American Bar Association
www.supremecourtpreview.org

No. 10-5443

In The Supreme Court of the United States

CHARLES FOWLER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF FOR THE PETITIONER

KENNETH S. SIEGEL
Counsel of Record
14502 North Dale Mabry
Tampa, Florida 33618
813-962-6676
Fla. Bar No. 746053
E-mail: simonscrowd@gmail.com

STEPHEN M. CRAWFORD
610 West Bay Street
Tampa, Florida 33606
813-251-2273
Fla. Bar No. 309613
E-mail: stephen_crawford@msn.com

Counsel for Petitioner,
Charles Fowler

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

1. Whether a defendant may be convicted of murder under 18 U.S.C. §1512(a)(1)(C) without proof that information regarding a possible Federal crime would have been transferred from the victim to Federal law enforcement officers or judges.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

STATUTES

TABLE OF AUTHORITIES – Continued

OTHER AUTHORITIES

OPINIONS BELOW

The published opinion of the United States Court of Appeals for the Eleventh Circuit is reported as *United States v. Fowler*, 603 F.3d 883 (11th Cir. 2010) and appears at pages 76 to 86 of the Joint Appendix ("J.A."). The District Court's unpublished bench rulings denying the Petitioner's Motion for Judgment of Acquittal appear at J.A. 46 and 50.

JURISDICTION

The District Court had jurisdiction over this Federal criminal case pursuant to 18 U.S.C. §3231. The United States Court of Appeals for the Eleventh Circuit had jurisdiction over the Petitioner's appeal pursuant to 28 U.S.C. §1291. The Eleventh Circuit issued its opinion and judgment on April 14, 2010, and the Petition for Certiorari was filed on July 13, 2010. This Court granted the Petition on November 15, 2010. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

RELEVANT STATUTORY PROVISION

Section 1512 of Title 18, United States Code, is titled, "Tampering with a witness, victim, or an informant." Subsection (a)(1)(C) provides:

> (a)(1) Whoever kills or attempts to kill another person, with intent to –

(C) prevent the communication by any person 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, parole, or release pending judicial proceedings;

shall be punished as provided in paragraph (3).

STATEMENT OF THE CASE

The Petitioner, Charles Fowler, has presented the following question for this Court's determination: "Whether a defendant may be convicted of murder under 18 U.S.C. §1512(a)(1)(C) without proof that information regarding a possible Federal crime would have been transferred from the victim to Federal law enforcement officers or judges."

The Government must prove as an essential element of the offense that information regarding a possible Federal crime would have been transferred from the victim to Federal law enforcement officers or judges. The Government presented no such proof in its case against the Petitioner.

Early on the morning of March 3, 1998, Officer Christopher Horner of the Haines City Police Department in Polk County, Florida, died of a single gunshot wound to the head. Officer Horner was shot with his own service weapon. At the time of his death,

Officer Horner was patrolling alone at the Oakland Cemetery. See Trial Transcript ("T Tr.") 1 at pp. 39, 41; T Tr. 4 at p. 114.[1]

Just before his death, Officer Horner had notified the Haines City police dispatcher that he was at the Oakland Cemetery – a place where car thieves often abandoned their stolen vehicles – investigating a suspicious vehicle without a visible license tag. There was no further communication from Officer Horner, and his radio silence prompted the shift supervisor, Sgt. Sandra Spicer, to drive to the Oakland Cemetery to investigate. She discovered Officer Horner lying on the ground, with his service weapon under his body. Emergency medical personnel declared Officer Horner dead at the scene. The medical examiner determined that the bullet that caused the officer's death had entered the back left side of his head. T Tr. 1, pp. 41-43, 47, 49-52, 54; T Tr. 2, pp. 26, 31; T Tr. 4, pp. 120, 122.

The Polk County Sheriff's Office ("Sheriff's Office") took control of the investigation. Homicide

---

[1] The trial transcripts have the following numbers in this Brief:

T Tr. 1 – June 9, 2008;
T Tr. 2 – June 10, 2008;
T Tr. 3 – June 11, 2008;
T Tr. 4 – June 12, 2008;
T Tr. 5 – June 13, 2008;
T Tr. 6 – June 16, 2008.

Detective Deanna Pry was initially assigned to lead the investigation. She was removed as lead investigator within a week after becoming angry over the fact that the Sheriff's Office refused to consider whether Officer Horner had committed suicide. The issue of suicide had created a feud among personnel in the Sheriff's Office. Officer Horner's death remained unsolved. T Tr. 5, pp. 36, 40, 55, 56, 58, 60.

There was no significant activity in the investigation until the spring of 2002, when Florida state prisoner Christopher Gamble reached out to local law enforcement officials in an effort to reduce a 20-year armed robbery sentence. Gamble claimed to have knowledge about the death of Officer Horner. Detective Louis Giampavolo, a member of the cold case unit of the Sheriff's Office, interviewed Gamble, but no formal state charges were filed. Gamble's descriptions of events were inconsistent, and he admittedly lied to a Federal Grand Jury in early 2003. T Tr. 4, pp. 169-170, 172, 179, 183; T Tr. 3, pp. 155, 158, 169.

According to Gamble, the events of March 3, 1998, began when he and two friends, Jeffrey Bouiye and Andre Paige, stole a Buick Regal and committed an armed robbery of a Holiday Inn in Dundee, Florida. After the robbery, Gamble, Bouiye and Paige returned to Haines City and decided to rob a bank later that morning. They happened to meet up with the Petitioner and Robert Winston in Haines City. T Tr. 3, pp. 95, 99.

The five men drove to the Oakland Cemetery to discuss the bank robbery, smoke cocaine and marijuana, and listen to music. T Tr. 3, pp. 100, 104, 106. Gamble stated that the Petitioner got out of the car and walked alone to a grove of trees. While the Petitioner was away from the vehicle, Officer Horner drove into the cemetery, turned on the spotlight of his patrol car, and exited from his vehicle. Officer Horner had his pistol in one hand and a flashlight in the other. T Tr. 3, pp. 108-110.

Officer Horner ordered the occupants to get out of their car. Bouiye hid in the car while Gamble, Winston and Paige exited. According to Gamble, the Petitioner attacked Officer Horner from behind and attempted to grab his pistol from him. Gamble, Winston, and Paige joined in the struggle to wrest control of the gun from Officer Horner. T Tr. 3, pp. 129, 131-132.

Gamble stated that Officer Horner surrendered his weapon to the Petitioner. The Petitioner ordered Officer Horner to get down on his knees. Gamble claimed that he did not want Officer Horner to be harmed, and he asked the Petitioner for the gun. According to Gamble, Bouiye yelled at the Petitioner to shoot the "cracker." Gamble asserted that the Petitioner fired one shot into Officer Horner's head. T Tr. 3, pp. 132-133, 137.

Gamble stated that he took Officer Horner's gun from the Petitioner and placed it underneath the officer's body. The five men then left the Oakland Cemetery and dropped their bank robbery plans.

Gamble became angry because Officer Horner's death canceled out the bank heist. T Tr. 3, pp. 140, 147.

On September 19, 2007, a Grand Jury in the Middle District of Florida indicted the Petitioner on two counts. The first count accused the Petitioner of murdering Officer Horner in violation of §1512(a)(1)(C) with the intent to prevent the officer from communicating with a law enforcement officer or judge of the United States about the commission or possible commission of a Federal offense. J.A. 1, 15-17.

The Indictment listed six Federal offenses that allegedly motivated the Petitioner to kill Officer Horner – first, that associates of the Petitioner had violated 18 U.S.C. §1951 by committing an armed robbery of a Holiday Inn in Dundee, Florida, earlier in the morning of March 3, 1998; second, that the Petitioner and others were conspiring to rob a bank later in the morning of March 3, 1998, in violation of 18 U.S.C. §§2113 and 371; third, that the Petitioner and others were conspiring to rob the bank in violation of 18 U.S.C. §1951; fourth, that the Petitioner previously had been convicted of a crime punishable by imprisonment for a term exceeding one year and was in knowing possession of a firearm that had been transported in interstate commerce in violation of 18 U.S.C. §922(g); fifth, that the Petitioner and others were in knowing and intentional possession of cocaine in violation of 21 U.S.C. §844(a); and sixth, that the Petitioner and others were in knowing and intentional possession of marijuana in violation of 21 U.S.C. §844(a). J.A. 15-16.

Count 2 of the Indictment charged the Petitioner with a violation of 18 U.S.C. §924(c)(1)(A) for knowingly using and carrying a firearm in relation to a crime of violence for which he may be prosecuted in a court of the United States. The underlying crimes of violence were the alleged conspiracies to commit robbery in violation of 18 U.S.C. §1951 and to commit bank robbery in violation of 18 U.S.C. §§2113 and 371. Count 2 further alleged that while in the course of using and carrying the firearm, the Petitioner committed murder of Officer Horner as defined in 18 U.S.C. §1111. J.A. 17.

The Petitioner went to trial from June 9 to 17, 2008. J.A. 1-3. The Government did not present any evidence to show that Officer Horner would have transferred information to Federal officers if he had not been killed. There was no evidence, for example, that the Haines City Police Department maintained procedures to contact Federal officers in the event of certain activity in the municipality.

The Petitioner presented three defenses at trial – Officer Horner took his own life; alibi witnesses proved that the Petitioner was nowhere near any of the activity described by Gamble; and Gamble was an unreliable witness not worthy of belief.

To show that Officer Horner may well have committed suicide, the defense presented evidence that he was beset with marital and financial problems and had confided to a Police Department colleague that he was seriously considering taking his own life. T Tr. 4, p. 128.

Other witnesses testified that they had seen or spoken with the Petitioner at or near the time of the murder. The Petitioner's mother testified that the Petitioner was at home at the time of Officer Horner's death. T Tr. 6, pp. 60-90, 112-114, 118. Gamble's credibility was significantly placed at issue. T Tr. 3, pp. 198-235; T Tr. 4, pp. 4-83.

The Petitioner moved for a judgment of acquittal at the close of the Government's case in chief and again at the conclusion of all the evidence. The District Court denied the motions. J.A. 47, 50.

The jury found the Petitioner guilty of both counts on June 17, and sentencing took place on September 18, 2008. The District Court imposed a mandatory life sentence on Count 1 and a consecutive 10-year sentence on Count 2. Final judgment was entered on September 19, and the Petitioner appealed to the Eleventh Circuit. J.A. 4.

The Petitioner argued on appeal that the Government had presented insufficient evidence of a violation of §1512(a)(1)(C). The Petitioner asserted that the Government failed to prove that information about a possible Federal crime would have been communicated to Federal law enforcement officers if the murder had not occurred. J.A. 81.

The Eleventh Circuit rejected the Petitioner's argument in its published decision of April 14, 2010. In its description of §1512(a)(1)(C), the Eleventh Circuit quoted a portion of the statute, including the language regarding the intent to "prevent the

communication by any person to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense . . . " J.A. 80. However, in the very next sentence of its Opinion, the Eleventh Circuit identified the facts that the Government must establish "to prove a violation of §1512(a)(1)(C) . . . " Significantly, this description excluded any reference to "a law enforcement officer or judge of the United States." J.A. 80.

Instead, the Eleventh Circuit stated that the only facts that the Government needed to prove were "(1) the defendant knowingly and willfully killed a person; and (2) the defendant killed the person with the intent to prevent the communication of information 'relating to the commission or possible commission of a [f]ederal . . . offense . . . ' 18 U.S.C. §1512(a)(1)(C)." J.A. 80. The Eleventh Circuit's description of the essential elements ignored the clear and specific statutory requirement regarding Federal officers.

According to the Eleventh Circuit, the Petitioner improperly focused on the victim's state of mind instead of the defendant's. The Eleventh Circuit stated:

> Petitioner's sufficiency argument is based on his incorrect assertion that the federal nexus required by §1512(a)(1)(C) requires proof that the victim would have likely communicated information relating to the possible commission of a federal offense to federal

> authorities. In construing the statute this way, Petitioner focuses on the victim's state of mind instead of, as the statute requires, the defendant's state of mind. His approach has been rejected by the majority of our sister circuits and by this court in *United States v. Veal*, 153 F.3d 1233, 1251-52 (11th Cir. 1998), which addressed the similarly-worded §1512(b)(3).

J.A. 81-82.

SUMMARY OF ARGUMENT

Title 18 U.S.C. §1512(a)(1)(C) makes it a Federal crime to kill or attempt to kill another person "with intent to . . . prevent the communication by any person to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense . . . " In the case sub judice, the Government's proof was insufficient to convict the Petitioner of a violation of 18 U.S.C. §1512(a)(1)(C) because the Government offered no evidence from which a reasonable jury could conclude, beyond a reasonable doubt, that the Petitioner killed Officer Horner with the intent to prevent a communication to Federal officials about the commission or possible commission of a Federal crime.

The Eleventh Circuit held that the Government satisfied its burden of showing that the Petitioner violated Section 1512(a)(1)(C), even without proof that

the victim, Officer Horner, would have communicated information to a Federal officer or judge. The Eleventh Circuit ruled that "possible or potential communication to federal authorities of a possible federal crime is sufficient for purposes of section 1512(a)(1)(C)." The Eleventh Circuit permitted the conviction to stand on the basis of mere possibility or potential. Mere possibility or potential is insufficient under the statute.

The Eleventh Circuit's interpretation of §1512(a)(1)(C) violates basic tenets of statutory interpretation. The analysis of the Eleventh Circuit eliminates the requirement that the victim communicate information to a Federal officer. Section 1512(a)(1)(C) requires more than proof that the defendant acted with intent to prevent communication about a *possible* Federal crime – it requires proof that the communication would have been to a Federal officer or judge. Such Federal officers are specifically defined in §1515(a)(4). By allowing a conviction to stand on nothing but a possible or theoretical communication, the Eleventh Circuit's opinion reads this critical element out of the statute.

In addition to failing to give effect to multiple terms of the statute, the opinion below inserts additional terms as well. While §1512(a)(1)(C) allows a conviction based on proof that the defendant sought to prevent a communication about a "possible" Federal offense, the statute does not contain the word "possible" as a modifier of "communication." A communication to a Federal officer or judge is the critical

element that brings the statute within the realm of Congress's regulatory powers; the statute should not be read so broadly as to render its connection to the Federal Government merely a theoretical possibility.

Other Circuits have interpreted the statute to require at least a likely, if not imminent, communication between the victim and the Federal officer. The decisions of the Fifth Circuit in *United States v. Causey*, 185 F.3d 407 (5th Cir. 1999), and the Second Circuit in *United States v. Lopez*, 372 F.3d 86 (2d Cir. 2004), properly apply all elements of §1512(a)(1)(C) and should be adopted by this Court in requiring proof of an actual or likely communication between the victim and Federal authorities regarding the commission or possible commission of a Federal crime.

Causey and *Lopez* require a nexus between the obstructive conduct and the communication of information from the victim to the Federal officer. If there is no communication, there is no nexus. The nexus analyses in *Causey* and *Lopez* are consistent with this Court's nexus decisions in *United States v. Aguilar*, 515 U.S. 593 (1995) and *Arthur Andersen, LLP v. United States*, 544 U.S. 696 (2005) (which involved another subsection of §1512). The nexus requirement guards against convictions that rest on speculation or guesswork as to the defendant's intent.

By divesting the offense conduct from the Federal interest underlying the statute, the opinion below raises significant questions about the extent of

Federal power, which are easily avoided by interpreting §1512(a)(1)(C) to require proof of an actual or likely communication between the victim and the Federal official.

Under the Petitioner's construction of the statute, it is clear that the Government failed to present sufficient evidence by which any reasonable jury could have found the Petitioner guilty of violating §1512(a)(1)(C). The robbery of the Holiday Inn in Dundee, Florida, constituted one of the predicate Federal crimes for the Indictment against the Petitioner. Yet, the Government presented no evidence at all to suggest that a Federal agency played any part in the investigation of that offense, or that the Federal Government would have been called to address the other offenses listed in the Indictment.

There was no testimony or exhibit which dealt even remotely with the subject of Officer Horner transferring information to Federal authorities. There was no evidence, for example, of any practices whereby Federal agents met periodically with the Haines City Police Department; Polk County Sheriff's Office; or representatives from the Polk County State Attorney's Office. Without such proof, the Government's evidence was insufficient to establish the nexus between the obstructive conduct and the transfer of information from local law enforcement to a Federal official.

ARGUMENT

I. The Eleventh Circuit's interpretation of §1512(a)(1)(C) is incompatible with basic principles of statutory construction.

The statute at issue here – 18 U.S.C. §1512(a)(1)(C) – requires that a defendant act with the intent to prevent communication by any person (1) to a "law enforcement officer or judge of the United States", (2) "of information relating to the commission or possible commission of a Federal offense. . . ." A "law enforcement officer" is defined as "an officer or employee of the Federal Government, or a person authorized to act for or on behalf of the Federal Government or serving the Federal Government as an adviser or consultant." 18 U.S.C. §1515(a)(4).

By its plain terms, §1512(a)(1)(C) requires that the Government prove more than that the defendant intended to impede communications relating to the possible commission of a Federal offense; in addition, the Government must prove beyond a reasonable doubt that the communication would have been to a Federal officer, or as the statute provides, "a law enforcement officer or judge of the United States . . . "

Notwithstanding this plain language, the Eleventh Circuit, perhaps joined by the Fourth and Eighth Circuits,[2] decided that §1512(a)(1)(C) does not

[2] See *United States v. Harris*, 498 F.3d 278 (4th Cir. 2007); *United States v. Wright*, 536 F.3d 819 (8th Cir. 2008).

require proof of a likely communication of information to Federal authorities. According to the Eleventh Circuit, a possible or potential communication to Federal authorities "is sufficient for purposes of section 1512(a)(1)(C)." J.A. 85.

Had Congress intended to permit Federal jurisdiction over any act intended to prevent communication about the "commission or possible commission of a Federal offense," it would not have required that the communication be "to a law enforcement officer or judge of the United States." §1512(a)(1)(C). The statute requires both a Federal crime and communication to Federal authorities.

Instead of giving meaning to every word in §1512(a)(1)(C) and the definitions in §1515(a)(4), the Eleventh Circuit effectively made superfluous the statutory definition of "a law enforcement officer" in §1515(a)(4), making the statute apply whenever a defendant acts with the intent to prevent communication with *any* law enforcement officer, Federal or otherwise, about a potential Federal offense. See, e.g., *Marbury v. Madison*, 5 U.S. 137, 174 (1803) ("The subsequent part of the section is mere surplusage, is entirely without meaning, if such is to be the construction . . . it cannot be presumed that any clause . . . is intended to be without effect; and therefore such a construction is inadmissible, unless the words require it."); *Beck v. Prupus*, 529 U.S. 494, 506 (2000) (long-standing canon of statutory construction is that statutory terms are not to be construed so as to render any provision of statute meaningless or

superfluous); *Colautti v. Franklin*, 439 U.S. 379, 392 (1979) (it is an "elementary canon of construction that a statute should be interpreted so as not to render one part inoperative.").

The opinion below further errs by judicially inserting the word "possible" before the word "communication" in the statute. Congress employed the word "possible" in §1512(a)(1)(C) when it referred to "the commission or possible commission of a Federal offense . . . " In the context of "possible commission," the word "possible" means a future event or an event that already has occurred and could constitute a Federal offense upon full investigation. However, Congress did not use the word "possible" at the beginning of subsection (C) before the word "communication." Therefore, while the commission of a Federal offense might be "possible," there must be actual communication to a Federal official.

Although Congress provided for certain contingencies where commission of a Federal offense was concerned, it did not see fit to include the word "possible" as a modifier of communication. "Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983); *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 452 (2002). Congress therefore intended that the communication to be protected would be certain or likely, not merely possible.

In deciding that a possible or potential communication was sufficient under §1512(a)(1)(C), the Eleventh Circuit ignored the language of the statute and opened the door for convictions which Congress never intended. "It is the '"cardinal principle of statutory construction" . . . [that] [i]t is our duty "to give effect, if possible, to every clause and word of a statute" . . . rather than to emasculate an entire section.' *United States v. Menasche*, 348 U.S. 528, 538 (1955) (quoting *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30 (1937), and *Montclair v. Ramsdell*, 107 U.S. 147, 152 (1883))." *Bennett v. Spear*, 520 U.S. 154, 173 (1997). To prevent the emasculation of §1512(a)(1)(C), this Court should adopt the Second Circuit's decision in *United States v. Lopez,* 372 F.3d 86 (2d Cir. 2004) (as discussed in Part II of this Argument), as a correct interpretation of the statute and hold that the Government must adduce evidence that the victim plausibly would have turned to Federal officials. The Government's evidence must demonstrate "a realistic likelihood" of such communication, and not merely a "theoretical possibility."

II. The decisions of the Fifth Circuit in *Causey* and the Second Circuit in *Lopez* correctly apply the requirements of §1512(a)(1)(C).

Two Courts of Appeals – the Fifth Circuit in *United States v. Causey*, 185 F.3d 407 (5th Cir. 1999), and the Second Circuit in *United States v. Lopez*, 372 F.3d 86 (2d Cir. 2004) – have reversed convictions

under §1512(a)(1)(C) because the Government presented insufficient evidence to establish that the victims in those cases would have transferred information to Federal officials. *Causey* and *Lopez* properly apply the essential elements of the statute and should be adopted by this Court as accurate expressions of the standards governing cases under §1512(a)(1)(C).

In *Causey*, New Orleans Police Officer Len Davis targeted Kim Marie Groves for assassination because she had filed a complaint with the Police Department's internal affairs division and accused him of brutality. Davis enlisted Paul Hardy and Damon Causey in his murder plot. The three men planned the murder and subsequent cover up. Hardy was the trigger man who actually shot Ms. Groves. Id., 185 F.3d at 411.

The three men were indicted in United States District Court on multiple charges – denying Ms. Groves her civil rights in violation of 18 U.S.C. §§241 and 242, and killing Ms. Groves with the intent to prevent her from communicating information to a Federal law enforcement officer relating to the commission of a Federal offense in violation of §1512(a)(1)(C). The jury found Davis and Hardy guilty on all counts and Causey on just the civil rights offenses. Id., 185 F.3d at 411.

The defendants appealed, and the Fifth Circuit reversed the convictions against Davis and Hardy under §1512(a)(1)(C). The Fifth Circuit held that "the

evidence was not sufficient to establish the federal nexus required by §1512." Id., at 422.

The basis for the Fifth Circuit's decision was the absence of any communication between Ms. Groves and Federal law enforcement officers. Although "the evidence was sufficient to establish that Groves's police brutality complaint concerned a federal crime and that the defendants intended to interfere with Groves's pursuit of that complaint," the crucial consideration in the Fifth Circuit's view was the fact that "the only agency to which Groves had complained was the New Orleans Police Department." Id., at 423.

The Fifth Circuit found nothing in the record to support jury findings that "any of the persons to whom Groves complained were federal officers" or "that Groves had any intention of communicating with any federal law enforcement officer prior to her death." Further, there was no evidence to support an inference that "Davis intended to prevent Groves from pursuing her complaint beyond the New Orleans Police Department IAD and communicating with authorities who were in fact federal officers." Id., at 423.

In the case at bar, just like in *Causey*, there is nothing in the record to support jury findings that any of the persons to whom Officer Horner normally reported were Federal officers, or that Officer Horner intended to communicate with any Federal law enforcement officers prior to his death. Further, there was no evidence to support an inference that the

Petitioner intended to prevent Officer Horner from reporting any crime to any law enforcement agency outside Polk County, Florida.

The Fifth Circuit in *Causey* focused its attention on the fact that the victim, Ms. Groves, had not sought out Federal authorities or shown any intention of doing so. Because communication had not occurred and had not appeared likely to occur, the Government failed to establish the nexus between the obstructive conduct and the particular type of proceeding which §1512(a)(1)(C) was intended to protect.

The Eleventh Circuit decision in the present case is plainly at odds with *Causey*. The Eleventh Circuit criticized the Petitioner for "his incorrect assertion that the federal nexus required by §1512(a)(1)(C) requires proof that the victim would have likely communicated information relating to the possible commission of a federal offense to federal authorities." According to the Eleventh Circuit, the Petitioner's construction of the statute mistakenly "focuses on the victim's state of mind instead of, as the statute requires, the defendant's state of mind. This approach has been rejected by the majority of our sister circuits and by this court in *United States v. Veal*, 153 F.3d 1233, 1251-52 (11th Cir. 1998), which addressed the similarly-worded §1512(b)(3)."

Causey, however, did focus on the state of mind of Ms. Groves and the fact that she had not communicated with Federal authorities. The absence of any actual or likely communication in *Causey* meant that

the Government failed to establish the nexus under §1512(a)(1)(C). Therefore, the Eleventh Circuit's ruling, according to the logic of *Causey*, is incorrect and must be reversed.

Like *Causey*, the Second Circuit's *Lopez* case involved a victim who went to local police for help but never turned to Federal law enforcement. Like the Fifth Circuit in *Causey*, the Second Circuit held in *Lopez* that the Government failed to prove the "requisite federal nexus." See *Lopez*, 372 F.3d at 91.

The Second Circuit declared that "there must be evidence – not merely argument" of an individual's possible cooperation with Federal authorities. "In other words, the government must adduce evidence from which a rational juror could infer that the victim plausibly might have turned to federal officials." Id., at 92.

Carlos Lopez, a Brooklyn drug dealer, threatened an individual named Edward Montalvo at gunpoint. Montalvo reported the incident to the New York City police and expressed fear that Lopez would kill him. Montalvo pleaded with local authorities to prosecute Lopez for criminal possession of guns, but they decided instead to charge Lopez with less serious offenses. Fearing for his life, Montalvo went to a state court and obtained a temporary order of protection against Lopez. Id., at 89.

Montalvo never approached Federal authorities for assistance. On the eleventh day after the state court had issued its temporary order of protection,

Lopez went to Montalvo's apartment and shot and killed Montalvo. Id., at 89.

Carlos Lopez was indicted for obstruction of justice murder under §1512(a)(1)(C) as a result of the killing of Montalvo. The jury found Carlos Lopez guilty, but the Second Circuit reversed the murder conviction.

The Second Circuit based its reversal of the §1512(a)(1)(C) conviction on the fact that Montalvo never sought out Federal authorities. Further, there was no evidence of any Federal investigation into Lopez's activities at the time of Montalvo's death. According to the Second Circuit, "All the government proved was that conduct punishable under both state and federal law was involved and that Montalvo was willing to communicate with local authorities. The Government did show that Montalvo feared for his life after the district attorney declined to pursue more serious charges. But even after that decision, Montalvo did not turn to Federal officials; instead, he returned to local authorities for a protective order. There simply is no evidence that, despite the passage of over ten days between the issuance of the protective order and his murder, Montalvo ever turned to, or gave so much as a moment's thought of turning to, Federal officers, or that Federal agents were otherwise involved. The Government provided no evidence, for example, that a Federal investigation was underway, that Federal authorities were in any way involved, that Lopez knew of the Federal nature of his offense at the time he murdered Montalvo, or that

Montalvo intended to communicate or anticipated communicating with Federal authorities. See, e.g., *Causey*, 185 F.3d at 422-23." Id., at 92. (*emphasis supplied*).

In the case at bar, the Government provided no evidence that a Federal investigation was underway, or that Federal authorities were involved, even after four years following the death of Officer Horner. Likewise, there was no evidence that Officer Horner, like Montalvo in *Lopez*, intended to communicate or anticipated communicating with Federal authorities.

The Second Circuit in *Lopez* refused to affirm the conviction on the basis of possibilities or things that might happen:

> It is always possible that Montalvo someday 'might' have turned to federal officials; but the range of things he 'might' do is limitless, and no evidence in the record connects this possibility with reality. On these facts, even drawing all reasonable inferences in the government's favor, we hold that a reasonable jury could not conclude that Lopez killed Montalvo to prevent his communication to a federal law enforcement officer. Accordingly, we reverse Lopez's conviction on Count III.

Lopez, at 92.

Applying the Second Circuit's logic to the present case should result in a reversal of the Petitioner's conviction. A communication between Officer Horner and Federal officials is devoid of "reality." A reasonable jury could not possibly have concluded, therefore,

that the Petitioner killed Officer Horner to prevent his communication to a Federal law enforcement officer.

Judge Jon Newman dissented from the decision to reverse Lopez's conviction. The dissenting judge believed that the facts of the case – Montalvo's fear of Lopez and his dissatisfaction with the steps taken by local authorities – made it "entirely reasonable to conclude that he [Montalvo] would then have turned to federal authorities and reported the defendant's federal conduct." Id., at 96. In fact, the dissenting judge believed that Montalvo's eventual resort to Federal authorities was "a highly likely prospect, had he not been murdered eleven days later." Id., at 95. (*emphasis supplied*).

While disagreeing with the majority as to the inferences to be drawn from the trial evidence, the dissent nevertheless agreed that §1512(a)(1)(C) requires something more than the "theoretical possibility" of a communication between the victim and a Federal official. Instead, there must be "a realistic likelihood" of such communication to support a conviction. Id., at 95. The dissent's reasoning in *Lopez* is favorable to the Petitioner in the present case:

> Of course, the statute requires something more than the theoretical possibility that the victim would have communicated with a federal official. When a person knows of conduct that constitutes a federal crime, the possibility, in that sense, always exists that he will tell some federal official. If that sort of possibility sufficed, the statute would be violated

> by anyone murdering a person who knew about a federal crime. The statute must be understood to mean that the possibility of a communication with a federal official has some plausibility. The evidence must provide the jury with some reason to believe that there was a realistic likelihood that the victim would have communicated with a federal official.

Id., at 95.

The jury in the Petitioner's case was not provided with any evidence to meet the standards described in the dissent's rationale. There was no testimony or exhibit which dealt even remotely with the subject of Officer Horner transferring information to Federal authorities – no evidence, for example, of any policies or programs in effect where Federal agents met periodically with Haines City police officers or representatives from the Polk County State Attorney's Office.

The robbery of the Holiday Inn in Dundee, Florida, constituted one of the predicate Federal crimes for the Indictment against the Petitioner. Yet, the Government presented no evidence at all to suggest that a Federal agency played any part in the investigation of that offense.

The Government's first two trial witnesses were the night manager of the Holiday Inn and the local Dundee police officer who responded to the emergency call and arrived at the motel moments after the robbers had sped away from the scene. T Tr. 1,

pp. 11-33. As "a theoretical possibility," a Holiday Inn official or a member of the Dundee Police Department perhaps could have contacted the FBI to report a Federal crime immediately after it occurred.

Yet, the Government presented no such evidence linking the Holiday Inn robbery to Federal involvement. There was no proof of any kind that demonstrated a "reasonable likelihood" of communication between the Dundee Police Department or Holiday Inn officials and a Federal law enforcement officer. Likewise, there was no "reasonable likelihood" of communication between Officer Horner and a Federal official. Without such proof, the Government's evidence was insufficient to establish the nexus between the obstructive conduct and the transfer of information from Officer Horner to a Federal official.

Causey and *Lopez* are the only two decisions in which a Court of Appeals has reversed a conviction under §1512(a)(1)(C) because of insufficient evidence regarding communication between the victim and the Federal authorities. However, other appellate courts have determined that the Government presented sufficient evidence of communication to sustain convictions under §1512(a)(1)(C). These decisions provide guidance for how the Government should proceed in securing a conviction under §1512(a)(1)(C).

For example, the First Circuit stated in *United States v. Rodriguez*, 390 F.3d 1 (1st Cir. 2004), that the communication element "may be proven, among other ways, by demonstrating that the underlying offense was a federal offense and that the federal

authorities had begun an investigation prior to the informant's murder or attempted murder." Id., at 13. The "government easily met its burden" in *Rodriguez*. "The federal government, through the [Drug Enforcement Administration] had opened an investigation into this [drug] conspiracy and interviewed [the victim] prior to the murder." The First Circuit dismissed as "irrelevant" the defendant's claim that he had not realized that he was helping to conceal a Federal crime by murdering the victim. Id., at 13.

In *United States v. Bell*, 113 F.3d 1345 (3rd Cir. 1997), the victim "had been acting as an informant for the Tri-County Drug Task Force," an organization that consisted of "local, state and federal investigators" and "developed federal as well as state cases." Id., at 1346-1347. The Third Circuit held that "it was reasonable for the jury to infer that if [the victim] had continued to cooperate with a partially federal law enforcement body regarding conduct constituting federal crimes, at least one of her communications would have been to a federal officer or to an officer authorized to act on behalf of the federal government." Id., at 1350.

The Defendant in *Bell* claimed that the evidence "reveals no nexus between her charged conduct and any federal interest." The Third Circuit disagreed and stated that "because the evidence is sufficient to sustain [the defendant's] convictions for tampering with a federal informant, we reject her jurisdictional argument." Id., at 1350.

The Eighth Circuit focused on the victim's participation in a Federal investigation in *United States v. Emery*, 186 F.3d 921 (8th Cir. 1999). The Eighth Circuit declared that it "is sufficient for conviction that the victim was actually cooperating in a federal investigation or in the investigation of a federal crime, and that at least some part of a defendant's motive in killing that victim was to halt that cooperation . . . " Id., at 925. The evidence at trial enabled a reasonable jury to "conclude that [the victim] was cooperating with an agent of the federal Bureau of Alcohol, Tobacco, and Firearms (BATF), and that some part of Mr. Emery's motivation for killing her was to stop this cooperation. [The victim] gave the BATF agent substantial information about Mr. Emery's activities that constituted federal crimes, agreed to testify if necessary, and attempted to record conversations with Mr. Emery about drug trafficking on a micro-cassette recorder provided by the BATF agent." Id., at 925.

In the case at bar, there is no evidence that the Federal authorities had begun an investigation into the Holiday Inn robbery or any other Federal crime prior to Officer Horner's death, as was the case in *Rodriguez*. Likewise, there is no information that Officer Horner was working with a joint state-federal task force, as was the case in *Bell*. Finally, there is no evidence that Officer Horner was cooperating with any Federal agent prior to his death, as was the case in *Emery*. If the Government had provided proof of Federal involvement, as illustrated in *Rodriguez,*

Bell, or *Emery*, the conviction would stand. Since no evidence was provided in the present case, the Petitioner's conviction should be reversed.

III. The Court has construed related statutes to require a nexus to an actual Federal proceeding.

Requiring proof of an actual or at least likely communication with Federal authorities is consistent with precedent from this Court applying a nexus requirement in cases where the defendant is accused of obstruction of justice, witness intimidation, perjury and other conduct that subverts the Federal judicial process. See *United States v. Aguilar*, 515 U.S. 593 (1995); *Arthur Andersen, LLP v. United States*, 544 U.S. 696 (2005). The nexus requirement places a burden on the Government to establish a connection between the wrongful conduct attributed to the defendant and a specific Federal interest that the particular criminal statute is designed to protect.

Arthur Andersen is the only decision in which this Court has construed any portion of §1512. Subsections 1512(b)(2)(A) and (B) were at issue in *Arthur Andersen*. Those particular subsections make it a crime to "knowingly . . . corruptly persuade" another person "with intent to . . . cause" that person to "withhold" documents from, or "alter" documents for use in an "official proceeding." Id., at 703.

Arthur Andersen was the auditing firm for Enron Corporation. The Grand Jury indicted the firm for

allegedly violating §§1512(b)(2)(A) and (B) by destroying documents at a time when Enron's financial condition was crumbling and the Securities and Exchange Commission was conducting an investigation. The Indictment alleged that Arthur Andersen corruptly persuaded its employees to withhold from, and alter documents for use in, "official proceedings, namely: regulatory and criminal proceedings and investigations." Id., at 702.

The jury found Arthur Andersen guilty, and the Court of Appeals for the Fifth Circuit affirmed. This Court reversed, holding that "the jury instructions were flawed in important respects." Id., at 698, 708. Among other defects, the instructions "led the jury to believe that it did not have to find any nexus between the 'persua[sion]' to destroy documents and any particular proceeding." Id., at 707.

The Government "resist[ed] any type of nexus element," and relied upon §1512(e)(1), stating that an official proceeding "need not be pending or about to be instituted at the time of the offense," as the basis for its opposition. Id., at 707.[3]

This Court rejected the Government's argument and held that the prosecution still was required to prove that a proceeding was at least foreseen if not yet instituted. "It is, however, one thing to say that a

[3] Subsection (e)(1) was redesignated as subsection (f)(1) by Pub.L. 107-204, Section 1102, July 30, 2002.

proceeding 'need not be pending or about to be instituted at the time of the offense,' and quite another to say a proceeding need not even be foreseen. A 'knowingly . . . corrup[t] persuade[r]' cannot be someone who persuades others to shred documents under a document retention policy when he does not have in contemplation any particular official proceeding in which those documents might be material." Id., at 708.

This Court compared the nexus requirement in *Arthur Andersen* to "a similar situation in *Aguilar* . . . " The defendant in *Aguilar* was a Federal district court judge who made false statements to an agent for the Federal Bureau of Investigation and then was convicted of "'corruptly endeavor[ing] to influence, obstruct, and impede [a] . . . grand jury investigation'" in violation of 18 U.S.C. §1503. *Arthur Andersen*, 544 at 708, quoting *Aguilar*, 515 U.S. at 599.

The Ninth Circuit reversed the §1503 conviction in *Aguilar*, and this Court affirmed the Ninth Circuit's decision. As described in *Arthur Andersen*,

> All the Government had shown [in *Aguilar*] was that Aguilar had uttered false statements to an investigating agent "who might or might not testify before a grand jury," Id., at 600. We held that §1503 required something more – specifically, a "nexus" between the obstructive act and the proceeding. Id., at 599-600. "[I]f the defendant lacks knowledge that his actions are likely to affect the judicial

> proceeding," we explained, "he lacks the requisite intent to obstruct." Id., at 599.

Arthur Andersen, 544 U.S. at 708.

Arthur Andersen and *Aguilar* thus establish that a Federal statute requires the specific intent to obstruct or interfere with a judicial proceeding; a defendant's generally obstructive conduct is not by itself sufficient. It was not enough under *Arthur Andersen* and *Aguilar* that a defendant committed a wrongful act while a Federal proceeding was on the horizon – an SEC investigation in *Arthur Andersen* and a grand jury investigation in *Aguilar*. There had to be proof that the defendant's conduct had a tangible connection to the proceeding which the statute of conviction is intended to protect.

The Eleventh Circuit ignored the nexus requirement of *Arthur Andersen* and *Aguilar* when it held in the present case that the Government did not need to prove that information would have been transferred from Officer Horner to Federal officers. The mere possibility that a Federal crime had been committed was all that the Eleventh Circuit demanded to establish the Petitioner's guilt. A nexus between the obstructive conduct and the proceeding – a communication with Federal officers – was left to chance. Any degree of certainty or likelihood was unnecessary in the Eleventh Circuit's free-ranging view of the statute.

The Petitioner acknowledges that the nexus requirement can be satisfied in prosecutions under §1512(a)(1)(C) even if the victim does not communicate directly with Federal law enforcement officers.

In the present case, for example, the Government could have carried its burden if there had been proof that agents of the Federal Bureau of Investigation or Drug Enforcement Administration routinely conferred with members of the Haines City Police Department to discuss criminal activity. As another example, if the State Attorney's Office in Polk County, Florida, regularly furnished local arrest or incident reports to Federal agencies, it would have been reasonably likely that information obtained by Officer Horner would have worked its way to Federal officers.

The Government, however, did not present any evidence that tended to prove the likelihood of a transfer of information. The jury had no evidence, let alone sufficient evidence, to prove that information regarding a possible Federal crime would have been transferred from Officer Horner to Federal agents, whether directly or through intermediaries. Without proof of the nexus between the wrongful conduct and the proceeding, the Government failed to prove every element of §1512(a)(1)(C) beyond a reasonable doubt.

In contrast to the present case, the evidence in *United States v. Perry*, 335 F.3d 316 (4th Cir. 2003), demonstrated a working relationship between local police and Federal authorities with respect to the transfer of information regarding possible Federal crimes. In *Perry*, the Fourth Circuit affirmed the defendant's conviction under §1512(b)(3), which prohibits misleading conduct toward another person with intent to hinder, delay or prevent communication to

Federal authorities regarding the commission or possible commission of a Federal offense.

The defendant in *Perry* was arrested by the Montgomery County (Maryland) Police Department (MCPD) on state weapons charges following a traffic stop and consensual search of his car. The defendant provided the MCPD with a false name and date of birth in an effort to conceal his status as a convicted felon. When the MCPD learned the defendant's true identity and criminal history, it referred the information to Federal authorities pursuant to standard practice. Id., at 319.

The defendant's concealment of his true identity led to an indictment and conviction under §1512(b)(3). In affirming the conviction, the Fourth Circuit emphasized that the MCPD regularly communicated information to Federal authorities when felons had been arrested for weapons offenses.

At one point, the Fourth Circuit observed that it was standard practice for local law enforcement agents to notify their Federal counterparts when felons were arrested for firearm offenses: "Under the evidence, the standard practice of the MCPD is to check the criminal history of all persons arrested for firearms offenses, utilizing name and date of birth, in order to identify any that are felons. Once such an individual is identified, an Assistant State's Attorney decides whether that person's case should be referred to the United States Attorney and the ATF." Id., at 319, fn. 1.

The defendant's concealment of his true identity was seen as an effort to hinder the regular communications between local and Federal agencies: "As the evidence demonstrated, the MCPD regularly communicated with federal authorities regarding felons who were arrested for firearms offenses. Accordingly, the jury was entitled to conclude that, had Perry's true name and date of birth gone undetected, he would have successfully hindered the MCPD's communication with federal officials regarding possible federal crimes – conduct the statute is designed to prevent." Id., at 321, fn. 8.

Ergo, the nexus requirements established by this Court in *Arthur Andersen* and *Aguilar* contradict the Eleventh Circuit opinion in the present case. As is well illustrated in the Fourth Circuit's *Perry* opinion, far more than a mere possibility of communications to a Federal officer is required.

IV. The Federal Government wrongfully exercises a general police power if it prosecutes persons under §1512(a)(1)(C) without proof that a valid Federal interest protected by the statute has been affected.

Congress may not wield "a general 'police power, which the Founders denied the National Government and reposed in the States.' [citing *United States v. Morrison*, 529 U.S. 598, 618 (2000)]." *United States v. Comstock*, ___ U.S. ___, ___, 130 S.Ct. 1949, 1964 (2010). "Under our federal system, the States

possess primary authority for defining and enforcing the criminal law." (*citations and internal quotations omitted*). *United States v. Lopez*, 514 U.S. 549, 561, fn. 3 (1995). "It goes without saying that preventing and dealing with crime is much more the business of the States than it is of the Federal Government . . . " *Patterson v. New York*, 432 U.S. 197, 201 (1977).

This Court has stated time and again that Federal criminal statutes are not to be construed in a way that will upset the delicate balance between State and Federal powers. In *United States v. Bass*, 404 U.S. 336 (1971), this Court held that 18 U.S.C. §1202(a)(1), a statute that prohibited convicted felons from possessing firearms, required the Government to prove that the weapons were in or affecting interstate commerce.

The Government had advocated a broad reading that would have dispensed with a showing of interstate commerce. This Court rejected the Government's proposal and stated, "Because its [the statute's] sanctions are criminal, and because, under the Government's broader reading, the statute would mark a major inroad into a domain traditionally left to the States, we refuse to adopt the broad reading in the absence of a clearer direction from Congress." Id., at 339.

This Court declared in *Bass* that Congressional restraint in the enactment of criminal laws is essential to American federalism, comparable to the

abstention doctrine as expressed in *Younger v. Harris*, 401 U.S. 37 (1971):

> Unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance. Congress has traditionally been reluctant to define as a federal crime conduct readily denounced as criminal by the States. This congressional policy is rooted in the same concepts of American federalism that have provided the basis for judge-made doctrines. See, e.g., *Younger v. Harris*, 401 U.S. 37 (1971). As this Court emphasized only last Term in *Rewis v. United States*, supra, [401 U.S. 808 (1971)], we will not be quick to assume that Congress has meant to effect a significant change in the sensitive relation between federal and state criminal jurisdiction.

Id., at 349.

In the present case, the Eleventh Circuit's opinion upsets the federal-state balance by affirming a conviction under §1512(a)(1)(C) even though communications to Federal officers never occurred. The Government produced no evidence that Office Horner would be likely to communicate with a Federal officer, and in the absence of such proof, the Federal Government has altered the relation between Federal and state criminal jurisdiction.

In *Jones v. United States*, 529 U.S. 848 (2000), this Court rejected the Government's contention that the Federal arson statute at 18 U.S.C. §844(i) applied

to owner-occupied residences that were not used for any commercial purpose. The interpretation advocated by the Government would have subjected virtually every building in the country to Federal jurisdiction. "Were we to adopt the Government's expansive interpretation of §844(i), hardly a building in the land would fall outside the federal statute's domain." Id., at 857.

This Court rejected an interpretation that would have allowed the Federal Government to intrude into a subject long identified as a "paradigmatic common-law state crime. . . ." Id., at 858. Relying in part upon *United States v. Lopez*, 514 U.S. 549 (1995), this Court stated in *Jones*:

> Given the concerns brought to the fore in *Lopez*, it is appropriate to avoid the constitutional questions that would arise were we to read §844(i) to render the "traditionally local criminal conduct" in which petitioner Jones engaged "a matter for federal enforcement," *United States v. Bass*, 404 U.S. 336, 350 (1971) . . . We have cautioned, as well, that "unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance" in the prosecution of crimes. *Bass*, 401 U.S. at 349. To read §844(i) as encompassing the arson of an owner-occupied private home would effect such a change, for arson is a paradigmatic common-law state crime. . . .

Jones, at 858.

Murder, at issue in the case at bar, is a paradigmatic common law state crime. It may have Federal implications if it involves a Federal law officer or is communicated to a Federal officer to prevent a Federal crime. On the other hand, the concept of Federalism is compromised by a conviction under §1512(a)(1)(C) when, as in the present case, the victim would not have communicated with a Federal officer.

The restrained approach endorsed in *Jones* played a key role in *Cleveland v. United States*, 531 U.S. 12 (2000). This Court concluded in *Cleveland* that video poker licenses issued by the State of Louisiana did not constitute "property" for purposes of the mail fraud statute at 18 U.S.C. §1341. Without a "clear statement by Congress," this Court refused to "read the mail fraud statute to place under federal superintendence a vast array of conduct traditionally policed by the States." Id., at 27.

This Court "resist[ed] the Government's reading of §1341 as well because it invites us to approve a sweeping expansion of federal criminal jurisdiction in the absence of a clear statement by Congress." This Court relied upon *Jones* for the proposition that Congress does not intend to upset the federal-state balance in the prosecution of crimes:

> Equating issuance of licenses or permits with deprivation of property would subject to federal mail fraud prosecution a wide range of conduct traditionally regulated by state and local authorities . . . As we reiterated last

> Term, "unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance' in the prosecution of crimes." *Jones v. United States*, 529 U.S. 848, 858 (2000) (quoting *United States v. Bass*, 404 U.S. 336, 349 (1971).

Cleveland, at 24.

This Court recognized as long ago as 1821 that Congress "has no general right to punish murder committed within any of the States," and " . . . cannot punish felonies generally." *Cohens v. Virginia*, 6 Wheat. 264, 426, 428 (1821) (Marshall, C.J.), cited in *United States v. Morrison*, 529 U.S. 598, 618 (2000), where this Court stated, "[W]e can think of no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime and vindication of its victims."

The Petitioner does not contend that Congress exceeded its powers with the enactment of §1512(a)(1)(C). This Court has described "perjury and witness tampering as federal crimes enacted in furtherance of the power to constitute federal tribunals." See *United States v. Comstock*, ___ U.S. ___, ___, 130 S.Ct. 1949, 1958 (2010), citing to *Jinks v. Rockland County*, 538 U.S. 456, 462, fn. 2 (2003), which in turn cited *McCulloch v. Maryland*, 4 Wheat. 316, at 417 (1819).

However, if the Government does not have to prove that the victim's communication with Federal

authorities was likely to occur, the statute will be used in a broad range of circumstances unrelated to the basic purpose of protecting and encouraging the transfer of information to Federal authorities. To prevent the Government from converting §1512(a)(1)(C) into a criminal statute of general application, this Court should adopt the Second Circuit's decision in *Lopez* and the Fifth Circuit's decision in *Causey* as a correct interpretation of the statute and hold that the Government must adduce evidence that the victim plausibly would have turned to Federal officials. The Government's evidence must demonstrate "a realistic likelihood" of such communication, and not merely a "theoretical possibility."

Applying a standard of "plausibility" or "realistic likelihood" will result in a judgment of acquittal in the Petitioner's favor. The Government presented no evidence at all on the issue of communication between Officer Horner and Federal authorities.

CONCLUSION

For the reasons stated herein, Charles Fowler respectfully requests that his conviction under 18 U.S.C. §1512(a)(1)(C) be reversed.

Respectfully submitted,

KENNETH S. SIEGEL
Counsel of Record
14502 North Dale Mabry
Tampa, Florida 33618
813-962-6676
Fla. Bar No. 746053
E-mail: simonscrowd@gmail.com

STEPHEN M. CRAWFORD
610 West Bay Street
Tampa, Florida 33606
813-251-2273
Fla. Bar No. 309613
E-mail: stephen_crawford@msn.com

Counsel for Petitioner,
Charles Fowler