No. 16-9642

# 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**

## REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

THOMAS A. BURNS
*Counsel of Record*
BURNS, P.A.
301 West Platt Street, Suite 137
Tampa, FL 33606
(813) 642-6350
tburns@burnslawpa.com

*Counsel for Petitioner*

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## ARGUMENT

For almost 200 years, Congress intended to punish corrupt persuasion of witnesses with only one conviction. *See* Pet. 9-13. In 1982 and 1988, however, Congress revised and amended its statutory scheme (*see* Pet. 14-15), which led to a mature 7-1-1 circuit split[1] concerning an important question of federal law. *Compare* Pet. 7-8 & n.1, *with* U.S. Br. 6, 14. The majority rule allows the Government to prosecute under either or both statutes. The minority rule of *Hernandez* and *Masterpol* forbids the Government from prosecuting under § 1503(a), but permits prosecution under § 1512(b)(1). And the alternative rule of *Kenny* and *Radcliffe* permits prosecution under either statute, but not both. This disarray cries out for this Court's review.

### I. THE CIRCUIT SPLIT IS MATURE, SQUARE, DEEP, AND FRESH, IT CONCERNS AN IMPORTANT QUESTION OF FEDERAL LAW, AND THIS CASE PRESENTS A PERFECT VEHICLE FOR ITS RESOLUTION

The Government expressly concedes the mature circuit split is both square (not attenuated) and deep (not shallow). *See* U.S. Br. 14. Indeed, nowhere does the Government pooh-pooh the petition as raising an issue that involves fact-bound application of settled law, assert that alternative grounds of affirmance exist, or indicate this issue would somehow benefit from further percolation among the three remaining circuits (Third, Tenth, and D.C.) yet to address it. Nor does the Government raise any serious concern that this case presents any vehicle problems. Instead, the Government defends the ruling below by arguing the merits. In doing so, the Government merely concedes the importance of the question presented, so this Court should grant certiorari to consider it.

[1] On further review, counsel has now concluded the split is not 8-1, but 7-1-1.

### A. The Circuit Split, Which This Court Identified In *United States* v. *Aguilar*, Concerns An Important Question Of Federal Law And Is Square, Deep, And Fresh

The circuit split is square (not attenuated), deep (not shallow), and fresh (not stale). *See* Sup. Ct. R. 10 (certiorari may be granted when "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter"); EUGENE GRESSMAN & KENNETH S. GELLER, SUPREME COURT PRACTICE 243 (9th ed. 2007) ("a square and irreconcilable conflict … *ordinarily* should be enough to secure review, assuming that the underlying question has substantial practical importance" (emphasis in original)). Moreover, although the split is lopsided rather than balanced, it concerns an important question of federal law about which only the minority or alternative rule is correct. *See infra* Argument I.B.

The Government concedes the split is square and deep. Specifically, the Government acknowledges the Second Circuit's "contrary" (U.S. Br. 6) decisions in *United States* v. *Hernandez*, 730 F.2d 895, 897-99 (2d Cir. 1984), and *United States* v. *Masterpol*, 940 F.2d 760, 762-63 (2d Cir. 1991), simply cannot be reconciled with the decisions of the First, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, and Eleventh Circuits, *see* Pet. 8 n.1 (collecting cases).[2] Indeed, as the Government acknowledges (U.S. Br. 7 n.1), this Court previously granted certiorari to consider this precise issue, but left its resolution open in *United States* v. *Aguilar*, 515 U.S. 593, 600

[2] The Government dismisses the alternative rule announce in *United States* v. *Kenny*, 973 F.2d 339, 342 (4th Cir. 1992), as dictum. *See* U.S. Br. 19 n.4.

& n.1 (1995) (declining to address whether "Congress narrowed the scope of the Omnibus Clause when it expressly punished his conduct in 18 U.S.C. § 1512").

The split also remains fresh. The Government apparently believes (U.S. Br. 6-7) this circuit split is stale in light of this Court's most recent denial of certiorari in two petitions filed in *Aguilar*'s wake in *Ladum* v. *United States*, 525 U.S. 1021 (1998) (No. 98-5772), and *Tackett* v. *United States*, 522 U.S. 1089 (1998) (No. 97-521), almost two decades ago during the Clinton administration. It is mistaken. Although the conflict has evolved over time, it remains alive. Given the "important and recurring nature of the issue in conflict," GRESSMAN & GELLER, *supra*, at 245-46 (collecting cases), the Court should grant certiorari.

For instance, the First Circuit thoroughly addressed this issue as recently as 2007. *United States* v. *LeMoure*, 474 F.3d 37, 40-41 (1st Cir. 2007).[3] The Second Circuit declined to overrule its holdings in *Hernandez* and *Masterpol* as recently as 2004 and 2010. *United States* v. *Bruno*, 383 F.3d 65, 87 (2d Cir. 2004); *United States* v. *Kumar*, 617 F.3d 612, 622 n.9 (2d Cir. 2010) (noting prosecutor avoided dual charges to avoid "*Masterpol* issue"). The Court of Appeals, of course, addressed the issue this year. *United States* v. *Davis*, 854 F.3d 1276 (11th Cir. 2017). And the issue continues to vex the district courts, as indicated by the Southern District of West Virginia's recent ruling (approximately two weeks after oral argument and

[3] Notably, the First Circuit's prior discussion of this issue in *United States* v. *Marrapese*, 826 F.2d 145, 147-48 (1st Cir. 1987), which had addressed a vindictiveness argument rather than multiplicity or statutory interpretation of 18 U.S.C. § 1503, predated both the enactment of the 1988 amendment and this Court's 1995 decision in *Aguilar*. Additionally, for reasons that are not immediately apparent, the defendant in *LeMoure* did not petition this Court for a writ of certiorari.

one week before issuance of the opinion in this case) that the Government may prosecute a defendant for corrupt persuasion of a witness under either 18 U.S.C. § 1503(a) or 18 U.S.C. § 1512(b)(1), but not both. *United States* v. *Radcliffe*, 2017 U.S. Dist. LEXIS 58712, at *16-23 (S.D. W. Va. Apr. 11, 2017).[4]

*Radcliffe* illustrates the deep confusion in the lower courts about the statutory interpretation and double jeopardy concerns that swirl around simultaneous prosecution of corrupt persuasion of witnesses under § 1503(a) and § 1512(b)(1). Specifically, *Radcliffe* distinguished the First Circuit's decision in *LeMoure* and the Eighth Circuit's decision in *United States* v. *Risken*, 788 F.2d 1361, 1369 (8th Cir. 1986), because unlike those cases, "under the circumstances presented here," the prosecutor "[ha]d not attempt[ed] to differentiate the factual basis of the two charges." 2017 U.S. Dist. LEXIS 58712, at *19. Accordingly, "[i]f § 1512 specifically addresses conduct generally proscribed by § 1503, a set of facts supporting a conviction under § 1512 would logically also support a conviction under § 1503." *Id.* at *20. For that reason, although the "elements" of each crime "are not identical," they also did

[4] Indeed, *Radcliffe* is consistent with the Fourth Circuit's prior ruling, which the Government now characterizes as dictum (U.S. Br. 19 n.4), that the "existence of a more narrowly tailored statute," such as § 1512(b)(1), "does not necessarily prevent prosecution under a broader statute," such as the residual clause of § 1503(a), "so long as the defendant is not punished under *both* statutes for the same conduct." *United States* v. *Kenny*, 973 F.2d 339, 342 (4th Cir. 1992) (emphasis added). Nevertheless, the Government has cross-appealed in *Radcliffe* and plans to raise the following issue: "Did the district court err by concluding that punishing the defendant under two separate counts—a conspiracy charge and an obstruction of justice charge—would violate the Double Jeopardy Clause of the United States Constitution." C.A. Doc. 11 at 2, *United States* v. *Radcliffe*, No. 17-4373 (4th Cir.).

not each require "'proof of a *fact* which the other does not.'" *Id.* (emphasis added) (quoting *Blockburger* v. *United States*, 284 U.S. 299, 304 (1932)).

In short, because disputes over these legal issues remain alive and well, the 7-1-1 circuit split is fresh.

### B. By Arguing The Merits, The Government Concedes The Importance Of The Split

By arguing the merits of the multiplicity and statutory interpretation issues, the Government merely undermines its qualms about the lopsided nature of the split and concedes the importance of the question presented.

There is no question the 7-1-1 split[5] concerns an important question of federal law. *See, e.g.*, *Newton* v. *Rumery*, 480 U.S. 386, 392 (1987) (granting certiorari when "case raises a question important to the administration of criminal justice"); *Thompson* v. *Keohane*, 516 U.S. 99, 106 (1995) (granting certiorari in federal habeas case "[b]ecause uniformity among federal courts is important on questions of this order"). The upshot of the 7-1-1 split is that there are now three possible rules a court could apply when considering simultaneous prosecution for corrupt persuasion of witnesses under § 1503(a) and § 1512(b)(1): (1) allow the government to prosecute under either or both statutes as it sees fit (majority rule); (2) forbid the government from prosecuting under § 1503(a) while permitting it to prosecute under only § 1512(b)(1) (*Hernandez/Masterpol*); or (3) allow the government to prosecute under

[5] It makes little difference whether the lower courts' disagreement is characterized as a two-way 8-1 split or a three-way 7-1-1 split, because even a mature, albeit lopsided, mature two-way split warrants this Court's intervention. *See, e.g.*, *Maislin Indus., U.S., Inc.* v. *Primary Steel, Inc.*, 497 U.S. 116, 125 n.8 (1990) (granting certiorari to consider 4-1 circuit split).

either statute, but not both simultaneously (*Kenny/Radcliffe*). In addition to portending significant collateral consequences for defendants convicted of corruptly persuading witnesses, *see infra* Argument I.C.2, these incompatible approaches also raise considerable procedural due process concerns for laypersons and affect the general deterrent force of the two statutes.

Specifically, at the heart of criminal law rests the notion that laypersons have advance notice of the consequences of their actions. That is, the Government violates the Due Process Clause, U.S. Const. amend. V, when it "tak[es] away someone's life, liberty, or property under a criminal law so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement." *Johnson* v. *United States*, 135 S. Ct. 2551, 2556 (2015) (citing *Kolender* v. *Lawson*, 461 U.S. 352, 357-58 (1983)). "These principles apply not only to statutes defining elements of crimes, but also to statutes fixing sentences." *Id.* (citing *United States* v. *Batchelder*, 442 U.S. 114, 123 (1979)).

Here, based on where an individual commits an act, he or she may be exposed to prosecution under only § 1503 (with its 10-year maximum penalty), under both statutes (with their 10- and 20-year maximum penalties), or either § 1503(a) or § 1512(b)(1) but not both (with either a 10- or 20-year maximum penalty). Depending on that defendant's guidelines score, criminal history, and the district court's discretion in determining whether to run sentences concurrently or consecutively, *Setser* v. *United States*, 566 U.S. 231, 236 (2012) ("Judges have long been understood to have discretion to select whether the sentences they impose will run con-

currently or consecutively with respect to other sentences that they impose, or that have been imposed in other proceedings, including state proceedings." (citing *Oregon* v. *Ice*, 555 U.S. 160, 168-69, (2009)), those defendants who corruptly persuade witnesses could face maximum penalties ranging from 10 to 20 to 30 years based on nothing more than the street address of the court where they are prosecuted.

Relatedly, this uncertainty could undermine the general deterrent force of the two statutes by sowing confusion about what the statutes actually mean. *See infra* note 6. "The vices inherent in an unconstitutionally vague statute" are "the risk of unfair prosecution and the potential deterrence of constitutionally protected conduct." *Cramp* v. *Bd. of Pub. Instr.*, 368 U.S. 278, 283 (1961).

As such, the circuit split goes far "beyond the academic or the episodic," and it presents concerns of great importance "to the public as distinguished from" merely the parties involved. *Rice* v. *Sioux City Mem'l Park Cemetery*, 349 U.S. 70, 74, 79 (1955); *Layne & Bowler Corp.* v. *Western Well Works*, 261 U.S. 387, 393 (1923). In other words, it is precisely the kind of split so "'intolerable'" it requires this Court's review. GRESSMAN & GELLER, *supra*, at 241 (citing Stewart A. Baker, *A Practical Guide to Certiorari*, 33 CATH. U. L. REV. 611, 617 (1984)).

As each court involved in the split, Mr. Davis, and the Government has already explained, persuasive interpretations of the statutes, their legislative histories, and their constitutional double jeopardy backdrop support each possible rule.[6]

[6] In some respects, the majority rule appears flawed as a policy matter. For instance, some justices of this Court have bemoaned "a deeper pathology in the federal criminal code" that leaves statutes "too broad and undifferentiated, with too-

Like most questions of statutory interpretation, competing canons of construction can parry virtually every thrust. *See generally* Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons about How Statutes Are to Be Construed*, 3 VAND. L. REV. 395, 401-06 (1950) (contrasting 28 equally valid, but incompatible canons of statutory construction). For instance, under *Blockburger*, "prosecution for a greater offense," such as § 1512(b)(1), "bars prosecution for a lesser included offense," such as § 1503(a). *United States* v. *Dixon*, 509 U.S. 688, 705 (1993). And it is obvious why Congress would leave § 1503(a)'s residual clause in place, because it captured much conduct beyond corrupt persuasion of witnesses. *See, e.g.*, *Aguilar*, 515 U.S. at 598 (§ 1503(a)'s residual clause is "is far more general in scope than the earlier clauses of the statute"). The Court should grant certiorari to consider such arguments on their merits.

### C. Any Supposed Vehicle Problems Are Nonexistent

Finally, at all times, Mr. Davis preserved his arguments regarding the question presented in the District Court and in the Court of Appeals. Additionally, a ruling in Mr. Davis's favor would provide him significant practical benefits. The Government's contrary suggestions and contentions (U.S. Br. 3-4, 19) are mistaken.

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high maximum penalties, which give prosecutors too much leverage and sentencers too much discretion." *Yates* v. *United States*, 135 S. Ct. 1074, 1101 (2015) (Kagan, Scalia, Kennedy, Thomas, JJ., dissenting) (fish prosecution). And many scholars share that concern. *See, e.g.*, Ellen S. Podgor, *Overcriminalization: New Approaches to a Growing Problem*, 102 J. CRIM. L. & CRIMINOLOGY 529, 530 (2013) (decrying "the evils of overcriminalization and overfederalization," which "lessens the value of existing and important legislation," "makes it unwieldy, impossible for the lay person to understand what is criminal and what is not," "grows the power of prosecutors," and deprives punishment of "its deterrent, educative, rehabilitative, and even retributive qualities").

### 1. The Question Presented Was Preserved

The Government obliquely suggests Mr. Davis did not preserve the question presented by advancing supposedly different arguments in the District Court and his appellant's brief to the Court of Appeals. U.S. Br. 3-4. It is mistaken.

To the contrary, Mr. Davis did preserve the question presented[7] in both the District Court and the Court of Appeals. As the Government acknowledges (U.S. Br. 3-4), in addition to raising it in his motion to dismiss, *see* D. Ct. Doc. 62 at 2 ("the Double Jeopardy Clause does not prohibit the prosecution from proceeding with multiplicitous counts, however, should the jury return verdicts for each count, the district judge should enter judgment on only one of the statutory offenses"), Mr. Davis also raised it in his appellant's brief, *see* C.A. Appellant's Br. 53-55 (arguing convictions were multiplicitous), amplified it in his reply brief, *see* C.A. Reply Br. 1-2 (discussing circuit split), and extensively discussed it at oral argument, *see* Audio of Oral Argument at 16:58-18:04, 19:12-21:15, 26:30-28:15, *United States* v. *Davis*, 854 F.3d 1276 (11th Cir. 2017) (No. 15-13241) (discussing error preservation).

Whether that sequence of motions and briefs preserves an issue for resolution on appeal is a purely discretionary question of circuit precedent,[8] which the Gov-

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[7] The question presented in the petition is: "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?" Pet. i (emphases added).

[8] *See, e.g.*, *United States* v. *Starke*, 62 F.3d 1374, 1379 (11th Cir. 1995) (although issues that "clearly are not designated in the initial brief ordinarily are considered abandoned," "we liberally read briefs to ascertain the issues raised on appeal," which also includes "amplification of [a] position in the reply brief and at oral

ernment pressed and Mr. Davis addressed at oral argument, *see id.*, and the Court of Appeals considered but resolved in Mr. Davis's favor:

> Although Davis raised the issue of multiplicity in his motion to dismiss, he did not make any arguments to the district court regarding legislative history and did not raise the issue in his opening brief on appeal. In his reply brief, however, Davis argues that Congress intended that intimidation and witness tampering would only be prosecuted under § 1512—not § 1503.

App. A at 15; *see also* App. A at 13-14 ("Davis contends that the multiplicity analysis here turns on legislative intent and that Congress did not intend simultaneous prosecution under 18 U.S.C. §§ 1503 and 1512.").

Resolving that error-preservation question in Mr. Davis's favor, the Court of Appeals expressly reviewed the multiplicity issue, not for plain error, but rather under its normal standards of review. *See* App. A at 13 ("[w]e review a multiplicity decision for an abuse of discretion, but review the appellant's double jeopardy arguments de novo"). And under those standards, even the Government concedes the Court of Appeals expressly "rejected both versions of petitioner's argument." U.S. Br. 4. Thus, the question presented is properly preserved for this Court's review.[9]

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argument"); *Juris* v. *Inamed Corp.*, 685 F.3d 1294, 1324 (11th Cir. 2012) (to preserve an argument in district court, a litigant must present it "in such a way as to afford the district court an opportunity to recognize and rule on it").

[9] And even if Mr. Davis had not preserved the question presented in the lower courts, this Court could still consider it. True, this Court "ordinarily will not decide questions not raised or litigated in the lower courts." *Springfield* v. *Kibbe*, 480 U.S. 257, 259 (1987) (dismissing writ of certiorari as improvidently granted where petitioner did not raise assert argument regarding question presented in district court or court of appeals). But in federal cases, unlike state cases, that is merely a prudential consideration rather than a jurisdictional one: whenever a question presented "was passed on by the Court of Appeals below," "[t]here is doubtless no jurisdictional bar to our reaching it." *Id.*; *accord Yee* v. *City of Escondido*, 503 U.S. 519, 533 (1992) ("In cases arising from federal courts, the rule is prudential only."); *Carl-*

Relatedly, the Government asserts Mr. Davis's double jeopardy concerns are "undeveloped." U.S. Br. 7. The Government is incorrect. No matter which of the three incompatible rules best resolves the question presented, it ultimately depends on statutory interpretation. Indeed, "[t]he *Blockburger* test is simply a 'rule of statutory construction,' a guide to determining whether the legislature intended multiple punishments." *Grady* v. *Corbin*, 495 U.S. 508, 517 (1990), *overruled in part by Dixon*, 509 U.S. at 703-11 (overruling *Grady*'s "same conduct" test and applying only *Blockburger*'s "same elements" test).[10]

Addressing the merits of that statutory interpretation question, the Government cites three pre-1982 cases that held the omnibus clause can capture corrupt persuasion of witnesses and suggests "the omnibus clause has always existed alongside witness-tampering provisions and has nevertheless generally been understood to have the reach that its text would dictate." U.S. Br. 7 (citing *United States* v. *Friedland*, 660 F.2d 919, 930-31 (3d Cir. 1981), *United States* v. *Partin*, 552 F.2d 621, 631 (5th Cir. 1977), and *Falk* v. *United States*, 370 F.2d 472, 475-76 (9th Cir. 1966)). Alas, that historical detour begs the question presented here, which is whether the Government can *simultaneously* prosecute a defendant for corrupt persuasion of witnesses under both the residual clause and the specific witness tamper-

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*son* v. *Green*, 446 U.S. 14, 17 n.2 (1980) ("Though we do not normally decide issues not presented below, we are not precluded from doing so" when "the interests of judicial administration will be served by addressing the issue on its merits.").

[10] In this regard, Justices White, Stevens, Blackmun, and Souter dissented from overruling *Grady*. *Dixon*, 509 U.S. at 721 (White, Stevens, and Souter, JJ., dissenting); *id.* at 741 (Blackmun, J., dissenting); *id.* at 744 (Souter and Stevens, JJ., dissenting). In doing so, they refused to join Justice Scalia, Chief Justice Rehnquist, and Justices O'Connor, Kennedy, and Thomas. *See id.* at 703-11.

ing provisions. *See* Pet. i. *Friedland*, *Partin*, and *Falk* provide no historical support for the Government's argument because none permitted a *simultaneous* prosecution under both the residual clause and the specific witness provisions of old § 1503(a).

In other words, the idea that such defendants could face two convictions for corrupt persuasion of witnesses emerged only when Congress enacted and amended § 1503(a) and § 1512(b)(1) in 1982 and 1988. And *Blockburger* is only one of many statutory construction tools at this Court's disposal to determine what was Congress' intent at those times.[11]

### 2. A Ruling In Mr. Davis's Favor Would Provide Him Significant Practical Benefits

The Government also suggests a ruling in Mr. Davis's favor would give him no "practical benefit." U.S. Br. 19. In doing so, the Government either misunderstands or gives short shrift to precedent regarding the sentence package doctrine, the possibility of a downward variance at resentencing based on post-sentencing rehabilitation, the imposition of duplicate special assessments, and the collateral consequences that follow from multiple felony convictions.

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[11] Importantly, *Blockburger* is typically applied to situations where one congress enacts statute *A*, and then a subsequent congress enacts statute *B*. In contrast, this is a situation where one congress enacted statute *A*, then a subsequent congress moved parts of statute *A* into statute *B*, but left some bits behind. Since the goal, as always, is merely to divine congressional intent, it would seem odd to restrict this Court's interpretive toolbox to *Blockburger* only, particularly when decisions such as *Hernandez*, *Masterpol*, *Kenny*, and *Radcliffe* indicate the Government's interpretation raises serious constitutional questions. *Edward J. DeBartolo Corp.* v. *Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) ("where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress").

"'A criminal sentence is a package of sanctions that the district court utilizes to effectuate its sentencing intent.'" *Pepper* v. *United States*, 562 U.S. 476, 507 (2011) (quoting *United States* v. *Stinson*, 97 F.3d 466, 469 (11th Cir. 1996)). "Consequently, when a sentence is vacated and the case is remanded for resentencing, the district court is free to reconstruct the sentence utilizing any of the sentence components." *Stinson*, 97 F.3d at 469.

The sentence package doctrine has significant implications whenever a defendant is resentenced on remand. On one hand, a district court typically cannot raise the sentence on remand without running afoul of the Due Process Clause. *See North Carolina* v. *Pearce*, 395 U.S. 711, 723, 726 (1969).[12] That is, although "neither the double jeopardy provision nor the Equal Protection Clause imposes an absolute bar to a more severe sentence upon reconviction," the Due Process Clause does prohibit more severe sentences unless "based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding." *Id.* Without making those findings, a higher sentence would be deemed unconstitutionally vindictive. *Id.* at 725-26.

But on the other hand, district courts at resentencing may also consider evidence of a defendant's post-sentencing rehabilitation. *Pepper*, 562 U.S. at 490 ("when a defendant's sentence has been set aside on appeal and his case remanded for resentencing, a district court may consider evidence of a defendant's rehabilita-

[12] Of course, "no presumption of vindictiveness arises when the first sentence was based upon a guilty plea, and the second sentence follows a trial." *Alabama* v. *Smith*, 490 U.S. 794, 795 (1989). Mr. Davis, however, was convicted after a jury trial. *See* D. Ct. Doc. 125.

tion since his prior sentencing and that such evidence may, in appropriate cases, support a downward variance from the advisory Guidelines range"); *accord United States* v. *Smith*, 638 F.3d 1351, 1352 (11th Cir. 2011) (*Pepper* abrogated contrary decision in *United States* v. *Lorenzo*, 471 F.3d 1219, 1221 (11th Cir. 2006)). In other words, the Government's no-practical-benefit contention (U.S. Br. 19) failed to acknowledge that if Mr. Davis has behaved well in prison while his direct appeal has been pending, he could receive a downward variance at resentencing.

Additionally, the Government does not appreciate the collateral consequences that follow from duplicate felony convictions. For starters, the Government expressly acknowledges (U.S. Br. 19) that, at the very least, the vacation of either of Mr. Davis's convictions (including its special assessment) would put $100 in his pocket. *See Rutledge* v. *United States*, 517 U.S. 292, 301-303 (1996) (imposition of duplicate special assessment required by 18 U.S.C. § 3013 "amounts to cumulative punishment not authorized by Congress"). But more to the point, such collateral consequences for convicted felons typically include the loss of civil rights, harsher sentences under recidivist statutes for future offenses, credibility impeachment, the inability to obtain business licenses, and societal stigma. *See, e.g.*, *Spencer* v. *Kemna*, 523 U.S. 1, 7 (1998) (discussing examples of collateral consequences). To be sure, it would help Mr. Davis in each of those regards to eliminate an unnecessary duplicate felony conviction.

* * *

It is impossible to corruptly persuade a witness in violation of § 1512(b)(1) without also violating § 1503(a)'s residual clause. The question presented asks whether Congress intended to break with nearly 200 years of its statutory schemes by suddenly burdening defendants who corruptly persuaded witnesses with the collateral consequences of two duplicate convictions instead of only one—and doing so by the confusing, circuitous route of leaving behind a lesser-included offense in the residual clause of § 1503(a) (with a 10-year maximum) while moving the much more obvious substantive witness provisions to § 1512(b)(1) (with a 20-year maximum). That is an important question of federal law about which nine courts of appeals and at least one district court have irreconcilably disagreed for over three decades, creating three different rules. And the time for its resolution is now.

## CONCLUSION

The petition for a writ of certiorari should be granted.

October 3, 2017

Respectfully submitted,

THOMAS A. BURNS
*Counsel of Record*
BURNS, P.A.
301 West Platt Street, Suite 137
Tampa, FL 33606
(813) 642-6350
tburns@burnslawpa.com

*Counsel for Petitioner*