No. 98-837

In the Supreme Court of the United States

OCTOBER TERM, 1998

JESSE WOODROW SHOTTS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the evidence was sufficient to support petitioner's convictions for witness tampering, in violation of 18 U.S.C. 1512(b).

2. Whether the phrase "corruptly persuades" in Section 1512(b) is unconstitutionally vague or overbroad.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-29) is reported at 145 F.3d 1289. The order of the court of appeals denying petitions for rehearing (Pet. App. 30-32) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 10, 1998. A petition for rehearing was denied on October 2, 1998. The petition for a writ of certiorari was filed on November 19, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Alabama, petitioner

was convicted on one count of conspiracy to commit mail fraud, in violation of 18 U.S.C. 371; 15 counts of mail fraud, in violation of 18 U.S.C. 1341; one count of making false statements to a grand jury, in violation of 18 U.S.C. 1623; and two counts of witness tampering, in violation of 18 U.S.C. 1512(b). Pet. App. 3. The district court sentenced petitioner to concurrent terms of 60 months' imprisonment on the conspiracy, mail fraud, and false statement counts, and 60 months' imprisonment on the witness tampering counts. The court also fined petitioner $10,000 and ordered him to pay $14,000 in restitution. Pet. C.A. Br. 3. The court of appeals vacated and remanded petitioner's convictions for conspiracy and mail fraud, reversed his false statement conviction, and affirmed his convictions for witness tampering. Pet. App. 1-29.

1. During the 1980s, petitioner, an attorney in Birmingham, Alabama, operated a bail bond business known as J & J Bonding Co. In 1990, after the Alabama Supreme Court promulgated a rule that prohibited attorneys from having an interest in a bail bond business, petitioner closed J & J Bonding Co. and formed a new bail bond company called JC Bail Bonds, Inc. (JC), listing his wife as the incorporator. Stock certificates for the new corporation were issued in the name of petitioner's wife; she subsequently transferred them to Donald Long, whom petitioner had hired to run the bail bond business. Petitioner directed his secretary, Kandy Kennedy, to mail applications for licenses for the business to various municipalities. The applications named Long as the owner of the bail bond business. Petitioner also directed Kennedy to prepare a required certification stating that Long was the owner of the business and that no attorney had any interest in the company. Pet. App. 1-2; Gov't C.A. Br. 2-6.

After the new business began to operate, petitioner repeatedly went to the home of Jack Montgomery, a state district court judge, where he obtained appearance bonds that were signed by the judge but were otherwise blank. Petitioner referred to these preapproved bonds as "Jack" bonds. The bonds were used as appearance bonds by JC, but without showing JC as the surety. If the defendant did not appear in court as required, JC had no liability on the bond. Pet. App. 2; Gov't C.A. Br. 7-8.

In 1992, as part of an investigation into allegations of corruption on the part of Judge Montgomery, the Federal Bureau of Investigation (FBI) placed a wiretap on the judge's home telephone. FBI agents intercepted a telephone call from petitioner to the judge and heard petitioner ask the judge to sign a bond for a prisoner in another county. When Judge Montgomery hesitated, noting that he lacked jurisdiction in that county, petitioner said that he "had 5,000 reasons to try." The judge then told petitioner to come to his house. FBI agents executed a search warrant at Judge Montgomery's house that evening and found $31,000 in cash. Pet. App. 2; Gov't C.A. Br. 11-12.

After the search of Judge Montgomery's house, Kennedy asked petitioner about the FBI investigation. Petitioner told Kennedy to "just not say anything and [she] wasn't going to be bothered." Petitioner also directed another employee, Larry Eddy, to destroy the remaining "Jack" bonds. Pet. App. 25-27; Gov't C.A. Br. 12-13.

2. Petitioner was indicted in the United States District Court for the Northern District of Alabama and charged with one count of conspiracy to commit mail fraud, in violation of 18 U.S.C. 371; 15 counts of mail fraud, in violation of 18 U.S.C. 1341; five counts of

bribery, in violation of 18 U.S.C. 666; five counts of witness tampering, in violation of 18 U.S.C. 1512(b); and one count of making false statements before a grand jury, in violation of 18 U.S.C. 1623. Pet. App. 3. Following a jury trial, petitioner was convicted on the mail fraud conspiracy and substantive mail fraud counts, the false statements count, and two of the witness tampering counts. The district court dismissed the remaining witness tampering counts, and the jury acquitted petitioner on the bribery counts. *Ibid.*

3. The court of appeals affirmed petitioner's witness tampering convictions, reversed his other convictions, and remanded for resentencing.[1] Pet. App. 1-29. The court rejected petitioner's claim that his convictions on the witness tampering counts should be reversed because the "corruptly persuades" language of 18 U.S.C. 1512(b) is unconstitutionally overbroad and vague.[2] Pet.

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[1] The court reversed petitioner's mail fraud conspiracy and substantive mail fraud convictions, which were based in part on allegations that petitioner fraudulently obtained licenses to operate a bail bonds business from Alabama municipalities, because it concluded that such licenses were not property under Alabama law. Pet. App. 3-15; see *id.* at 31 (order denying petitions for rehearing). The court also reversed petitioner's false statement conviction, holding that his testimony before the grand jury was "literally true" and therefore could not support a conviction under 18 U.S.C. 1623. Pet. App. 15-20.

[2] 18 U.S.C. 1512(b) provides:

> Whoever knowingly uses intimidation or physical force, threatens, or corruptly persuades another person, or attempts to do so, or engages in misleading conduct toward another person, with intent to * * * cause or induce any person to * * * alter, destroy, mutilate, or conceal an object with intent to impair the object's integrity or availability for use in an official proceeding; [or with intent to] hinder, delay, or prevent the communication to a law enforcement officer or

App. 20-25. By prohibiting only persuasion that is "corrupt," the court reasoned, "Section 1512(b) clearly limits only constitutionally unprotected speech, and is not, therefore, overbroad." *Id.* at 22 (citing *United States* v. *Thompson*, 76 F.3d 442 (2d Cir. 1996)); see *id.* at 24 ("Section 1512 does not prohibit constitutionally protected speech, even if such conduct has the effect of hindering an investigation").

The court of appeals also rejected petitioner's vagueness claim, noting that the term "corruptly" in the omnibus obstruction-of-justice provision of 18 U.S.C. 1503(a) had "long been upheld as meaning with an 'improper purpose.'" Pet. App. 22. In accord with the Second Circuit's decision in *Thompson*, the court of appeals held that "[i]t is reasonable to attribute to the 'corruptly persuade' language in Section 1512(b), the same well-established meaning already attributed by the courts to the comparable language in Section 1503(a), i.e., motivated by an improper purpose."[3] *Id.* at 24. "So defined," the court held, "'corrupt' is a scienter requirement which provides adequate notice of what

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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 fined under this title or imprisoned not more than ten years, or both.

[3] The court also noted that the "corruptly persuades" language of 18 U.S.C. 1512 was added by Congress in 1988. See Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181. "Senator Biden, one of the drafters of the 1988 Amendments, stated at the time that the intention was 'merely to include in section 1512 the same protection of witnesses from noncoercive influence that was (and is) found in section 1503.'" Pet. App. 23; see 134 Cong. Rec. S17324 (daily ed. Oct. 21, 1988) (statement of Sen. Biden).

conduct is proscribed." *Id.* at 22-23 (citing *Thompson*, 76 F.3d at 452).[4]

The court of appeals also rejected petitioner's challenge to the sufficiency of the evidence to support his witness tampering convictions. Pet. App. 25-28. In one count, petitioner was charged with violating Section 1512(b)(3) by telling Kennedy to "just not say anything and [she would not] be bothered." *Id.* at 25. The court of appeals noted the government's argument that petitioner's "use of the term 'bother' could have included the possibility of Kennedy's being prosecuted and jailed for her involvement with the bail bond business" and that, therefore, petitioner's "comment was an attempt to frighten Kennedy into not talking to the FBI." *Id.* at 25-26. The court also explained that the jury at petitioner's trial had been instructed correctly that it must find that petitioner acted "knowingly and dishonestly with the specific intent to subvert or undermine the integrity or truth-seeking ability of an investigation by a federal law enforcement officer." *Id.* at 26. Accordingly, the court held that the jury could reasonably have inferred from Kennedy's testimony that petitioner "was attempting with an improper motive to persuade Kennedy not to talk to the FBI." *Ibid.*

In the second witness tampering count on which petitioner was convicted, he was charged with violating Section 1512(b)(2) by instructing Eddy to destroy

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[4] With respect to the purely statutory question of whether the understanding of the term "corruptly" in 18 U.S.C. 1503(a) informs the proper interpretation of "corruptly" in Section 1512(b), the court acknowledged that "a majority of a panel of the Third Circuit" had refused to follow *Thompson*. Pet. App. 23 (citing *United States* v. *Farrell*, 126 F.3d 484 (3d Cir. 1997)). The court of appeals nevertheless concluded that "the Second Circuit and the dissent in *Farrell* have the better reasoned position on this issue." *Id.* at 24.

"Jack" bonds in order to "impair [the bonds'] availability for use in an official proceeding." Pet. App. 26. With respect to that count, the court of appeals rejected petitioner's claim that the government failed to prove that the "Jack" bonds actually were destroyed. The court found that "[e]ven assuming that the statute requires such an event to occur, * * * Kennedy's testimony is sufficient proof that it did." *Id.* at 26-27.

ARGUMENT

1. Petitioner contends (Pet. 9-10) that this Court should grant certiorari because the court of appeals' decision conflicts with the Third Circuit's opinion in *United States* v. *Farrell*, 126 F.3d 484 (1997), on the question of the proper meaning of the phrase "corruptly persuades" in 18 U.S.C. 1512(b). Petitioner claims that, under the Third Circuit's interpretation of that statute, the evidence was insufficient to support his convictions. Even if the court of appeals' rationale is in tension with the decision in *Farrell*, the holding in petitioner's case is correct, and the narrow area of disagreement does not at present warrant this Court's intervention.

In *Farrell*, the Third Circuit rejected the view that the "corruptly persuades" clause of Section 1512(b) proscribes all persuasion that is motivated by an improper purpose. 126 F.3d at 489-490. As the court of appeals in petitioner's case explained, however, the legislative history indicates that the "corruptly persuades" language was added to Section 1512(b) to provide witnesses with the same protection found in 18 U.S.C. 1503. Pet. App. 23; see *Farrell*, 126 F.3d at 492 (Campbell, J., dissenting). Section 1503's use of the term "corruptly," in turn, has long been understood to mean "that the government must prove that the defendant's [conduct was] *motivated by an improper purpose*."

United States v. *Thompson*, 76 F.3d 442, 452 (2d Cir. 1996) (emphasis added) (citing *United States* v. *Fasolino*, 586 F.2d 939, 941 (2d Cir. 1978), and *United States* v. *Rasheed*, 663 F.2d 843, 852 (9th Cir. 1981), cert. denied, 454 U.S. 1157 (1982)). The court of appeals in this case thus correctly interpreted Section 1512(b)'s "corruptly persuades" clause as having "the same well-established meaning already attributed by the courts to the comparable language in Section 1503(a), i.e., motivated by an improper purpose." Pet. App. 24.[5]

To the extent the court of appeals' reasoning in affirming petitioner's conviction for corruptly persuading Kennedy not to talk to the FBI conflicts with *Farrell*, that disagreement does not warrant this Court's intervention at present.[6] The Third Circuit's decision in *Farrell* is a limited one. The court held that the defendant's conduct in that case—attempting to persuade a co-conspirator to withhold information from federal investigators—did not violate the statute be-

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[5] Contrary to petitioner's suggestion (Pet. 9), interpreting Section 1512(b)'s use of the term "corruptly" to mean that the persuasion must be motivated by an improper purpose does not make the term redundant with the statute's requirement that the defendant have the intent to "hinder, delay, or prevent" the communication of the relevant information to a law enforcement officer or judge. Not all actions taken to hinder an investigation violate Section 1512(b); the action must also be "corrupt"—*i.e.*, motivated by an improper purpose. See *United States* v. *Farrell*, 126 F.3d 484, 493 (3d Cir. 1997) (Campbell, J., dissenting). "For example, a mother urging her son, in his own interest, to claim his Fifth Amendment right to remain silent would hardly be acting 'corruptly.'" *Ibid.*

[6] The court of appeals' affirmance of petitioner's conviction for corruptly persuading Eddy to destroy the "Jack" bonds does not in any way conflict with *Farrell*. Destroying evidence, like lying to the authorities, is not conduct protected by the Fifth Amendment, and it would not enjoy protection under *Farrell*'s rationale.

cause "the 'culpable conduct' that violates § 1512(b)(3)'s 'corruptly persuades' clause does not include a noncoercive attempt to persuade a coconspirator who enjoys a Fifth Amendment right not to disclose self-incriminating information about the conspiracy to refrain, in accordance with that right, from volunteering information to investigators." 126 F.3d at 488. Beyond that specific holding, the court stated that it was "hesitant to define in more abstract terms the boundaries of the conduct punishable under the somewhat ambiguous 'corruptly persuades' clause. [W]e do not think it necessary to provide such a definition here." *Ibid.*

The court in *Farrell*, however, suggested several boundaries on its holding. Initially, because the district court had "expressly found that Farrell did not employ coercive methods" to dissuade his co-conspirator from cooperating with investigators (*Farrell*, 126 F.3d at 489), the Third Circuit confined its holding to "noncoercive attempt[s]." *Id.* at 488. Moreover, the court held that if the defendant had attempted to persuade his co-conspirator to lie to federal investigators—rather than simply withhold information pursuant to a valid Fifth Amendment privilege—the defendant would have exhibited the culpable conduct necessary to be found guilty of violating 18 U.S.C. 1512(b). 126 F.3d at 488, 491. Finally, the court left open the question whether persuading a person to withhold information from federal investigators, when that person does not have a valid Fifth Amendment privilege to do so, would be covered by Section 1512(b)'s "corruptly persuades" clause. *Id.* at 489 n.3.

Those features of *Farrell* remove from the scope of the court's holding many of the characteristic situations prosecuted under Section 1512. Moreover, the court did

not address the extent to which the general obstruction-of-justice statute, 18 U.S.C. 1503, might apply to the facts at issue in *Farrell*. Accordingly, to the extent the court of appeals' rationale conflicts with the Third Circuit's opinion in *Farrell*, the disagreement is only a narrow one. Because the fact pattern implicating the courts' disagreement has arisen only in those two cases, the scope of any divergence between the Third Circuit and the other courts of appeals on this issue is not, as of yet, sufficiently pronounced as to warrant this Court's review.

2. Petitioner also contends (Pet. 6-11) that this Court should grant certiorari because Section 1512(b)'s "corruptly persuades" clause is unconstitutionally overbroad and vague. There is no conflict in the circuits on that issue. The Third Circuit in *Farrell* addressed only the statutory meaning of the phrase "corruptly persuades." The only other court of appeals' decision to have addressed the constitutionality of Section 1512(b) —*United States* v. *Thompson*, 76 F.3d at 452-453—held that Section 1512(b) is neither overbroad nor impermissibly vague.

Petitioner nevertheless contends (Pet. 9 n.6, 10 & n.7) that the court of appeals' decision conflicts "in principle" with the District of Columbia Circuit's opinion in *United States* v. *Poindexter*, 951 F.2d 369 (1991), cert. denied, 506 U.S. 1021 (1992), on the question whether the use of the word "corruptly" in a criminal statute is unconstitutionally vague. No such conflict exists. First, the court in *Poindexter* held that the word "corruptly" in 18 U.S.C. 1505 (1988)[7] was unconstitutionally

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[7] The version of Section 1505 at issue in *Poindexter* provided:

> Whoever corruptly, or by threats or force, or by any threatening letter or communication influences, obstructs, or

vague only as applied to the specific conduct of the defendant in that case—lying directly to Congress. 951 F.3d at 377, 379, 385. The court distinguished that conduct from the influencing *of another* to violate his legal duty to comply with a congressional inquiry, and it held that Section 1505 was unconstitutionally vague only as applied to a defendant who *himself* lies to Congress. *Id.* at 379, 381-382, 384; see *id.* at 385 ("[W]e need not conclude that the ambiguity of the term 'corruptly' in § 1505 renders that term unconstitutionally vague as applied to all conduct."). In contrast to the defendant in *Poindexter*, petitioner was found guilty of corruptly persuading *other persons*—Eddy and Kennedy—to destroy and withhold incriminating information. To the extent *Poindexter* is at all relevant, the decision is inapplicable to the conduct underlying petitioner's convictions.

Second, the court of appeals' decision in petitioner's case does not conflict with the opinion in *Poindexter* because the court in that case addressed a different statute—Section 1505. The court expressly distinguished Section 1503, the statute on which Section 1512(b) was modeled, stating that "the language of § 1505 is materially different from that of § 1503." 951 F.2d at 385. And, as noted by the court of appeals in petitioner's case (Pet. App. 22 n.22), the District of Columbia Circuit chose not to extend *Poindexter*'s holding

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> impedes or endeavors to influence, obstruct, or impede * * * the due and proper exercise of the power of inquiry under which any inquiry or investigation is being had by either House, or any committee of either House or any joint committee of the Congress [s]hall be fined not more than $5,000 or imprisoned not more than five years, or both.

18 U.S.C. 1505 (1988).

to Section 1512(b) in *United States* v. *Morrison*, 98 F.3d 619 (D.C. Cir. 1996), cert. denied, 117 S. Ct. 1279 (1997). In that case, the court affirmed a defendant's conviction under Section 1512(b) for attempting to "corruptly persuade" another person to testify falsely in court. *Id.* at 629-630.

The court of appeals' holding that Section 1512(b) is not unconstitutionally overbroad or vague is correct. As the court explained, because the statute's application is limited to persuasion "motivated by an improper purpose," it "does not prohibit constitutionally protected speech, even if such conduct has the effect of hindering an investigation." Pet. App. 24; see *Thompson*, 76 F.3d at 452 ("By targeting only such persuasion as is 'corrupt[],' § 1512(b) does not proscribe * * * constitutionally protected speech and is not overbroad."). Likewise, the court correctly held (Pet. App. 22-23) that "corruptly"—defined to mean "with an improper purpose"—"is a scienter requirement which provides adequate notice of what conduct is proscribed."[8]

[8] There is also no basis for petitioner's apparent suggestion (Pet. 7) that his conviction for corruptly persuading Kennedy not to talk to the FBI violated his rights under the Fifth Amendment. Although Kennedy could have asserted the Fifth Amendment privilege against compelled self-incrimination in response to questioning by the FBI, petitioner had no Fifth Amendment right to persuade her to do so.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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