); *Darif*, 446 F.3d at 712 (finding jury instructions sufficient because they made “clear to the jury that the witness tampering charge was related to ‘a particular proceeding’”); see also *Starks*, 472 F.3d at 469–70 (implicitly acknowledging that *Arthur Andersen* requires a nexus).

²⁸ John Hasnas, *The Significant Meaninglessness of Arthur Andersen LLP v. United States*, 2005 CATO SUP. CT. REV. 187, 187 (alteration in original).

²⁹ Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified in scattered sections of Titles 11, 15, 18, 28, and 29 of the United States Code).

³⁰ See Hasnas, *supra* note 28, at 192–94.

³¹ See *id.* at 194–212.

³² *Id.* at 194.

³³ *Id.*

concludes that the best reading of *Aguilar* and *Arthur Andersen* requires strict application of the nexus element—that the defendant’s act have the “natural and probable effect” of interfering with a pending proceeding—to § 1512(b) and Sarbanes-Oxley document destruction prosecutions.

I

OBSTRUCTION OF JUSTICE, WITNESS TAMPERING, AND DOCUMENT DESTRUCTION: STATUTORY LAW

A. The Omnibus Clause

Obstruction of justice is “[i]nterference with the orderly administration of law and justice, as by giving false information to or withholding evidence from a police officer or prosecutor, or by harming or intimidating a witness or juror.”³⁴ The federal obstruction of justice criminal statutes are located in Title Eighteen of the United States Code, §§ 1501–1520.³⁵ The more important obstruction of justice provisions include the definitions section and the Omnibus Clause, as well as provisions dealing with obstruction of proceedings before departments, agencies, and committees; obstruction of criminal investigations; witness tampering; and retaliating against a witness, victim, or an informant.³⁶ The Omnibus Clause of § 1503 serves as the general obstruction of justice statute,³⁷ while § 1512 has traditionally served as the general witness tampering statute.³⁸

Section 1503(a) is codified under the broad heading of “[i]nfluencing or injuring officer or juror generally”³⁹ and applies in two ways. The first part of § 1503(a) proscribes any effort to corruptly influence, or to influence by threats or force, any grand juror, petit juror, or court officer.⁴⁰ The second part, the Omnibus Clause, broadly protects the “due administration of justice.”⁴¹

³⁴ BLACK’S LAW DICTIONARY 1107 (8th ed. 2004).

³⁵ See 18 U.S.C. §§ 1501–1520 (2000 & Supp. IV 2004).

³⁶ *Id.* § 1503 (2000) (Omnibus Clause); *id.* § 1505 (Supp. IV 2004) (obstruction of proceedings before departments, agencies, and committees); *id.* § 1510 (2000) (obstruction of criminal investigations); *id.* § 1512 (2000 & Supp. IV 2004) (witness tampering); *id.* § 1513 (retaliating against a witness, victim, or an informant); *id.* § 1515 (2000) (definitions).

³⁷ See *United States v. Aguilar*, 515 U.S. 593, 598 (1995) (“[T]he ‘Omnibus Clause’ serves as a catchall, prohibiting persons from endeavoring to influence, obstruct, or impede the due administration of justice.”).

³⁸ See *United States v. Hernandez*, 730 F.2d 895, 898 (2d Cir. 1984) (discussing the congressional intent to create more extensive protections against witness tampering exclusively by enacting § 1512).

³⁹ § 1503 (2000).

⁴⁰ See *id.* § 1503(a).

⁴¹ *Id.*

A number of the circuit courts of appeals have held that the restrictive language preceding the Omnibus Clause does not limit its general language.⁴² Rather, the Omnibus Clause proscribes an extensive class of conduct that interferes with the judicial process.⁴³ In 1995, the Supreme Court held that the Omnibus Clause is essentially a “catchall . . . far more general in scope than the earlier clauses of the statute.”⁴⁴ The Court has placed some limits on the Omnibus Clause, however, by holding that the obstructive conduct must have the “natural and probable” effect of interfering with the due administration of justice.⁴⁵

The Omnibus Clause of § 1503 provides that “[w]hoever corruptly . . . influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be punished.”⁴⁶ The mens rea required to violate the Omnibus Clause is “corruptly.”⁴⁷ A defendant may satisfy the actus reus element of the crime by “influenc[ing], obstruct[ing], or imped[ing], or endeavor[ing] to influence, obstruct, or impede.”⁴⁸ Finally, the result element involves obstruction of the “due administration of justice.”⁴⁹ In any case other than a killing or an attempted killing, § 1503 calls for “imprisonment for not more than 10 years, a fine . . . , or both.”⁵⁰

Conviction under § 1503 requires pendency of a judicial proceeding⁵¹ and some connection between the obstruction of a government investigation or official proceeding and the pending judicial proceed-

⁴² Lisa R. Rafferty & Julie Teperow, *Obstruction of Justice*, 35 AM. CRIM. L. REV. 989, 992 (1998) (citing cases).

⁴³ *Id.* (citing *United States v. Thomas*, 916 F.2d 647, 650 (11th Cir. 1990) (“any [corrupt] act” which obstructs justice); *United States v. Griffin*, 589 F.2d 200, 205–06 (5th Cir. 1979) (false testimony to a grand jury); *United States v. Howard*, 569 F.2d 1331, 1333–35 (5th Cir. 1978) (coercion of judge to disclose secret grand jury testimony); *United States v. Walasek*, 527 F.2d 676, 679–81 (3d Cir. 1975) (destruction of evidence for grand jury investigation)).

⁴⁴ *United States v. Aguilar*, 515 U.S. 593, 598 (1995). Before the Supreme Court’s decision in *Aguilar*, the Ninth Circuit applied the canon of statutory construction of *ejusdem generis* in interpreting the Omnibus Clause to proscribe only acts similar to those that the restrictive language of the first clause of § 1503(a) prohibited. *See United States v. Aguilar*, 21 F.3d 1475, 1486 n.9 (9th Cir. 1994), *rev’d*, 515 U.S. 593 (1995). *Ejusdem generis* provides that “when a general word or phrase follows a list of specifics, the general word or phrase will be interpreted to include only items of the same type as those listed.” BLACK’S LAW DICTIONARY 556 (8th ed. 2004).

⁴⁵ *Aguilar*, 515 U.S. at 599; *see Rafferty & Teperow, supra* note 42, at 992.

⁴⁶ § 1503(a).

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.* § 1503(b).

⁵¹ *See, e.g., United States v. Mullins*, 22 F.3d 1365, 1370 (6th Cir. 1994); *United States v. Nelson*, 852 F.2d 706, 709 (3d Cir. 1988); *United States v. Reed*, 773 F.2d 477, 485 (2d Cir. 1985); *United States v. McComb*, 744 F.2d 555, 560 (7th Cir. 1984).

ing.⁵² Moreover, a pending investigation by a grand jury constitutes a judicial proceeding under § 1503.⁵³ The temporal determination of the point at which a proceeding becomes “pending” has varied throughout the circuits.⁵⁴

Other elements of a § 1503 violation include a knowledge requirement and a “nexus” requirement. To establish a § 1503 violation, the government must prove that the defendant knew of the pending judicial proceeding.⁵⁵ Lack of knowledge of a pending judicial proceeding would indicate that the requisite intent to obstruct justice is also absent.⁵⁶ In addition, the intent element of § 1503 includes a “nexus” element requiring that “the act . . . have a relationship in time, causation, or logic with the judicial proceedings. In other words, the endeavor must have the ‘natural and probable effect’ of interfering with the due administration of justice.”⁵⁷

Before the Court’s decision in *Arthur Andersen*, the courts of appeals employed varying definitions of the term “corruptly.”⁵⁸ Al-

⁵² See, e.g., *United States v. Aguilar*, 21 F.3d 1475, 1483–84 (9th Cir. 1994), *rev’d*, 515 U.S. 593 (1995) (holding that statements made to FBI agents did not fall under § 1503 because the defendant did not know that they would be provided to a grand jury); *United States v. Tham*, 960 F.2d 1391, 1400 (9th Cir. 1992) (ruling that a defendant cannot be convicted under § 1503 merely for hindering an FBI function); *United States v. Brown*, 688 F.2d 596, 598 (9th Cir. 1982) (concluding that § 1503 does not proscribe mere interference with a search warrant execution).

Obstruction of a congressional, federal department, or federal agency investigation falls under 18 U.S.C. § 1505 (2000 & Supp. IV 2004).

⁵³ See, e.g., *United States v. Wood*, 6 F.3d 692, 696 (10th Cir. 1993); *United States v. Cintolo*, 818 F.2d 980, 990 (1st Cir. 1987); *McComb*, 744 F.2d at 560; *United States v. Vesich*, 724 F.2d 451, 454 (5th Cir. 1984).

⁵⁴ See, e.g., *United States v. Fernandez*, 837 F.2d 1031, 1034 (11th Cir. 1988) (case deemed pending even after sentencing due to the availability of avenues for appeal); *United States v. Gonzalez-Mares*, 752 F.2d 1485, 1490–91 (9th Cir. 1985) (proceeding pending despite the fact that a complaint had not been filed, where the defendant waived trial and sentencing rights with assistance of counsel); *Vesich*, 724 F.2d at 455–56 (proceeding pending where a grand jury had been empaneled and a witness had signed an agreement to testify); *United States v. Ellis*, 652 F. Supp. 1451, 1452–53 (S.D. Miss. 1987) (no proceeding pending where the U.S. Attorney had empaneled a grand jury but had not issued any subpoenas nor informed the grand jury of the investigation).

⁵⁵ See, e.g., *United States v. Williams*, 874 F.2d 968, 977 (5th Cir. 1989); *United States v. Guzzino*, 810 F.2d 687, 696 (7th Cir. 1987); *United States v. Ardito*, 782 F.2d 358, 360–62 (2d Cir. 1986).

⁵⁶ See *Aguilar*, 515 U.S. at 599.

⁵⁷ *Id.* (citations omitted).

⁵⁸ See Rafferty & Teperow, *supra* note 42, at 995–96 (discussing the historical development of the term “corrupt”).

The First, Fifth, and Eleventh Circuits defined “corruptly” as requiring, at least in part, a corrupt motive. See, e.g., *United States v. Barfield*, 999 F.2d 1520, 1524 (11th Cir. 1993); *United States v. Thomas*, 916 F.2d 647, 651 (11th Cir. 1990); *Cintolo*, 818 F.2d at 991–92; *United States v. Howard*, 569 F.2d 1331, 1336 n.9 (5th Cir. 1978). Other circuits had held that “corruptly” simply meant that the act must have been “done with the purpose of obstructing justice.” *United States v. Rasheed*, 663 F.2d 843, 852 (9th Cir. 1981); see also *United States v. Machi*, 811 F.2d 991, 996 (7th Cir. 1987) (approving a jury instruction that

though the Court in *Arthur Andersen* was construing the meaning of “knowingly . . . corruptly persuad[e]” under § 1512(b),⁵⁹ it nevertheless clarified the meaning of “corrupt” and “corruptly” as “normally associated with wrongful, immoral, depraved, or evil.”⁶⁰ Moreover, actual obstruction is not necessary to sustain a § 1503 conviction; a mere “endeavor” to obstruct justice is sufficient.⁶¹ Courts have defined “endeavor” in this context as “any effort or essay to accomplish the evil purpose that the [statute] was enacted to prevent.”⁶²

B. Witness Tampering

Despite the § 1503 Omnibus Clause and its broad applicability, both Congress and prosecutors realized that protection for witness tampering victims remained deficient.⁶³ Congress found that the statutory construction of § 1503 was problematic because it offered limited protection and forced prosecutors to satisfy difficult threshold requirements.⁶⁴ Among other problems, Congress noted that § 1503 only protected witnesses rather than other persons who might be involved in a judicial proceeding—including victims and individuals not called as active witnesses.⁶⁵ Furthermore, Congress understood that the threshold requirements of § 1503, such as the requirement that a pending judicial proceeding exist at the time that the defendant acted, essentially provided easy means for a defendant to escape prosecution.⁶⁶ The passage of the Victim and Witness Protection Act of 1982,⁶⁷ codified as 18 U.S.C. § 1512, led one commentator to state

to act “corruptly” means “to act with the purpose of obstructing justice”); *United States v. Jeter*, 775 F.2d 670, 679 (6th Cir. 1985) (same).

⁵⁹ See *Arthur Andersen LLP v. United States*, 544 U.S. 696, 703–06 (2005).

⁶⁰ *Id.* at 705.

⁶¹ See 18 U.S.C. § 1503(a) (2000); *United States v. Wood*, 6 F.3d 692, 695 (10th Cir. 1993); *Barfield*, 999 F.2d at 1522–23; *United States v. Bashaw*, 982 F.2d 168, 172 (6th Cir. 1992); *Thomas*, 916 F.2d at 651; *United States v. Buffalano*, 727 F.2d 50, 53 (2d Cir. 1984).

⁶² *Osborn v. United States*, 385 U.S. 323, 333 (1966) (quoting *United States v. Russell*, 255 U.S. 138, 143 (1921)).

⁶³ See Brian M. Haney, Note, *Contrasting the Prosecution of Witness Tampering Under 18 U.S.C. § 1503 and 18 U.S.C. § 1512: Why § 1512 Better Serves the Government at Trial*, 9 SUFFOLK J. TRIAL & APP. ADVOC. 57, 61 (2004) (citing Tina M. Riley, Note, *Tampering with Witness Tampering: Resolving the Quandary Surrounding 18 U.S.C. §§ 1503, 1512*, 77 WASH. U. L.Q. 249, 255 (1999) (discussing congressional motivations underlying § 1512)).

⁶⁴ See Riley, *supra* note 63, at 255 (citing S. REP. NO. 97-532, at 14–15 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2515, 2520–21).

⁶⁵ See S. REP. NO. 97-532, at 10, 14–15.

⁶⁶ See Haney, *supra* note 63, at 63 (citing Teresa Anne Pesce, Note, *Defining Witness Tampering Under 18 U.S.C. Section 1512*, 86 COLUM. L. REV. 1417, 1419–20 (1986) (listing witness tampering prosecution elements)); *see also* S. REP. NO. 97-532, at 14–15 (acknowledging § 1503’s high threshold).

⁶⁷ Victim and Witness Protection Act of 1982, Pub. L. No. 97-291, 96 Stat. 1248.

that “[u]nder § 1503 Congress provided only an ax to fight witness tampering, but under § 1512 it gave prosecutors a scalpel.”⁶⁸

Witness tampering is “[t]he act or an instance of obstructing justice by intimidating, influencing, or harassing a witness before or after the witness testifies.”⁶⁹ The federal witness tampering provisions are generally codified under § 1512 as “[t]ampering with a witness, victim, or an informant.”⁷⁰ Section 1512(a) criminalizes witness tampering with the threat or use of violence.⁷¹ Section 1512(b), the provision that the government has traditionally used to prosecute document destruction cases,⁷² applies to “[w]hoever knowingly uses intimidation, threatens, or corruptly persuades another person, or attempts to do so, or engages in misleading conduct toward another person.”⁷³ Section 1512(c) is the Sarbanes-Oxley Act addition⁷⁴ to witness tampering law and mainly applies to document destruction cases.⁷⁵ Section 1512(d) criminalizes the actions of “[w]hoever intentionally harasses another person and thereby hinders, delays, prevents, or dissuades any person from” appearing before an official proceeding, law enforcement officer, or United States judge.⁷⁶ The sections following § 1512(d) act as modifiers to § 1512 and do not add separate substantive crimes.⁷⁷

Congress intended § 1512(b) to apply to noncoercive—in addition to coercive—witness tampering cases and, thus, included the term “corruptly.”⁷⁸ To obtain a conviction for noncoercive witness tampering under § 1512(b), the government must prove that the defendant (a) knowingly, (b) corruptly persuaded or attempted to do so, or engaged in misleading conduct, (c) toward another person, and

⁶⁸ See Haney, *supra* note 63, at 64.

⁶⁹ BLACK’S LAW DICTIONARY 1634 (8th ed. 2004).

⁷⁰ 18 U.S.C. § 1512 (2000 & Supp. IV 2004).

⁷¹ See *id.* § 1512(a)(1) (covering the acts of “[w]hoever kills or attempts to kill another person”); *id.* § 1512(a)(2) (covering the acts of “[w]hoever uses physical force or the threat of physical force against any person, or attempts to do so”); *id.* § 1512(a)(3) (setting forth punishments).

⁷² See Dana E. Hill, Note, *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, 1533 (2004).

⁷³ § 1512(b).

⁷⁴ See Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, § 1102, 116 Stat. 745, 807.

⁷⁵ See § 1512(c).

⁷⁶ *Id.* § 1512(d).

⁷⁷ See *id.* § 1512(e) (affirmative defense); *id.* § 1512(f) (pendency of official proceeding and admissibility of objects); *id.* § 1512(g) (state of mind); *id.* § 1512(h) (extraterritorial federal jurisdiction); *id.* § 1512(i) (jurisdictional venue); *id.* § 1512(j) (maximum term of imprisonment). But see *id.* § 1512(k) (dealing with conspiracy).

⁷⁸ See *id.* § 1512(b); see also Richard M. Strassberg & Roberto M. Bracerias, ‘Corruptly Persuading’ the Obstruction of Justice, 16 WHITE-COLLAR CRIME REP., May 2002, at 1, 4 (discussing the history of § 1512 and its amendment to include language targeting noncoercive witness tampering).

(d) with the intent that the other person should act to obstruct justice.⁷⁹ In addition, § 1512(b)(3), which applies to obstructing the communication of certain information to government officials, does not include the “official proceeding” requirement.⁸⁰ Section 1512(b)(2)(A) and (B) have been the traditional subsections under which the government has prosecuted witness tampering cases.⁸¹

The Sarbanes-Oxley Act added § 1512(c) to the government’s witness tampering arsenal in response to the recent corporate document destruction scandals.⁸² Some commentators suggest that § 1512(c) will become the Omnibus Clause equivalent in witness tampering prosecution.⁸³ Section 1512(c) affords the government several advantages in prosecuting a document destruction case: (1) it does not require the government to pursue the “persuader” to obtain a conviction; (2) it does not require that the perpetrator act “knowingly” in addition to “corruptly”; and (3) it carries twice the maximum penalty of § 1512(b).⁸⁴

C. Document Destruction Under § 1519

The Sarbanes-Oxley addition of § 1519⁸⁵ subjects

[w]hoever knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States . . . or in relation to or contemplation of any such matter

to up to twenty years’ imprisonment.⁸⁶ Section 1519—along with § 1512(c)—will provide a very useful tool for prosecutors in the future.⁸⁷ Section 1519 does not require that the defendant act “corruptly,” but merely that the defendant “knowingly” destroy documents with intent to hamper a federal investigation.⁸⁸ Moreover, § 1519 requires only that the defendant engage in document destruction “in

⁷⁹ See § 1512(b).

⁸⁰ See *id.* § 1512(b)(3).

⁸¹ See, e.g., Arthur Andersen LLP v. United States, 544 U.S. 696, 696, 702–03 (2005). The full text of the relevant statutory provision is reproduced *supra* note 12.

⁸² See § 1512(c); Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, § 1102, 116 Stat. 745, 807; Hasnas, *supra* note 28, at 193.

⁸³ See Hasnas, *supra* note 28, at 193; Julie R. O’Sullivan, *The Federal Criminal “Code” Is a Disgrace: Obstruction Statutes as Case Study*, 96 J. CRIM. L. & CRIMINOLOGY 643, 685 (2006) (“It added a new omnibus provision, § 1512(c)(2), which mimics in major part § 1503’s omnibus clause but is applicable in contexts outside of the judicial proceedings that § 1503 protects, such as in proceedings before federal agencies and in congressional inquiries.”).

⁸⁴ See § 1512(c); Hasnas, *supra* note 28, at 193.

⁸⁵ See Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, § 802(a), 116 Stat. 745, 800.

⁸⁶ See § 1519 (Supp. IV 2004).

⁸⁷ See Hasnas, *supra* note 28, at 194.

⁸⁸ See § 1519; Hasnas, *supra* note 28, at 194.

. . . contemplation of” an official proceeding.⁸⁹ This appears to demonstrate congressional intent to avoid a “pending proceeding” requirement.⁹⁰

II

OBSTRUCTION OF JUSTICE CASES AND THE NEXUS REQUIREMENT

A. The Nexus Requirement and *United States v. Aguilar*

In July 1987, Michael Rudy Tham sought post-conviction relief from a federal court pursuant to 28 U.S.C. § 2255 to set aside his embezzlement conviction.⁹¹ Tham asked Edward Solomon and Abraham Chalupowitz (Abe Chapman) to assist him by talking to a Northern District of California judge not assigned to the case, Judge Robert Aguilar.⁹² Solomon and Chapman met with Aguilar,⁹³ and Aguilar spoke with the assigned judge, Judge Stanley Weigel, about the matter.⁹⁴

In addition to the embezzlement conviction, the FBI had identified Tham as a suspect in a labor racketeering investigation.⁹⁵ Chief District Judge Robert Peckham authorized the FBI to install a wiretap on Tham’s business phones, and the application included Chapman as a potential interceptee.⁹⁶ After the FBI informed Chief Judge Peckham of the meetings between Chapman and Aguilar, the Chief Judge advised Aguilar that Chapman might have criminal connections because his name had appeared on the wiretap authorization.⁹⁷

Five months after learning of the wiretap authorization, Aguilar noticed a man observing his home during a visit with Chapman.⁹⁸ Aguilar informed his nephew of the home surveillance and the wiretapping of Chapman’s phone with the intention that his nephew would pass along the message to Chapman.⁹⁹ Aguilar mistakenly believed that the wiretap stemmed from the original application, but

⁸⁹ See § 1519; Hasnas, *supra* note 28, at 194.

⁹⁰ See Hill, *supra* note 72, at 1539.

⁹¹ *United States v. Aguilar*, 515 U.S. 593, 595 (1995) (explaining that Tham was convicted of embezzling funds from the local affiliate of the International Brotherhood of Teamsters).

⁹² *Id.*

⁹³ *Id.* at 595–96. Aguilar knew Chapman through a distant marriage relation and knew Solomon through law school. *Id.* at 595.

⁹⁴ *Id.* at 595–96.

⁹⁵ *Id.* at 596.

⁹⁶ *Id.* (observing that the FBI applied for the wiretap on April 20, 1987, the 30-day wiretap expired on May 20, 1987, and Chief Judge Peckham maintained the secrecy of the wiretap following a showing of good cause).

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

Chief Judge Peckham had separately authorized another wiretap application, beginning in October 1987.¹⁰⁰

Eventually, a grand jury began investigating an alleged conspiracy to influence Tham's habeas case.¹⁰¹ During the investigation, two FBI agents questioned Aguilar,¹⁰² but he lied about his role in the Tham case and his knowledge of the wiretap.¹⁰³ The grand jury indicted Aguilar, and a jury found him guilty of disclosing a wiretap, violating 18 U.S.C. § 2232(c), and endeavoring to obstruct the due administration of justice, violating 18 U.S.C. § 1503.¹⁰⁴ A Ninth Circuit panel affirmed the § 2232(c) conviction and reversed the § 1503 conviction.¹⁰⁵ Later, the Ninth Circuit reversed both convictions on rehearing en banc,¹⁰⁶ reasoning that Aguilar had not interfered with a pending judicial proceeding under § 1503.¹⁰⁷

On review, the Supreme Court considered whether the Omnibus Clause of § 1503 may punish mere false statements to potential grand jury witnesses.¹⁰⁸ The Court examined¹⁰⁹ its decision in *Pettibone v. United States*,¹¹⁰ which held that "a person is not sufficiently charged with obstructing or impeding the due administration of justice in a court unless it appears that he knew or had notice that justice was being administered in such court."¹¹¹ The *Aguilar* Court proceeded to note that courts of appeals cases had placed "metes and bounds" on the broad "catchall provision."¹¹² The Court then held that a nexus requirement applied to § 1503—that the "endeavor must have the 'natural and probable effect' of interfering with the due administration of justice."¹¹³ Therefore, if the "defendant lacks knowledge that his actions are likely to affect the judicial proceeding, he lacks the requisite intent to obstruct."¹¹⁴

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 596–97.

¹⁰² *Id.* at 597.

¹⁰³ *Id.*

¹⁰⁴ *Id.* Aguilar received a sentence of two concurrent six-month terms of imprisonment and a fine of \$2,000. *United States v. Aguilar*, 21 F.3d 1475, 1477 (9th Cir. 1994), *rev'd*, 515 U.S. 593 (1995).

¹⁰⁵ *Aguilar*, 515 U.S. at 597.

¹⁰⁶ *Id.*; *Aguilar*, 21 F.3d at 1476–77.

¹⁰⁷ *Aguilar*, 515 U.S. at 597.

¹⁰⁸ *Id.* at 595.

¹⁰⁹ *See id.* at 599.

¹¹⁰ 148 U.S. 197 (1893).

¹¹¹ *Id.* at 206. The Court in *Pettibone* reasoned that a person lacking knowledge of a pending proceeding necessarily cannot have the evil intent to obstruct. *Id.* at 206–07.

¹¹² *See Aguilar*, 515 U.S. at 599.

¹¹³ *Id.* (quoting *United States v. Wood*, 6 F.3d 692, 695 (10th Cir. 1993)); *United States v. Thomas*, 916 F.2d 647, 651 (11th Cir. 1990).

¹¹⁴ *Aguilar*, 515 U.S. at 599. The Court declined to address Aguilar's various other arguments on the basis that the "'nexus' requirement developed in the decisions of the Courts of Appeals is a correct construction of § 1503." *Id.* at 600.

B. *Arthur Andersen LLP v. United States*

Aggressive accounting practices and rapid growth accompanied Enron Corporation's shift in business focus from natural gas to energy.¹¹⁵ At the time, Enron entrusted Arthur Andersen LLP with the responsibility of auditing Enron's public financial statements.¹¹⁶ Enron's declining financial performance began in 2000 and continued through 2001.¹¹⁷ Jeffrey Skilling, Enron's Chief Executive Officer (CEO), resigned suddenly in August 2001, and Enron reappointed Kenneth Lay as his successor.¹¹⁸ Soon after, a senior Enron accountant informed Lay and Arthur Andersen partner Michael Odom of the potential accounting scandals looming over Enron.¹¹⁹

On August 28, 2001, the Securities and Exchange Commission (SEC) opened an informal investigation into Enron's alleged improprieties.¹²⁰ Arthur Andersen reacted by forming an Enron "crisis-response" team, which included in-house counsel Nancy Temple, and retained outside counsel for any potential Enron-related litigation.¹²¹ Temple's notes from an in-house counsel meeting indicated that "some SEC investigation" [was] "highly probable."¹²²

In October 2001, Odom spoke at a general training meeting and urged all employees to comply with Arthur Andersen's document retention policy.¹²³ Meanwhile, Temple designated the type of potential claim for the Enron matter as "Professional Practice—Government/Regulatory Inv[estigation]"¹²⁴ and e-mailed Odom to suggest that he remind the crisis-response team of the document retention policy.¹²⁵

After Enron announced its third quarter results in October 2001, the SEC notified the company that it had commenced an informal investigation in August.¹²⁶ The SEC's letter also requested "certain

¹¹⁵ *Arthur Andersen LLP v. United States*, 544 U.S. 696, 698 (2005).

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 699. Arthur Andersen also became embattled in its own right. In June 2001, the firm executed a settlement agreement with the Securities and Exchange Commission (SEC) which carried a large fine. In addition, the SEC also censured the firm and enjoined it from committing further securities violations. Then, in July 2001, the SEC named a lead audit partner in an amended complaint alleging improprieties by Sunbeam Corporation. *Id.* at 699 n.2.

¹¹⁸ *Id.* at 699.

¹¹⁹ *Id.*

¹²⁰ *Id.* (noting that the informal investigation followed a Wall Street Journal article suggesting improprieties at Enron).

¹²¹ *Id.*

¹²² *Id.* (citation omitted).

¹²³ *Id.* at 699–700.

¹²⁴ *Id.* at 700.

¹²⁵ *Id.*

¹²⁶ *Id.*

information and documents.”¹²⁷ On October 19, Enron forwarded a copy of the letter to Arthur Andersen.¹²⁸ The following day, Temple instructed the crisis-response team to continue to follow the document retention policy.¹²⁹ David Duncan, the leader of Arthur Andersen’s Enron crisis-response team,¹³⁰ reminded certain Arthur Andersen partners of the document retention policy following Enron CEO Kenneth Lay’s refusal to answer analysts’ questions due to “potential lawsuits, as well as the SEC inquiry.”¹³¹ Duncan later distributed the policy at a crisis-response team meeting.¹³²

On October 26, an unnamed Arthur Andersen partner distributed a *New York Times* article discussing the SEC’s Enron investigation.¹³³ The partner commented via e-mail that “the problems are just beginning and [Arthur Andersen] will be in the cross hairs.”¹³⁴ Days later, on October 30, the SEC began a formal investigation and requested accounting documents from Enron.¹³⁵

On November 8, the SEC served Enron and Arthur Andersen with subpoenas to obtain records.¹³⁶ The next day, Duncan’s secretary distributed an e-mail stating, “Per Dave—No more shredding. . . . We have been officially served for our documents.”¹³⁷ Less than a month later, Enron filed for bankruptcy.¹³⁸ Arthur Andersen later fired Duncan, who pleaded guilty to witness tampering.¹³⁹

The indictment against Arthur Andersen in March 2002—charging one count of violating 18 U.S.C. § 1512(b)(2)(A) and (B)—alleged that the petitioner “‘did knowingly, intentionally and corruptly persuade . . . other persons, to wit: [Arthur Andersen] employees, with intent to cause’ them to withhold documents from, and alter documents for use in, ‘official proceedings, namely: regulatory and criminal proceedings and investigations.’”¹⁴⁰ The jury returned a guilty verdict.¹⁴¹ The Fifth Circuit affirmed, holding that the district court properly instructed the jury on the meaning of “corruptly persuades”

127 *Id.*

128 *Id.*

129 *Id.* at 701.

130 *See id.* at 698–99.

131 *Id.* at 698–99, 701.

132 *Id.* at 701.

133 *Id.*

134 *Id.*

135 *Id.*

136 *Id.* at 702.

137 *Id.* (omission in original).

138 *Id.*

139 *Id.*

140 *Id.* (omission in original).

141 *Id.*

and “official proceeding” and that the jury did not need to find any consciousness of wrongdoing.¹⁴²

On review, the Supreme Court analyzed what it means to “‘knowingly . . . corruptly persuad[e]’ another person ‘with intent to . . . cause’ that person to ‘withhold’ documents from, or ‘alter’ documents for use in, an ‘official proceeding.’”¹⁴³ The Court found that “[o]nly persons conscious of wrongdoing can . . . ‘knowingly . . . corruptly persuad[e].’”¹⁴⁴ Therefore, the Court held that the “jury instructions at issue . . . failed to convey the requisite consciousness of wrongdoing.”¹⁴⁵

Although the Court ostensibly limited its holding to the district court’s error in instructing the jury on the meaning of “knowingly . . . corruptly persuade,” the Court proceeded to discuss the lack of any nexus requirement in the instructions.¹⁴⁶ The Court noted that the instructions “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.”¹⁴⁷ The Court stated that 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.”¹⁴⁸ The Court reached this conclusion despite the language in the current version of § 1512(f)(1)

¹⁴² *Id.*

¹⁴³ *Id.* at 703 (alteration in original) (omission in original).

¹⁴⁴ *Id.* at 706 (second alteration in original) (second omission in original).

¹⁴⁵ *Id.*

¹⁴⁶ *See id.* at 707–08. The district court charged the jury, in part:

[T]o determine whether Andersen corruptly persuaded “another person,” an employee or partner of Andersen is considered “another person.” To “persuade” is to engage in any non-coercive attempt to induce another person to engage in certain conduct. The word “corruptly” means having an improper purpose. An improper purpose, for this case, is an intent to subvert, undermine, or impede the fact-finding ability of an official proceeding. In order to establish this corrupt persuasion element, the government must prove that the agent of Andersen who engaged in the persuasion, not the other person persuaded, possessed the improper purpose. The improper purpose need not be the sole motivation for the defendant’s conduct so long as the defendant acted, at least in part, with that improper purpose.

Thus, if you find beyond a reasonable doubt that an agent, such as a partner, of Andersen acting within the scope of his or her employment, induced or attempted to induce another employee or partner of the firm or some other person to withhold, alter, destroy, mutilate, or conceal an object, and that the agent did so with the intent, at least in part, to subvert, undermine, or impede the fact-finding ability of an official proceeding, then you may find that Andersen committed [an element of the charged offense.]

Court’s Instructions to the Jury, Arthur Andersen LLP, Cr. No. H-02-121, *reprinted in* O’Sullivan, *supra* note 83, at 694–95 (alterations in original).

¹⁴⁷ *Arthur Andersen*, 544 U.S. at 707 (alteration in original).

¹⁴⁸ *Id.* at 708 (alterations in original) (omission in original).

providing that an official proceeding “need not be pending or about to be instituted at the time of the offense” for prosecution under § 1512.¹⁴⁹

The Court’s nexus discussion was not strictly a part of its holding, but the Court clearly sought to require some sort of nexus in witness tampering cases. The specific nature of the nexus requirement, however, remains less clear. The Court could mean (1) that nexus requires “knowledge of a pending proceeding,” (2) that nexus requires knowledge of a nexus, or (3) that the allegedly obstructive act must have the “‘natural and probable effect’ of interfering with the due administration of justice.”¹⁵⁰

C. Post-*Arthur Andersen* Nexus Requirement Cases

1. United States v. Ronda

Seven former police officers were convicted in a U.S. District Court of conspiracy to obstruct justice, and six were convicted of obstruction of justice.¹⁵¹ On appeal, the officers argued that the Court’s decision in *Arthur Andersen* with respect to § 1512(b)(2) applied with equal force to their convictions under § 1512(b)(3).¹⁵² The Eleventh Circuit rejected this argument and affirmed their convictions and sentences,¹⁵³ reasoning that although *Arthur Andersen* required that “the acts of obstruction relate to ‘an official proceeding,’” § 1512(b)(3) makes no mention of “an official proceeding.”¹⁵⁴

2. United States v. Byrne

A federal district court jury convicted Harry Byrne, a former police sergeant, of one count of deprivation of constitutional rights and four counts of witness tampering.¹⁵⁵ The First Circuit affirmed Byrne’s convictions but vacated his sentence.¹⁵⁶ On appeal, Byrne challenged the sufficiency of evidence to support his convictions under *Arthur Andersen*.¹⁵⁷ The First Circuit noted that the Court in *Arthur Andersen* “did not elaborate on the particularity required by the nexus requirement in subsection (b)(2).”¹⁵⁸ Accordingly, the First

¹⁴⁹ 18 U.S.C. § 1512(f)(1) (Supp. IV 2004); O’Sullivan, *supra* note 83, at 707.

¹⁵⁰ United States v. Aguilar, 515 U.S. 593, 599 (1995) (quoting United States v. Wood, 6 F.3d 692, 695 (10th Cir. 1993)).

¹⁵¹ See United States v. Ronda, 455 F.3d 1273, 1276 (11th Cir. 2006). Two of the defendants were also convicted of perjury. See *id.*

¹⁵² *Id.* at 1288.

¹⁵³ *Id.* at 1276, 1288.

¹⁵⁴ *Id.* at 1288 (citing United States v. Byrne, 435 F.3d 16, 24 (1st Cir. 2006)).

¹⁵⁵ *Byrne*, 435 F.3d at 17–18.

¹⁵⁶ *Id.* at 18.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* at 25.

Circuit declined to “resolve the exact contours of any nexus requirement in subsection (b)(3),” opting instead to “defer any final judgment for a future case that requires resolution of that issue.”¹⁵⁹

3. United States v. Quattrone

A jury found Frank Quattrone guilty of corruptly endeavoring to obstruct a grand jury proceeding, corruptly endeavoring to obstruct an SEC investigation, and witness tampering.¹⁶⁰ On review, the Second Circuit vacated the judgment and remanded for retrial,¹⁶¹ concluding that the district court’s § 1512(b) jury instruction was erroneous because it “told the jury that it need not find any nexus between Quattrone’s actions and the pending investigations.”¹⁶² The Second Circuit noted, however, that the “question of whether the nexus requirement applies in the same way to section 1512(b) as it does to sections 1503 and 1505 is not relevant to resolution of this appeal.”¹⁶³

4. United States v. Vampire Nation

A jury convicted Frederick Banks on counts of mail fraud, criminal copyright infringement, uttering and possessing counterfeit or forged securities, and witness tampering.¹⁶⁴ The Third Circuit affirmed Banks’s convictions and sentence in full.¹⁶⁵ Banks argued that the district court improperly instructed the jury on the *Arthur Andersen* requirement of “a nexus between the persuasion Banks allegedly directed at [another person] and a particular proceeding.”¹⁶⁶ The Third Circuit agreed with Banks that “a prosecution under [§ 1512(b)(2)] cannot succeed if the Government fails to show a ‘nexus between the “persuasion” to [impede] and any particular proceeding.’”¹⁶⁷ The Third Circuit held, however, that the jury instructions exhibited no plain error in light of *Arthur Andersen*¹⁶⁸ because the district court instructed the jury “that Banks could be found guilty of witness tampering only if he acted with the specific intent to induce [another person] to withhold evidence from an official proceeding.”¹⁶⁹

159 *Id.*

160 *United States v. Quattrone*, 441 F.3d 153, 161 (2d Cir. 2006).

161 *Id.*

162 *Id.* at 180–81.

163 *Id.* at 176 n.22.

164 *United States v. Vampire Nation*, 451 F.3d 189, 192 (3d Cir. 2006).

165 *Id.*

166 *Id.* at 204.

167 *Id.* at 205 (second alteration in original).

168 *Id.* at 205–06.

169 *Id.* at 205.

5. United States v. Darif

A jury found Anouar Darif guilty of marriage fraud, conspiracy to commit marriage fraud, and witness tampering under 18 U.S.C. § 1512(b)(1).¹⁷⁰ The Seventh Circuit affirmed the conviction on all three counts.¹⁷¹ Darif argued that the district court's failure to instruct the jury as to the definition of "corruptly persuade" constituted reversible error.¹⁷² The Seventh Circuit noted the Supreme Court's holding in *Arthur Andersen* that the witness tampering statute "requires proof of a nexus between the corrupt persuasion and a particular proceeding."¹⁷³ Consequently, the Seventh Circuit found the jury instructions at issue sufficient because they made "clear to the jury that the witness tampering charge was related to 'a particular proceeding.'"¹⁷⁴

6. United States v. Starks

At trial, a jury convicted Pernell Starks of obstructing an investigation by destroying an affidavit but found him not guilty of assaulting a federal agent.¹⁷⁵ On appeal, Starks brought a multiplicity challenge, claiming that both the assault and obstruction of justice counts charged the same criminal conduct.¹⁷⁶ Starks acknowledged *Arthur Andersen's* requirement of a nexus between the corrupt act and the government proceeding but argued that his actions did not involve corruption, so that only the physical obstruction aspect of his conduct remained.¹⁷⁷ Starks reasoned that the physical obstruction equated to an assault against a federal officer, and thus, the obstruction charge was multiplicitous.¹⁷⁸ In rejecting Starks's argument, the Seventh Circuit implicitly acknowledged that *Arthur Andersen* would indeed require a nexus in appropriate cases.¹⁷⁹

¹⁷⁰ United States v. Darif, 446 F.3d 701, 703 (7th Cir. 2006).

¹⁷¹ *Id.*

¹⁷² *Id.* at 711.

¹⁷³ *Id.*

¹⁷⁴ *Id.* at 712.

¹⁷⁵ United States v. Starks, 472 F.3d 466, 467–68 (7th Cir. 2006).

¹⁷⁶ *Id.* at 468.

¹⁷⁷ *See id.* at 470.

¹⁷⁸ *See id.*

¹⁷⁹ *See id.* at 469–70 ("There was no allegation that Starks tried to corruptly persuade a third party to destroy the affidavit and therefore [the] *Arthur Andersen* nexus requirement is not relevant to this case." (emphasis added)).

III ANALYSIS

A. Defining “Nexus”

1. *Generally*

Much of the confusion surrounding the *Arthur Andersen* opinion stems from the issue of defining “nexus.” Presumably, “nexus” might assume a different meaning in various contexts. For example, a nexus requirement under a federal drug statute¹⁸⁰ might differ from a nexus requirement in an obstruction of justice statute.¹⁸¹ Within the obstruction statutes—generally understood to comprise §§ 1501–1520¹⁸²—one would reasonably expect a consistent definition of the term. Because the named sections proscribe the same general type of conduct—interfering with some type of adjudication—the same definition of “nexus” should apply consistently throughout these sections.

In *United States v. Aguilar*, the Court provided a clear definition of “nexus” as applied to § 1503,¹⁸³ reasoning that the defendant’s action “must be with an intent to influence judicial or grand jury proceedings.”¹⁸⁴ The Court further explained that “the act must have a relationship in time, causation, or logic with the judicial proceedings.”¹⁸⁵ Finally, the Court defined “nexus” as requiring that the “endeavor . . . have the ‘natural and probable effect’ of interfering with the due administration of justice.”¹⁸⁶

Aguilar thus makes clear that “nexus” requires more than mere knowledge of a pending proceeding.¹⁸⁷ The nexus requirement might easily be confused with the “knowledge of a pending proceeding” requirement because the nexus requirement necessarily implies knowledge of a pending proceeding. Indeed, it would seem nearly impossible for a defendant’s act to have the natural and probable ef-

¹⁸⁰ See, e.g., *United States v. Pryor*, 75 F. App’x 157, 160 (4th Cir. 2003) (concluding that the district court did not err in applying enhanced federal drug sentencing provisions given that evidence demonstrated a *temporal nexus* between the defendant’s prior convictions and the scope of his involvement in the conspiracy).

¹⁸¹ See, e.g., *United States v. Aguilar*, 515 U.S. 593, 599 (1995) (defining the Omnibus Clause nexus element to require that “the endeavor . . . have the ‘natural and probable effect’ of interfering with the due administration of justice” (quoting *United States v. Wood*, 6 F.3d 692, 695 (10th Cir. 1993))).

¹⁸² See 18 U.S.C. §§ 1501–1520 (2000 & Supp. IV 2004); *supra* note 8 and accompanying text.

¹⁸³ See *Aguilar*, 515 U.S. at 599.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ *Id.* (quoting *United States v. Wood*, 6 F.3d 692, 695 (10th Cir. 1993)).

¹⁸⁷ See *id.* (discussing the knowledge element as requiring that “a person is not sufficiently charged with obstructing or impeding the due administration of justice in a court unless it appears that he knew or had notice that justice was being administered in such court” (quoting *Pettibone v. United States*, 148 U.S. 197, 206 (1893))).

fect of interfering with the due administration of justice if the defendant did not, in some way, contemplate a pending proceeding. The key distinction, then, may very well amount to the difference between “contemplation” and “knowledge” of a pending proceeding. A defendant may satisfy the nexus requirement merely by contemplating a pending proceeding and acting in a way that would have the natural and probable effect of interfering with that proceeding, without ever having *knowledge* that the pending proceeding actually existed. Regardless, the Court makes clear that the nexus requirement and the “knowledge of a pending proceeding” requirement are distinct elements.¹⁸⁸ Commentators agree with the Court that these two elements, the nexus requirement and the knowledge requirement, limit the obstruction of justice statutes.¹⁸⁹

2. Arthur Andersen *and* § 1512(b)

The more difficult task is to determine what the *Arthur Andersen* Court intended when it required some “type of nexus” in cases arising under § 1512(b).¹⁹⁰ The Court provided its reasoning for the nexus requirement without ever precisely defining what it was requiring.¹⁹¹ In the absence of further guidance, a reader would likely assume that the Court viewed the nexus requirement in *Arthur Andersen* in the same manner that it defined the concept in *Aguilar*.

Though it left no clear explanation, the *Arthur Andersen* Court did leave hints as to its intent. First, it implied that § 1512(b) required some level of foreseeability with respect to an official proceeding.¹⁹² Foreseeability, however, pertains to the “knowledge of a pending proceeding,” not the nexus, requirement. A defendant who may foresee a pending proceeding may not necessarily realize that a given act will have the natural and probable effect of interfering with that proceeding. The nexus requirement, as the Court in *Aguilar* outlined, implies some level of materiality that is missing from mere foreseeability. Thus, “foreseeability” directly implicates nothing more than the knowledge requirement.¹⁹³

¹⁸⁸ See *id.*

¹⁸⁹ See, e.g., Hill, *supra* note 72, at 1524, 1535–48. Hill explains that the courts have used two requirements “to limit the reach of pre-Sarbanes-Oxley obstruction statutes: the ‘nexus’ requirement and the requirement that defendants have knowledge of the particular proceeding obstructed by their actions.” *Id.* at 1524.

¹⁹⁰ See *Arthur Andersen LLP v. United States*, 544 U.S. 696, 707 (2005) (“In resisting any type of nexus element, the Government [contends] . . .” (emphasis added)).

¹⁹¹ See *id.* at 707–08.

¹⁹² See *id.* (“It 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.”).

¹⁹³ *But cf.* *United States v. Neiswender*, 590 F.2d 1269, 1273–75 (4th Cir. 1979). The court in *Neiswender* held that the government can satisfy the knowledge requirement with

Second, the Court's *Arthur Andersen* opinion indicates that it intended the nexus requirement to apply in the same manner as it did in *Aguilar*. The Court stated that a "'knowingly . . . corrupt[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*.¹⁹⁴ The Court's use of "contemplate" is especially important when read in conjunction with "material."¹⁹⁵ This language implies that when the Court talks about the nexus requirement, it is not talking about knowledge of a pending proceeding but rather *contemplation* of a particular proceeding that the acts of the defendant might *materially* affect.¹⁹⁶ This strongly suggests that the Court in *Arthur Andersen* was applying the *Aguilar* nexus requirement.

Unfortunately, the Court never explicitly announced that it was applying the *Aguilar* nexus requirement to § 1512(b)—as opposed to some other type of nexus—despite devoting the penultimate paragraph of the opinion to a discussion of *Aguilar*.¹⁹⁷ The Court did, however, state that it "faced a similar situation in *Aguilar*," implying application of the nexus requirement to § 1512(b) in the same manner as to § 1503.¹⁹⁸ Furthermore, after briefly restating the facts of *Aguilar*, the Court in *Arthur Andersen* repeated its holding, requiring "a 'nexus' between the obstructive act and the proceeding."¹⁹⁹ The Court's quotation of the term "nexus" in the context of its § 1512(b) discussion²⁰⁰ tends to convey a clear intention to import the term—with the same meaning—from *Aguilar* and apply it to § 1512(b). Indeed, the Court's conclusion of its nexus discussion essentially constitutes acceptance of the *Aguilar* nexus requirement precedent.²⁰¹

the lesser showing of "notice" or "the reasonable *foreseeability* of the natural and probable consequences of one's acts." *Id.* at 1273 (emphasis added).

The Second, Sixth, Seventh, and Eleventh Circuits have followed the approach in *Neiswender*. See *United States v. Atkin*, 107 F.3d 1213, 1219 (6th Cir. 1997); *United States v. Bucey*, 876 F.2d 1297, 1314 (7th Cir. 1989); *United States v. Silverman*, 745 F.2d 1386, 1393–96 (11th Cir. 1984); *United States v. Buffalano*, 727 F.2d 50, 53–54 (2d Cir. 1984).

¹⁹⁴ *Arthur Andersen*, 544 U.S. at 708 (emphasis added) (alternations in original) (omission in original).

¹⁹⁵ "Material" is defined as being of "such a nature that knowledge of the item would affect a person's decision-making; significant; essential." BLACK'S LAW DICTIONARY 998 (8th ed. 2004).

¹⁹⁶ Compare the language in *Aguilar* that "if the defendant lacks knowledge that his actions are likely to affect the judicial proceeding, he lacks the requisite intent to obstruct." *United States v. Aguilar*, 515 U.S. 593, 599 (1995).

¹⁹⁷ See *Arthur Andersen*, 544 U.S. at 708.

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ See *id.*

²⁰¹ See *id.*

B. The Nexus Requirement and § 1512(c)

The passage of the Sarbanes-Oxley Act in 2002 greatly augmented the government's ability to prosecute subsequent witness tampering and document destruction cases.²⁰² Some argued that §§ 1512(c) and 1519 would largely displace § 1512(b) as the tools for prosecuting obstructive document destruction.²⁰³ Thus, one commentator, John Hasnas, brushed aside *Arthur Andersen* as a “meaningless,” albeit “important,” decision.²⁰⁴ Despite this apparent contradiction, Hasnas is clearly correct that some document destruction prosecutions will utilize § 1512(c) or § 1519, notwithstanding prosecutors' natural tendency to prefer trusted, preexisting statutes. It does not follow, however, that the reasoning behind *Arthur Andersen* does not pertain to these newer statutes as well.

In many respects, § 1512(c)(2) appears destined to become the new Omnibus Clause.²⁰⁵ According to President George W. Bush, the Sarbanes-Oxley Act arose from a need to “adopt[] tough new provisions to deter and punish corporate and accounting fraud and corruption, ensure justice for wrongdoers, and protect the interests of workers and shareholders.”²⁰⁶ Unlike § 1512(b), § 1512(c)(2) is intransitive—it applies to obstructive activity that the defendant directly performs, rather than obstructive activity that the defendant somehow encourages.²⁰⁷ To the extent that § 1512(c)(2) overlaps with § 1503,²⁰⁸ § 1512(c)(2)'s requirement that there be obstruction of an “official proceeding” is broader and more widely applicable than § 1503, which applies only to obstruction of a pending “judicial proceeding.” Furthermore, and very importantly, § 1512(f) states that “[f]or the purposes of this section[,] an official proceeding need not

²⁰² See Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, §§ 802(a), 1102, 116 Stat. 745, 800, 807 (codified at 18 U.S.C. §§ 1512(c), 1519 (2000)).

²⁰³ See, e.g., Hasnas, *supra* note 28, at 193–94; see also O'Sullivan, *supra* note 83, at 654–55 (arguing that prosecutors leverage “substantially greater bargaining power vis-à-vis the defense” by exploiting the choices available to them to prosecute new offenses that are essentially “more specialized models of old statutes”).

²⁰⁴ See Hasnas, *supra* note 28, at 187.

²⁰⁵ See O'Sullivan, *supra* note 83, at 685 (“[Sarbanes-Oxley] added a new omnibus provision, § 1512(c)(2), which mimics in major part § 1503's omnibus clause but is applicable in contexts outside of the judicial proceedings that § 1503 protects, such as in proceedings before federal agencies and in congressional inquiries.”).

²⁰⁶ Statement on Signing the Sarbanes-Oxley Act of 2002 (July 30, 2002), 38 WEEKLY COMP. PRES. DOC. 1286, 1286 (Aug. 5, 2002), available at <http://www.gpoaccess.gov/wcomp/v38no31.html>.

²⁰⁷ See 18 U.S.C. § 1512(b)–(c) (2000 & Supp. IV 2004); O'Sullivan, *supra* note 83, at 712.

²⁰⁸ Sections 1503 and 1512(c)(2) both involve instances in which the defendant acted “corruptly” to “influence.” See O'Sullivan, *supra* note 83, at 712. But see *id.* at 713 (pointing out that § 1503 requires an “endeavor,” while § 1512 applies only to “attempts,” a slightly more demanding standard).

be pending or about to be instituted at the time of the offense.”²⁰⁹ Thus, unlike § 1503, § 1512(c)(2) does not require that the defendant know of a pending proceeding.

In determining the attractiveness of prosecuting under § 1512(c)(2), an important issue is the extent to which the nexus requirement applies. Given the *Aguilar* Court’s reasoning for applying a nexus requirement to § 1503 and the *Arthur Andersen* Court’s reasoning for applying the nexus requirement to § 1512(b), the Court would likely apply the same requirement to § 1512(c)(2). Thus, assuming the nexus requirement will apply, the intransitive nature of § 1512(c)(2) is the only facially obvious difference between the statutory text of §§ 1512(c)(2) and 1512(b).²¹⁰

In *Aguilar*, the Court discussed Justice Scalia’s dissent, analogizing his position to finding that a person violated § 1503

if he knew of a pending investigation and lied to his wife about his whereabouts at the time of the crime, thinking that an FBI agent might decide to interview her and that she might in turn be influenced in her statement to the agent by her husband’s false account of his whereabouts.²¹¹

The majority concluded its § 1503 discussion by asserting that in such a hypothetical, “[t]he intent to obstruct justice is indeed present, but the man’s culpability is a good deal less clear from the statute than [the Court] usually require[s] in order to impose criminal liability.”²¹² Likewise, the Court in *Arthur Andersen* concluded its discussion of the nexus requirement and § 1512(b) by simply repeating its holding in *Aguilar*.²¹³

The impetus for the *Aguilar* Court’s addition of the nexus requirement to § 1503 was clearly based on its view of the level of culpability required by that provision, and the *Arthur Andersen* Court deferred its nexus discussion to its holding in *Aguilar*.²¹⁴ In light of the Court’s concern for culpability in applying the nexus requirement to § 1503, as well as the extensive similarities between §§ 1503 and 1512(c)(2), the reasoning in *Aguilar* also demands application of the nexus requirement to § 1512(c)(2). Moreover, *Arthur Andersen* demonstrated that the Court remains willing to defer to precedent when considering whether to apply the nexus requirement to obstruc-

²⁰⁹ § 1512(f)(1) (Supp. IV 2004); O’Sullivan, *supra* note 83, at 712 (explaining that the official proceeding need not be pending for purposes of § 1512 prosecutions).

²¹⁰ *See id.* § 1512(b)–(c) (2000 & Supp. IV 2004).

²¹¹ *United States v. Aguilar*, 515 U.S. 593, 602 (1995).

²¹² *Id.*

²¹³ *Arthur Andersen LLP v. United States*, 544 U.S. 696, 708 (2005).

²¹⁴ *See id.*

tion of justice cases,²¹⁵ making the case for applying a nexus requirement to § 1512(c)(2) even stronger.

The option to use either § 1503 or § 1512(c)(2) significantly impacts prosecutorial bargaining power.²¹⁶ The maximum penalty under § 1503 is ten years' imprisonment,²¹⁷ while the maximum penalty under § 1512(c) is twenty years.²¹⁸ In addition, § 1512(c)(2) overlaps with § 1505's application to congressional and agency investigations.²¹⁹ Under § 1505, the maximum penalty is a mere five-year term of imprisonment.²²⁰ Although this prosecutorial leverage presents little constitutional concern, defendants may, in close cases, choose to negotiate a plea agreement rather than pursue trial.²²¹ The potential limit on § 1512(c)(2) prosecutions offered by a nexus requirement remains attractive to defendants given the advantages that a choice among statutes currently affords the prosecution.

C. The Nexus Requirement and § 1519

Sarbanes-Oxley significantly enhanced the prosecutorial arsenal for document destruction with the addition of § 1519.²²² Like § 1512(c), § 1519 is intransitive, affecting obstructive activity that the defendant directly performs.²²³ Moreover, it also appears to extend to executive branch or agency investigations, which allows broad prosecutorial reach.²²⁴ Significantly, § 1519 omits the mental state element "corruptly," merely requiring that one "knowingly" destroy documents with the intent to impede a federal investigation.²²⁵

Some commentators have downplayed the significance of § 1519 by arguing that it does little to proscribe conduct that earlier statutes had not already criminalized.²²⁶ This view stems from the claim that § 1519 fails to meaningfully extend the broad reach that some courts had given obstruction of justice statutes prior to Sarbanes-Oxley.²²⁷ One commentator observed the sentiments of others that "criminal

²¹⁵ See *id.*

²¹⁶ See O'Sullivan, *supra* note 83, at 713.

²¹⁷ 18 U.S.C. § 1503 (2000) (assuming that the underlying crime involves no killing or other special circumstance).

²¹⁸ *Id.* §§ 1503, 1512(c).

²¹⁹ See *id.* §§ 1505, 1512(c) (2000 & Supp. IV 2004); O'Sullivan, *supra* note 83, at 713.

²²⁰ § 1505.

²²¹ See O'Sullivan, *supra* note 83, at 713.

²²² See Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, § 802(a), 116 Stat. 745, 800 (codified at 18 U.S.C. § 1519 (2000)); Hasnas, *supra* note 28, at 194.

²²³ See § 1519 (Supp. IV 2004).

²²⁴ See *id.*

²²⁵ See *id.*

²²⁶ See Hill, *supra* note 72, at 1522 (citing Michael A. Perino, *Enron's Legislative Aftermath: Some Reflections on the Deterrence Aspects of the Sarbanes-Oxley Act of 2002*, 76 ST. JOHN'S L. REV. 671, 680 (2002)).

²²⁷ See *id.*

practitioners view the new provisions and get-tough rhetoric [of Sarbanes-Oxley] as little more than sound and fury signifying nothing.”²²⁸

Dana Hill adopts a different approach by arguing that § 1519 “can play a new and significant role in prohibiting anticipatory obstruction of justice—document destruction by individuals who are savvy enough to pre-empt an investigation by acting before they have knowledge about the specific proceeding that may demand the documents.”²²⁹ In other words, Hill argues that Congress intended and, in fact, designed § 1519 to generate an entirely new area of obstruction of justice law—that of anticipatory obstruction.²³⁰ Under this theory, courts could find § 1519 liability in cases in which the defendant “intentionally destroys documents with only a general contemplation of the obstructed proceedings.”²³¹ As Hill points out, this would eliminate the “knowledge of a specific proceeding” requirement from § 1519 cases.²³²

Hill augments his interpretation of § 1519 by arguing that this position “gives distinct meaning to the unique language of § 1519, which imposes liability on those who act ‘in relation to or contemplation of’ a federal investigation or matter.”²³³ To the extent that courts may read the “knowledge of a pending proceeding” requirement out of § 1519, the language to which Hill refers still lends itself to application of the nexus requirement. In addition, Hill expresses disbelief at the possibility of redundancy between § 1519 and pre-Sarbanes-Oxley obstruction of justice statutes.²³⁴ Assuming that a nonredundant criminal code is desirable, Hill’s reading partially avoids redundancy only with respect to the “knowledge of a pending proceeding” requirement²³⁵ while leaving the threat of redundancy with respect to the nexus requirement. Applying the nexus requirement to § 1519

²²⁸ *Id.* at 1522–23 (alteration in original) (quoting John J. Falvey Jr. & Matthew A. Wolfman, *The Criminal Provisions of Sarbanes-Oxley: A Tale of Sound and Fury?*, WHITE-COLLAR CRIME REP., Oct. 2002, at 1, 2).

²²⁹ *Id.* at 1523 (citing W. Warren Hamel et al., *They Got Tougher: New Criminal Penalties for Fraud and Obstruction Affect All Companies*, LEGAL TIMES, Oct. 7, 2002, at 34; Abbe David Lowell & Kathryn C. Arnold, *Corporate Crime After 2000: A New Law Enforcement Challenge or Déjà Vu?*, 40 AM. CRIM. L. REV. 219, 225 (2003)).

²³⁰ *Id.* at 1565.

²³¹ *Id.*

²³² *See id.*; *see also id.* 1565 n.295 (discussing Justice Scalia’s *Aguilar* dissent, in which he posited that awareness of a pending proceeding must only be shown insofar as it relates to the actor’s intent).

²³³ *Id.* at 1565 (quoting 18 U.S.C. § 1519 (Supp. IV 2004)).

²³⁴ *See id.*

²³⁵ There is still a slight overlap with respect to the knowledge requirement because knowledge of a pending proceeding would certainly satisfy Hill’s “general contemplation” requirement.

helps to remedy the concern for jury confusion²³⁶ that has troubled some commentators. Requiring that the obstruction exhibit the “‘natural and probable effect’ of interfering with the due administration of justice”²³⁷ helps clarify the meaning of “in relation to or contemplation of.”²³⁸ A nexus requirement would also help to alleviate concern that courts might “reward perpetrators of business crimes for their prescience by shifting the focus from the actor’s mental state *regarding the proceeding* to the actor’s mental state *regarding the obstruction.*”²³⁹ The nexus keeps the focus on *both* the actor’s mental state regarding the proceeding and the actor’s mental state regarding the obstruction by demanding that the obstruction have the natural and probable effect of interfering with the proceeding.

Although some arguments for eliminating the “knowledge of a pending proceeding” requirement from § 1519 have merit, they do not hold true for the nexus requirement. Following the *Arthur Andersen* trial verdict, then-Assistant United States Attorney Andrew Weissmann stated, “When you expect the police, don’t destroy evidence.”²⁴⁰ This statement is simply too broad. One defense to prosecution under § 1519 involves consistent application and enforcement of a retention policy, which tends to demonstrate a lack of the requisite specific intent to obstruct justice.²⁴¹ As Hill acknowledges, the statute explicitly limits itself by using “contemplation” as a separate mental state regarding the obstructed proceeding.²⁴² The nexus requirement is not only consistent with this added language but is desirable as a limitation on the expansive reading that some commentators and courts would like to afford § 1519. In *Aguilar*, the Court appealed to culpability when it applied the nexus requirement to § 1503,²⁴³ and the Court in *Arthur Andersen* followed that precedent by applying the nexus requirement to § 1512(b).²⁴⁴ Courts should follow the same course with respect to § 1519.

²³⁶ Cf. Hill, *supra* note 72, at 1565–66 (offering “an alternative to the confusing jury instructions under § 1512 which instruct jurors that they do not need to find that a proceeding was in progress when the obstructive act took place, but that they do need to find an ‘intent to obstruct . . . an official proceeding’” (omission in original)).

²³⁷ *United States v. Aguilar*, 515 U.S. 593, 599 (1995) (quoting *United States v. Wood*, 6 F.3d 692, 695 (10th Cir. 1993)).

²³⁸ § 1519.

²³⁹ Hill, *supra* note 72, at 1566 (discussing jury confusion regarding the “knowledge of a pending proceeding” requirement).

²⁴⁰ *Id.*

²⁴¹ *See id.* Of course, this does not constitute a defense under the actual language of the statute but may act to prevent successful prosecution of the crime.

²⁴² *See* § 1519; Hill, *supra* note 72, at 1567.

²⁴³ *See United States v. Aguilar*, 515 U.S. 593, 602 (1995).

²⁴⁴ *See Arthur Andersen LLP v. United States*, 544 U.S. 696, 708 (2005).

D. Practical and Constitutional Considerations

1. *Document Retention Policies After Arthur Andersen*

Business entities develop document retention policies for various business and legal reasons, resulting in both economic and legal protection.²⁴⁵ The policy at issue in *Arthur Andersen* mandated that employees only retain final work papers supporting client audits and required destruction of drafts, notes, and memos.²⁴⁶ The same policy also required employees to retain all documents related to any litigation anticipated by Arthur Andersen.²⁴⁷

To avoid inundation beneath ever-growing piles of documents, business organizations inevitably look to document retention policies as a way of managing space limitations and storage costs.²⁴⁸ Business entities should create such policies prior to engaging in document destruction,²⁴⁹ and these policies should clearly describe which documents to retain, which documents to destroy, and the appropriate time frame for destruction.²⁵⁰

Not only do companies, firms, and partnerships purge useless documents, but they also utilize document retention policies to keep “unnecessarily damaging documents from coming to light.”²⁵¹ Simply put, document retention policies reduce legal exposure. Nevertheless, all document retention policies “should clearly state the categorization of documents and electronic files, what documents must be preserved, the retention period for each category, the document destruction procedures, and what to do when litigation or an investigation commences.”²⁵²

Because a document retention policy may work against a company if employees violate it, strict compliance is essential.²⁵³ To secure strict employee compliance, management should inform all

²⁴⁵ 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, 721 (2003).

²⁴⁶ See *id.* at 723.

²⁴⁷ See *id.*

²⁴⁸ See *id.* at 724.

²⁴⁹ See *id.* In addition, organizations should adopt document retention policies outside the context of current litigation. See Lisa Shaheen, *Required Recordkeeping Sets the Record Straight*, PEST CONTROL, Apr. 2001, at 27.

²⁵⁰ See Michael Orey, *Document Shredding Shows Importance of Having a Policy on What Is Preserved*, WALL ST. J., Jan. 14, 2002, at A6 (“Without a policy, you’re open to an allegation that there was some nefarious purpose for destruction of documents.” (quoting George Terwilliger III, a white-collar defense attorney at White & Case LLP)); Saundra Torry, *Shredding: Decisions of Taste, Law and Common Sense*, WASH. POST, Mar. 14, 1994, at F7 (“You don’t destroy anything until you have a ‘document retention policy’ in place.” (quoting attorney Arthur Wineburg)).

²⁵¹ Chase, *supra* note 245, at 725.

²⁵² *Id.* at 725–26 (citing Robert M. Barker et al., *Document Retention*, INTERNAL AUDITOR, Dec. 1996, at 50–51).

²⁵³ See *id.* at 726.

employees of the policy and its procedures,²⁵⁴ and should clarify that the purpose of the policy is not to dishonestly destroy evidence.²⁵⁵ To be safe, once any legal proceeding is contemplated or initiated, business entities should halt the normal operation of their document retention policies and instruct employees to retain all documents related to the proceeding.²⁵⁶

The post-*Arthur Andersen* Sedona Guidelines—promulgated by The Sedona Conference—provide additional guidance to business organizations.²⁵⁷ The Sedona Guidelines consist of four basic guidelines for business entities desiring to adopt a valid document retention policy:

Guideline 1: An organization should have reasonable policies and procedures for managing its information and records.

Guideline 2: An organization's information and records management policies and procedures should be realistic, practical, and tailored to the circumstances of the organization.

Guideline 3: An organization need not retain all electronic information ever generated or received.

Guideline 4: An organization adopting an information and records management policy should also develop procedures that address the creation, identification, retention, retrieval, and ultimate disposition or destruction of information and records.²⁵⁸

The Sedona Guidelines also provide case law analysis and discussion of secondary authorities to provide more detailed guidance for development of document retention policies.²⁵⁹

Most courts abstain from punishing document destruction pursuant to a business organization's legitimate document retention policy.²⁶⁰ Still, the policies must be reasonable and purposeful—not merely a pretense—for destroying evidence in contemplation of litigation.²⁶¹ As *Arthur Andersen* made clear at the district court level, a document retention policy will not immunize a business entity from

²⁵⁴ See *id.* at 726–27.

²⁵⁵ See Julian Joshua, *European Union: Antitrust Compliance Programmes for Multinational Companies*, INT'L FIN. L. REV., Supplement: Competition and Antitrust 2001, at 65, 68.

²⁵⁶ See Chase, *supra* note 245, at 727.

²⁵⁷ See generally THE SEDONA CONFERENCE, THE SEDONA GUIDELINES: BEST PRACTICE GUIDELINES & COMMENTARY FOR MANAGING INFORMATION & RECORDS IN THE ELECTRONIC AGE (Charles R. Ragan et al. eds., 2005) [hereinafter SEDONA GUIDELINES].

²⁵⁸ Jonathan M. Redgrave et al., *Looking Beyond Arthur Andersen: The Impact on Corporate Records and Information Management Policies and Practices*, FED. LAW., Sept. 2005, at 32, 35 (citing SEDONA GUIDELINES, *supra* note 257).

²⁵⁹ See *id.*

²⁶⁰ See Chase, *supra* note 245, at 728 (citing *Moore v. Gen. Motors Corp.*, 558 S.W.2d 720, 737 (Mo. Ct. App. 1977) (“[W]e see no evidence of fraud or bad faith in a corporation destroying records it is no longer required by law to keep and which are destroyed in accord with its regular practices.”)).

²⁶¹ See *id.*

sanctions.²⁶² Moreover, document destruction in the absence of a document retention policy may constitute bad faith on the part of the business entity.²⁶³

It is especially important for organizations to follow developments in obstruction of justice laws. With a firm knowledge of the developing laws, businesses can appropriately balance the competing purposes of obstruction laws and document retention policies.²⁶⁴ Determining whether a nexus must exist between the alleged obstruction and the pending proceeding is of great practical importance to a company seeking to establish a document retention policy.

2. *Prosecutorial Discretion and Power*

Federal prosecutors enjoy broad prosecutorial discretion, allowing for far-reaching control over criminal cases. The power to charge is perhaps the strongest example of the reach of prosecutorial discretion.²⁶⁵ Prosecutors determine whether and how to charge a defendant, as well as whether to offer a plea bargain and the ultimate terms of such an agreement.²⁶⁶ Because trial presents a defendant with the risk of additional convictions and an extended prison term compared to most plea agreements,²⁶⁷ plea bargaining resolves a majority of criminal cases.²⁶⁸ Thus, prosecutorial control over the plea bargaining process translates into direct control over the resolution of the majority of criminal cases.²⁶⁹

Given this significant prosecutorial power, the potential for abuse of discretion is high. Coercive pretrial tactics include intimidation of

²⁶² See *id.* (citing *Lewy v. Remington Arms Co.*, 836 F.2d 1104, 1112 (8th Cir. 1988) (“[A] corporation cannot blindly destroy documents and expect to be shielded by a seemingly innocuous document retention policy.”)).

²⁶³ See *id.*

²⁶⁴ Chase argues that this balance can be achieved if a document retention policy is: a) suspended when a corporation learns that litigation or an investigation into the corporation is imminent; b) the corporation then reinstates the policy as to irrelevant or unnecessary documents regarding the investigation or litigation proceedings; c) and is fully reinstated once the investigation or litigation proceedings are over, thereby making the process cost effective while at the same time complying with the government and the essence of fairness.

Id. at 756 (footnote omitted).

²⁶⁵ See Angela J. Davis, *The American Prosecutor: Independence, Power, and the Threat of Tyranny*, 86 IOWA L. REV. 393, 408 (2001) [hereinafter Davis, *The American Prosecutor*] (discussing the important effect of the initial charging decision on the outcome of a criminal case); Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 FORDHAM L. REV. 13, 23–24 (1998) (same).

²⁶⁶ Davis, *The American Prosecutor*, *supra* note 265, at 408.

²⁶⁷ See *id.* at 409.

²⁶⁸ See Douglas D. Guidorizzi, Note, *Should We Really “Ban” Plea Bargaining?: The Core Concerns of Plea Bargaining Critics*, 47 EMORY L.J. 753, 753 (1998) (citing BUREAU OF JUSTICE STATISTICS, FELONY DEFENDANTS IN LARGE URBAN COUNTIES 29 (1992)).

²⁶⁹ See, e.g., Davis, *The American Prosecutor*, *supra* note 265, 408–09.

witnesses,²⁷⁰ selective²⁷¹ and vindictive²⁷² prosecution, and abuse of the grand jury process.²⁷³ Examples of abusive prosecution trial tactics include improper opening statements,²⁷⁴ cross-examination,²⁷⁵ and closing arguments.²⁷⁶ In addition, prosecutors may violate their legal duty to reveal exculpatory evidence to the defense.²⁷⁷

In addition to these tangible examples of prosecutorial misconduct, a prosecutor's decision to bring charges without sufficient evidence is both unethical and harmful.²⁷⁸ Despite these concerns, prosecutors tend to "charge more and greater offenses than they can prove beyond a reasonable doubt."²⁷⁹ And while defendants frequently plead to reduced charges, even these lesser charges often exceed the scope of evidence available to the prosecutor.²⁸⁰ To make

²⁷⁰ *Id.* at 410 (citing *United States v. Schlei*, 122 F.3d 944, 991 (11th Cir. 1997) (threatening a witness with loss of immunity if he testified for the defense); *United States v. LaFuente*, 54 F.3d 457, 459, 461 (8th Cir. 1995) (alleging that the government threatened a witness with jail time if she spoke to the defense counsel or the press); *United States v. MacCloskey*, 682 F.2d 468, 475 (4th Cir. 1982) (threatening a witness's attorney with indictment if the witness self-incriminated while testifying)).

²⁷¹ *Id.* (citing *United States v. Armstrong*, 517 U.S. 456, 459 (1996) (evaluating a selective prosecution claim supported by a "study" purporting to show that the government failed to prosecute nonblack individuals for cocaine and crack offenses); *United States v. Al Jibori*, 90 F.3d 22, 23–24 (2d Cir. 1996) (evaluating a selective prosecution claim stemming from pattern similarity between defendant and a known terrorist, both of whom separately entered the United States with fake Swedish passports); *United States v. Cyprian*, 23 F.3d 1189, 1195 (7th Cir. 1994) (claiming that the government singled out defendants based on their religious faith)).

²⁷² *Id.* (citing *United States v. Holloway*, 74 F.3d 249, 250–51 (11th Cir. 1996) (dismissing criminal charges brought by the prosecution pursuant to the defendant's deposition and in violation of a pre-existing immunity agreement); *United States v. Dudden*, 65 F.3d 1461, 1464–68, 1472 (9th Cir. 1995) (vacating the defendant's sentence where prosecutors breached an informal immunity agreement and indicted the defendant to force cooperation in another investigation)).

²⁷³ *Id.* at 411 (citing *United States v. Chen*, 933 F.2d 793, 796–98 (9th Cir. 1991) (examining a "perjury trap" in which a prosecutor calls a witness for the primary purpose of obtaining testimony to support a later prosecution of the witness for perjury); *Barry v. United States*, 865 F.2d 1317, 1318–21 (D.C. Cir. 1989) (involving alleged grand jury secrecy violations where a United States Attorney issued a press release disclosing matters occurring before a federal grand jury); *United States v. Samango*, 607 F.2d 877, 884–85 (9th Cir. 1979) (upholding the dismissal of an indictment due to prosecutorial misconduct in grand jury proceedings)).

²⁷⁴ *Id.*

²⁷⁵ *Id.* (citing *United States v. Sanchez*, 176 F.3d 1214, 1219, 1221–22 (9th Cir. 1999) (finding misconduct where the prosecutor had forced the defendant to call the United States marshal a liar and impeached the defendant with inadmissible evidence)).

²⁷⁶ *Id.* (citing *United States v. Francis*, 170 F.3d 546, 551–53 (6th Cir. 1999) (holding that the prosecutor's closing argument and witness bolstering necessitated a new trial)).

²⁷⁷ *See id.* at 411–12 (citing *Brady v. Maryland*, 373 U.S. 83, 87–88 (1963) (determining that withholding material exculpatory evidence violates "standards of justice" and fairness to the accused)).

²⁷⁸ *See id.* at 413.

²⁷⁹ *Id.*

²⁸⁰ *See id.*

matters worse, defendants face difficulty in availing themselves of discovery procedures necessary to obtain judicial review of prosecutorial misconduct, and courts rarely act to remedy abuses.²⁸¹

Prosecutorial power and the potential for misconduct remain equally troubling in the context of white collar investigations.²⁸² Prosecutors yield tremendous leverage in the white collar arena—given the potentially catastrophic effects of a mere indictment, many companies opt to yield to prosecutorial authority and cooperate.²⁸³ Moreover, under the U.S. Sentencing Guidelines, cooperation is a factor that “mitigate[s] the ultimate punishment” of business entities.²⁸⁴ The advantage that prosecutors hold in criminal cases—both white collar and non-white-collar alike—is clear.

The broad and far-reaching power that federal prosecutors enjoy in white collar criminal cases calls for additional limitations on white collar statutes. As a general matter, corporate defendants often find themselves in dire straits amidst investigation and prosecution. Because of the significant leverage that prosecutors possess—and the grave consequences that may result—federal courts must clarify and limit the language of obstruction of justice statutes. If nothing else, limiting language in the form of a nexus requirement will clarify the scope of criminal behavior. The risk of prosecutorial abuse is especially relevant given the concern for culpability that the Court discussed in *Aguilar* when introducing the nexus requirement to the realm of obstruction of justice.²⁸⁵ With the risk of prosecutorial abuse and the concern for culpability just as relevant throughout the obstruction of justice statutes, the trend toward a broadly applicable nexus requirement should continue.

²⁸¹ See *id.* at 414.

²⁸² But see Elizabeth K. Ainslie, *Indicting Corporations Revisited: Lessons of the Arthur Andersen Prosecution*, 43 AM. CRIM. L. REV. 107, 114 (2006) (“On the criminal side of things, resources are limited: prosecutors have other crimes besides corporate misconduct to pursue, and white-collar investigations often take years of prosecutor and investigator time to complete.”); Peter J. Henning, *Targeting Legal Advice*, 54 AM. U. L. REV. 669, 671 (2005) (“The difficulty prosecutors face in prosecuting corporate misconduct and other types of white-collar crimes is identifying the particular acts that violate the statute, and then amassing sufficient proof of intent to establish that a crime has occurred.”).

²⁸³ See George Ellard, *Making the Silent Speak and the Informed Wary*, 42 AM. CRIM. L. REV. 985, 987–88 (2005) (“[A]s the demise of the accounting firm Arthur Andersen demonstrates, indictments can be lethal, even for venerable institutions. The 2002 indictment of that company and its subsequent conviction for obstruction of justice caused the 90-year-old entity to implode. Thus, the possibility of avoiding indictment creates a strong incentive for business organizations to cooperate in government investigations.”).

²⁸⁴ UNITED STATES SENTENCING COMMISSION, GUIDELINES MANUAL 468 (2004).

²⁸⁵ See *supra* notes 211–12 and accompanying text.

3. *Constitutional Constraints and Canons of Construction*

The Constitution can provide additional guidance as to whether the *Aguilar* nexus requirement should apply to §§ 1512(b), 1512(c)(2), and 1519. Obstruction of justice statutes often survive constitutional challenges by defendants claiming they lacked notice that the law prohibited their actions.²⁸⁶ Defendants have challenged the obstruction statutes on various grounds,²⁸⁷ including vagueness,²⁸⁸ overbreadth,²⁸⁹ and free expression under the First Amendment.²⁹⁰ Obstruction of justice statutes have also survived Double Jeopardy challenges,²⁹¹ Fifth Amendment due process challenges,²⁹² and challenges that Congress overstepped its authority under the Necessary and Proper Clause.²⁹³ Given the history of unsuccessful constitutional challenges to obstruction of justice statutes, defendants considering such challenges to the nexus requirement should proceed with an understanding of the unlikelihood of success.

Criminal canons of construction serve as valuable tools for examining the application of the nexus requirement to obstruction of justice statutes from a constitutional perspective. Courts typically apply canons of construction dealing with ambiguity only after examining prior judicial decisions,²⁹⁴ legislative history,²⁹⁵ and underlying policies²⁹⁶ of the law.²⁹⁷ Although courts reserve the application of canons of construction until the completion of this hierarchical analysis,

²⁸⁶ See Hill, *supra* note 72, at 1569; see also Keith Palfin & Sandhya Prabhu, *Obstruction of Justice*, 40 AM. CRIM. L. REV. 873, 886–87, 900–01 (2003) (citing cases holding that the § 1503 Omnibus Clause is not unconstitutionally vague and noting that courts have upheld §§ 1512 and 1513 against various constitutional challenges).

²⁸⁷ See Palfin & Prabhu, *supra* note 286, at 886–87, 900–01.

²⁸⁸ See, e.g., *United States v. Tyler*, 281 F.3d 84, 91–92 (3d Cir. 2002) (rejecting arguments of constitutional vagueness with respect to § 1512 despite the fact that the prosecution need not prove the defendant's mental state as to the federal nature of the proceeding); *United States v. Shotts*, 145 F.3d 1289, 1300 (11th Cir. 1998); *United States v. Thompson*, 76 F.3d 442, 452 (2d Cir. 1996).

²⁸⁹ See, e.g., *Shotts*, 145 F.3d at 1300; *Thompson*, 76 F.3d at 452.

²⁹⁰ See, e.g., *Thompson*, 76 F.3d at 452; *United States v. Velasquez*, 772 F.2d 1348, 1356–58 (7th Cir. 1985); *United States v. Wilson*, 565 F. Supp. 1416, 1429–30 (S.D.N.Y. 1983).

²⁹¹ See, e.g., *United States v. McLaughlin*, 164 F.3d 1, 3, 7–12 (D.C. Cir. 1998); *United States v. Galvan*, 949 F.2d 777, 780–82 (5th Cir. 1991).

²⁹² See, e.g., *Tyler*, 281 F.3d at 93–94.

²⁹³ See, e.g., *id.* at 92–93.

²⁹⁴ See John Calvin Jeffries, Jr., *Legality, Vagueness, and the Construction of Penal Statutes*, 71 VA. L. REV. 189, 210 (1985) (“[J]udicial administration of the rule belies any real concern for fair warning. Pronouncements in ancient precedent are taken to have resolved statutory ambiguity . . .”).

²⁹⁵ See 3 NORMAN J. SINGER, *STATUTES AND STATUTORY CONSTRUCTION* § 59:3, at 134 (6th ed. 2001) (“The rule of lenity should only be applied if after reviewing all sources of legislative intent the statute still remains ambiguous.”).

²⁹⁶ See *Moskal v. United States*, 498 U.S. 103, 108 (1990).

²⁹⁷ See Note, *The New Rule of Lenity*, 119 HARV. L. REV. 2420, 2425 (2006).

such canons still provide a useful tool by which to consider potentially ambiguous statutory language.

At the head of the criminal canons of construction is the principle of legality.²⁹⁸ The principle of legality “stands for the desirability in principle of advance legislative specification of criminal misconduct.”²⁹⁹ The concerns of legality arise under the doctrines of vagueness and lenity.³⁰⁰ The vagueness doctrine acts as the “operational arm of legality” and requires that a “crime definition be meaningfully precise—or at least that it not be meaninglessly indefinite.”³⁰¹ Filling in the post-Sarbanes-Oxley obstruction statutes with the nexus requirement will help to ensure that the statutes do not reach an unconstitutional level of vagueness.

Among the most common of the canons of construction is the rule of lenity. The rule of lenity states that “penal statutes should be strictly construed against the government.”³⁰² In interpreting the obstruction statutes in cases of sufficient ambiguity, the rule of lenity may act as a tiebreaker and compel application of the nexus requirement as a limitation on the government’s ability to prosecute.

CONCLUSION

In the wake of the corporate scandals of the late twentieth and early twenty-first centuries, the area of white collar crime has never been more significant. A successful prosecution can not only vindicate corporate fraud but also destroy the corporation itself and the jobs that it provides. The high stakes of white collar crime demand clear and cautious rules that provide prosecutors and courts alike concrete guidelines with which to make their decisions.

The U.S. Supreme Court in *Aguilar* and *Arthur Andersen* made its intentions known by applying restrictive nexus requirements to the § 1503 Omnibus Clause and to the § 1512(b) noncoercive witness tampering clause. Given the Court’s appeal to culpability and nexus requirement precedent in those cases, the importance of having clear rules, and the necessity of limiting criminal statutes to avoid criminal-

²⁹⁸ Jeffries, *supra* note 294, at 190 (“It is, as Herbert Packer said, ‘the first principle’ of the criminal law, of ‘central importance’ in academic discussions of the subject, and all-but-universally complied with in this country.” (quoting HERBERT L. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 79–80 (1968))).

²⁹⁹ *Id.* (citing PETER W. LOW, JOHN CALVIN JEFFRIES, JR. & RICHARD J. BONNIE, *CRIMINAL LAW: CASES AND MATERIALS* 36 (1982)).

³⁰⁰ *See id.* at 195 (“[T]he concerns of legality . . . arise under the subsidiary doctrines of vagueness and strict construction—doctrines that, although of very different origin, are used today to implement the legality ideal.”).

³⁰¹ *Id.* at 196.

³⁰² SINGER, *supra* note 295, at 125; *see also* *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820) (describing the rule of lenity as “perhaps not much less old than construction itself”).

izing innocent behavior, the nexus requirement should apply to Sarbanes-Oxley's additions to obstruction of justice in §§ 1512(c) and 1519. The stakes are simply too high to not take the Court's restrictions seriously.

