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

REPLY BRIEF FOR PETITIONER

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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.

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ARGUMENT IN REPLY

1. Introduction.

A Grand Jury empanelled in the Tampa Division of the Middle District of Florida indicted the Petitioner on September 19, 2007, and accused him of murdering Officer Christopher Horner of the Haines City Police Department "[o]n or about March 3, 1998." The Grand Jury alleged that the Petitioner violated 18 U.S.C. §1512(a)(1)(C) by committing the murder "with the intent to prevent the communication by *Officer Horner* to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a federal offense. . . ." See Indictment, J.A. 15-16. (italics added) The Indictment identified six Federal crimes that the Petitioner and his companions allegedly had committed or were preparing to commit on the morning of March 3, 1998.

The Petitioner was tried in June of 2008 (ten years after the alleged murder of Officer Horner), and a jury found him guilty of violating both §1512(a)(1)(C) and §924(C)(1)(a). The Petitioner appealed his conviction under §1512(a)(1)(C), and argued to the United States Court of Appeals for the Eleventh Circuit that the Government had failed to present any proof that Officer Horner would have communicated any information to a Federal officer if he had not been killed on the morning of March 3, 1998.

The Eleventh Circuit affirmed the Petitioner's conviction on April 14, 2010, and held that the Government was not required to prove that Officer Horner would have communicated with a Federal officer. According to the Eleventh Circuit, "the *possible* or *potential* communication to federal authorities of a possible federal crime is sufficient for purposes of section 1512(a)(1)(C). . . ." See Eleventh Circuit's Opinion, J.A. 76, 85. (italics in original)

This Court granted the Petitioner's Petition for Certiorari on November 15, 2010. The Petitioner filed his Merits Brief on January 12, 2011. The Government filed its Brief on February 25, 2011.

The Government has acknowledged that the Eleventh Circuit's formulation was erroneous. The Government has not stated anywhere in its Brief that the Eleventh Circuit was correct in allowing a conviction under §1512(a)(1)(C) to stand on nothing more than a "possible or potential communication." The Government has attempted to distance itself from the decision under review and has stated that a "theoretical or remote possibility will not suffice. . . ." See Government Brief, page 13.

Instead, the Government has proposed a standard which arguably is somewhat more demanding than the Eleventh Circuit's. The Government has asserted that §1512(a)(1)(C) "is satisfied by proof of a *reasonable possibility* that one of the communications that a defendant prevented or intended to prevent by killing his victim would have been with a federal law

enforcement official. . . ." See Government's Brief, page 9. (italics added)

The Government has also claimed that its proposed standard has been fulfilled by the transfer of information four years after the death of Officer Horner. For that reason, the Government argues, the Petitioner's conviction should be affirmed. See Government's Brief, pages 39-40.

The Petitioner asserts in Reply that the Government's "reasonable possibility" standard conflicts with the text of §1512(a)(1)(C) and should be rejected as a guide for District Courts in determining whether there is sufficient evidence of a communication to a Federal officer.[1]

Furthermore, the Government's reliance on events that occurred four years after the death of

[1] The Government has mentioned in its Brief that the Petitioner raised his sufficiency argument for the first time on appeal to the Eleventh Circuit. See Government Brief, p. 6. The Government made the same contention in its Brief to the Eleventh Circuit (pgs. 9-11, 13) and in its Response (pg. 5) to the Petitioner's Petition for Certiorari. The Eleventh Circuit, however, fully addressed the Petitioner's sufficiency arguments on the merits in its decision of April 14, 2010. See Eleventh Circuit decision, J.A. 76 et seq. Under these circumstances, the grant of the Petition for Certiorari signifies that this Court "necessarily considered and rejected that contention as a basis for denying review." See *United States v. Williams*, 504 U.S. 36, 40 (1992). This Court's traditional rule "precludes a grant of certiorari only when 'the question was not pressed or passed upon below.' " Id., at 40. The sufficiency issue was both pressed and passed upon in the Eleventh Circuit.

Officer Horner leads to absurd results, not the least of which would be the almost indefinite postponement of a completed offense under §1512(a)(1)(C). The likelihood of a communication between an informant and a Federal officer should be determined by the circumstances at the time of the victim's death and not at some unknown point in the future.

2. The reasonably possible standard conflicts with the text of §1512(a)(1)(C).

Congress has already dealt with the subject of "possibilities" in §1512(a)(1)(C). The word "possible" appears in one place, as an adjective to modify the word commission. Section 1512(a)(1)(C) makes it a crime to kill another person 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. . . ." (italics added)

In contrast, Congress did not qualify "communication" with the word "possible" or any other modifier. Although Congress arguably could have treated "communication" in the same way that it treated "commission" and inserted the word "possible" as an adjective, it clearly chose not to do so. The presence of the word "possible" in one part of the statute and its absence from another part cannot be passed off as a mere inadvertence. The disparate treatment is intentional.

This Court has recognized its "duty to refrain from reading a phrase into the statute when Congress has left it out. [W]here Congress includes particular language in one section of a statute but omits it in another . . . , 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) (citation omitted)." See *Keene Corp. v. United States*, 508 U.S. 200, 208 (1993). (internal quotations omitted) In the context of §1512(a)(1)(C), Congress intended that the communication between the informant and Federal officer would be certain or likely, not merely possible or reasonably possible.

3. Information obtained by the Government in 2002 may not supplant the circumstances that existed as of March 3, 1998.

The Government has contended that it fulfilled its "reasonably possible" standard in 2002 when Christopher Gamble (who was sentenced in 2001 to 20 years in the Florida state prison system for a 1999 robbery of a liquor store) provided local law enforcement officers with information which they in turn delivered to their Federal counterparts.[2] See Government Brief, pages 12, 37-40. The Government asserts that this transfer of information establishes the Federal nexus necessary under §1512(a)(1)(C).

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[2] As a reward for his cooperation in the Federal prosecutions, Gamble received a reduction in his Federal sentence from life to 185 months on November 25, 2008. See *U.S. v. Gamble*, 8:04-CR-04-T-30TGW (MDFL) Doc. 52.

The Government's attempt to rely on the transfer of information in 2002 is flawed for at least three reasons. First, the Government has contradicted the allegations of the Indictment by arguing that the communication element of §1512(a)(1)(C) did not occur until 2002. Second, the likelihood of a transfer of information should be determined according to the circumstances in effect at the time of the obstructive conduct, and not at some indefinite point in the future. Third, convictions under §1512(a)(1)(C) will be virtually automatic if the Government is allowed to substitute the receipt of information at some unknown point in the future for the circumstances that existed when the obstructive conduct occurred.

3(a). Postponing the communication element until 2002 contradicts the Indictment in this case.

The Grand Jury accused the Petitioner of violating §1512(a)(1)(C) on March 3, 1998. The Indictment alleged in relevant part:

> On or about March 3, 1998, in the Middle District of Florida, the defendant . . . with malice aforethought, did unlawfully, willfully, deliberately, maliciously, and with premeditation, kill Haines City Police Officer Christopher Todd Horner . . . with the intent to prevent the communication by Officer Horner to a law enforcement officer or judge of the United States of information relating

> to the commission or possible commission of a federal offense, namely that:
>
> [six federal crimes are specified]
>
> All in violation of Title 18, United States Code, Sections 1512(a)(1)(C), 1512(a)(3)(A), 1111, and 2.

See Indictment, J.A. 15-17.

The Fifth Amendment of the United States Constitution provides in relevant part, "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury. . . ." The Sixth Amendment provides in relevant part, "In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation. . . ."

An indictment must "contain [ ] the elements of the offense intended to be charged, and sufficiently apprise[ ] the defendant of what he must be prepared to meet. . . ." See *Russell v. United States*, 369 U.S. 749, 764 (1962). (citations and internal quotation marks omitted) "It is generally sufficient that an indictment set forth the offense in the words of the statute itself, as long as 'those words of themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offence intended to be punished.' *United States v. Carll,* 105 U.S. 611, 612 (1882)." *Hamling v. United States*, 418 U.S. 87, 117 (1974).

According to the Indictment in the case at bar, the violation of §1512(a)(1)(C) occurred on March 3, 1998. All elements of the charged offense – including the prevention of the communication between Officer Horner and Federal agencies – should have been fulfilled as of that date. Now, however, the Government has contradicted the Indictment and is claiming that the communication which the Petitioner allegedly prevented would not have occurred until 2002, as opposed to some time in early March of 1998. The Government's position is contrary to the plain language of the Indictment.

The Government also is contradicting the Indictment in an additional way. Although the Indictment alleged that Petitioner killed Officer Horner "to prevent the communication by *Officer Horner* to a law enforcement officer," the Government now has taken the position that the communication element can be fulfilled by any person who transferred information to the Federal agents.

According to the Government, "Because Section 1512(a)(1)(C) does not require that the victim himself be the one who might have communicated with a federal officer, the relevant inquiry is whether information relating to the underlying federal crimes might have been communicated by *any* person to federal officers. That standard was easily satisfied in this case." See Government's Brief, page 38. (italics added)

The Petitioner disagrees with the Government's assertion. There is no question that §1512(a)(1)(C) applies to cases where the defendant kills one person for the purpose of preventing another person from communicating with Federal officers. Ergo, the killing of a spouse to prevent the other partner from communicating with Federal officers undoubtedly is criminalized under §1512(a)(1)(C).

However, the Grand Jury specified that the killing of Officer Horner was perpetrated for the purpose of preventing *Officer Horner* from communicating with Federal officers.[3] The Government should not be permitted to ignore the Indictment and shift the communication inquiry to other law enforcement personnel who transferred information to Federal agents four years later. The Indictment pleads otherwise.

In a similar vein, the Government has argued that it "was required to prove that petitioner killed Officer Horner with the intent to prevent *any person's* communication to a law enforcement official. . . ." Government Brief, p. 36. (italics added) The Indictment

[3] The Government has stated in its Brief (p. 8) that the Petitioner did not dispute the evidence that he murdered Officer Horner. To the contrary, the Petitioner presented evidence at trial that Officer Horner had committed suicide and that the Petitioner was home at the time of Officer Horner's death in the Oakland Cemetery. See Petitioner's Merits Brief, pp. 7-8. While understanding that the jury found him guilty of murdering Officer Horner, the Petitioner continues to maintain that he is innocent.

specified only Officer Horner. It did not refer to any other person whose communication was allegedly thwarted. The Government should not be permitted to ignore the allegations of the Indictment or steer the inquiry away from the circumstances that existed in March of 1998.

3(b). Circumstances at the time of the obstructive conduct should determine whether the communication would have occurred.

Appellate decisions which have analyzed §1512(a)(1)(C), or comparable subsections of §1512, have concentrated on the circumstances at the time of the killing or other obstructive conduct to determine whether a communication with Federal officers would have occurred. In *United States v. Lopez*, 372 F.3d 86 (2d Cir. 2004), the Second Circuit reversed a conviction under §1512(a)(1)(C) because there was no evidence that the victim ever contemplated going to Federal officers for protection from the defendant. See *Lopez*, 372 F.3d at 92. The Second Circuit refused to speculate as to what might occur at some point in the indefinite future: "It is always possible that Montalvo [the victim] *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." Id., at 92. (italics added)

In the converse situation, the Second Circuit affirmed the conviction under §1512(b)(3) of a gang leader who had ordered the beating of a suspected

informant in *United States v. Diaz*, 176 F.3d 52 (2d Cir.), cert. denied, 528 U.S. 875, and 528 U.S. 957 (1999). The defendant in *Diaz* ordered the beating at a time when

> federal authorities were in fact working closely with local police on a massive federal investigation of the gang's drug activities. Therefore, we find that a jury could reasonably have inferred from this evidence that if the potential informant communicated with the local police concerning Latin King activities constituting federal offenses, at least one of his communications would have been with a federal law enforcement officer. Accordingly, we conclude that there was sufficient evidence to satisfy the federal jurisdictional element of §1512(b)(3).

Id., at 90.

Lopez and *Diaz* illustrate that the likelihood of a communication between the informant and the Federal officer is determined by the circumstances which exist when the obstructive conduct takes place. In the present case, there is no evidence that a communication would have occurred between Officer Horner and Federal officers in March 1998, and the Government has not suggested anything to the contrary in its Brief. The Government's attempt to substitute a different set of circumstances that arose in 2002 is completely at odds with the law as expressed in *Lopez* and *Diaz*.

3(c). The Government's approach would eliminate a defense and guarantee a conviction in every prosecution under §1512(a)(1)(C).

The Government's position would automatically assure a conviction every time it prosecuted a defendant for violating §1512(a)(1)(C). Every prosecution under §1512(a)(1)(C) inevitably is based on actions taken by Federal officers who at some point have received information about Federal crimes and have linked this information to a person's death. If the Federal Government's eventual discovery of the information can be used in place of the circumstances that existed at the time of the victim's death, the defendant no longer will be able to defend by demonstrating that the victim would not have communicated with Federal officers.

Once again, the Second Circuit's decision in *Lopez* illustrates the fallacy in the Government's approach. In describing the background of the *Lopez* case, the Second Circuit stated that Federal law enforcement officials learned of the murder eight years after it had occurred. The Second Circuit explained, "In early 1999, the Federal Bureau of Investigation and the New York City Police Department learned through a cooperating witness, Victor Cruz, that Carlos Lopez murdered an individual named Edward Montalvo in 1991 and that from 1989 through 1996 Lopez led a violent crew of crack cocaine dealers operating principally in the vicinity of a flower shop in the East New York section of Brooklyn, New York. . . ." See *Lopez*, 372 F.3d at 88.

If the Government's position were to be accepted by this Court, the FBI's receipt of the information in 1999 would constitute the "communication" for purposes of §1512(a)(1)(C) and, ipso facto, prove that Mr. Montalvo would have gone to the FBI in 1991 if Lopez had not killed him (This is classic bootstrapping). A prosecution under §1512(a)(1)(C) no longer would be concerned with circumstances of communication with Federal agents as they existed at the time of the obstructive conduct.

The Government's proposal would lead to an absurd result barring the accused from defending on the basis that the victim would not have communicated with Federal agents. A statute should receive a "sensible construction" that avoids an "absurd conclusion." See *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 346 (1998), citing *United States v. Granderson*, 511 U.S. 39, 56 (1994).

Section 1512(a)(1)(C) should be interpreted sensibly so as to require the Government to prove beyond a reasonable doubt that the obstructive act prevented a communication that otherwise would have occurred between the informant and a Federal agent. The proof should relate only to the circumstances that existed at the time of the obstructive act and not at some indefinite point in the future. The Government's proposal ignores the circumstances that existed at the time of Officer Horner's death, fosters an absurd interpretation of §1512(a)(1)(C); and should be rejected.

For all of the foregoing reasons – the disregard for the Indictment, the effort to sidestep the circumstances that existed at the time of Officer Horner's death, and the absurd meaning that would hopelessly distort §1512(a)(1)(C) – this Court should reject the Government's argument that the information transferred in 2002 fulfills the communication element of the statute.

4. The Government has relied upon numerous appellate decisions in which Federal agents already were investigating at the time of the obstructive conduct. The facts of those decisions defeat any contention that reasonable possibility is a proper standard in determining whether the Government has presented sufficient evidence.

The Government has cited numerous appellate court decisions which have analyzed §1512(a)(1)(C) or other subsections of §1512. The Government has declared that "Courts of appeals have routinely held that the federal-officer element in Section 1512(a)(1)(C) is established when the evidence establishes a 'possibility' that the information would have been communicated to a federal official." See Government Brief, page 25, fn. 4.

Contrary to the Government's assertion, the vast majority of Circuit Court decisions cited in its Brief have emphasized that Federal law enforcement agents were already involved or were certain to

become involved when the defendant in each case committed an obstructive act in violation of §1512. The facts in these cases established that the Federal agencies were involved, and reliance on possibilities was entirely unnecessary.

In *United States v. Diaz*, 176 F.3d 52 (2d Cir.), cert. denied, 528 U.S. 875 and 528 U.S. 957 (1999), a leader of the Latin Kings in Connecticut directed another member of the organization to "impose discipline" upon a person believed to be cooperating with the New Haven police. The leader, Nelson Millet, was in Federal prison when he issued his order. "At the time of Millet's conversations with J. Rodriguez [the other member], there was an extensive *federal* investigation underway of the Latin Kings. The investigation was being conducted by a task force which included the *FBI, the Drug Enforcement Administration*, the Connecticut State Police, as well as the New Haven and Bridgeport Police Departments." Id., at 90. (italics added)

Millet eventually was indicted and convicted on a wide array of Federal charges, including obstruction of justice in violation of §1512(b)(3) as a result of the beating perpetrated upon the suspected informant. The Second Circuit affirmed the conviction and rejected Millet's claim of insufficient evidence. The active participation of Federal agencies in the Latin Kings investigation played a large part in the Second Circuit's decision:

> In this case, the government presented sufficient evidence for a jury to reasonably conclude (1) that Millet intended to prevent Garcia [the suspected informant] from communicating with local police because he feared that Garcia would provide information on the Latin Kings' racketeering activities, which clearly constitute federal offenses; (2) that Millet knew federal authorities could record his telephone conversations with J. Rodriguez; and (3) *at the time of these conversations, federal authorities were in fact working closely with local police on a massive federal investigation of the gang's drug activities*. Therefore, we find that a jury could reasonably have inferred from this evidence that if the potential informant communicated with the local police concerning Latin King activities constituting federal offenses, at least one of his communications would have been with a federal law enforcement officer. Accordingly, we conclude that there was sufficient evidence to satisfy the federal jurisdictional element of §1512(b)(3).

Diaz, 176 F.3d at 91. (italics added)

In *United States v. Stansfield*, 101 F.3d 909 (3d Cir. 1996), the defendant's house was destroyed by arson in 1990. Initially, the property insurer and state law enforcement officials investigated. In September of 1993, the insurer "referred the matter to federal postal inspectors. The Postal Inspector presented the case to the United States Attorney's Office, which requested that the Postal Inspection Service

continue the investigation." Id., at 911. The obstructive conduct occurred the following month, October of 1993, when the defendant physically beat and terrorized a witness and the witness's parents. Id., at 911-912. Again, there was significant evidence of Federal law enforcement involvement at the time of the offense presented to the jury.

In *United States v. Baldyga*, 233 F.3d 674 (1st Cir. 2000), the defendant's convictions arose from a drug "investigation begun by state and local authorities in Webster, Massachusetts, in January of 1998. The federal Drug Enforcement Administration (DEA) joined the investigation in February, 1998." A cooperating witness named Richard Chenevert already had made three controlled buys of cocaine from the defendant in January and February of 1998. Id., at 678.

Chenevert "testified that on March 1, 1998, he agreed with local and federal law enforcement authorities to do a fourth controlled buy of cocaine from Baldyga." The obstructive conduct occurred on the night of March 1 when Baldyga discovered that Chenevert was wired with a listening device. Id., at 678-79. By that time, the Federal DEA had already been involved in the investigation for at least a month. Again, the jury heard evidence of significant Federal law enforcement involvement.

In *United States v. Romero*, 54 F.3d 56 (2d Cir. 1995), cert. denied, 517 U.S. 1149 (1996), the defendant, Eugene Romero, was serving a Federal prison sentence for possession of heroin with intent

to distribute and RICO conspiracy. Despite being in Federal custody, the defendant "continued to supervise his [drug trafficking] organization while in prison. . . ." Id., at 59.

Romero ordered the killing of a high-level assistant, Warren Tyson, for the very reason that Tyson was believed to be "cooperating with federal authorities." Id., at 59. When there is direct evidence that the defendant has ordered the killing of a person because of his suspected cooperation with Federal agents, the intent element under §1512(a)(1)(C) is readily fulfilled. Speculation as to possible Federal involvement is unnecessary when there is explicit evidence of the Defendant's actual intent to kill someone to prevent that person's cooperation with the Government. Again, significant evidence of Federal law enforcement involvement was presented to the petit jury.

In *United States v. Carson*, 560 F.3d 566 (6th Cir. 2009), cert. denied, 130 S.Ct. 1048 (2010), several members of the Mount Clemens (Michigan) Police Department assaulted a man named Robert Paxton. The police officers then were indicted in Federal court for depriving the assault victim of his civil rights and obstruction of justice. Id., at 570.

One of the officers, Peter Jacquemain, appealed his conviction for obstruction of justice in violation of §1512(b)(3). The conviction was based on a misleading report that Officer Jacquemain had submitted to his department on the night of the assault.

He contended that because a Federal investigation did not begin until six months later, there was insufficient evidence to prove beyond a reasonable doubt that he intended to hinder, delay, or prevent the communication of information to a Federal official. Id., at 581.

The Sixth Circuit, however, affirmed the conviction on the strength of evidence which proved that Officer Jacquemain was well aware that he could be prosecuted under Federal law for using excessive force. "At trial, the government read into evidence a joint stipulation stating that the training given to all officers in Michigan 'included instruction that if officers use excessive force they could be prosecuted in state or federal court.' The government also introduced into evidence Jacquemain's community college transcript and police academy training records, which indicate that he had received this training." Id., at 581. In the case at bar, the Government offered no evidence that Officer Horner or any other member of the Haines City Police Department shared information with Federal law enforcement officials or was trained to do so.

The foregoing survey of cases cited by the Government demonstrates that the Courts of Appeals did not have to rely on mere possibility or even a reasonable possibility that a communication with Federal law enforcement officers would occur. As a matter of fact, in each of the cases analyzed above, communications already had taken place or were entirely likely to occur.

To the extent that the Courts of Appeals used the term "possible" in describing the quantum of proof necessary to establish a Federal nexus, their comments were dicta. In *Baldyga*, where the defendant challenged his conviction by arguing that Federal authorities were not listening to the device that the cooperating witness was wearing when he made his controlled buy, the First Circuit rejected the defendant's "claim because §1512 does not require that the witness's communication with federal officers be as imminent as Baldyga suggests. Instead, other circuits have read the statute to require only a possibility that the conduct will interfere with communication to a federal agent." Id., at 680. When the defendant in *Baldyga* disconnected the cooperating witness's listening device during the cocaine transaction, he "satisfied the requirements of the statute because the possibility existed that such communication would eventually occur with federal officials." Id., at 680.

The First Circuit then alluded to the fact that the cooperating witness already had made controlled buys at the direction of the state and Federal agencies investigating the defendant. "Indeed, not only was it possible that Chenevert [the cooperating witness] would communicate with federal agents, but his prior cooperation with them made such communication probable." Id., at 680.

The First Circuit thus recognized that the cooperating witness's communications with the Federal agencies were probable, and not merely possible. If anything, the First Circuit's use of "probable" was an

understatement. The cooperating witness already had completed three controlled buys from the defendant in *Baldyga* and was engaged in a fourth such transaction when the defendant disconnected the listening device. Federal law enforcement officials were already involved in the investigation at the time of the fourth controlled buy, and the jury was so informed.

The facts in the Petitioner's case are fundamentally different from those in the foregoing decisions. There was "NO EVIDENCE" that as of March 3, 1998, the Haines City Police Department was working together with one or more Federal agencies in any sort of investigation; or that Federal agents routinely met with Haines City officers or reviewed incident or arrest reports generated by the Department; or that the Polk County State Attorney's Office conveyed information from local departments to Federal agents; or that any other procedures or practices would have made it likely that Officer Horner would have communicated with Federal officers.

If there had been any cooperative arrangement between the Haines City Police and Federal agencies, the proof of such collaborative efforts would have been a comparatively simple matter to establish before the jury. Cases cited in the foregoing survey and in the Petitioner's Merits Brief, dealt specifically with cooperative ventures between Federal and local agencies. See, for example, *Baldyga*; *Diaz*; *United States v. Bell*, 113 F.3d 1345, 1346-47 (3rd Cir. 1997) (where 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."); and *United States v. Perry*, 335 F.3d 316, 319, 322 (4th Cir. 2003) (where the county police department had instituted procedures to notify Federal officials when felons were arrested for firearms offenses). The absence of comparable proof in the present case signifies that Officer Horner would not have transferred information to Federal officers.

To require the Federal prosecutors to establish a Federal nexus is neither difficult nor contrary to the plain language of the statute. Many Federal criminal statutes require the Federal prosecutor to prove an element that is in addition to the equivalent state criminal statute. For example, many, if not all, of the States in this Union criminalize bank robbery. None require proof that the bank was insured by the Federal Deposit Insurance Corporation. In contrast, a Federal prosecutor must prove in a Federal bank robbery prosecution in Federal court that the Bank was federally insured. See 18 U.S.C. §2113. Similarly, the Federal prosecutor trying a case under §1512(a)(1)(C) in Federal court should have no difficulty in recognizing that he or she must prove communication to a Federal law enforcement officer of the commission or possible commission of a Federal crime. In the case at bar, the Government completely failed to establish a Federal nexus.

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CONCLUSION

For the reasons stated in his Merits Brief and this Reply Brief, the Petitioner, Charles Fowler respectfully requests that his conviction under 18 U.S.C. §1512(a)(1)(C) be reversed.

Respectfully submitted,

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