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"Corruptly" Continues Consistently Confounding Courts: A New Look at "Corruptly Persuades" in 18 U.S.C. § 1512(b) Obstruction of Justice

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"CORRUPTLY" CONTINUES CONSISTENTLY CONFOUNDING COURTS: A NEW LOOK AT "CORRUPTLY PERSUADES" IN 18 U.S.C. § 1512(B) OBSTRUCTION OF JUSTICE

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Abstract

The word "corruptly" presents significant interpretation problems to courts construing the word in statutes. This word has created a circuit split between the Second and Third Circuits over 18 U.S.C. § 1512(b), which forbids corruptly persuading witnesses not to cooperate with federal authorities. The Second Circuit requires defendants to have an improper purpose for persuading a witness not to cooperate. The Third Circuit requires defendants to know they have a corrupt motive behind their persuasion. Rather than declare one approach superior to the other, this Note instead contends that both Circuits achieve the same outcome for two reasons. First, both circuits rely on equivalent connotations for interpreting "corruptly." Second, both circuits recognize that some motives for persuading a witness are not corrupt, and thus should not be prosecuted under § 1512(b). Even though the Third Circuit better clarifies that persuasion undertaken for innocent purposes should not be prosecuted, this Note demonstrates that the circuit split over § 1512(b) is not as drastic as other analyses claim.

I. INTRODUCTION

Obstruction of justice has received much media coverage, thanks to former Special Counsel Robert S. Mueller III's high-profile investigation into both Russian interference in the 2016 United States presidential election and former President Donald Trump's potentially obstructive efforts to hinder the investigation.[1] While Mueller declined to issue obstruction of justice charges against Trump,[2] the renewed

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[1] *See generally* U.S. DEP'T OF JUST., REPORT ON THE INVESTIGATION INTO RUSSIAN INTERFERENCE IN THE 2016 PRESIDENTIAL ELECTION 2, VOL. II OF II, 2019 WL 1780146 (2019) [hereinafter MUELLER REPORT] (probing some of Trump's actions in the first half of his term for potential obstruction of the investigation into Russian interference in the 2016 presidential election).

[2] *Id.* at *144. A lengthy explanation of the reasons why Mueller chose not to issue any indictments against Trump is beyond the scope of this Note and will not be discussed herein.

popular discussion of obstruction of justice that his investigation produced gives ample opportunity to reconsider the mechanics of this particular crime. Key among them are what characteristics establish a corrupt motive and how they should apply in prosecutions.

Most important is whether the person performing the obstructive acts possessed the requisite intent for an obstruction of justice charge.[3] The act of obstructing a federal proceeding can be achieved inadvertently.[4] Discussion on the importance of motive matters because the law demands careful consideration of a defendant's intent behind the alleged obstructive actions.[5] Determining when a defendant's obstruction is performed with the requisite intent for criminal liability is a problem in obstruction of justice prosecution across federal courts.[6]

18 U.S.C. § 1512 criminalizes witness tampering by "corruptly persuad[ing]" another with the intent to cause the other to "withhold testimony," "alter, destroy, mutilate, or conceal" evidence to make that evidence unavailable, "evade legal process summoning," and to "be absent from an official proceeding" after receiving a summons.[7] Two major lines of interpreting "corruptly" within this statute exist.[8] First, the Second Circuit describes "corruptly" as an "improper purpose."[9] In *United States v. Thompson*,[10] the court held that "corruptly" meant a defendant was "motivated by an improper purpose."[11] Second, the Third Circuit demands knowledge of a corrupt purpose for the alleged behavior, or corruption as a specific intent.[12] In *United States v. Farrell*,[13] the court held that persuasion could occur "with the intent of hindering an investigation . . . [but] without doing so 'corruptly.'"[14] This split has expanded to several other circuits. In their respective

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However, the particular circumstances and consequences for presidential obstruction of justice pose important constitutional and criminal law questions for in-depth scholarly study. For more detailed analysis of these questions, see generally Daniel J. Hemel & Eric A. Posner, *Presidential Obstruction of Justice*, 106 CALIF. L. REV. 1277 (2018).

[3] MUELLER REPORT, *supra* note 1, at *11; Sarah Grant, Sabrina McCubbin, Yisahi Schwartz, & Benjamin Wittes, *Donald Trump, Paul Manafort and that Pesky Witness Tampering Statute*, LAWFARE (Aug. 23, 2018, 6:55 PM), https://www.lawfareblog.com/donald-trump-paul-manafort-and-pesky-witness-tampering-statute [https://perma.cc/8BTL-FMUW].

[4] *See* Grant et al.*, supra* note 3.

[5] *See* MUELLER REPORT, *supra* note 1, at *14.

[6] Diane A. Shrewsbury, Comment, *Degrees of Corruption: The Current State of "Corrupt Persuasion" in 18 USC Sec. 1512*, 2012 U. CHI. LEGAL F. 375, 375 (2012).

[7] 18 U.S.C. § 1512(b).

[8] Grant et al.*, supra* note 3; 18 U.S.C. § 1512(b) was one of the statutes reviewed in the final report as one source for possible criminal liability. MUELLER REPORT, *supra* note 1, at *14.

[9] Grant et al.*, supra* note 3.

[10] 76 F.3d 442 (2d Cir. 1996).

[11] *Id.* at 452.

[12] Grant et al., *supra* note 3.

[13] 126 F.3d 484 (3d Cir. 1997).

[14] *Id.* at 489.

reviews of 18 U.S.C. § 1512(b), the Eleventh Circuit generally adopted the Second Circuit formulation,[15] and the Ninth Circuit expressly chose the Third Circuit formulation.[16]

Despite the different phrasing between them, this Note argues that the circuits' understandings of "corruptly" in "corruptly persuades" are not at odds, but that they achieve the same practical effect. This reading is true for two reasons. First, both circuits identify similar connotations, such as wrongful and immoral, as acceptable bases for satisfying "corruptly." Second, both the "improper purpose" standard and the "knowledge of a corrupt purpose" standard as implemented recognize that some purposes for persuasion are not corrupt, and are therefore exempt from prosecution. The purpose of this Note is not to argue that one formulation of "corruptly persuades" is superior to the other. Instead, this Note aims to show that both circuits recognize and review § 1512(b) witness tampering obstruction of justice under similar guiding principles to achieve similar results.

Part II gives background and commentary on "corruptly" in United States federal criminal law and for "corruptly persuades" in § 1512(b). The background will draw on three sources: (1) legislative history and Congressional intent for 18 U.S.C. § 1512(b), (2) the federal criminal justice systems' consideration of what "corruptly" means and the difficulties courts have had establishing a consistent theoretical meaning, and (3) the Supreme Court's most recent consideration of § 1512(b) in *Arthur Andersen LLP v. United States*.[17] Part III reviews the Second and Third Circuit's precedential cases for § 1512(b) prosecution, including how each reasoned what "corruptly" means in "corruptly persuades" and how the reasons given applied to each case. Part IV compares the two circuits' formulations for similarities to *Arthur Andersen LLP* and each other. Even though the United States Supreme Court decided *Arthur Andersen LLP* in 2005, after the Second Circuit decided *Thompson* in 1996 and the Third Circuit decided *Farrell* in 1997, both circuits have carried their respective analyses through to their more recent cases. A comparison of their approaches will demonstrate that both circuits capture and apply "corruptly" appropriately under *Arthur Andersen LLP*.

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[15] United States v. Shotts, 145 F.3d 1289, 1299–1302 (11th Cir. 1998); Shrewsbury, *supra* note 6, at 381–88 (examining the circuit split over interpreting "corruptly" between the Second, Third, Ninth, and Eleventh Circuits). *But see* United States v. Brown, 934 F.3d 1278, 1299–1301 (11th Cir. 2019) (upholding an 18 U.S.C. § 1512(b)(3) conviction based on jury's reasonable determination based on the evidence, but without mentioning the "improper purpose" standard).

[16] United States v. Doss, 630 F.3d 1181, 1187–89 (9th Cir. 2011); United States v. Johnson, 874 F.3d 1078, 1080 (9th Cir. 2017) (reviewing convictions for a variety of counts under 18 U.S.C. § 1512, including § 1512(b)); Shrewsbury, *supra* note 6, at 381–88.

[17] 544 U.S. 696 (2005).

II. BACKGROUND: ARTICULATING CONCEPTS FOR "CORRUPTLY" IN 18 U.S.C. § 1512(B)

When statutory construction using the plain meaning of words produces unclear interpretations, courts must look to additional sources to define statutory language.[18] As discussed below, "corruptly" is one such word troubling courts in interpreting many criminal law statutes, including § 1512(b).[19] For an illustration of this issue, this Note overviews § 1512(b)'s legislative history, lower court attempts to grapple with and interpret "corruptly," and the Supreme Court's determinations for § 1512(b) set forth in *Arthur Andersen LLP*.

A. 18 U.S.C § 1512(b): General Construction and Legislative Insights

Obstruction of justice charges in 18 U.S.C. § 1503 *et. seq.* punish conduct preventing the "due administration of justice."[20] Acts potentially warranting a witness tampering charge include witness intimidation, false testimony, and compromising the integrity of individuals involved in judicial proceedings.[21] Introduced as part of the Victim and Witness Protection Act of 1982,[22] and prosecuted as obstruction of justice, subsections of § 1512 criminalize killing witnesses,[23] "corruptly persuad[ing]" witnesses,[24] destroying documents,[25] and otherwise interfering with judicial processes.[26] As Congress intended, § 1512(b) is the most commonly used statute for prosecuting witness tampering activity.[27] The troubling phrase "corruptly persuades" entered § 1512(b) with amendments adopted in 1988.[28]

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[18] *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 (1950) (elaborating on how courts ought to interpret statutes).

[19] Eric J. Tamashasky, *The Lewis Carroll Offense: The Ever-Changing Meaning of "Corruptly" within the Federal Criminal Law*, 31 J. LEGIS. 129, 130–32 (2005); *see* Bosselman v. United States, 239 F. 82, 86 (2d Cir. 1917).

[20] 18 U.S.C. § 1503.

[21] *See* John F. Decker, *The Varying Parameters of Obstruction of Justice in American Criminal Law*, 65 LA. L. REV. 49, 61–65 (2004).

[22] Mark Hsen, Nicholas Evert, Rien Susca, & Bailey Wendzel, *Obstruction of Justice*, 55 AM. CRIM. L. REV. 1497, 1518 (2018); *see generally* Victim and Witness Protection Act of 1982, 18 U.S.C. §§ 1512–1515 (2012) (enacting the new obstruction of justice statutes).

[23] 18 U.S.C. § 1512(a).

[24] *Id.* § 1512(b).

[25] *Id.* § 1512(c)(1).

[26] *Id.* § 1512(d).

[27] Decker, *supra* note 21, at 72.

[28] United States v. Doss, 630 F.3d 1181, 1187 (9th Cir. 2011); *see generally* Anti-Drug Abuse Act of 1988, Pub. L. No. 100–690, § 7029(c), 102 Stat. 4181, 4398 (1988) (expanding 18 U.S.C. § 1512 by adding new obstruction of justice amendments).

Before the enactment of § 1512, witness tampering prosecutions fell under 18 U.S.C. § 1503,[29] along with many other obstructive acts.[30] However, this statute did not offer the best source for witness tampering charges because defendants had to commit a greater number of serious acts to face criminal liability.[31] Recognizing the burdens of a § 1503 charge for witness tampering, Congress enacted § 1512 to provide federal prosecutors a section specifically designed for prosecuting witness tampering.[32] Section 1512 first expanded the types of individuals classified as witnesses to cover more people than just those called by subpoena in an active proceeding.[33] The change intended to extend the witness tampering charge to persuasive conduct directed towards persons not called to testify at trial.[34] Section 1512 also removed the "threshold requirements" for a § 1503 charge applied to witness tampering: an intent to influence a witness, under subpoena, in an active criminal prosecution.[35] This new statute provided two possible opportunities to prosecute criminal persuasion that were not allowed under § 1503: persuasion of witnesses a defendant did not expect to testify, and persuasion that occurred before a judicial proceeding commenced.[36]

Legislative history provides few additional insights for implementing "corruptly." Information provided to the Senate during its consideration of the 1988 bill offers this clarification: by "corrupt persuasion," the bill intended to apply to any "non-coercive attempt to induce a witness to become unavailable to testify, or to testify falsely."[37] The report also shows that Congress intended to strengthen § 1512(b) to cover a greater range of coercive behavior than the 1982 enactment allowed.[38] The amendment intended to "include in section 1512 the same protection of witnesses from non-coercive influence that was (and is) found in section 1503."[39] The idea behind "corruptly persuades" was to exempt certain behaviors from prosecution under § 1512 the same as § 1503 presently did.[40] However, the report

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[29] Eric C. Surette, Annotation, *Construction and Application of Federal Witness Tampering Statute, 18 U.S.C.A. § 1512(b)*, 185 A.L.R. Fed. 1, 2b (2003); *see also* 18 U.S.C. § 1503 (providing the general obstruction of justice statute, applicable to influencing or injuring jurors and court officials. Before § 1512 was enacted in 1982, § 1503 also applied to witness tampering).

[30] Brian M. Haney, *Contrasting the Prosecution of Witness Tampering Under 18 U.S.C. § 1503 and 18 U.S.C. § 1512: Why § 1512 Better Serves the Government at Trial*, 9 SUFFOLK J. TRIAL & APP. ADVOC. 57, 61–62 (2004).

[31] *Id.* at 63.

[32] *Id.* at 62–64.

[33] S. REP. NO. 97-532, at 14–15 (1982).

[34] Haney, *supra* note 30, at 62–63.

[35] *Id.*

[36] *Id.* at 63.

[37] Shrewsbury, *supra* note 6, at 378–79 (citing The Minor and Technical Criminal Law Amendments Acts of 1988, HR 5210, 100th Cong., 2d Sess., in 134 Cong. Rec. S. 7446–01, 7447 (daily ed. June 8, 1988)).

[38] *Id.*

[39] *Id.* at 379, n.16 (citing 134 Cong. Rec. S., at 7447).

[40] *Id.* at 379.

did not discuss what Congress meant by "corruptly," or what purposes would satisfy any definition.

The elements of a § 1512(b) prosecution are straightforward. The prosecution must prove a defendant: "(1) knowingly (2) engaged in intimidation, physical force, threats, misleading conduct, or corrupt persuasion toward another person (3) with intent to influence, delay, or prevent testimony or cause any person to withhold a record, object, document, or testimony (4) from an official proceeding."[41] Intimidation, threats, misleading conduct, or anything else that corruptly persuades a witness is enough to cause criminal liability.[42] The prosecution must show a "pending judicial proceeding" (or that a proceeding is occurring or soon will occur, though it need not occur when the persuasion happened),[43] the defendant's "knowledge of the proceeding," and actions which show the defendant "corruptly endeavored to influence, obstruct, or impede the due administration of justice."[44] Framing obstruction of justice around a pending or ongoing judicial proceeding limits potential obstructive acts to times when a federal authority is or soon will administer justice.[45]

Section 1512(e) offers an affirmative defense to all § 1512 charges. To use this defense successfully, the defendant must show the alleged "conduct consisted solely of lawful conduct and that the defendant's sole intention was to encourage, induce, or cause the other person to testify truthfully."[46] This defense acknowledges a difference between culpable and innocent purposes for persuasion.[47] Recognizing that innocent persuasive acts are permissible underlies the Supreme Court's analysis of § 1512(b) in *Arthur Andersen LLP*.[48] The purpose for this defense, granting an exception from liability for innocent acts of persuasion, parallels the circuit split discussed in this Note. However, the "improper purpose" standard does not expressly exclude innocent persuasive acts from prosecution, causing confusion in its application.[49]

B. "Corruptly": A Confounding Term in the United States Criminal Code

Deciding what purposes are corrupt and punishable is an issue that has long plagued United States judicial systems. While courts may consider obstructive acts

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[41] Hsen et al., *supra* note 22, at 1520.

[42] 18 U.S.C. § 1512(b); Sean Lavin, Julia Bell, MaeAnn Dunker, & Mitchell McBride, *Obstruction of Justice*, 56 AM. CRIM. L. REV. 1201, 1225–26 (2019).

[43] *See* 18 U.S.C. § 1512(f)(1).

[44] Decker, *supra* note 21, at 54.

[45] Lavin et al., *supra* note 42, at 1228.

[46] 18 U.S.C. § 1512(e); Decker, *supra* note 21, at 72.

[47] *See* Steven F. Smith, *"Innocence" and the Guilty Mind*, 69 HASTINGS L.J. 1610, 1619 (2018).

[48] Arthur Andersen LLP v. United States, 544 U.S. 696, 703–04 (2005).

[49] *See* Shrewsbury, *supra* note 6, at 388 (applying the "improper purpose" standard to hypothetical situations involving innocent persuasive acts); *Arthur Andersen*, 544 U.S. at 706.

inherently corrupt,[50] and construe bribery or attempts to falsify testimony as corrupt,[51] they do not uniformly apply "corruptly" as a *mens rea* term in United States federal criminal law.[52] Such inconsistent definitions pose problems for establishing a consistent criminal culpability for "corruptly" regardless of how it appears in the United States Code.[53] It is unhelpful that "corruptly" can take many meanings, further complicating how courts should read this word.[54]

There are some exceptions to this general trend. One example appears outside the obstruction of justice context, where "corruptly" means acting with an "intent to secure an unlawful advantage or benefit" under 28 U.S.C. § 7212(a), for certain I.R.S. investigations.[55] Under this definition, the prosecution can focus either on obtaining unlawful benefits or interfering with the administration of justice.[56] Uniformly applied definitions like in 28 U.S.C. § 7212(a) cases give greater consistency and certainty to the term's effect in any jurisdiction, a quality lacking in other obstruction of justice contexts.

Different obstruction of justice statutes in 18 U.S.C. § 1500 *et. seq* apply "corruptly" inconsistently.[57] The "improper purpose" language of the Second Circuit, or its near equivalent, "evil intent," also appears in some circuits' 18 U.S.C. § 1503 analyses, while others elect to use the even more recursive phrasing, "with intent to obstruct justice."[58] For example, in a prosecution under 18 U.S.C. § 1505,[59] the D.C. Circuit analyzed "corruptly" in great detail.[60] The *Poindexter* court determined that corrupt intent was "the intent to obtain an improper advantage for [one]self or someone else, inconsistent with official duty and the rights of others,"

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[50] United States v. Aguilar, 515 U.S. 593, 617 (1995) (Scalia, J., concurring in part and dissenting in part) (claiming acts that defendants intend to obstruct justice are "wrongful" and therefore "corrupt.").

[51] Surette, *supra* note 29, at 2a.

[52] *See* Tamashasky, *supra* note 19, at 130–32.

[53] *Id.* at 130, n.7. Multiple organizations, including the National Commission on Reform of Federal Criminal Laws and the American Law Institute criticize using "corruptly" as a standard of culpable conduct and suggest alternative, more specific language be used instead. *Id.* at n.7.

[54] Bosselman v. United States, 239 F. 82, 86 (2d Cir. 1917); *see also Corruption*, BOUVIER LAW DICTIONARY 264 (Compact ed. 2011) ("Corruption is, in general, the degradation of something once pure, noble, or correct. In law, it is the failure to use a legal power in the manner and for the purpose it was invested in its holder.").

[55] *See, e.g.*, United States v. Reeves, 752 F.2d 995, 1001 (5th Cir. 1985).

[56] *See* Tamashasky, *supra* note 19, at 148–49.

[57] *See id.* at 129–31; *see also* United States v. Doss, 630 F.3d 1181, 1187–88 (9th Cir. 2011).

[58] Tamashasky, *supra* note 19, at 150–57.

[59] *See* 18 U.S.C. § 1505 (applying to obstruction of federal agency or department proceedings).

[60] *See* United States v. Poindexter, 951 F.2d 369, 378. (D.C. Cir. 1991) (noting "corruptly" means "depraved, evil: perverted into a state of moral weakness or wickedness" (quoting United States v. North, 910 F.2d 843, 881–82 (D.C. Cir. 1991) (Silberman, J., concurring in part)).

but that the word "corrupt" was defined vaguely.[61] The court's review of legislative intent determined that for § 1505's "corruptly" to apply, "obstruction . . . of justice cannot be fully carried out by a simple enumeration of the commonly prosecuted obstruction offenses. There must also be protection against the rare type of conduct that is the product of an inventive criminal mind and which also thwarts justice."[62] Based on its analysis, the D.C. Circuit found that this standard did not describe Poindexter's conduct.[63]

Seemingly specific yet effectively imprecise language similar to "corruptly persuades" appears in many statutes, which has posed difficulties in interpretation to lawyers and judges alike.[64] Language such as "corruptly" is difficult to interpret because of how broadly some verbs and adverbs apply to specific contexts.[65] Problems applying the proper meaning of "corruptly" are further compounded because the proper context for the best definition "exist[s] in case-by-case settings."[66] If applications of "corrupt" require some degree of individual case review, prosecutors and courts have greater latitude determining what acts are corrupt and open to prosecution.[67] But case-by-case review does not and should not prevent federal courts from recognizing a uniform application for "corruptly" in § 1512(b) and elsewhere. The example of 28 U.S.C. § 7212(a) demonstrates courts can apply a uniform definition without issue.[68]

C. Supreme Court Precedent: Arthur Andersen LLP v. United States

The most recent Supreme Court case to discuss "corruptly" § 1512(b) at length occurred in 2005, in *Arthur Andersen LLP*. In this case, the accounting firm Arthur Andersen LLP faced scrutiny for its accounting of Enron Corporation's finances.[69]

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[61] *Id*.

[62] *Id*. at 382.

[63] Tamashasky, *supra* note 19, at 161; *see also Poindexter*, 951 F.2d at 378–79 (holding "corruptly" in § 1505 "is too vague to provide constitutionally adequate notice that it prohibits lying to the Congress").

[64] *See* Tamashasky, *supra* note 19, at 130–32.

[65] *See id.* This problem plagues many areas of the law, but is essential in criminal law given the nature of acts prosecuted and the consequences for those convicted. The necessary inquiry of criminal prosecution entails establishing which sorts of conduct rise to the vague standard described in the pertinent statute, which do not, and if the alleged facts before the court belongs in the former or latter category. Professor Jill C. Anderson notes that considering a statute's overall sentence structure may provide an answer to the problem of seemingly conflicting interpretations. Jill C. Anderson, *Misreading Like a Lawyer: Cognitive Bias in Statutory Interpretation*, 127 HARV. L. REV. 1521, 1522 (2014) (discussing imprecise language and the statutory interpretation difficulties it poses). The sentence in a statutory provision may mean something different than would one word analyzed out of context. *Id.*

[66] Tamashasky, *supra* note 19, at 132.

[67] *See id.*

[68] *Id.* at 141.

[69] Arthur Andersen LLP v. United States, 544 U.S. 696, 698–702 (2005).

When the Enron scandal broke in 2001,[70] Arthur Andersen LLP faced obstruction of justice charges under 18 U.S.C. § 1512(b)(2)(A) and (B) for shredding documents related to Enron under its internal document shredding policy, but also under potentially dubious circumstances.[71] The accounting firm was convicted at trial and appealed.[72] The Supreme Court's reversal did not save Arthur Andersen LLP,[73] and other developments changed how § 1512(b) relates to the document shredding and destruction of evidence contexts.[74] However, the case contributes to this Note's discussion of § 1512(b) because the Court used this case to consider how "corruptly" should apply in "corruptly persuades."

The Supreme Court began by noting how "corruptly" in § 1512(b)'s "corruptly persuades" was "key to what may or may not lawfully be done."[75] Properly describing and applying "corruptly" in § 1512(b) was therefore an important issue.[76] The Court first noted that persuasion intending to cause another "to 'withhold' testimony or documents from a Government proceeding or Government official is not inherently malign."[77] For example, telling another person of her guaranteed Constitutional rights during a criminal investigation or giving privileged legal advice as an attorney are not necessarily corrupt acts, even though they could obstruct a government inquiry.[78] Instead, because "corruptly" modifies "persuades," a defendant must have a purpose beyond impeding the proceeding, which must be a

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[70] Enron Corp. was one of the largest energy trading companies in the 1980s and 1990s. Alex Berenson & Andrew Ross Sorkin, *Rival to Buy Enron, Top Energy Trader, After Financial Fall*, N.Y. TIMES (Nov. 10, 2001), https://www.nytimes.com/2001/11/10/business/rival-to-buy-enron-top-energy-trader-after-financial-fall.html [https://perma.cc/2WBW-MP8J]. However, much of its profits in the late 1990s were attributable to misleading accounting practices and offloading debts to offshore partnership companies. *Enron Fast Facts*, CNN (Apr. 24, 2020), https://www.cnn.com/2013/07/02/us/enron-fast-facts/index.html [https://perma.cc/QN26-682B]. Finally, in October 2001, after concerns about the company's finances become public, the SEC investigated the company, the results of which in turn led to Enron's demise in 2002. *Id.* Arthur Andersen began shredding documents related to Enron in October 2001 as well. *Id.*

[71] *Arthur Andersen LLP*, 544 U.S. at 699–702.

[72] *Id.* at 702.

[73] The Enron scandal severely damaged Arthur Andersen LLP's reputation. Despite a favorable ruling from the Supreme Court, Arthur Andersen LLP still went out of business in the scandal's wake. John Hasnas, *The Significant Meaninglessness of* Arthur Andersen LLP v. United States, 2004 CATO SUP. CT. REV. 187, 187–89 (2004).

[74] The Sarbanes-Oxley Act of 2002 introduced 18 U.S.C. § 1512(c) and § 1519, while the *Arthur Andersen LLP* prosecution proceeded in the courts. *Id.* at 193–94; *see generally* 18 U.S.C. §§ 1512(c), 1519 (criminalizing document destruction, alteration, or falsification with the intent to obstruct official proceedings).

[75] *Arthur Andersen LLP*, 544 U.S. at 704.

[76] *Id.* at 706.

[77] *Id.* at 703–04.

[78] *Id.* at 704; *see also* Hasnas, *supra* note 73, at n.34 (contemplating that *Arthur Andersen LLP* may prove significant for future § 1512(b) prosecutions, but instead postulating the new, stricter, and uninterpreted statute § 1512(c) would replace § 1512(b) as a favorite provision for obstruction of justice prosecutions).

corrupt purpose.[79] The Court further determined, "Only persons conscious of wrongdoing can be said to 'knowingly . . . corruptly persuade.'"[80] These examples recognize that persuasion can occur without a corrupt intent, or that some persuasive efforts are beyond § 1512(b)'s reach. The Supreme Court's emphasis on this distinction defers to the defendant's state of mind.[81]

The Supreme Court issued no controlling definition for "corruptly" as used in § 1512(b). Instead, the Court held that the jury instruction defining "corruptly," using "subvert, undermine, or impede," harmed Arthur Andersen LLP at trial because the conventional definitions of each word encompass acts the Court described as innocent.[82] To frame its discussion of the qualifying term "corruptly," the opinion only mentions synonyms for "corruptly," which were its ordinary associations with words such as "wrongful, immoral, depraved, or evil."[83] These connotations describe what sorts of intent a defendant ought to have to face liability under § 1512(b), namely intents that are not innocent. The connotations recognize the difference between the intents of persuasion the Supreme Court thought should not be prosecutable under § 1512(b), like informing another of Constitutional rights or giving privileged advice as an attorney, and prosecutable types of persuasion.[84] Though they are not a controlling definition, these connotations are useful in establishing a conceptual framework for what each court—the Supreme Court, the Second Circuit, and the Third Circuit—means by "corruptly."

The Supreme Court's general observations parallel scholarly commentary of inconsistent definitions of "corrupt" across federal criminal law.[85] While the *Arthur Andersen LLP* ruling had little consequence in changing the accounting firm's fate,[86] the case offers some important guidance for applying "corruptly" in "corruptly persuade[s]."[87]

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[79] *Arthur Andersen LLP*, 544 U.S. at 707.

[80] *Id.* at 706.

[81] Smith, *supra* note 47, at 1614.

[82] *Arthur Andersen LLP*, 544 U.S. at 706–08 (determining that the verbs subvert, undermine, and impede and similar "connotations do not incorporate any 'corrupt[ness]' at all.").

[83] *Id.* at 705. The Supreme Court relied on several different dictionaries in searching for a proper meaning for "corrupt." *See Corrupt*, BLACK'S LAW DICTIONARY 371 (8th ed. 2004); *Corrupt*, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 512 (1993); *Corrupt*, WILLIAM MORRIS, THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 299–300 (1981).

[84] *Arthur Andersen LLP*, 544 U.S. at 704.

[85] *See* Tamashasky, *supra* note 19, at 130–31.

[86] Arthur Andersen LLP's involvement in the Enron scandal severely damaged its reputation. Despite a favorable ruling from the Supreme Court, Arthur Andersen LLP still closed in the Enron scandal's wake. Hasnas, *supra* note 73, at 187–89.

[87] *Id.* at 189.

III. CIRCUIT COURT CONSIDERATIONS OF 18 U.S.C. § 1512(B)

In the wake of *Arthur Andersen LLP*, the Second Circuit has made some changes to its framework for interpreting "corruptly persuades" as an "improper purpose."[88] One recent case began moving away from the "improper purpose" articulation.[89] The Third Circuit by contrast has not needed to alter is approach because *Arthur Andersen LLP*'s holding traced its general reasoning.[90] Due to this state of affairs, this Note analyzes the key cases reviewing "corruptly" in both circuits.[91] The present circuit split hinges on explicitly recognizing what purposes surpass innocent persuasion, as the Supreme Court recognized it in *Arthur Andersen LLP*.[92]

A. The Second Circuit Approach: United States v. Thompson

Everett Thompson participated in a marijuana distribution conspiracy by purchasing from a local distributor for resale.[93] After becoming aware of a federal

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[88] *See, e.g.*, United States v. Gotti, 459 F.3d 296, 343 (2d Cir. 2006) (restating "corrupt persuasion" in § 1512(b) as "motivated by an improper purpose" (quoting United States v. Thompson, 76 F.3d 442, 452 (2d Cir. 1996))); United States v. Gray, 642 F.3d 371, 372 (2d Cir. 2011) (affirming a § 1512(b) conviction); United States v. Veliz, 800 F.3d 63, 70 (2d Cir. 2015) (observing again that "'corrupt persuasion' under 18 U.S.C.S. § 1512(b)" has been defined "to mean persuasion 'motivated by an improper purpose'" (quoting *Thompson*, 76 F.3d at 452)); United States v. Sampson, 898 F.3d 287, 299 (2d. Cir. 2018); *cf.* United States v. McLaurin, 767 F. App'x 186, 187 (2d Cir. 2019) (upholding a § 1512(b) conviction and discussing 1512(b)(3) as "knowingly uses intimidation, threatens, or corruptly persuades another person" (citing 18 U.S.C.S. § 1512(b)(3))).

[89] *McLaurin* actually goes farther towards recognizing the knowing of a corrupt purpose standard from *Arthur Andersen LLP* than previous Second Circuit cases, farther than some of the "improper purpose" line of cases discussed herein. "[I]mproper purpose" does not appear in the *McLaurin* opinion, but "specific intent" does. *McLaurin*, 767 F. App'x at 187 (citing United States v. Genao, 343 F.3d 578, 586 (2d Cir. 2003) (internal quotation marks omitted)). Even though the analysis here argues there is no effective distinction between "improper purpose" and the knowing of a corrupt purpose standard, this case reinforces the Second Circuit's recognition that a defendant ought to know of his corrupt purpose to support a § 1512(b) prosecution. *Id.* Future developments in the Second Circuit on this point should prove illuminating.

[90] *See, e.g.*, United States v. Shavers, 693 F.3d 363, 379 (3d Cir. 2012) (remanding a § 1512(b)(1) case under the judicial proceeding element, without much discussion of corrupt persuasion); United States v. Tyler, 732 F.3d 241, 247 (3d Cir. 2013) (remanding a § 1512(b) case under the judicial proceeding element, without much discussion of corrupt persuasion); United States v. Williams, 666 F. App'x 186, 202–03 (3d Cir. 2016) (discussing the applicability of the affirmative defense in § 1512(e) based in innocent purposes persuasion and concluding the District Court did not need to raise awareness of William's defense in jury instructions).

[91] *See* Shrewsbury, *supra* note 6, at 381–88.

[92] Arthur Andersen LLP v. United States, 544 U.S. 696, 704 (2005).

[93] United States v. Thompson, 76 F.3d 442, 447 (2d Cir. 1996).

grand jury investigation into the distributor's activities, Thompson pressured a witness, another buyer, to tell the grand jury that Thompson bought less marijuana from the distributor than he actually had.[94] Thompson was charged with involvement in this conspiracy, a related tax fraud conspiracy, and for witness tampering under § 1512(b)(1).[95] Thompson challenged many aspects of his trial, including § 1512(b)'s constitutionality.[96]

The *Thompson* court first established the constitutionality of § 1512(b) because it permitted speech protected under the First Amendment.[97] Thompson had asserted that § 1512(b) "broadly 'proscrib[ed] persuasion'" of any kind.[98] The first step in the Court's response to Thompson's argument involved laying grounds for the challenged use of "corruptly." The Court relied on its earlier interpretation of § 1503 to inform its reading of § 1512(b) in *Thompson*.[99] "Corruptly," then, applied to all acts "motivated by an improper purpose."[100] With this framework, the *Thompson* court depended on the illegality of the speech at issue to declare § 1512(b) constitutional. Instead of imposing an unacceptable blanket ban on all types of speech, "corruptly" confined the statute's applicability to "constitutionally unprotected and purportedly illicit activity."[101] Recognizing that the Constitution does not protect illegal activity, this construction prevented § 1512(b) from being "overbroad."[102]

Thompson also challenged the statute on vagueness grounds. But "corruptly" as used within the statute was not found impermissibly vague either.[103] Relative to "persuades," "corruptly" acted as a "scienter," modifying the conduct Congress intended to criminalize.[104] That is, using the borrowed § 1503 interpretation for "corruptly," "corruptly" modifies "persuades" with sufficient clarity so that its use in § 1512(b) describes prohibited conduct.[105] The court in *Thompson* relied on the

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[94] *Id.*

[95] *Id.* at 445.

[96] *Id.*

[97] *Id.* at 452.

[98] *Id.*

[99] *Thompson*, 76 F.3d at 452; *cf.* United States v. Fasolino, 586 F.2d 939, 941 (2d Cir. 1978) (discussing § 1503 and applying the "improper purpose" standard). The Second Circuit's application may better incorporate Congressional intent for "corruptly persuades" in § 1512 to parallel intents similar to § 1503. *See* 134 CONG. REC. 13,780 (1988).

[100] *Thompson*, 76 F.3d at 452.

[101] *Id.* (quoting United States v. Jeter, 775 F.2d 670, 679 (6th Cir. 1985)).

[102] *Id.*

[103] *Id.*

[104] *Id.*; *see also* Surette, *supra* note 29, at 3a ("[A] scienter requirement could suffice to provide adequate notice that given conduct was proscribed.").

[105] *Thompson*, 76 F.3d at 452 (quoting Kolender v. Lawson, 461 U.S. 352, 357 (1983)). The court made particular mention to recognize the connection between § 1503's and § 1512(b)'s use of "corruptly" as meaning "motivated by an improper purpose." *Id.* (referencing United States v. Fasolino, 586 F.2d 939, 941 (2d Cir. 1978)).

scienter to overcome the contention that "corruptly" is "unduly vague."[106] The statute puts the defendant on notice that "corruptly" modifies the act of persuasion, and that is sufficient for establishing a criminal standard.[107]

Applying these principles, the court upheld Thompson's § 1512(b) conviction. The challenged jury instruction defined "corruptly" as "act[ing] deliberately for the purpose of improperly influencing, or obstructing, or interfering with the administration of justice."[108] The court reasoned that this instruction articulated "corruptly" as an "improper purpose" well enough for the trial jury to apply against Thompson's communication with the witness given the weight of the evidence.[109]

B. The Third Circuit Approach: United States v. Farrell

William Farrell delivered meat byproduct to a processor in a meat adulterating conspiracy.[110] Farrell contacted one of the processor's employees during the federal investigation and asked the employee to withhold or falsify information told to investigators.[111] Despite finding Farrell did not use coercive methods with the employee, the jury found Farrell guilty under § 1512(b)(3).[112] Farrell appealed this conviction, arguing he did not "corruptly" persuade the employee witness under § 1512(b).[113]

The *Farrell* court noted the difficulty of defining "corruptly persuades" in § 1512(b).[114] The court first concluded the statute did not define which party "corruptly" applied to, because "corruptly" could describe changing either one's own behavior or another's behavior from "good to bad."[115] Legislative history suggested Congress intended to prohibit corrupt persuasion without defining what specific behavior was corrupt.[116] The *Farrell* court then indicated the same problem the Supreme Court identified about corrupt conduct in *Arthur Andersen LLP*: a court should not punish persuasion that is not corrupt, and many ordinary situations produce persuasive conduct, but not corruptly persuasive conduct the statute intended to prevent.[117] One example the *Farrell* court gave was the protection against self-incrimination since the employee Farrell attempted to persuade had a

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[106] *Id.* In incorporating § 1503's "improper purpose" language wholesale, the *Thompson* court fails to mention, or even acknowledge, the complexities in actually defining or using "corruptly" noted in other cases. *See* United States v. Farrell, 126 F.3d 484, 488 n.2 (3d Cir. 1997); *see also* discussion *supra* Section II.A.

[107] *Thompson*, 76 F.3d at 452.

[108] *Id.* at 453.

[109] *Id.*

[110] *Farrell*, 126 F.3d at 486.

[111] *Id.* at 487.

[112] *Id.* at 487–88.

[113] *Id.* at 487; *see also* Surette, *supra* note 29, at 2a.

[114] *Id.* at 487.

[115] *Id.* at 488, n.2.

[116] *Farrell*, 126 F.3d. at 488.

[117] *Id.* at 488–89.

valid Fifth Amendment interest.[118] Because the employee could permissibly invoke his Fifth Amendment right against self-incrimination without persuasion by Farrell, it would not be improper for Farrell to urge the employee to do so.[119]

The *Farrell* court scrutinized "corruptly persuades" independent of other obstruction of justice statutes' uses of "corruptly," such as § 1503.[120] The court then read "corruptly" in § 1512(b) as "implying that an individual can 'persuade' another not to disclose information . . . with the intent of hindering an investigation without violating the statute, i.e., without doing so 'corruptly.'"[121] The court gave two reasons for this distinction. First, the reading comports with the rule of lenity.[122] As written, "corruptly persuades" could either use "corruptly" generally or apply only to persuasion, and resolving the ambiguity to favor the defendant supports the latter interpretation.[123] Second, the court observed "corruptly" serves different purposes in § 1503 and § 1512(b).[124] Section 1503 criminalizes acts "corruptly . . . influenc[ing], obstruct[ing] or imped[ing], or endeavor[ing] to influence, obstruct, or impede, the due administration of justice."[125] "Corruptly" acts as the *mens rea* for that statute.[126] Conversely, since § 1512(b) imposes a "knowing" *mens rea* on all of its provisions, "corruptly" only modifies "persuades" and therefore limits applicability to persuasion that is corrupt.[127] In direct contrast to *Thompson*, the *Farrell* court believed that without this construction, "corruptly" becomes redundant.[128] Under its reading, the Third Circuit concluded Farrell's conduct was not corrupt persuasion under § 1512(b).[129]

IV. THE CIRCUITS' APPROACHES COMPARED

Many discussions of this circuit split contend that the Third Circuit articulates *Arthur Andersen LLP*'s holding better than the Second Circuit, and that the Second Circuit's approach leaves great discretion in finding an "improper purpose" in alleged conduct.[130] However, both circuits achieve the same goal in a § 1512(b) case: allowing prosecutions where corrupt intent exists and excusing innocent yet obstructive conduct. This outcome is true for two reasons that reconcile with *Arthur*

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[118] *Id.* at 489; *see also* Tamashasky, *supra* note 19, at 164.

[119] *Farrell*, 126 F.3d at 488.

[120] *Id.* at 489 (noting the government desired that "corruptly persuades" apply to § 1512(b) the same as in § 1503, that is, with "corruptly" amounting to any "improper purpose" as in the Second Circuit).

[121] *Id.*

[122] *Id.*

[123] *Id.*

[124] *Farrell*, 126 F.3d at 490.

[125] 18 U.S.C. § 1503.

[126] *Farrell*, 126 F.3d at 490.

[127] 18 U.S.C. § 1512(b).

[128] *Farrell*, 126 F.3d at 490.

[129] *Id.*

[130] *See, e.g.*, Shrewsbury, *supra* note 6, at 401; Hasnas, *supra* note 73, at 190.

Andersen LLP, insofar as Circuit courts apply the same general concepts for "corruptly" across § 1512(b) prosecutions.[131] First, both circuits correctly limit "corruptly" to acts performed for a wrongful, immoral purpose, not an innocent one. Second, using this limitation, both circuits exempt innocent persuasive acts from 1512(b)'s scope, in accord with *Arthur Andersen LLP*'s holding. This Note will discuss both points below.

A. The Second and Third Circuits Recognize § 1512(b) Applies to Wrongful, Immoral Purposes

Both circuits conform with the *Arthur Andersen LLP* connotations for "corruptly" as "wrongful, immoral, depraved, or evil."[132] Recognizing wrongful conduct is imperative in criminal law. Through the *mens rea* requirement, criminal law purports "to insulate morally blameless conduct from the reach of federal criminal statutes by ensuring that offenders will not face conviction unless they had adequate notice that their conduct was legally or morally wrongful."[133] Conversely, showing "moral blameworthiness" in a defendant's conduct is the foundation for just punishment.[134]

In *Farrell*, the Third Circuit declined to define "corruptly," instead focusing on how acts of persuasion could either be innocent or corrupt in practice and discussing to which acts § 1512(b) applies.[135] The Court decided a definition was not needed because its interpretation recognized "the 'culpable conduct' that violates § 1512(b)(3)'s 'corruptly persuades' clause does not include a noncoercive attempt to persuade a coconspirator" and its interpretation was therefore adequate.[136] However, the court mentioned in a footnote that "corruptly" could apply in either a verb or adjective form.[137] The adjective form means "morally degenerate and perverted" and "characterized by improper conduct (as bribery or the selling of favors)."[138] The verb form describes changing another's conduct from "good to bad

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[131] *See* Tamashasky, *supra* note 19, at 131–33 (noting the original purpose for "corruptly" was to denote morality-based offenses).

[132] Arthur Andersen LLP v. United States, 544 U.S. 696, 705 (2005).

[133] Smith, *supra* note 47, at 1614.

[134] *Id.* at 1613; *see also Arthur Andersen LLP*, 544 U.S. at 706 ("[L]imiting criminality to persuaders conscious of their wrongdoing sensibly allows § 1512(b) to reach only those with the level of 'culpability . . . we usually require in order to impose criminal liability.'" (quoting United States v. Aguilar, 515 U.S. 593, 602 (1995)).

[135] United States v. Farrell, 126 F.3d 484, 488–89 (3d Cir. 1997).

[136] *Id.* at 488.

[137] *Id.* at n.2.

[138] *Id.* (quoting *Corrupt*, WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 294 (1985)). The Merriam Webster's dictionary definition the Third Circuit cited aligns "corruptly" with the older common law definition for corrupt as conduct "against morals," which was directed towards the bribery context. However, modern definitions of corrupt encompass both the earlier morality-based definition as well as the more worldly and straightforward idea of illegal or unlawful conduct that distinguished its first uses. Tamashasky, *supra* note 19, at 133.

in morals, manners, or actions" and "to become [oneself] morally debased."[139] This latter description encompasses corruption on the part of two parties: the defendant attempting the witness tampering, and the targeted witness herself.

The *Farrell* court then suggested that the word "corruptly" implied that the defendant must have a corrupt purpose citing a definition from the Webster's Dictionary, or that "some 'morally debased' purpose" was necessary in the § 1512(b) witness tampering context.[140] These notions are intended to limit § 1512(b) to conduct that has some form of corrupt influence,[141] using the same reasoning later adopted in *Arthur Andersen LLP*.[142] In particular, both the Second Circuit and Third Circuit directly connected "corruptly" to recognizably "bad"[143] and "evil"[144] conduct. These synonyms perform the work of constraining conduct absent a formal definition for "corruptly." Section 1512(b) can only apply if the defendant had a recognizably wicked purpose for persuading a witness not to testify or cooperate with an investigation.

In *Thompson*, the Second Circuit included little discussion of connotations for "corrupt" beyond "improper purpose" and the jury instruction.[145] As an earlier Second Circuit case explained, "'corruptly' is capable of different meanings in different connections."[146] Earlier Second Circuit opinions use language such as "influence, intimidate, or impede" to apply "corruptly," which without additional clarification comes dangerously close to rejected Supreme Court connotations.[147]

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[139] *Farrell*, 126 F.3d at 488, n.2.

[140] *Id.*

[141] *See* Tamashasky, *supra* note 19, at 163–64.

[142] Hasnas, *supra* note 73, at 191.

[143] *Farrell*, 126 F.3d at 488–89.

[144] Arthur Andersen LLP v. United States, 544 U.S. 696, 705 (2005). The Ninth Circuit also applies *Arthur Andersen LLP*'s discussion of "corruptly" this way in its jurisprudence, even though jury instructions do not expressly need to include the connotations when defining "corruptly." United States v. Watters, 717 F.3d 733, 735 (9th Cir. 2013).

[145] United States v. Thompson, 76 F.3d 442, 453 (2d Cir. 1996). See the discussion *supra* Section III.A for more analysis of the Second Circuit's review of the jury instructions. The *Thompson* opinion includes an excerpt of the jury instructions for the obstruction of justice charge. The instruction reads in whole at the pertinent part, "To act 'corruptly[']as that word is used in these instructions means to act deliberately for the purpose of improperly influencing, or obstructing, or interfering with the administration of justice." *Id*. The remainder of the instructions cited lay out the elements of the obstruction of justice charge. *Id.* Like the more concise "improper purpose" phrasing from the Second Circuit's review, the instruction bestows wide potential to determine if the defendant's actions satisfy "corruptly persuades" in § 1512(b). *Id.*; *see also* United States v. Gotti, 459 F.3d 296, 343 (2d Cir. 2006).

[146] Bosselman v. United States, 239 F. 82, 86 (2d Cir. 1917). This 1917 holding more accurately captures the difficulties applying "corruptly" consistently in differing situations that *Thompson* omits. *See also* Tamashasky, *supra* note 19, at 131–32.

[147] *Thompson*, 76 F.3d at 452 (noting the prior holding in United States v. Fasolino, 586 F.2d 939, 941 (2d Cir. 1978)); *cf. Arthur Andersen LLP*, 544 U.S. at 703–04, 707 (Noting

This application would allow for trial courts to prosecute any "improper" act that has an obstructive effect, not just acts performed with a wicked intent, precisely what the Supreme Court later rejected in *Arthur Andersen LLP*[148] and the Third Circuit excluded in *Farrell*.[149]

However, the court in *Thompson* also noted that the Constitution does not protect "illegal" acts, thereby indirectly connecting "corruptly" in § 1512(b) to wrongful conduct and wrongful purposes.[150] Illegal acts differ from innocent acts in the "moral blameworthiness" of the actor.[151] The commission of an illegal act alone is not sufficient for establishing criminal liability, because "it is also necessary to ask whether the offender's act was *sufficiently blameworthy* to warrant the penalties authorized by Congress."[152] An awareness of the wrongful nature of a communication, rather than the mere fact that a communication occurred, is what creates criminal liability.[153] Statutory *mens rea* requirements apply to understanding the illegal nature of a communication.[154] Applying these determinations to § 1512(b), "corruptly" ensured "illegal" purposes are not exempt from § 1512(b)'s scope, and approach the acceptable "wrongful, immoral, depraved, or evil" articulations for "corruptly" from *Arthur Andersen LLP*.[155] These connotations move "corruptly" away from the rejected connotations of "subvert, undermine, or impede."[156] Reading "corruptly" with the connotations discussed frame its use properly, as an improper state of mind necessary for establishing *mens rea*, instead of a modifier on the act of persuasion.

The foundation for both circuits' interpretations of "corruptly" on a conceptual level underscores how § 1512(b) prosecutions proceed towards a similar result: advancing cases against defendants with corrupt purposes motivating their persuasive acts. Without this similar understanding, especially under the *Arthur Andersen LLP* articulation for "corruptly," the current circuit split would have greater consequences than this Note argues. This divergence in interpretation has been the primary thrust of prior analyses on this circuit split.[157]

However, comments from both circuits align their understanding of "corruptly" towards acts performed for recognizably evil and immoral purposes. Language from the *Farrell* and *Thompson* opinions compared to *Arthur Andersen LLP* underscores this point. The Third Circuit in *Farrell* described "corruptly" as "morally degenerate

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that withholding testimony or documents from Government proceedings or officials "is not inherently malign" and that the term "impede" need "not incorporate any 'corrupt[ness]' at all").

[148] *Arthur Andersen LLP*, 544 U.S. at 703–04.

[149] United States v. Farrell, 126 F.3d 484, 488–89 (3d Cir. 1997).

[150] *Thompson*, 76 F.3d at 452.

[151] Smith, *supra* note 47, at 1619.

[152] *Id.*

[153] *See* Elonis v. United States, 135 S.Ct. 2001, 2011 (2015).

[154] *Id.*

[155] Arthur Andersen LLP v. United States, 544 U.S. 696, 705 (2005).

[156] *Id.* at 706.

[157] *See, e.g.*, Shrewsbury, *supra* note 6, at 376.

and perverted."[158] While the Second Circuit in *Thompson* only described "corruptly" in terms of illegal actions, it expounded on "corruptly" in its later opinions to mean "debased in character; infected with evil; depraved."[159] These descriptors focus on the defendant's state of mind during the persuasive act, which must be an immoral one. Both circuits recognize that a defendant's underlying immoral purpose motivating her persuasion is required to prosecute for "corruptly persuading" under § 1512(b), and therefore assess "corruptly" from a similar understanding.

B. Both Circuits Exempt Innocent Persuasive Actions from § 1512(b) Prosecution

The "improper purpose" and "knowledge of corrupt purpose" standards both account for and excuse persuasion that is not corrupt, as required by *Arthur Andersen LLP*.[160] The Supreme Court construed § 1512(b) to limit its applicability to wrongful purposes a defendant would know of in persuading, or attempting to persuade, a witness to some course of action in an effort to obstruct a federal proceeding.[161] The Court used this two-step review of a defendant's purpose because "knowingly" requires awareness or understanding and "corruptly" connotes wrong or evil.[162] Therefore, a person must understand he undertakes a persuasive act and knows of its wrongfulness to fall under § 1512(b).[163] The illegal nature of a defendant's act is "the crucial element separating legal innocence from wrongful conduct" producing criminal liability.[164] Also, if "corruptly" encompassed prosecuting innocent activity, the statutorily granted defense in § 1512(e) would fail in the Second Circuit.[165] Therefore, any construction of § 1512(b) must protect innocent persuasion and persuasion for any reason other than a corrupt motive.

In *Farrell*, the Third Circuit analyzed § 1512(b) along parallel lines to the Supreme Court in *Arthur Andersen LLP*. The Third Circuit imposed two culpability standards on defendants because "corruptly" only modifies "persuade," and "knowing" modifies both words.[166] The Supreme Court and the Third Circuit chose to clearly state that innocent or non-corrupt purposes for persuasion were not performed "corruptly," based on statutory interpretation grounds.[167] The Third Circuit determined that if "corruptly" applied strictly using the Second Circuit's acceptance of the § 1503 definition, then "corruptly" would have no effective

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[158] United States v. Farrell, 126 F.3d 484, 488 n.2 (3d Cir. 1997).

[159] United States v. Veliz, 800 F.3d 63, n.6 (2d Cir. 2015) (citing 3 THE OXFORD ENGLISH DICTIONARY 972 (2d ed. 1989)).

[160] *Arthur Andersen LLP*, 544 U.S. at 703–04.

[161] *Id.* at 705–06.

[162] *Id.*

[163] *Id.* at 706; *see also* Hasnas, *supra* note 73, at 191.

[164] Elonis v. United States, 135 S.Ct. 2001, 2011 (2015) (internal quotation omitted).

[165] *See* Decker, *supra* note 21, at 72.

[166] United States v. Farrell, 126 F.3d 484, 489–90 (3d Cir. 1997).

[167] Hasnas, *supra* note 73, at 190–91.

meaning.[168] Thus according to the Third Circuit's interpretation of the Second Circuit's reasoning, the statute would read as "intending to bring about an improper result such as the obstruction of justice."[169] This reading would include actions that obstruct justice without the requisite improper intent to obstruct justice.[170] Statutory interpretation is one reason the Third Circuit majority rejected the Second Circuit's "improper purpose" formulation for § 1512(b) in *Farrell*.[171] From this logic, the Third Circuit surmised that innocent purposes, such as informing a witness of his legitimate Fifth Amendment right against self-incrimination, would disappear without a narrower application of "corruptly."[172] Innocent purposes are excluded from § 1512(b)'s scope under *Arthur Andersen LLP* as well;[173] including them at this point would defy that precedent.

In the Second Circuit, acts done for an "improper purpose," are also done "corruptly" for reasons that reconcile with *Arthur Andersen LLP*. Borrowing "improper purpose" from § 1503,[174] the Second Circuit utilizes the term as a "specific intent to impede the administration of justice"[175] for § 1512(b). This application of "corruptly" would limit the section to cases where the defendant intends to obstruct justice, instead of cases where obstruction occurs merely as a consequence of an action taken for another purpose. Furthermore, a defendant in a Second Circuit § 1512(b) prosecution must understand she had an "improper purpose" in the act of persuasion.[176] In the line of cases examining the corrupt persuasion of federal officers and judges (prohibited under § 1512(b)(3)), the Second Circuit has stated, "[t]his provision 'requires a specific intent to interfere with the communication of information.'"[177]

Following these guidelines, persuasion for any other purpose, such as encouraging a person to use their Fifth Amendment right against self-

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[168] *Farrell*, 126 F.3d at 490; Jeffrey W. DeBeer, *Corruptly Persuading Privilege: The Effect of* United States v. Doss *on the Marital Privilege, The Fifth Amendment, and Federal Witness Tampering Statute § 1512(B)*, 80 U. CIN. L. REV. 591, 598 (2011).

[169] DeBeer, *supra* note 168, at 598.

[170] *Farrell*, 126 F.3d at 488.

[171] *Id.* at 490; DeBeer, *supra* note 168, at 598. *But see Farrell*, 126 F.3d at 491–94 (Campbell, J., dissenting).

[172] *Farrell*, 126 F.3d at 489–90.

[173] Arthur Andersen LLP v. United States, 544 U.S. 696, 705–07 (2005). The Ninth Circuit also stated that "'knowingly corruptly' [in 18 U.S.C. § 1512(b)] requires 'consciousness of wrongdoing.'" United States v. Watters, 717 F.3d 733, 735 (9th Cir. 2013) (quoting *Arthur Andersen LLP*, 544 U.S. at 706); *see also* United States v. Doss, 630 F.3d 1181, 1188–89 (9th Cir. 2011) (noting *Arthur Andersen* "offers some guidance" as the Court considered the "two competing approaches").

[174] United States v. Thompson, 76 F.3d 442, 452 (2d Cir. 1996).

[175] United States v. Sun Myung Moon, 718 F.2d 1210, 1236, (2d Cir. 1983); *see* Tamashasky, *supra* note 19, at 152.

[176] *Thompson*, 76 F.3d at 452 (noting the court's prior holding relative to § 1503 in United States v. Fasolino, 586 F.2d 939, 941 (2d Cir. 1978)).

[177] United States v. McLaurin, 767 F. App'x 186, 187 (2d Cir. 2019) (quoting United States v. Genao, 343 F.3d 578, 586 (2d Cir. 2003)).

incrimination[178] or to follow office policy,[179] is not prosecutable because the would-be defendant is not "knowingly" acting with an "improper purpose" to obstruct. These purposes do not track with the explanation or connotations for what courts recognize as improper or corrupt.[180] The "improper purpose" standard only applies when the would-be defendant has a purpose that a jury (or an appellate court on review) finds improper after an inquiry into the facts.[181] Compare persuasion with the intent to inform a person of her Fifth Amendment right against self-incrimination to persuasion with the intent to hide one's guilt. Evidence could establish either motive case by case, as the trier of fact determines which motive the evidence proves. "Corruptly" and "knowingly" act as a limitation on persuasive acts to ensure that § 1512(b) does not become "overbroad."[182]

Current commentary on the circuit split insists "improper purpose" applies "corruptly" too broadly because any purpose that obstructs a proceeding is considered corrupt.[183] The "improper purpose" formulation in *Thompson* seems to contradict the Third Circuit and *Arthur Andersen LLP* because it gave no recognition to cases where other reasons for persuasion may excuse conduct from criminal liability.[184] The "improper purpose" framing collapses the distinction between how "corruptly" can apply to both a defendant obtaining an improper benefit for himself and any action that interferes with the administration of justice.[185] The distinction is the precise reason some other circuits considering a § 1512(b) case in their jurisdictions have rejected the "improper purpose" standard.[186] But this argument identifies a risk with the Second Circuit approach, rather than a fatal defect.

While it is true the Second Circuit does not note the distinction in *Thompson*, the court analyzes a defendant's alleged "improper purpose" case by case. If the trier of fact determines that the defendant's purpose for persuasion is not improper, then

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[178] *But see* United States v. Gotti, 459 F.3d 296, 343 (2d Cir. 2006) (finding an improper purpose when evidence supported the conclusion that the defendant's purpose was to prevent testimony that implicated the defendant).

[179] *See* Arthur Andersen LLP v. United States, 544 U.S. 696, 700, 704 (2005).

[180] *Thompson*, 76 F.3d at 452.

[181] *Id.* at 453; *see also* United States v. Farrell, 126 F.3d 484, 493 n.1 (3d Cir. 1997) (Campbell, J., dissenting) ("To be sure, 'improper purpose' may not always be self-defining, and may require further analysis in some situations.").

[182] *Thompson*, 76 F.3d at 452.

[183] Shrewsbury, *supra* note 6, at 389.

[184] *Id.* at 391. The evolution of the Second Circuit's language in more recent years has made this distinction clearer than in *Thompson*. *See* United States v. McLaurin, 767 F. App'x 186, 187 (2d Cir. 2019) (citing United States v. Genao, 343 F.3d 578, 586 (2d Cir. 2003)) (recognizing "corruptly" requires a "specific intent").

[185] *See* Tamashasky, *supra* note 19, at 148–49 (mentioning an example of how one definition of "corruptly" can be separated into two distinct parts for more consistent application).

[186] United States v. Doss, 630 F.3d 1181, 1189 (9th Cir. 2011).

§ 1512(b) cannot apply.[187] The defendant's "improper purpose" must stem from a wrongful intent.[188] Determining if the defendant had an "improper purpose" also remains a jury question, as the jury must decide if the prosecution has shown an "improper purpose,"[189] considering the defendant's intent from all of the presented evidence.[190] And in many obstruction of justice prosecutions, the alleged conduct will often conform to an understandable violation of § 1512(b), so that a more precise definition would not change a trial's outcome.[191] It is the margin cases, such as advising a potential witness of their Fifth Amendment right against self-incrimination, that a precise definition of "corruptly" proves most useful. But a jury decides these cases based on presented evidence. Appellate review considers the alleged conduct in light of appropriate connotations for "corruptly."[192] Therefore, the case-by-case application of the Second Circuit's interpretation of "corruptly" in § 1512(b) yields similar practical outcomes as the Third Circuit's interpretation and is compatible with the precedent set in *Arthur Andersen LLP*.

V. CONCLUSION

As Mueller's overview of § 1512(b) noted, the United States federal court system faces a difficult challenge using "corruptly" in "corruptly persuades."[193] The importance of this problem is reflected in just how much conduct could obstruct justice when a case is ongoing. In the cases examined above, prosecutors challenged persuading a coconspirator to lie about a defendant's involvement in a crime,[194] asking a fellow employee to falsify testimony,[195] and shredding potentially incriminating documents according to office policy.[196] Too low of a standard for corruptly leaves innocent acts open to prosecution under § 1512(b). Too high of a

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[187] United States v. Gotti, 459 F.3d 296, 343 (2d Cir. 2006); United States v. Farrell, 126 F.3d 484, 493, n.1 (3d Cir. 1997) (Campbell, J., dissenting). The Second Circuit later clarified how "corruptly" should be read under *Arthur Andersen LLP*. United States v. Veliz, 800 F.3d 63, n.6 (2d Cir. 2015) (restating that "corruptly" in § 1512(b) "where the . . . persuasion . . . is by itself innocuous" means that § 1512(b) can only apply to "persuaders conscious of their wrongdoing" (quoting Arthur Andersen LLP v. United States, 544 U.S. 696, 706 (2005) (internal quotation marks omitted))).

[188] *See* United States v. Thompson, 76 F.3d 442, 452 (2d Cir. 1996).

[189] *Id.*; *see also* United States v. Sun Myung Moon, 718 F.2d 1210, 1236, (2d Cir. 1983) ("Intent to obstruct justice is normally something that a jury may infer from all of the surrounding facts and circumstances.").

[190] *See Farrell*, 126 F.3d at 490.

[191] Tamashasky, *supra* note 19, at 150.

[192] *Sun Myung Moon*, 718 F.2d at 1236; *see* discussion *supra* Section IV.A–B.

[193] *See* Shrewsbury, *supra* note 6, at 375; MUELLER REPORT, *supra* note 1 at *14 (discussing how Mueller described a standard for "corruptly" in 18 U.S.C. § 1512(b)).

[194] United States v. Thompson, 76 F.3d 442, 447 (2d Cir. 1996).

[195] United States v. Farrell, 126 F.3d 484, 487 (3d Cir. 1997).

[196] Arthur Andersen LLP v. United States, 544 U.S. 696, 699–702 (2005).

standard gives little deterrence for tampering with potential witnesses in ways § 1512(b) was adopted to prevent.[197]

Despite confusing interpretations, this Note has shown that the practical effect of this split over §1512(b) is less significant than the circuits' different phrasing suggests. The conceptual understandings of "corruptly" are comparable across circuits, and the "improper purpose" must be recognizable as corrupt within this understanding. Though the Supreme Court's interpretation of § 1512(b) more closely resembles the Third Circuit's, the Second Circuit's foundation in *Thompson* and later developments in its caselaw recognize that only a wrongdoer's conscious consideration of her immoral, illegal actions will place her at risk for prosecution. Only wrongful acts done for wrongful purposes satisfy "corruptly" under the statute.[198]

But the very fact a circuit split has endured for so long, even after a Supreme Court opinion on the statute, implies that some effort should be made to resolve the different circuits' applications of "corruptly" through legislation. Congress should enact a consistent definition of "corruptly" in § 1512(b) to avoid further confusion and give a clear standard for "corruptly" to prosecutors, witnesses, and judges.[199] A clearer statutory definition or standard for "corruptly persuades" may not resolve all difficulties in interpretation that have arisen since § 1512(b)'s 1988 amendments. Instead, such language would signal innocent reasons for persuasion are explicitly excluded from § 1512 (b) prosecutions in all circuits. Clearer language need not enumerate all ways potential defendants might corruptly persuade, as such precision is likely impossible.[200] Out of the two types of formulations discussed in this Note, adopting the Third Circuit or *Arthur Andersen LLP* language[201] would establish that "corruptly" for 18 U.S.C. § 1512(b) means only a truly wrongful purpose.

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[197] 134 Cong. Rec. S 7446–01, 7447 (daily ed. June 8, 1988).

[198] *See* United States v. Veliz, 800 F.3d 63, n.6 (2d Cir. 2015).

[199] *See* Shrewsbury, *supra* note 6, at 376 (explaining the benefits of a clear standard for "corruptly persuades" in the context of § 1512(b)). Again, it is worth considering the counterexample of a uniform application of "corruptly" for prosecutions under 26 U.S.C. § 7212(a). The uniform definition given resolves any ambiguities on how all parties should apply "corruptly" to each new case's facts. *See* Tamashasky, *supra* note 19, at 148–49.

[200] *Farrell*, 126 F.3d at 493, n.1 (Campbell, J., dissenting).

[201] The Supreme Court chose a construction of "corruptly persuades" that more closely resembles the Third Circuit's in *Arthur Andersen LLP*. The Court did so to explicitly recognize that some acts of persuasion are not corrupt. Hasnas, *supra* note 73, at 190.