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I. THE EVOLUTION OF WITNESS TAMPERING LAWS

A. Introduction

In criminal cases, witnesses are often presented by the prosecution and the defense as a means of proving or disproving the charges alleged and the theories of fact presented.1 Such witnesses (generally only prosecution witnesses) often have to deal with the very real problem of being harassed or intimidated.2 The problems associated with witness tampering are neither new nor novel issues in criminal law.3 Not until 1982, however, did a prosecutor have the appropriate tools to deal specifically with a defendant who influenced or otherwise hindered a witness from providing information to federal law enforcement officers regarding the investigation of a crime.4 By enacting 18 U.S.C. § 1512,5 (“§ 1512”), Congress modified the process under which a prosecutor should bring witness tampering prosecutions.6 This legislation made the job of preventing and prosecuting witness tampering an easier one.7 While there are various actions that may

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3 See id. (recalling testimony illustrating intimidation to be “widespread and pervasive problem that inherently thwarts the administration of criminal justice.”).
7 18 U.S.C. § 1512(b) (2004), in its current form, states, in relevant part:
constitute witness tampering, and numerous provisions found within §
1512 that criminalize such actions, this note will focus only on the actions
prosecuted by the provisions set forth in § 1512(b), specifically those in §
1512(b)(2)(A) and § 1512(b)(3).

Prior to 1982 there was no law that expressly criminalized witness tampering. All that was available for the prosecution of witness tampering was the “Omnibus Clause” of 18 U.S.C. § 1503 (“§ 1503”). While prosecutors successfully utilized § 1503 to prosecute tampering, Congress recognized that a new law was needed to specifically govern witness protection and to obviate the shortfalls that existed under § 1503 with regard to the prevention of witness tampering. By enacting § 1512, Congress provided prosecutors with a clear and seemingly singular method by which to prosecute witness tampering. The judicial interpretation of § 1512 varied, however, and resulted in the prosecutors within different circuits employing inconsistent methodology in witness tampering prosecutions.

(b) Whoever knowingly uses intimidation, threatens, or corruptly persuades another person, or attempts to do so, or engages in misleading conduct toward another person, with intent to--,

(1) influence, delay or prevent the testimony of any person in an official proceeding;
(2) cause or induce any person to--,

(A) withhold testimony, or withhold a record, document, or other object, from an official proceeding; or
(3) hinder, delay, or prevent the communication to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense or a violation of conditions of probation, supervised release, parole, or release pending judicial proceedings;


8 See Hernandez, 730 F.2d at 898 (concluding § 1503 did not provide adequate protection of persons from witness tampering).
10 See S. Rep. No. 97-532, at 10 (1982), reprinted in U.S.C.C.A.N. 2515, 2516 (recognizing witness cooperation integral to criminal justice system). In enacting § 1512, Congress stated that: “With few exceptions, victims and witnesses are either ignored by the criminal justice system or simply used to identify offenders. Without the cooperation of victims and witnesses, the criminal justice system would cease to function and few criminals, if any, would be brought to justice.” Id.
12 See United States v. Miller, 161 F.3d 977, 983-84 (6th Cir. 1998) (holding Con-
This note examines the differences between § 1503 and § 1512 and concludes that when a prosecutor employs § 1512 to prosecute witness tampering, his burden of proof is more easily satisfied and he is capable of vindicating the rights of witness tampering victims. Section I of this work explains the historical underpinnings of witness tampering laws and the efforts by lawmakers to prevent and eliminate the effects of witness tampering conduct. Section I also attempts to reconcile the various, general differences between § 1503 and § 1512 and explains the circuit split that exists regarding the scope and intent of each law. Although this note reaches its conclusions through an analysis of witness tampering prosecutions only involving § 1512(b)(2)(A) and § 1512(b)(3), the general background of witness tampering law is discussed to provide a better understanding of the evolution of, and the problems with, this area of the law.

Section II of this note is a hypothetical fact pattern that sets the stage for a mock witness tampering prosecution. Through the hypothetical, and the subsequent analysis in Section III, a witness tampering prosecution under § 1503 is contrasted with prosecutions under § 1512(b)(2)(A) and § 1512(b)(3). Section III analyzes the burden of proof required by each statute, as well as the likelihood of success or failure. By illustrating why a prosecutor would be wise to bring a witness tampering prosecution under either § 1512(b)(2)(A) or § 1512(b)(3), but not under § 1503, Section III offers the summation that when a prosecutor employs the provisions set forth in § 1512(b) his burden is more easily met and his power to deter future witness tampering conduct is significantly expanded.
B. History of 18 U.S.C. § 1503

The origins of § 1503 can be traced back to an 18th Century United States law that granted broad authority to federal courts to control “contemptible” offenses. Specifically, the provisions provided by the Act of 1789 led to abuses of power, most notably by Judge James H. Peck, a federal judge who imprisoned and disbarred an attorney who published a critique about one of the judge’s opinions pending appeal. Following Judge Peck’s actions, Congress held impeachment hearings and although the House of Representatives voted to impeach Judge Peck, the Senate voted to acquit.

Motivated by the potential that others might follow Judge Peck’s example, Congress reduced the scope and power of the Act of 1789 by passing the Act of March 2, 1831. Containing two sections, the Act of March 2, 1831 set forth: (1) criminal cases that could be tried using summary punishment; and (2) criminal cases stemming from contempt of court occurring outside the courtroom. The language of Section 2 was codified as several different statutes throughout the years, most notably as Revised Stat. 5399, before Congress ultimately codified Section 2 as 18 U.S.C. § 1503.

The first analysis of Revised Stat. 5399 came in 1893 when the Supreme Court considered how the statute applied in charges of obstruction of justice. The Court held that a prosecution under Revised Stat. 5399

15 See Nye v. United States, 313 U.S. 33, 45-46 (1941) (discussing history of early obstruction of justice law). Specifically, the Nye Court examined The Act of 1789 (1 Stat. 73, 83) which provided that courts of the United States “shall have the power ... to punish by fine or imprisonment, at the discretion of said courts, all contempt of authority in any cause or hearing before the same.” Id. at 45 (quoting Act of 1789).
17 See Fitzpatrick, supra note 14, at 1385 (citing 7 REG. DEB. 1830-31 (1837)). The Senate acquitted Judge Peck by a vote of twenty-one to twenty. Id.
19 Act of March 2, 1831, ch. 99, 4 Stat. 487. Section 2 of the Act of March 2, 1831 specifically criminalized “any person [who] shall, corruptly, or by threats or force, endeavor to influence, intimidate, or impede any juror, witness, or officer ... or impede, or endeavor to impede, the due administration of justice.” Id. See also Nye, 313 U.S. at 45-47 (discussing Act of March 2, 1831 enactment).
20 See Fitzpatrick, supra note 14, at 1386. While Section 2 of the Act of March 2, 1831 would ultimately become § 1503, Section 2 was first codified as Revised Stat. 5399; then Revised Stat. 135; then Revised Stat. 241, before finally forming § 1503. Id.
21 See Pettibone v. United States, 148 U.S. 197 (1893). The defendants in Pettibone were charged with violating Revised Stat. 5399 by conspiring to intimidate, by force and threats of violence, certain employees of a local mill and mining company. Id. at 199. A writ of injunction issued by a United States circuit court restrained and enjoined the defendants from interfering in any manner with the employees of the mill and the mining com-
could only commence when: (1) justice is being administered in a court of the United States; and (2) a defendant knows or is on notice that justice is being administered and willfully intends to obstruct, resist, or oppose such justice from being administered. The Pettibone Court's analysis initiated the broad application of Revised Stat. 5399 to include the interference with any judicial proceeding, including grand jury investigations, but excluding governmental agency investigations. Once the language of Section 2 was ultimately codified in the Omnibus Clause of 18 U.S.C. § 1503(a), it was the broad nature of the statute, as was the case under Revised Stat. 5399, that allowed § 1503 to be the means employed to prosecute witness tampering in federal proceedings. Today, the prosecution of witness tampering under § 1503 must prove: (1) the existence of a pending judicial proceeding that the defendant was aware of; (2) the defendant's specific intent to influence a witness; and (3) that the person influenced was someone who would be, or someone the defendant believed would be, a witness in the pending procedure.

C. History of 18 U.S.C. § 1512

Despite the ability provided by the Omnibus Clause of § 1503 to prosecute witness tampering, Congress and prosecutors recognized that comprehensive and adequate protection for victims of witness tampering was still lacking. Congressional analysis of the effects of § 1503 on witness tampering.

22 See id. at 204-05 (discussing elements of obstruction charge under Revised Stat. 5299). See also Fitzpatrick, supra note 14, at 1386 (interpreting early applications of Revised Stat. 5399).


24 See Riley, supra note 14, at 253 (“In fact, section 1503 was the only tool available specifically for the prosecution of obstruction of justice involving witnesses in federal court proceedings.”). See also United States v. Simmons, 591 F.2d 206, 207-08 (3d Cir. 1979) (detailing 18 U.S.C. § 1503 application in witness tampering cases).

25 See United States v. Williams, 874 F.2d 968, 977 (5th Cir. 1989) (describing government burden when alleging § 1503 Omnibus Clause violation). See also Pesce, supra note 6, at 1419-21 (analyzing requirements for witness tampering prosecution under 18 U.S.C. § 1503).

26 See Riley, supra note 14, at 254-55 (discussing Congressional motivations for enacting § 1512). During House debates, Representative Peter Rodino (D-NJ) testified that "the needs of crime victims and witnesses have been neglected. Our criminal justice system is perceived and with much justification to be run for the convenience of judges, lawyers, police, and defendants with little regard for the convenience of victims and witnesses." 128 CONG. REC. 26,348 (1982). Similarly, the Senate found the problem of threats to victims and witness tampering to be a prevalent one, going so far as to state, "the victim or witness has little hope of protection from the government if he is harassed or threatened by the defendant out on bail, or the defendant's friends or family." S. REP. 97-532, at 10 (1982),
ness tampering identified shortcomings of the Omnibus Clause that in fact fostered an atmosphere conducive to witness tampering and victim intimidation. Specifically, Congress focused on two problems with the statutory construction of § 1503: the limited protection the law offered and the threshold requirements a prosecutor had to satisfy in order to bring a case under the statute.

Regarding the limited protection afforded by § 1503, Congress acknowledged that the law only protected witnesses instead of all persons who may be involved in a judicial proceeding. Additionally, Congress recognized that a criminal case often involves people who will never testify in open court, but who act as confidential informants, provide background information, or give hearsay statements. Such people are frequently crucial to conducting a criminal investigation and to bringing a successful prosecution, but do not enjoy the protection of § 1503 because they are not called as witnesses. Because § 1503 only protected those individuals who appeared before a grand jury or took the stand at trial, prosecutors were unable to deter witness tampering conduct against those

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27 See id. at 15, reprinted in U.S.C.C.A.N. 2515, 2521 (citing testimony given to American Bar Association describing witness tampering as widespread problem). The Senate placed heavy reliance on testimony heard by the ABA Criminal Justice Section that illustrated the prevalence of witness tampering in criminal cases. Id. (citing “Reducing Victim / Witness Intimidation” American Bar Association 1981, p. 4). One study that focused on New York City reported intimidation in at least 10% of criminal cases and cited forms of “non-direct” (i.e. not a person-person confrontation) intimidation as well as direct threats or physical violence. Id. (citing “Witness Intimidation: An Examination of the Criminal Justice System’s Response to the Problem,” Victim Services Agency, New York (1982)).


29 See id. (emphasis added) (recognizing limited protection of 18 U.S.C. § 1503 applied only to witnesses under subpoena in active cases). In recognizing that § 1503 only applied to witnesses, the Senate report concluded that individuals who provided necessary hearsay or background information, but who would not testify, would not be protected by the only statute available for the prosecution of witness tampering. See id. at 15, reprinted in 1982 U.S.C.C.A.N., 2515, 2521.

30 See id.

31 See id. But see United States v. Friedland, 660 F.2d 919, 930-31 (3d Cir. 1981) (holding 18 U.S.C. § 1503 applies to victims the defendant believes to be prospective witnesses). The defendants in Friedland were under investigation by federal agents for suspected fraudulent business practices and money laundering. Id. at 922-24. The defendants asked a woman who they believed would be a prospective witness in their case to give false statements to authorities they believed were sure to contact her. Id. at 924. At the time of the defendants’ solicitation of false testimony, the woman had not been contacted by authorities, was not under investigation, and even told the defendants that she was not involved in the investigation. Id. at 931. Regardless of the woman’s non-involvement in the investigation, the court held that because the defendants believed the woman to be a prospective witness, the Omnibus Clause of § 1503 applied to the defendants’ conduct. Id.
people who often participated in, and were important to, the criminal justice system.\textsuperscript{32}

The second concern enumerated by Congress stemmed from the recognition that a witness tampering prosecution could not commence until a defendant had committed a series of evils that, individually, would not bring him under the purview of the Omnibus Clause of § 1503.\textsuperscript{33} Congress realized that the threshold requirements a prosecutor must prove – that the defendant intended to influence a witness, that the witness was under subpoena in an active criminal case, and that there was a pending judicial proceeding at the time of the defendant’s actions – allowed for three relatively simple methods through which a defendant could escape prosecution under § 1503.\textsuperscript{34} Because a defendant was free to tamper with a potential witness whom he believed would not testify, or to target individuals before a judicial proceeding commenced, Congressional concern was warranted with regard to the limited protection § 1503 afforded.\textsuperscript{35}

In an attempt to solve the various problems that Congress identified in § 1503, both the House and Senate drafted legislation aimed at simplifying the prosecution of witness tampering.\textsuperscript{36} While both drafts included a prohibition of the same types of conduct, the House version offered more sweeping reform by deleting all references to witnesses from § 1503, thereby arguably removing witness tampering prosecution from the exclusive jurisdiction previously held by the Omnibus Clause of § 1503.\textsuperscript{37} Ultimately the House draft was accepted by the Senate and the new law, entitled The Victim and Witness Protection Act of 1982, was codified as 18


\textsuperscript{35} See Pesce, supra note 6, at 1420 (acknowledging crimes escaping 18 U.S.C. § 1503 coverage).

\textsuperscript{36} The Senate approved the “Omnibus Victims Protection Act” (S. 2420, 97th Cong., § 201 (1982)) while the House approved the “Comprehensive Victim and Witness Protection and Assistance Act of 1982” (H.R. 7191, 97th Cong. (1982)).

\textsuperscript{37} See Riley, supra note 14, at 255-57 (describing House, Senate drafts). Both drafts included a prohibition on knowingly using physical force, intimidation, threats, or misleading conduct and actions which caused a person to withhold testimony, alter or destroy documents. See id. (discussing legislative drafts, debate). Although the House draft also served to amend 18 U.S.C. § 1503 by removing all references to witnesses, neither the House nor the Senate drafts expressly stated that the new witness tampering law would preclude prosecution of tampering under the Omnibus Clause of § 1503. See Riley, supra note 14, at 256-57 (discussing Congressional intent). See also S. 2420, 97th Cong. § 201 (1982); H.R. 7191, 97th Cong. § 3 (1982).
U.S.C. § 1512. Under this new law, Congress changed the parameters governing the prosecution of witness tampering by eliminating the burden to prove that a defendant acted with the intent to obstruct justice, by criminalizing tampering of any person, and by eliminating the requirement that a judicial proceeding be pending at the time of the offense. By enacting § 1512 and streamlining the process of witness tampering prosecution, Congress gave prosecutors a more effective tool to help deter witness tampering conduct against persons involved in, and vital to, federal criminal investigations. Under § 1503 Congress provided only an ax to fight witness tampering, but under § 1512 it gave prosecutors a scalpel.

D. Judicial Interpretation of 18 U.S.C. § 1512

The Second Circuit was the first to offer judicial analysis of § 1512 when the court in United States v. Hernandez held that Congress intended § 1512 to be the sole means of prosecuting witness tampering. Of critical importance to the Hernandez court was the vast increase in the ability to bring prosecutions for witness tampering due to the diminished requirement of criminal activity. The court also emphasized that the all-encompassing nature of § 1512 offered expansive protection to those involved in any federal criminal investigation, particularly when compared with the limited coverage offered by § 1503.

Although other circuits that analyzed the applications and impact of § 1512 did not conclude that Congress intended witness tampering to be prosecuted exclusively under § 1512, the prevailing judicial conclusion was that § 1503 no longer provided an effective weapon to prosecutors in


40 See generally Pesce, supra note 6, at 1426 (concluding 18 U.S.C. § 1512 offered stronger witness protection, lower burden of proof than existing laws).

41 730 F.2d 895 (2d Cir. 1984).

42 See id. at 898 (holding statute plain language proves intent to limit tampering prosecution to 18 U.S.C. § 1512). In analyzing whether § 1503 still applied to “witness harassment”, the Hernandez court went as far as to claim such an argument “defies common sense” and “is also contrary to the legislative history of Pub. L. No. 97-291.” Id. at 899.

43 See id. at 898 (noting lower threshold of criminal activity required in prosecution under 18 U.S.C. § 1512). The court noted that § 1503 only criminalized influencing witnesses by corruption, threats, or force, while § 1512 also criminalized intimidation or harassment. Id. While intimidation and harassment could not be prosecuted under § 1503, thus allowing greater threatening conduct without the threat of prosecution, such conduct was specifically targeted under § 1512, thereby allowing a prosecutor to intervene in greater instances of potentially violent behavior. See id.

44 See id. (discussing 18 U.S.C. § 1512 protection of potential witnesses and witnesses whose testimony may be inadmissible at trial).
preventing witness tampering. The Fifth Circuit’s decision in Wesley, for instance, expressly agreed with the conclusion reached by the Second Circuit, that § 1512 was the preferable means for prosecuting tampering. Meanwhile, the Ninth Circuit in Lester recognized that the specific goal of § 1512 improved the coverage afforded witnesses. While recognizing the benefits offered by § 1512, both the Fifth and Ninth Circuits nevertheless concluded that § 1503 still criminalized witness tampering. Specifically, both circuits expressed concern that a “statutory gap” would exist if § 1503 no longer applied to witness tampering prosecutions.

In response to the confusion illuminated by the Fifth and Ninth Circuits regarding the existence of a statutory gap, Congress amended § 1512 to include the prohibition of non-coercive witness tampering. The 1988 amendment changed the language of § 1512(b) from “or threatens another person” to “threatens, or corruptly persuades another person,” thereby making § 1512(b) applicable to non-coercive forms of witness tampering.

Federal courts have divided over whether non-coercive conduct that does not fall within the definition of ‘misleading conduct’ (and thus is not criminal under 18 U.S.C. (§) 1512(b)) can by prosecuted under the residual clause of 18 U.S.C. (§) 1503, which prohibits corrupt endeavors to influence, obstruct, or impede the due administration of justice. It is intended that culpable conduct that is not coercive

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45 See United States v. Lester, 749 F.2d 1288, 1292 (9th Cir. 1984) (recognizing Congressional rationale in enacting 18 U.S.C. § 1512 was to “strengthen existing legal protections for victims and witnesses of Federal crimes.”) (quoting S. REP. No. 97-532, at 9 (1982), reprinted in U.S.C.C.A.N. 2515); Wesley, 748 F.2d at 964 (“The safeguards afforded by § 1512 are both more extensive and more detailed than those given by § 1503.”).

46 See Wesley, 748 F.2d at 964 (concluding 18 U.S.C. § 1512 offers improved witness tampering protection).

47 See Lester, 749 F.2d at 1293 (noting 18 U.S.C. § 1512 ability to specifically target certain forms of witness tampering).

48 See id. at 1295 (holding Congress did not intend to limit general coverage afforded obstruction of justice); Wesley, 748 F.2d at 964 (holding Congress did not intend 18 U.S.C. § 1512 to exclusively prosecute tampering).

49 See Lester, 749 F.2d at 1293-94 (concluding 18 U.S.C. § 1503 still applied to non-coercive witness tampering); Wesley, 748 F.2d at 964 (holding same). In analyzing § 1512, the Wesley court concluded that the language of the statute did not address non-coercive forms of witness tampering such as “urging and advising” a witness not to testify. See Wesley, 748 F.2d at 964. The court recognized that if the enactment of § 1512 meant that § 1503 no longer applied to any form of witness tampering, and § 1512 did not criminalize non-coercive witness tampering, a statutory gap existed that Congress could not have intended. See id. Similarly, the Lester court recognized that § 1512 applied to intimidation, physical force, threats or misleading conduct, but that § 1503 continued to apply to all forms of non-coercive tampering. See Lester, 749 F.2d at 1293-94. The court’s conclusion was that such a gap left, “inventive tampering by other means to section 1503.” Id. at 1295.


Not only did the 1988 amendment serve to close the statutory gap perceived by the Fifth and Ninth Circuits, but the language used by Congress during the amendment process once more reaffirmed that the purpose of § 1512 was to provide comprehensive protection for witnesses, even to the exclusion of all other existing law on the subject.\(^5\)

Regardless of the seemingly clear direction provided by Congress' 1988 amendment to § 1512, judicial confusion persisted as to the continued application of the Omnibus Clause of § 1503 in witness tampering prosecutions.\(^5\) In United States v. Masterpol,\(^5\) the Second Circuit considered whether false statements made without intimidation or harassment were prosecuted solely under § 1512, or whether § 1503 continued to criminalize such conduct.\(^5\) Following the precedent established in Hernandez, the court held that not only should Hernandez not be narrowly construed, but that the 1988 amendment to § 1512 conclusively established that witness tampering should no longer be prosecuted under the Omnibus Clause of § 1503.\(^5\)

The Masterpol holding was followed by the Ninth Circuit when it held in United States v. Aguilar\(^5\) that § 1512 now applied to non-coercive witness tampering.\(^5\) Despite the fact that Aguilar recognized § 1512 now provided protection from all forms of witness tampering, the court did not overrule its earlier holding in Lester that the conduct at issue in Aguilar, which occurred five months before the 1988 amendment to § 1512, made the amended statute inapplicable.\(^5\) Although not able to overrule Lester,


\(^5\) See id at 266-71 (discussing judicial reaction following 1988 amendment of 18 U.S.C. § 1512).

\(^5\) See id. at 763. The defendant, Nicholas Masterpol, was convicted of obstruction of justice under 18 U.S.C. § 1503 for urging two witnesses to lie during the sentencing phase of an unrelated federal matter. Id. at 761-62. On appeal, Masterpol argued that his conduct was no longer covered under § 1503, and therefore his conviction was improper. See id. at 762. The government's principle argument was that non-coercive witness tampering conduct continued to fall under § 1503, and therefore the conviction was proper. See id. at 763.


\(^5\) See id. The defendant in Aguilar, a Federal District Court Judge, was found guilty of making false and misleading statements to FBI agents who would later testify before the Grand Jury charged with his investigation. See id. at 1483. Judge Aguilar was charged with obstruction of justice under the Omnibus Clause of § 1503 and was found guilty at
the Aguilar court nevertheless provided clarification regarding the future of witness tampering prosecutions in the Ninth Circuit by holding that not only did the 1988 amendment to § 1512 obviate the conflict between the Ninth Circuit's holding in Lester and the Second Circuit's holding in Hernandez, but that § 1512 now afforded extensive protection from witness tampering conduct. 60 Ultimately, the Ninth Circuit adopted a middle ground regarding its interpretation of the applicability of § 1512 by holding that while the 1988 amendment did not prevent a witness tampering prosecution under the Omnibus Clause of § 1503, the 1988 amendment to § 1512 brought non-coercive forms of witness tampering under the purview of § 1512. 61

Even after the 1988 amendment to § 1512, and the analysis provided in Masterpol and Aguilar, other circuits continued to refute the conclusion that the expansive coverage § 1512 afforded witness tampering eliminated the applicability of all other statutes on the subject. 62 In a series of cases that followed the 1988 amendment to § 1512, prosecutors continued to prosecute witness tampering under either § 1503 or § 1512, even while recognizing that § 1512 offered greater protection for witnesses and victims. 63 The court in Kenny, for instance, focused solely on the fact that

trial. Id. On appeal, the Ninth Circuit considered whether Judge Aguilar was properly charged under § 1503, or whether he should have been indicted under § 1512 because his statements were made to potential witnesses and had the effect of influencing their testimony. See id. at 1484. The court ultimately held that neither § 1503, nor § 1512 applied to Aguilar's conduct. See id. at 1483-86.

60 See id. at 1485 (recognizing expanded protection under 18 U.S.C. § 1512 resolved Lester concerns). The court recalled the rationale of Lester and how that opinion recognized that § 1512 offered protection from intimidation and harassment, while § 1503 punished alternative forms of non-coercive witness tampering. Id. In viewing § 1512 following the 1988 amendment, however, Aguilar admitted that "Congress obviated this conflict between the Ninth and Second Circuits by amending section 1512 to cover specifically non-coercive witness tampering." Id. By acknowledging in Lester that the enactment of § 1512 afforded protection from intimidation, physical force, threats or misleading conduct, and then concluding in Aguilar that § 1512 now also criminalized forms of non-coercive witness tampering, the Ninth Circuit can be fairly said to have joined the Second Circuit in the conclusion that § 1512 now afforded the most expansive protection from witness tampering. See id. (analyzing additional protections from witness tampering under post-1988 version of 18 U.S.C. § 1512); Lester, 749 F.2d at 1293-94 (recognizing witness tampering methods covered under 18 U.S.C. §§ 1503, 1512).

61 Compare United States v. Khatami, 280 F.3d 907, 914 (9th Cir. 2002) ("Accordingly we join with all the other circuits that have considered this issue and hold that non-coercive attempts to persuade witnesses to lie to investigators violate 18 U.S.C. § 1512(b)") with United States v. Ladum, 141 F.3d 1328, 1338 (9th Cir. 1998) ("Sections 1503 and 1512 are certainly capable of coexistence. For this reason, finding repeal is appropriate only if Congress clearly intended that there be one.").


because the language of § 1503 was unchanged by the 1988 amendment to § 1512, that § 1503 still applied to acts, such as witness tampering, that generally obstructed justice. The Maloney and Moody courts adopted a similar approach when considering whether § 1503 still applied to witness tampering by holding that the broad nature of § 1503 operated to allow its continued role in the prevention of tampering.

E. Conclusion

The early judicial interpretation of § 1512 reached the conclusion that Congress provided a more effective tool by which to prosecute witness tampering. The initial language used in § 1512, as well as the amendment added in 1988 to eliminate the “statutory gap” that concerned some courts, offered comprehensive protection for all persons involved in assisting criminal investigations. The question yet to be resolved is why prosecutors continue to operate under the statutory framework of § 1503 which requires such additional proof as a pending judicial proceeding and that the victim was a witness who did, or will, testify at trial. Such requirements still necessary in a § 1503 prosecution only make the job of the prosecutor more burdensome and allow for the increased likelihood of an unsuccessful prosecution. If witness tampering were prosecuted solely


See Kenny, 973 F.2d at 342 (rejecting argument that witness tampering exclusively prosecuted under 18 U.S.C. § 1512). In making its ruling, the court emphasized that merely because § 1512 specifically targeted witness tampering did not necessarily preclude “prosecution under a broader statute.” Id.

See Maloney, 71 F.3d at 659 (“The existence of a more narrowly tailored statute does not necessarily prevent prosecution under a broader statute, so long as the defendant is not punished under both for the same conduct.”) (quoting Kenny, 973 F.2d at 342); Moody, 977 F.2d at 1424 (holding 18 U.S.C. § 1503 “is broad enough to cover such proscribed acts against witnesses.”).


under § 1512, a likely result would be the realization by prosecutors that § 1512 provides a higher likelihood of success than prosecutions under § 1503 because of the lower threshold of criminal activity that must occur, as well as the ability to target and deter a greater variety of witness tampering behavior such as non-coercive conduct which interferes with a criminal investigation. The following hypothetical fact pattern and prosecution is set forth to better illustrate the argument that prosecutors should operate only under the parameters set forth by § 1512, and, specifically, when encountering the conduct at issue here, the parameters of § 1512(b)(2)(A) and § 1512(b)(3).

II. MR. FITZGERALD AND HIS THREE RUNNERS

Jack "Mickey" Fitzgerald is the boss of a mafia enterprise based out of the south side of Chicago. Fitzgerald’s operation derives its main source of income from a smuggling and distribution ring that brings in illegal weapons and controlled substances from several towns and waterways in Canada. As a cover for his illegal activities, Fitzgerald owns and operates a chain of theme restaurants in Chicago, St. Louis, and Pittsburgh that are based on famous sports figures from each city. The enterprise runs smoothly and is organized in a pyramid-like structure. The organization’s base level employees are runners who pick up deliveries of weapons and drugs from Canada and then transport the shipments to a basement in one of the three restaurants. The middle tier of the organization is comprised of the more trusted associates of Fitzgerald, known as “bean counters”, who are responsible for ensuring the accuracy of each shipment and the money each sale brings the organization and are stationed above the runners. Fitzgerald and two close relatives sit atop the organization, where they develop new business contacts and maintain existing relationships.

For more than two years, Fitzgerald and his organization have been the subject of a joint investigation by the Bureau of Alcohol, Tobacco, Firearms, and Explosives (“ATF”) and the Federal Bureau of Investigation (“FBI”). The investigation, however, has yet to yield any arrests or useful insider information on the workings of the organization. In fact, the government has not been able to present any evidence whatsoever to a grand jury. However, a major break in the government’s case came when a car containing three of Fitzgerald’s runners – Smith, Riley, and Jones – was

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The following hypothetical is entirely fictional and is not adopted from any case or other form of legal research material. Any similarity of the conduct illustrated within the hypothetical to present or past criminal investigations, or to popular culture entertainment, is entirely coincidental.
pulled over for speeding ten miles outside of Chicago. A legal search of the vehicle revealed five MAC-10 "street-sweepers", an illegal semi-automatic weapon, as well as small glassine bags that contained methamphetamine, or angel dust, an illegal controlled substance. After police learned that all three worked as cooks in Fitzgerald’s Chicago restaurant, the FBI was contacted to conduct any interrogation. The FBI met with all three runners and questioned them extensively regarding their involvement in Fitzgerald’s organization until each eventually requested an attorney.

The following day, Smith, Riley, and Jones had their initial appearance in federal court on charges of possession of illegal semi-automatic assault weapons under 18 U.S.C. § 922(v)(1), and possession of controlled substances with intent to distribute under 21 U.S.C. § 841(a)(1). All three are released on conditions which included reporting twice-weekly to a pre-trial services officer. For the three weeks following their release, each attended their pre-trial services meetings as required. During this time, Smith, with his attorney present, voluntarily met with FBI agents involved in the investigation of Fitzgerald and agreed to wear an electronic listening device while at work.

Having discovered that Smith, Riley, and Jones were arrested and interrogated, Fitzgerald invited his three runners to his apartment overlooking Lake Michigan to talk about what transpired the night of their arrest. While talking about the arrest and FBI questioning, Fitzgerald reminded his runners of the value of loyalty and added, “It’s such a shame when I have to deal with someone who decides to turn on us since it usually ends up bad for the other guy, but I always seem to get over it.” Following dinner, Fitzgerald invited the runners to stay and watch the movie The Godfather on his new entertainment center. When the movie turned to a scene that discussed the discovery of a government informant within the Corleone organization, Fitzgerald casually mentioned, “How they handle this kind of thing in the movies is ridiculous. Everything is so neat, clean, and apparently painless, but you guys know that’s not how it is in the real world.” Because of the listening device Smith wore to work that afternoon, the FBI was able to create a clear and audible tape-recording of everything that was said throughout the evening.

Over the next two weeks, Smith, Riley, and Jones failed to report to their meetings with pre-trial services, causing the FBI to search for them. After searching for more than one week, the FBI failed to find them, but had insufficient evidence to connect their disappearance to Fitzgerald. The statements recorded by Smith's listening device, however, led to the determination that Fitzgerald's two statements likely constituted witness tampering, thereby prompting the FBI to execute a raid on the Chicago restaurant and arrest Fitzgerald.
III. THE PROSECUTION OF MR. FITZGERALD


As illustrated by earlier analysis, if the prosecutor elects to charge Fitzgerald under § 1503, he will be required to show: (1) the existence of a pending judicial proceeding of which Fitzgerald was aware; (2) Fitzgerald’s specific intent to influence a witness; and (3) that Smith, Riley, or Jones would be, or Fitzgerald believed they would be, witnesses in the pending judicial proceeding. In looking at the prosecutor’s burden, it is likely that Fitzgerald can argue that at least two, possibly all three, elements cannot be established.

The first element the government must prove, that there was a pending judicial proceeding of which Fitzgerald was aware, cannot be demonstrated. The night Fitzgerald made the two statements at issue to his three runners, he was not under arrest, he was not on pre-trial release, and he was not under investigation or indictment by a grand jury. While Fitzgerald was certainly the subject of an ongoing and massive federal investigation, investigations are not considered pending proceedings under § 1503. To satisfy this first element of § 1503, the government would, at a minimum, have to establish that Fitzgerald was the subject of a grand jury investigation, something the government cannot demonstrate.

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71 See United States v. Williams, 874 F.2d 968, 977 (5th Cir. 1989) (describing government burden when alleging § 1503 Omnibus Clause violation). See also Pesce, supra note 6, at 1419-21 (analyzing requirements for witness tampering prosecution under 18 U.S.C. § 1503).


75 See United States v. Simmons, 591 F.2d 206, 208 (3d Cir. 1979) (holding interference of criminal investigation alone does not constitute 18 U.S.C. § 1503 violation). “The obstruction of an investigation that is being conducted by the FBI, or by any similar governmental agency or instrumentality, does not constitute a § 1503 violation because such agencies or instrumentalties are not judicial arms of the government ‘administering justice.’ On the other hand, obstruction of a pending grand jury investigation is punishable under the statute.” Id. (citing United States v. Scoratow, 137 F. Supp. 620, 621-22 (W.D.Pa. 1956); United States v. Walasek, 527 F.2d 676 (3d Cir. 1975). There is some disagreement amongst the circuits as to exactly when a judicial proceeding is “pending”,...
While the government cannot prove the existence of a pending judicial proceeding related to Fitzgerald, the government may offer the argument that there was a pending judicial proceeding which Fitzgerald interfered with: the upcoming trials of Smith, Riley, and Jones.\textsuperscript{76} The government’s claim would be premised on the fact that § 1503 criminalizes any attempt to influence, obstruct, or impede the due administration of justice.\textsuperscript{77} As the language of the Omnibus Clause of § 1503 does not require the pending judicial proceeding to be focused on the defendant alleged to have influenced, obstructed or impeded the due administration of justice (i.e., Fitzgerald influencing a witness who will testify in a proceeding of which he is the focus), the government’s argument is at least plausible.\textsuperscript{78} The government, however, may only rely on one case to support such an interpretation of § 1503, and it is doubtful that such an argument would be viewed favorably given the historical interpretation of § 1503 as applied in instances of witness tampering.\textsuperscript{79}

with the Eighth and Eleventh Circuits even holding that 18 U.S.C. § 1503 does not require a pending judicial proceeding. See Lent and Williams, \textit{supra} note 67, at 870-71. See also United States v. Novak, 217 F.3d 566, 571 (8th Cir. 2000) (“There is nothing on the face of [18 U.S.C.] § 1503 requiring a pending judicial proceeding.”); United States v. Veal, 153 F.3d 1233, 1250 n.24 (11th Cir. 1998), \textit{cert denied}, 526 U.S. 1147 (1999) (“In the second and third clauses of [18 U.S.C.] § 1503, the federal interest originates from the status of the targeted person, a federal juror, but no pending judicial proceeding is required.”).\textsuperscript{76} See \textit{Aguilar}, 515 U.S. at 599 (holding defendant must act “with an intent to influence judicial or grand jury proceedings”).\textsuperscript{77} 18 U.S.C. § 1503(a) (2004) (emphasis added). See also United States v. Walasek, 527 F.2d 676, 679 (3d Cir. 1975) (stating intentional withholding of evidence known to be target of grand jury investigation violates 18 U.S.C. § 1503).\textsuperscript{78} See 18 U.S.C. § 1503(a) (2004) (criminalizing attempt to influence, obstruct or impede due administration of justice). The language of the statute does not specify whether the pending proceeding must concern a particular individual, or whether the pending proceeding must merely exist in some form, before a witness tampering prosecution may be brought. See id.\textsuperscript{79} See Pesce, \textit{supra} note 6, at 1425 (discussing Congressional analysis of 18 U.S.C. § 1503). The government would have to overcome the Congressional interpretation of 18 U.S.C. § 1503, that a prosecution for witness tampering could only be brought when witnesses under subpoena in active cases were the victims of tampering. See \textit{id}. See also S. REP. No. 97-532, at 14 (1982), \textit{reprinted in} 1982 U.S.C.C.A.N. 2515, 2520 (“Section 1503 relates to witnesses in criminal proceedings, but only applies to witnesses under subpoena in cases which are still active.”). At the time of this writing, only the case of \textit{United States v. Barfield}, 999 F.2d 1520, 1525 (11th Cir. 1993) was discovered to generally stand for the proposition that the person whose conduct violates § 1503 does not have to be a party to the pending judicial proceeding in order to come under the purview of § 1503. See \textit{id}. The \textit{Barfield} case, however, should not be heavily relied on by the government for two reasons. First, the defendant Barfield was the person accused of obstruction of justice under § 1503, and therefore, can be seen as a person party to a pending judicial proceeding. See \textit{id}, at 1525. In the above hypothetical, however, Fitzgerald has not yet been charged with a crime and is not involved in any judicial procedure. The government’s second problem is that \textit{Barfield} focused on a prosecution under § 1503 for obstruction of justice stemming from Barfield making false statements, not from any form of witness tampering prosecuted under
The government cannot point to the existence of a pending judicial proceeding that relates to Fitzgerald as appears to be required for a § 1503 prosecution.\(^8\) Further, the government’s potential argument that the pending proceedings the court should look to are the three trials of the victims is not likely to be well received by the court.\(^8\) Because the government is hamstrung by the requirement that it prove a pending judicial proceeding that does not yet exist, the first element necessary for a witness tampering prosecution under § 1503 is not likely to be satisfied.\(^8\)

The second element that the government must prove is that Fitzgerald specifically intended to influence a witness to the pending judicial proceeding.\(^8\) If the government takes the position that Fitzgerald intended to influence a witness to a pending judicial proceeding that targets him, the government is not likely to be successful. As shown above, the government cannot point to the existence of a pending judicial proceeding relating to Fitzgerald and would therefore be unable to prove how Fitzgerald intended to influence a witness to that proceeding given that such a proceeding does not exist.\(^8\)

Similarly, the government’s theory that Fitzgerald endeavored to influence, obstruct or impede the due administration of justice by preventing Smith, Riley, or Jones from participating in their upcoming trials is likely to fail.\(^8\) Although the government may claim that Fitzgerald’s statements to his three runners constituted an endeavor to interfere with their individual trials, thus showing that Fitzgerald intended to influence a witness to a pending judicial proceeding, the argument will be unsuccessful.\(^8\)


\(^8\) See discussion supra note 79.

\(^8\) See Fulbright, 105 F.3d at 450 (“It is well settled that conviction under any portion of 18 U.S.C. § 1503 requires the government to prove the existence of a ‘judicial proceeding.’”).

\(^8\) See 18 U.S.C. § 1503(a) (2004); Williams, 874 F.2d at 977 (noting government must establish, “the defendant must have acted corruptly with the specific intent to obstruct or impede the proceeding in its due administration of justice.”).

\(^8\) See Nelson, 852 F.2d at 710 (requiring judicial proceeding in 18 U.S.C. § 1503 prosecution); Lent and Williams, supra note 67, at 876 (describing pending judicial proceeding requirement).


\(^8\) See Kolibash, supra note 68, at 74 (noting threat or force required to trigger protection of 18 U.S.C. § 1503 for witnesses and victims). “Many defendants, aware that overt threats constituted an additional crime, avoided this type of activity. Instead, they resorted to applying subtle pressure to prevent a witness or victim from testifying, or to retaliate against such a witness.” Id. Fitzgerald made two statements that could arguably be seen as threatening, but are not likely to be seen as witness tampering under 18 U.S.C. § 1503. The
The third and final element that the government must prove to successfully prosecute Fitzgerald for witness tampering under § 1503 is that Smith, Riley, or Jones would be, or Fitzgerald believed they would be, witnesses in the pending judicial proceeding.\(^{87}\) Focusing on the government’s argument that Fitzgerald tampered with witnesses who would testify, or who he believed would testify, at a proceeding against him, the government once more cannot satisfy its burden.\(^{88}\) Because there was no pending proceeding that involved Fitzgerald at the time of the alleged tampering, there could be no witnesses who would, or who Fitzgerald believed would, testify.\(^{89}\) Further, even if the government cites the pending trials of Smith, Riley, and Jones as support for the charge that Fitzgerald tampered with witnesses to a pending judicial proceeding, the government must overcome the reality that as none of the three trials has yet to commence, the three runners cannot be shown to be witnesses at their trials.\(^{90}\) Instead, the only argument available to the government is the theory that Fitzgerald believed all three would be witnesses at their trials.\(^{91}\)

The above analysis demonstrates the significant difficulty that faces the government when charging a defendant with witness tampering under the Omnibus Clause of § 1503. Leaving aside the confusing arguments that must be presented to determine whether there is a pending judicial proceeding that the court can look to, the government is still not able to statements, “it’s such a shame when I have to deal with someone who decides to turn on us since it usually ends up bad for the other guy, but I always seem to get over it” and “how they handle this kind of thing in the movies is ridiculous. Everything is so neat, clean and apparently painless, but you guys know that’s not how it is in the real world,” are not direct threats, nor are they a clearly corrupt endeavor to “influence, obstruct, or impede, the due administration of justice” and thus would not fall under the purview of the Omnibus Clause. See 18 U.S.C. § 1503(a) (2004).

\(^{87}\) See Berra v. United States, 221 F.2d 590, 596-97 (8th Cir. 1955) (holding 18 U.S.C. § 1503 prosecution requires victim to be witness to pending judicial proceeding). See also Pesce, supra note 6, at 1419-21 (discussing witness tampering prosecution elements under 18 U.S.C. § 1503).


\(^{89}\) See Falk v. United States, 370 F.2d 472, 476 (9th Cir. 1966) (holding Omnibus Clause requires, at minimum, defendant believe victims to be potential witness in judicial proceeding). See also Pesce, supra note 6, at 1419-20 (discussing elements of witness tampering prosecution under 18 U.S.C. § 1503).

\(^{90}\) See supra, note 79 (discussing difficulty of government’s potential argument that Fitzgerald tampered with witnesses in a proceeding unrelated to his activities and the government’s investigation of those activities).

\(^{91}\) Compare Falk, 370 F.2d at 476 (holding 18 U.S.C. § 1503 applies when defendant believed person would be witness) and S. REP. 97-532, at 14-15 (1982), reprinted in 1982 U.S.C.C.A.N. 2515, 2520-21 ("[18 U.S.C.] § 1503 only applies to witnesses under subpoena in cases which are still active."). If the court followed the Senate’s interpretation of 18 U.S.C. § 1503, a witness tampering prosecution of Fitzgerald would be impossible because the government could not prove that Smith, Riley, and Jones were under subpoena for their trials.
prove all of the elements required to maintain a prosecution under § 1503. The same result, however, does not occur when Fitzgerald is prosecuted under § 1512, as demonstrated below.


Although bringing Fitzgerald’s witness tampering prosecution under § 1512(b) does not guarantee a conviction, the prosecutor is likely able to satisfy his burden. The alleged conduct of Fitzgerald can be seen as either an attempt to cause Smith, Riley, and Jones to withhold their testimony from an official proceeding relating to Fitzgerald’s criminal activities, or as an attempt to hinder, delay, or prevent Smith, Riley, and Jones from communicating with federal officials investigating Fitzgerald’s criminal enterprise. As such, Fitzgerald’s conduct falls under two sections of § 1512(b): § 1512(b)(2)(A), and § 1512(b)(3). To prove that Fitzgerald’s statements constituted witness tampering, the government must prove that Fitzgerald: (1) acted knowingly when engaging in intimidation, physical force, threats, misleading conduct, or corrupt persuasion toward another person; (2) with the intent; (3) to cause or induce Smith, Riley, or Jones to withhold testimony from an official proceeding (under § 1512(b)(2)(A)) or to hinder, delay, or prevent Smith, Riley, or Jones from communicating to a federal law enforcement officer information relating to the commission or possible commission of a federal offense (under § 1512(b)(3)).

The first and most crucial point regarding the government’s prosecution of Fitzgerald for witness tampering under § 1512(b) is that the confusion over whether Smith, Riley, and Jones are witnesses is eliminated and does not play a role in determining the criminality of Fitzgerald’s conduct. Under § 1503, a debate exists regarding the semantics of the term

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95 See Tackett, 113 F.3d at 609 (holding 18 U.S.C. § 1512 not limited to formal witnesses). “The text of the VWPA refers to ‘persons’ rather than ‘witnesses’ or ‘victims’ so as to make clear that it protects anyone who may have knowledge of a crime.” Id. (quoting
“witness” and the distinction between the Congressional mandate that a witness is only someone under subpoena in an active criminal case and the judicial interpretation that a witness can be anyone that a defendant charged with witness tampering believed would be a witness to a pending judicial proceeding.\textsuperscript{96} When analyzing a § 1512(b) witness tampering prosecution, however, no such discussion is necessary.\textsuperscript{97} Unlike a § 1503 prosecution, when a witness tampering case proceeds under § 1512(b)(2)(A) or § 1512(b)(3), the government is not required to prove that the target of witness tampering acts was, or will be, a witness.\textsuperscript{98} Instead, the government may now protect any person, regardless of that person’s involvement in a criminal proceeding.\textsuperscript{99} Because of the expanded protection offered by § 1512(b), the government need only demonstrate that Smith, Riley, and Jones were “persons.”\textsuperscript{100}

The first element the government must, and can, prove under either § 1512(b)(2)(A) or § 1512(b)(3) is that Fitzgerald’s statements to Smith, Riley, and Jones constituted knowing intimidations or threats.\textsuperscript{101} To succeed in proving that Fitzgerald acted knowingly when intimidating or threatening his three runners, the government does not need to prove that Fitzgerald actually intimidated Smith, Riley, and Jones, but only that his conduct had the tendency to do so.\textsuperscript{102} Further, the government need not demonstrate that Fitzgerald issued an express threat, but will satisfy its burden by showing how threatening or intimidating conduct was implied in his statements or conduct towards Smith, Riley, and Jones.\textsuperscript{103}

Although not blunt or straightforward threats, the two statements Fitzgerald made to Smith, Riley, and Jones can logically be seen as an in-
timidation or threat.\textsuperscript{104} By viewing the statements in the context that Fitzgerald placed them, the government can make a believable argument that Fitzgerald was making a subtle, but intentional, threat to his three employees.\textsuperscript{105} The government can argue that by twice referencing the possible violent and dangerous consequences that could befall someone discovered to be a government informant, Fitzgerald knowingly intimidated or threatened Smith, Riley, and Jones.\textsuperscript{106}

The second element the government must prove is that Fitzgerald's statements were made with the intent to cause Smith, Riley, or Jones to withhold testimony from an official proceeding (under § 1512(b)(2)(A)), or to hinder, delay, or prevent Smith, Riley, or Jones from communicating to federal law enforcement officials information relating to Fitzgerald's commission, or possible commission, of a federal offense (under § 1512(b)(3)).\textsuperscript{107} The government will likely be able to successfully argue either that Fitzgerald's statements were made with the intent to at least influence, if not prevent the testimony of Smith, Riley, or Jones, or with the intent to prevent, Smith, Riley, or Jones from having any further communication with the FBI.\textsuperscript{108} The government does not have to prove that Fitzgerald succeeded in influencing or preventing the testimony of Smith, Riley, or Jones, nor that Smith, Riley, or Jones were actually hindered, delayed, or prevented from communicating with the FBI, only that Fitzgerald endeavor to do so.\textsuperscript{109}

Although the government has the difficult task of proving Fitzgerald's intent when he made both statements to Smith, Riley, and Jones, the government's burden can be met without presenting evidence that speaks directly to Fitzgerald's intent.\textsuperscript{110} Judicial analysis of threatening conduct and whether it demonstrates the requisite intent to influence conduct generally focuses on circumstantial evidence and the logical goal sought, not

\textsuperscript{104} See Kolibash, supra note 68, at 74 (noting 18 U.S.C. § 1512 prohibits common defendant tactic of applying subtle pressure to prevent testimony).

\textsuperscript{105} See Lent and Williams, supra note 67, at 886 (discussing 18 U.S.C. § 1512(b) requirement of proof of intimidation, physical force or threats).

\textsuperscript{106} See United States v. Elwell, 984 F.2d 1289, 1294 (1st Cir. 1993), cert. denied, 508 U.S. 945 (1993) (holding veiled statements that did not make direct threat constituted 18 U.S.C. § 1512(b) violation despite disclaimer that statements were not threatening in nature).


\textsuperscript{108} See, e.g., United States v. Victor, 973 F.2d 975, 978 (1st Cir. 1992) (holding defendant's unannounced visit to witness's home and "intrusive search" of home constitute intimidation under 18 U.S.C. § 1512(b)).

\textsuperscript{109} See United States v. Capo, 791 F.2d 1054, 1069-70 (2d Cir. 1986), vacated in part (en banc) 817 F.2d 947 (2d Cir. 1987) (holding unsuccessful attempt to influence witness punishable under 18 U.S.C. § 1512(b)).

\textsuperscript{110} See Lent and Williams, supra note 67, at 886-88 (analyzing state of mind requirement found under 18 U.S.C. § 1512(b)).
necessarily the end result actually achieved.\textsuperscript{111} The government’s task, therefore, is usually satisfied by proving that the defendant was aware that the natural and probable consequences of his actions would be to influence or prevent someone from providing testimony or other forms of assistance to the government.\textsuperscript{112} In the instant hypothetical, the government is likely to argue that Fitzgerald’s conduct points to a deliberate attempt to prevent Smith, Riley, and Jones from offering any assistance to the government, but was done without expressly making such a demand.\textsuperscript{113} Both comments by Fitzgerald were made in the context of what happens when a member of a criminal organization assists the government, and both reference the effects of punishment that the organization chooses to inflict.\textsuperscript{114} Merely by asking the jury members what the natural effect of such comments would be on them, the government should be able to demonstrate that the natural and probable consequence of Fitzgerald’s comments was the influence of Smith, Riley, and Jones’ testimony.\textsuperscript{115}

Although not necessary under § 1512(b)(3), the final element that the government must prove to successfully prosecute Fitzgerald of witness tampering under § 1512(b)(2)(A) is that an official proceeding existed when Fitzgerald’s comments were made.\textsuperscript{116} An official proceeding, although similar in name to the “pending judicial proceeding” required under § 1503, does not denote a courtroom or grand jury proceeding.\textsuperscript{117} To prove an official proceeding exists under § 1512(b), the government must demonstrate, “that at least one of the law-enforcement-officer-communications which the defendant sought to prevent would have been with a federal officer.”\textsuperscript{118} Certainly a formal trial or a grand jury investigation will constitute

\textsuperscript{111} See generally United States v. Maggitt, 784 F.2d 590, 593 (5th Cir. 1986) (noting 18 U.S.C. § 1512(b) analysis should focus on defendant’s endeavor, not defendant’s success).

\textsuperscript{112} See Lent and Williams, supra note 67, at 888 (noting government burden satisfied by demonstrating natural consequence of defendant’s actions would be to influence witness).

\textsuperscript{113} See supra notes 104-107 and accompanying text.

\textsuperscript{114} See supra notes 104-107 and accompanying text.

\textsuperscript{115} See supra notes 104-107 and accompanying text. The government must only convince the jury that the defendant was aware of the natural consequences of his actions, not that the defendant’s actions had any actual effect on the listener. See Maggitt, 784 F.2d at 593. By demonstrating the context in which Fitzgerald made each statement (discussing what generally happens to members of the organization that assist the government and watching a scene in The Godfather depicting physical harm due to a government informant being discovered) the government’s argument that Fitzgerald was aware of the natural consequences is a reasonable one. See Elwell, 984 F.2d at 1294.


\textsuperscript{117} See Fulbright, 105 F.3d at 450 (holding 18 U.S.C. § 1503 requires existence of pending judicial proceeding). See also Fayer, 573 F.2d at 745 (holding 18 U.S.C. § 1503 violation may not relate to an FBI investigation).

an official proceeding. The government, however, may also point to the existence of a federal agency investigation to prove that an official proceeding existed at the time of a defendant’s actions. Here, the government has the benefit of the investigations and trials as to the conduct of Smith, Riley, and Jones, as well as the ongoing joint-federal investigation of Fitzgerald himself, as a means of demonstrating the existence of an official proceeding.

C. Closing Analysis of the Government’s Success

By analyzing the prosecution of witness tampering under both 18 U.S.C. § 1512(b)(2)(A) and 18 U.S.C. § 1512(b)(3), when contrasted with a prosecution under the Omnibus Clause of 18 U.S.C. § 1503, it is readily apparent that a prosecution under § 1512(b) is more easily achieved.

In a witness tampering prosecution under § 1503, the government has two significant hurdles that appear insurmountable. As demonstrated by the mock prosecution of Fitzgerald under § 1503, the government will have difficulty demonstrating the existence of a pending judicial proceeding, as the federal investigation into Fitzgerald’s activities will not satisfy the statutory requirements under § 1503. Likewise, the government must prove that Smith, Riley, and Jones would be, or Fitzgerald believed they would be, witnesses in the pending judicial proceeding. On both elements, the government’s case falters because of the lack of a pending judicial proceeding against Fitzgerald. The government’s best, and likely only, argument that both of the above elements are satisfied appears to be the claim that Fitzgerald tampered with Smith, Riley, and Jones, who would all be witnesses in their own trials. As already discussed, the novelty of such an assertion, as well as the significant amount of speculation and conjecture involved when making it, suggests that the government will be unsuccessful in satisfying its burden of proof that Fitzgerald inter-

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120 See, e.g., Frankhauser, 80 F.3d at 652 (holding FBI investigation constituted official proceeding); Kelley, 36 F.3d at 1128 (holding investigation by Office of Inspector General, U.S. Agency for International Development, constitutes official proceeding); United States v. Gonzalez, 922 F.2d 1044, 1055-56 (2d Cir. 1991) (holding DEA investigation constitutes official proceeding).
122 See supra notes 72-75, 87-91 and accompanying text.
125 See supra notes 72-75 and accompanying text.
126 See supra notes 87-91 and accompanying text.
ferred with witnesses to a pending judicial proceeding when making his two statements to Smith, Riley, and Jones.\textsuperscript{127}

Recalling the analysis of the government’s case against Fitzgerald under both § 1512(b)(2)(A) and § 1512(b)(3), however, leads to a different conclusion. Because § 1512(b)(2)(A) does not require that a judicial proceeding be pending at the time of the tampering, but only that an “official proceeding” be interfered with, the government’s case against Fitzgerald survives even in the absence of a grand jury investigation into his conduct.\textsuperscript{128} By pointing to the ongoing federal investigation of Fitzgerald, the government satisfies its burden of demonstrating that an official proceeding exists.\textsuperscript{129} Under both § 1512(b)(2)(A) and § 1512(b)(3), the government also has the benefit of not having to prove that Smith, Riley, and Jones were “witnesses” to any pending judicial proceeding, but only that they were persons who may have knowledge of a crime and may communicate that knowledge to federal authorities at some time in the future.\textsuperscript{130} Because § 1512(b) focuses on the protection of all persons involved in a criminal matter and not just those designated as witnesses, the government’s case against Fitzgerald survives even though Smith, Riley, and Jones may never testify in any proceeding against Fitzgerald.\textsuperscript{131} Such a statutory framework allows for a much greater chance of success when prosecuting Fitzgerald.

IV. CONCLUSION

By extending comprehensive coverage to all those involved in a federal criminal investigation, and by requiring a lower threshold of investigative activity to be demonstrated, § 1512(b) provides prosecutors with a more useful tool to combat witness tampering. The prosecution of Jack “Mickey” Fitzgerald, while fictional, is only one of many possible scenarios the government may encounter that helps demonstrate why § 1512(b) should be the only statute employed when pursuing witness tampering prosecutions.

\textit{Brian M. Haney}

\textsuperscript{127} See \textit{supra} note 79 (discussing problems in prosecution under 18 U.S.C. § 1503 due to pending judicial procedure requirement).
\textsuperscript{128} See \textit{supra} notes 116-120 and accompanying text.
\textsuperscript{129} See \textit{supra} note 120 and accompanying text.
\textsuperscript{130} See \textit{Tackett}, 113 F.3d at 609 (noting 18 U.S.C. § 1512 requirement that government prove victim a “person” rather than a “witness”).
\textsuperscript{131} See \textit{supra} notes 95-100 and accompanying text.