No.

In the Supreme Court of the United States

DEMETRIUS SHARRON DAVIS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Did Congress intend, and does the Double Jeopardy Clause permit, simultaneous prosecution for one instance of corrupt persuasion of a witness under both 18 U.S.C. § 1512(b)(1), which addresses witness tampering, and the residual clause of 18 U.S.C. § 1503, which addresses obstruction of justice?

PARTIES TO THE PROCEEDING

The caption identifies all parties in this case.

Petitioner, Demetrius Sharron Davis, was Defendant-Appellant below.

Respondent, United States of America, was Plaintiff-Appellee below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Demetrius Sharron Davis, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINION BELOW

The published opinion of the Court of Appeals (Pet. App. A) is available at 854 F.3d 1276 (11th Cir. 2017). The unpublished order of the District Court (Pet. App. B) is available at 2015 WL 500531 (M.D. Fla. Feb. 4, 2015).

JURISDICTION

The Court of Appeals filed its opinion on April 20, 2017. Pet. App. A. Petitioner invokes this Court's jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Double Jeopardy Clause of the Fifth Amendment, U.S. Const. amend. V, which provides: "nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb."

18 U.S.C. § 1503(a) and (b)(3), which now provide: "Whoever corruptly … influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be punished" by "imprisonment for not more than 10 years, a fine under this title, or both."

18 U.S.C. § 1512(b)(1), which now provides: "Whoever knowingly … corruptly persuades another person, or attempts to do so … with intent to influence, delay, or prevent the testimony of any person in an official proceeding shall be fined under this title or imprisoned not more than 20 years, or both."

STATEMENT OF THE CASE

Course Of Proceedings

A grand jury indicted Mr. Davis with one count as a felon in possession of a firearm and six rounds of ammunition in violation of 18 U.S.C. § 922(g)(1) and § 924(e). C.A. App. 1 at 1-2. Mr. Davis pled not guilty. C.A. App. 4, 6.

Before the trial initially set for October 2014 (C.A. App. 26), the Government intercepted Mr. Davis's jail call to his minor daughter, D.D. *See* C.A. App. 37 at 2-3. Based on that call, the Government sought a superseding indictment that added one count of witness tampering in violation of 18 U.S.C. § 1512(b)(1) and one count of obstruction of justice in violation of 18 U.S.C. § 1503(a). C.A. App. 37 at 2-3.

Mr. Davis pled not guilty (C.A. App. 52) and moved to dismiss the new counts as multiplicitous. C.A. App. 62 at 1-4. The Government opposed. C.A. App. 71 at 2-9. After a hearing, the District Court denied the motion. C.A. App. 102.

In February 2015, the case went to a three-day jury trial. C.A. App. 76, 113, 116, 120, 181, 183, 187. The jury returned a guilty verdict on all counts (C.A. App. 125), and Mr. Davis was adjudicated guilty (C.A. App. 128).

On appeal, Mr. Davis challenged the denial of his motion to dismiss. In doing so, Mr. Davis identified a circuit split whether corrupt persuasion of a witness can be prosecuted under both 18 U.S.C. § 1512(b)(1) (witness tampering) and the residual clause of 18 U.S.C. § 1503 (obstruction of justice). The Court of Appeals adopted the majority rule, concluded Congress intended (and the Double Jeopardy Clause did not prohibit) simultaneous prosecution of corrupt persuasion of witnesses under both statutes, and affirmed Mr. Davis's convictions in all respects.

Statement Of Facts

A. Mr. Davis's Jail Call To His Minor Daughter, D.D.

Before the October 2014 trial, the Government intercepted Mr. Davis's October 7, 2014 jail call to his minor daughter, D.D.:

> AUTOMATED PHONE SYSTEM: Global Tel Link. This call may be recorded or monitored. I have a prepaid call from an inmate at the Pinellas County Jail. If you wish to accept this prepaid call, dial zero and hold. Thank you.
>
> MR. DAVIS: You ain't want to talk to me?
>
> D.D.: What?
>
> MR. DAVIS: You ain't want to talk to me?
>
> D.D.: No. I had it on silent.
>
> MR. DAVIS: What's up?
>
> D.D.: Nothing.
>
> MR. DAVIS: Where you at?
>
> D.D.: Home.
>
> MR. DAVIS: You know Daddy go to court this month?
>
> D.D.: Yes.
>
> MR. DAVIS: You know?
>
> D.D.: Uh-huh.
>
> MR. DAVIS: People came to talk to you?
>
> D.D.: No.
>
> MR. DAVIS: What's your side of the—you want to talk?
>
> D.D.: I don't, but I will.

MR. DAVIS: Did you see your daddy with anything?

D.D.: When?

MR. DAVIS: That night that happened, did you—did you see me with anything?

D.D.: No, but I seen it. I seen it on the dresser.

MR. DAVIS: Well, you don't need to get on the stand, 'cause that'll make Daddy go to jail for a long time just by you saying I was the house with it. You can't get on—you can't go.

D.D.: I'll—

MR. DAVIS: That won't help me. That will help lock me up, so never mind.

. . . .

D.D.: Hello.

MR. DAVIS: Hello.

D.D.: Yes?

MR. DAVIS: I called to see what you all was doing, but I want to talk to you. But, uh—the people wanted you to—they wanted you to, but I don't want you to. That will—that ain't good.

D.D.: You keep saying (inaudible)—

MR. DAVIS: That's why I have to be in a way to discuss, but—I think you old enough to understand the decisions that you make and the stuff that come out your mouth. You should know what's wrong and what's right, what not to say and what to say; and I don't know—what you just told me, I asked you something just that simple, and don't you know that will have me locked up for the rest of time—I'll be gone till you grown. You know, I'll be old when I get out just by you saying what you just said, which is not true.

D.D.: But—

MR. DAVIS: But let me ask you another question: You wrote that statement by yourself?

D.D.: Yes.

MR. DAVIS: So, is that what you see—is that what you say you seen? That's what—what you said—what I read on that paper, that's what you seen?

D.D.: Yes.

MR. DAVIS: So, nobody ain't help you write that?

D.D.: No. I was in my momma's room, and she was on the couch.

MR. DAVIS: But your momma said that your auntie helped you write that.

D.D.: No. She was in there. She helped me spell stuff, but she didn't—she didn't help me.

MR. DAVIS: So, that what really happened? That's what went on?

D.D.: Yes.

MR. DAVIS: So, why would you say that and—why would you say that? So, when your—when your—when she—when she say that our conversation getting recorded, they listen. So, when she came in the house, I was on that couch, and I met her in the hallway. I met her in the kitchen. I said, "Let me get them kids. I got somewhere to go." And she said, "No. I'm going to leave. We ain't staying here."

D.D.: Uh—

MR. DAVIS: Don't worry about it, though, but I—don't worry about it. I just wanted to ask you a question. Don't worry about it, 'cause that's the kind of questions they'll ask you, and I feel you lie for your momma, because that ain't how it went. How that—how that paper saying you said that, that's—that's not true. That's not what happened.

D.D.: No, 'cause I'm—I didn't—

MR. DAVIS: All right, I don't even want to talk about it no more. (Inaudible) to see what you would say. But don't worry about it. Lucky I ain't using what's his name to call you, 'cause they'll use this conversation in court, and that shit will get me locked up. This shit have me

> locked away for a long time. But I know you lying, though. (unintelligible.) I didn't do that in front of y'all. But don't worry about it.
>
> D.D.: So I'm going to just tell people—
>
> MR. DAVIS: Don't. I'm going to tell the man no, I don't want you to talk, because you'll fuck me up and I'd be locked up for a long time just from the stuff that you'd be saying.
>
> But I ain't mad at you, but I see you all chose sides and where you want me at. So, this is where you want me at. But I ain't mad at you, though. I ain't worried about it.
>
> Well, I just wanted to hear your voices and let you all know what was going, but I can't use you now, so I guess I'll—I just—I'll call y'all—well, I'll get you—when I get out. If I beat it, I get out. If I don't, that means I'm going away for more than 15 years. So, I guess y'all will have somebody else new to call y'all daddy, I guess, but I don't know. I love y'all, and I'll get at y'all when I can.
>
> D.D.: Okay.

C.A. App. 187 at 55-60; Gov't Exs. 5A, 5C.

B. The Motion To Dismiss The New Charges

Before trial, Mr. Davis moved to dismiss counts two and three of the superseding indictment, the actus reus of which was based solely on this October 7, 2014 jail call, as multiplicitous in violation of congressional intent and the Double Jeopardy Clause. C.A. App. 62 at 1-4. For relief, Mr. Davis sought "dismissal of both counts" or for the Government "to elect which count to take before a jury." C.A. App. 62 at 2.

The Government opposed. C.A. App. 71. It contended counts two and three were not multiplicitous under the test of *Blockburger* v. *United States*, 284 U.S. 299 (1932), because other circuits had previously held witness tampering and obstruction charges were not multiplicitous. C.A. App. 71 at 3-4.

At the hearing (C.A. App. 77, 176), the District Court mused it "certainly agree[d]" with Mr. Davis's multiplicity argument "to the extent that the charges are similar." C.A. App. 176 at 8. Nevertheless, the District Court found the other circuits' decisions persuasive and denied the motion. C.A. App. 176 at 8-9. Thereafter, the District Court reduced its ruling to a written order. C.A. App. 102 at 1-2.

C. The Trial

Based solely on Mr. Davis's Ocober 7, 2014 jail call as the actus reus, the jury returned guilty verdicts on counts two and three. C.A. App. 125.

D. The Appeal

On appeal, the Court of Appeals held Congress intended to allow, and the Double Jeopardy Clause permitted, prosecution of corrupt persuasion of witnesses under both § 1503(a)'s residual clause and § 1512(b)(1). 854 F.3d at 1286-89.

REASONS FOR GRANTING THE PETITION

I. A MATURE CIRCUIT SPLIT EXISTS WHETHER CONGRESS INTENDED, AND THE DOUBLE JEOPARDY CLAUSE PERMITS, SIMULTANEOUS PROSECUTION FOR CORRUPT PERSUASION OF A WITNESS UNDER BOTH 18 U.S.C. § 1512(B)(1) AND 18 U.S.C. § 1503(A)

There is a mature circuit split whether Congress intended, and the Double Jeopardy Clause permits, simultaneous prosecution for the same instance of corrupt persuasion of a witness under both 18 U.S.C. § 1512(b)(1), which addresses witness tampering, and the residual clause of 18 U.S.C. § 1503, which addresses obstruction of justice. This Court should grant certiorari to consider it.

The Second Circuit takes the minority position that ever since Congress amended § 1503 and enacted § 1512 in 1982 (and amended § 1512 again in 1988),

corrupt persuasion of witnesses can be prosecuted only under § 1512(b)(1). *United States* v. *Hernandez*, 730 F.2d 895 (2d Cir. 1984); *United States* v. *Masterpol*, 940 F.2d 760 (2d Cir. 1991). In contrast, the First, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, and Eleventh Circuits take the majority position that corrupt persuasion of witnesses can be prosecuted under either or both statutes, whether before or after the 1988 amendment.[1] Only the Third and Tenth Circuits have yet to join the split. When this Court last confronted this circuit split two decades ago, it declined to consider whether "Congress narrowed the scope of the Omnibus Clause when it expressly punished [a defendant's] conduct in 18 U.S.C. § 1512." *United States* v. *Aguilar*, 515 U.S. 593, 600 n.1 (1995). The time to consider it is now.

To understand how the mature circuit split over this statutory scheme came into existence and the strengths and weaknesses of each position, it is necessary to have a baseline familiarity with how Congress has criminally proscribed contempt of court and corrupt persuasion of witnesses throughout the history of the Republic.

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[1] **First Circuit:** *United States* v. *LeMoure*, 474 F.3d 37, 40-41 (1st Cir. 2007); **Fourth Circuit:** *United States* v. *Kenny*, 973 F.2d 339, 342 (4th Cir. 1992); **Fifth Circuit:** *United States* v. *Wesley*, 748 F.2d 962, 963-65 (5th Cir. 1984) (before 1988 amendment); **Sixth Circuit:** *United States* v. *Tackett*, 113 F.3d 603, 606-11 (6th Cir. 1997); **Seventh Circuit:** *United States* v. *Rovetuso*, 768 F.2d 809, 824 (7th Cir. 1985); *United States* v. *Maloney*, 71 F.3d 645, 659 (7th Cir. 1995); **Eighth Circuit:** *United States* v. *Risken*, 788 F.2d 1361, 1367-68 (8th Cir. 1986); **Ninth Circuit:** *United States* v. *Lester*, 749 F.2d 1288, 1295 (9th Cir. 1984); *United States* v. *Ladum*, 141 F.3d 1328, 1338 (9th Cir. 1998); **Eleventh Circuit:** *United States* v. *Moody*, 977 F.2d 1420, 1424 (11th Cir. 1992) (conduct before 1988 amendment); *United States* v. *Davis*, 854 F.3d 1276, 1286-89 (11th Cir. 2017).

A. Throughout The History Of The Republic, Congress Has Criminally Prohibited Contempt Of Court, The Corrupt Persuasion Of Witnesses, And Related Crimes Through Several Different Statutes

Consistent with the common law, and since the inception of the Republic, Congress has always authorized federal courts to exercise contempt power and to punish corrupt persuasion of witnesses.

1. The Common Law

At common law, courts had inherent authority to mete out immediate punishment for direct contempt in the court's presence, but not indirect contempt outside the court's presence. The basis for this procedural distinction was not "the ability of the judge to see and hear what happens in the open court," but rather "the danger that, unless such an open threat to the orderly procedure of the court and such a flagrant defiance of the person and presence of the judge before the public … is not instantly suppressed and punished, demoralization of the court's authority will follow." *Cooke* v. *United States*, 267 U.S. 517, 536 (1925).

Accordingly, common law courts "always" had authority to punish direct contempt "immediately" and "without further proof, without issue or trial, and without hearing an explanation of the motives of the offender." *Id.* at 534-35 (citing *Ex parte Terry*, 128 U.S. 289 (1888)). But common law courts could not punish indirect contempt without affording a defendant certain procedural rights to defend himself. *See id.* at 535 ("in cases of misbehavior of which the judge can not have such personal knowledge, and is informed thereof only by confession of the party, or by tes-

timony under oath of others, the proper practice is, by rule or other process, to require the offender to appear and show cause why he should not be punished").

This inherent authority to punish direct or indirect contempt included the power to punish those who tampered with individuals either entitled to protection from or under the authority of the court, such as witnesses, jurors, or other judicial officers. *See* 3 ENCYCLOPÆDIA OF THE LAWS OF ENGLAND 499 (1913) (contempt includes "any conduct that tends to bring the authority and administration of the law into disrespect or disregard, or to interfere with, or prejudice parties litigant, or their witnesses during the litigation"). For example, *In re Savin*, 131 U.S. 267 (1889), is illustrative. There, this Court affirmed a summary contempt against an individual who attempted to bribe a witness while he was in the courthouse (i.e., corruptly persuade that witness), but not in the judge's immediate presence, because the court's summary contempt power is both "incidental to [its] general power to exercise judicial functions" and authorized by Congress. *Id.* at 273-80.

2. The Judiciary Act Of 1789

The First Congress enacted the Judiciary Act of 1789, 1 Stat. 73, which established the federal judiciary and defined its jurisdiction. Consistent with the common law understanding of contempt of court, § 17 of the Judiciary Act granted district courts the "power … to punish by fine or imprisonment, at the discretion of said courts, all contempts of authority in any cause or hearing before the same."

3. The Act of March 2, 1831

In 1831, Congress enacted the Act of March 2, 1831, Sess. 2, Ch. 99, which limited the federal judiciary's authority to punish indirect contempt of court by creating a separate criminal prohibition against tampering with jurors, witnesses, or officers. To accomplish this, § 1 restated the federal judiciary's authority to punish only direct contempt of court, not indirect contempt of court, and § 2 explained tampering could not be punished without the procedural protections of a grand jury indictment and a trial before a petit jury:

> That if any person or persons shall, corruptly, or by threats or force, endeavor to influence, intimidate, or impede any juror, witness, or officer, in any court of the United States, in the discharge of his duty, or shall, corruptly, or by threats or force, obstruct, impede, or endeavor to obstruct or impede, the due administration of justice therein, every person or persons so offending shall be liable to prosecution therefor by indictment and shall, on conviction thereof, be punished by fine not exceeding five hundred dollars, or by imprisonment not exceeding three months, or both, according to the nature and aggravation of the offense.

Act of March 2, 1831 § 2. This appears to be the first tampering statute in which the residual "due administration of justice" clause appeared. *See id.*

4. The 1878 Revisions

In 1878, Congress fiddled with this bifurcated criminal prohibition against tampering further by enacting §§ 5399, 5404, 5405, and 5406 of the Revised Statutes of the United States, which separated tampering with witnesses or officers (punishable by three months' imprisonment) from tampering with jurors (punishable by twelve months' imprisonment). Specifically, § 5399 addressed tampering with

witnesses or officers, but not jurors, and retained the residual "due administration of justice" clause:

> Every person who corruptly, or by threats or force, endeavors to influence, intimidate, or impede any witness, or officer in any court of the United States, in the discharge of his duty, or corruptly, or by threats or force, obstructs or impedes, or endeavors to obstruct or impede, the due administration of justice therein, shall be punished by a fine of not more than five hundred dollars, or by imprisonment not more than three months, or both.

§ 5399 of the Revised Statutes of the United States; *see also Pettibone* v. *United States*, 148 U.S. 197, 206 (1893) ("a person is not sufficiently charged with obstructing or impeding the due administration of justice in a court [under § 5399] unless it appears that he knew or had notice that justice was being administered in such court"). In contrast, § 5404 addressed tampering with jurors, but not witnesses or officers, and it also contained a residual "due administration of justice" clause. § 5404 of the Revised Statutes of the United States.

5. The 1910 Revisions

In 1910, Congress repealed §§ 5399, 5404, 5405, and 5406 and replaced them with §§ 135, 136, and 137 of the Criminal Code of the United States. § 135 addressed tampering with witnesses, jurors, or officers and retained the residual "due administration of justice" clause:

> Whoever corruptly, or by threats or force, or by any threatening letter or communication, shall endeavor to influence, intimidate, or impede any witness, in any court of the United States or before any United States commissioner or officer acting as such commissioner, or any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States commissioner or officer acting as such commissioner, in the discharge of his duty, or who corruptly or by threats or force, or by any threatening letter or threatening communi-

> cation, shall influence, obstruct, or impede, or endeavor to influence, obstruct, or impede the due administration of justice therein, shall be fined not more than one thousand dollars, or imprisoned not more than one year, or both.

§ 135 of the Criminal Code of the United States (1910); *see also United States* v. *Russell*, 255 U.S. 138, 143 (1921) (§ 135 "is not directed at success in corrupting a juror but at the 'endeavor' to do so").

6. The 1948 Enactment Of 18 U.S.C. § 1503

In 1948, Congress enacted 18 U.S.C. § 1503(a) and (b)(3), which also addressed tampering with witnesses, jurors, or officers and included a residual "due administration of justice" clause:

> Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any witness, in any court of the United States or before any United States commissioner or other committing magistrate, or any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States magistrate judge or other committing magistrate, in the discharge of his duty, or injures any party or witness in his person or property on account of his attending or having attended such court or examination before such officer, commissioner, or other committing magistrate, or on account of his testifying or having testified to any matter pending therein, or injures any such grand or petit juror in his person or property on account of any verdict or indictment assented to by him, or on account of his being or having been such juror, or injures any such officer, magistrate judge, or other committing magistrate in his person or property on account of the performance of his official duties, or corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be punished [by] imprisonment for not more than 10 years, a fine under this title, or both.

18 U.S.C. § 1503(a), (b)(3) (1948).

7. The 1982 Amendment Of 18 U.S.C. § 1503 And Enactment Of 18 U.S.C. § 1512

In 1982, Congress amended 18 U.S.C. § 1503, which had a 10-year maximum sentence, by removing its witness provisions and placing them in 18 U.S.C. § 1503, which had a 20-year maximum sentence. As amended, § 1503 retained the residual "due administration of justice" clause, but otherwise provided:

> Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any ~~witness, in any court of the United States or before any United States commissioner or other committing magistrate, or any~~ grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States magistrate judge or other committing magistrate, in the discharge of his duty, ~~or injures any party or witness in his person or property on account of his attending or having attended such court or examination before such officer, commissioner, or other committing magistrate, or on account of his testifying or having testified to any matter pending therein,~~ or injures any such grand or petit juror in his person or property on account of any verdict or indictment assented to by him, or on account of his being or having been such juror, or injures any such officer, magistrate judge, or other committing magistrate in his person or property on account of the performance of his official duties, or corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be punished [by] imprisonment for not more than 10 years, a fine under this title, or both.

18 U.S.C. § 1503(a), (b)(3) (1982); Pub. L. 97–291.

Relatedly, as originally enacted, § 1512(b)(3) forbade the intimidation or threatening of witnesses, but not their corrupt persuasion:

> Whoever knowingly uses intimidation or threatens another person, or attempts to do so … with intent to influence, delay, or prevent the testimony of any person in an official proceeding shall be fined under this title or imprisoned not more than 20 years, or both.

18 U.S.C. § 1512(b)(1) (1982); Pub. L. 97–291.

As legislative history to the 1982 amendment of § 1503 and enactment of § 1512, Senator H. John Heinz III of Pennsylvania explained:

> The Senate-passed bill allowed a slight overlap between old section 1503 and new sections 1512 and 1513. The House version amends section 1503 so it will make no mention of, and provide no protection to, su[b]p[o]enaed witnesses. The compromise accepts the House position. By amending section 1503 in this way, the proposal will contribute to a clearer and less duplicative law.

128 Cong. Rec. S13063 (1982).

8. The 1988 Amendment Of 18 U.S.C. § 1512

In 1988, Congress amended § 1512(b)(1) to include prohibition of corrupt persuasion of witnesses:

> Whoever knowingly uses intimidation, threatens, or corruptly persuades ~~or threatens~~ another person, or attempts to do so … with intent to influence, delay, or prevent the testimony of any person in an official proceeding shall be fined under this title or imprisoned not more than 20 years, or both.

18 U.S.C. § 1512(b)(1) (1988); Pub. L. 100–690, § 7029(c).

As legislative history to that amendment, Senator Joseph Biden of Delaware explained the amendment was

> intended … merely to include in section 1512 the same protection of witnesses from non-coercive influence that was (and is) found in section 1503. It would permit prosecution of such conduct in the Second Circuit, where it is not now permitted, and would allow such prosecutions in other circuits to be brought under section 1512 rather than under the catch-all provision of section 1503.

134 Cong. Rec. S17369 (1988).

B. While Congress Was Fiddling With Statutory Provisions To Prohibit Corrupt Persuasion Of Witnesses, A Mature Circuit Split Erupted

While Congress was fiddling with these statutory provisions, a mature circuit split regarding prosecution for corrupt persuasion of witnesses erupted. The minority rule of the Second Circuit provides that corrupt persuasion of witnesses can be prosecuted only under § 1512(b)(1). *United States* v. *Hernandez*, 730 F.2d 895 (2d Cir. 1984); *United States* v. *Masterpol*, 940 F.2d 760 (2d Cir. 1991). In contrast, the majority rule allows such prosecutions under either § 1503(a) or § 1512(b)(1).

1. The Minority Rule Of The Second Circuit Holds Corrupt Persuasion Of A Witness Can Be Prosecuted Only Under § 1512(b)(1)

The Second Circuit was the first to confront the relationship between § 1503(a) and § 1512(b)(1) in *United States* v. *Hernandez*, 730 F.2d 895 (2d Cir. 1984). There, the defendant threatened to kill a witness and was convicted under both § 1503(a) and § 1512(b)(1). *Id.* at 897. Agreeing with the defendant, the *Hernandez* court read the "plain language" of "both statutes realistically" and held Congress "affirmatively intended to remove witnesses entirely from the scope of § 1503" and transfer it to § 1512. *Id.* at 898. Indeed, *Hernandez* concluded the government's contrary argument that Congress intended to create two crimes "def[ied] common sense" and contradicted the legislative history as explained by Senator Heinz. *Id.* at 899.

Seven years later, the Second Circuit stood by *Hernandez*'s holding in *United States* v. *Masterpol*, 940 F.2d 760 (2d Cir. 1991). There, the defendant was convict-

ed under § 1503(a) only. *Id.* at 762. On appeal, the government tried to distinguish *Hernandez* because it involved coercion, whereas *Masterpol* involved corrupt persuasion. *Id.* at 763. By that time, several other courts had distinguished *Hernandez* on that basis. *Id.* But the *Masterpol* court rejected that argument, because the 1988 amendment to § 1512(b)(1), which added corrupt persuasion to § 1512, filled the gap its original enactment had created. *Id.* "Thus, what justification there once was for giving *Hernandez* a narrow construction now lacks merit, at least where, as in this instance, there appears to be no statutory vacuum." *Id.* Accordingly, *Masterpol* reversed the § 1503(a) conviction. *Id.*

2. The Majority Rule Of The First, Fourth, Fifth, Seventh, Eighth, And Eleventh Circuits Allows Corrupt Persuasion Of Witnesses To Be Prosecuted Under Either § 1512(b)(1) Or § 1503(a)'s Residual Clause

After *Hernandez*, but before the 1988 amendment of § 1512, every other circuit to consider the question concluded prosecution for corrupt persuasion of witnesses could proceed either under § 1503(a) or § 1512(b)(1). For instance, *United States* v. *Wesley*, 748 F.2d 962, 963-65 (5th Cir. 1984), is illustrative. In *Wesley*, the Fifth Circuit correctly pointed out that the 1982 amendment of § 1503 and enactment of § 1512 had created a gap:

> If urging a witness to commit perjury is not prohibited by § 1512, and if witnesses have been removed entirely from the scope of § 1503, then the conduct with which Wesley is charged would violate neither section. There is simply no indication that, by enacting § 1512 to broaden the protection afforded witnesses, Congress intended to create such a gap in the statutory protection already available under § 1503.

Id. at 964. Applying preexisting circuit precedent, *Wesley* concluded such conduct could continue to be prosecuted under § 1503's residual clause. *Id.* As such, *Wesley*

held the defendant "was properly charged with both obstruction of justice under § 1503 and with intimidating a witness under § 1512." *Id.* at 965.

Other circuits rapidly followed suit. *E.g.*, *United States* v. *Rovetuso*, 768 F.2d 809, 824 (7th Cir. 1985); *United States* v. *Risken*, 788 F.2d 1361, 1367-68 (8th Cir. 1986); *United States* v. *Lester*, 749 F.2d 1288, 1295 (9th Cir. 1984); *United States* v. *Moody*, 977 F.2d 1420, 1424 (11th Cir. 1992) (conduct before 1988 amendment). And additional circuits continued to follow this majority rule even after the 1988 amendment, which closed Congress' "gap" regarding corrupt persuasion of witnesses. *E.g.*, *United States* v. *LeMoure*, 474 F.3d 37, 40-41 (1st Cir. 2007); *United States* v. *Kenny*, 973 F.2d 339, 342 (4th Cir. 1992); *United States* v. *Tackett*, 113 F.3d 603, 607 (6th Cir. 1997); *United States* v. *Maloney*, 71 F.3d 645, 659 (7th Cir. 1995); *United States* v. *Ladum*, 141 F.3d 1328, 1338 (9th Cir. 1998).

With respect to the majority rule surviving the 1988 amendment, *LeMoure* is illustrative. There, the First Circuit rejected the Second Circuit's holdings in *Hernandez* and *Masterpol* notwithstanding the 1988 amendment. 474 F.3d at 40-41. In doing so, *LeMoure* explained following *Hernandez* and *Masterpol* "would mean that Congress had meant in 1982 to *reduce* the protection afforded against soft witness tampering at the very time that it was trying to *expand* protection of witnesses." *Id.* at 41. *LeMoure* also ruled there was no double jeopardy problem under *Blockburger* v. *United States*, 284 U.S. 299 (1932), because § 1503(a) and § 1512(b)(1) each required an element of proof the other did not. 474 F.3d at 43-44.

C. The Court Should Grant Certiorari To Consider Whether To Adopt The Minority Rule Of *United States* v. *Masterpol*

The Court should grant certiorari to consider whether to adopt the majority rule of the Court of Appeals or the minority rule of *Masterpol*. *Wesley* and other courts correctly recognized that the 1982 amendment of § 1503(a) and enactment of § 1512(b)(1) had created a gap for which the residual clause of § 1503(a) served a critical purpose. But the 1988 amendment of § 1512(b)(1) closed that gap, as explained in *Masterpol*. But *LeMoure* and the Court of Appeals misunderstood it. For that reason, Congress could not have intended to leave behind a harder to prove but lesser included offense in § 1503(a) (which has a 10-year maximum sentence) when it created and amended § 1512(b)(1) (which has a 20-year maximum sentence).

"Our first step in interpreting a statute is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case." *Robinson* v. *Shell Oil Co.*, 519 U.S. 337, 340 (1997). Nevertheless, context matters. *E.g.*, *id.* ("The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole."); *King* v. *Burwell*, 135 S. Ct. 2480, 2495 (2015) ("the context and structure of the Act compel us to depart from what would otherwise be the most natural reading of the pertinent statutory phrase"); *Yates* v. *United States*, 135 S. Ct. 1074, 1079 (2015) (a fish is not a "tangible object" within the meaning of Sarbanes-Oxley because it does not "record or preserve information").

Given this Court's interpretive rubric, *Masterpol* correctly recognized the historical context, properly construed § 1503(a) and § 1512(b)(1), and faithfully interpreted and applied congressional intent. *LeMoure* and the Court of Appeals, on the other hand, failed to appreciate the significance of the 1988 amendment. It is for this Court to determine whether *Masterpol* is the law of the land.

CONCLUSION

The petition for a writ of certiorari should be granted.

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Respectfully submitted,

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