Knowledge and the Nexus Requirement in Obstruction-of-Justice Offenses

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This Note analyzes conflicting trends in caselaw interpreting the nexus requirement for obstruction-of-justice offenses under United States v. Aguilar*, 515 U.S. 593 (1995), and it argues that knowledge that one's actions are likely to affect an official proceeding remains an essential element of the nexus requirement. This Note is important because mainstream attention on obstruction of justice has put the offense in clear public view. But more importantly, diverging courts of appeals opinions have created confusion as to what obstruction of justice requires. The lingering circuit split on the role of knowledge in the nexus requirement creates inconsistent standards throughout the country. This result is particularly troubling because of the breadth of obstruction-of-justice offenses generally and 18 U.S.C. § 1512(c)(2) in particular. This Note works toward resolving conflicts in obstruction-of-justice law by carefully analyzing the Supreme Court's statements on obstruction of justice, tracing the application of those cases across the circuits, and arguing for a best interpretation of the nexus requirement that includes knowledge.*

Introduction

In the spring of 2019, the public at large became keenly aware of the crime of obstruction of justice. Through March and April, the nation waited in anxious anticipation for the publication of the Mueller Report to see whether President Trump obstructed justice when he fired then-Federal Bureau of Investigation Director James Comey.[1] The Mueller Report ultimately declined either to recommend a charge of obstruction of justice or to exonerate the President.[2] Meanwhile, on March 12, 2019, the Varsity Blues scandal orchestrated by Rick Singer staked its claim for the public's attention when U.S. Attorney Andrew Lelling unveiled the $25-million-dollar college-

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1. ROBERT S. MUELLER, III, U.S. DEP'T OF JUSTICE, REPORT ON THE INVESTIGATION INTO RUSSIAN INTERFERENCE IN THE 2016 PRESIDENTIAL ELECTION (2019); *Timeline: Every Big Move in the Mueller Investigation*, AXIOS (July 23, 2019), https://www.axios.com/mueller-russia-investigation-timeline-indictments-70433acd-9ef7-424d-aa01-b962ae5c9647.html [https://perma.cc/2D25-S5QZ].

2. 2 MUELLER, *supra* note 1, at 182 (declining "to make a traditional prosecutorial judgment" or "draw ultimate conclusions about the President's conduct," but stating that "if we had confidence after a thorough investigation of the facts that the President clearly did not commit obstruction of justice, we would so state.").

admissions scheme at a Boston press conference.[3] The charges to which Mr. Singer pleaded guilty included obstruction of justice for tipping off parents to the federal probe.[4]

In the midst of those national events, the legal world received a third helping at this obstruction-of-justice feast when the Fourth Circuit reinforced a circuit split by adhering to a *mens rea* understanding of the so-called "nexus requirement."[5] The Fourth Circuit, joining the Fifth and Eleventh Circuits, held that knowledge is an essential element of an obstruction-of-justice charge under 18 U.S.C. § 1512(c)(2),[6] in contrast to the Second and Tenth Circuits, which do not require knowledge.[7] That circuit split raised obstruction of justice from merely an interesting topic garnering public attention to a pressing legal issue of national importance. Because the Supreme Court declined to take up the Fourth Circuit case,[8] the fight over the knowledge element in obstruction of justice remains alive and in the hands of lower courts and legal journals.

The legal question—does § 1512(c)(2) require knowledge, and if so, knowledge of what?—revolves around the Court's opinion in *United States v. Aguilar*.[9] In *Aguilar*, the Court decided that the then-predominant general obstruction-of-justice statute, 18 U.S.C. § 1503, included a "nexus requirement."[10] *Aguilar*'s nexus requirement limits the scope of actions for which a defendant can be criminally liable by requiring an "intent to influence judicial or grand jury proceedings"; that is, "the [obstructive] act must have a relationship in time, causation, or logic with the judicial proceedings" allegedly obstructed.[11]

The Court's further articulation of this nexus requirement, explored thoroughly below,[12] has caused problems for lower courts applying the nexus requirement to the now-predominant general obstruction-of-justice statute,

3. Jennifer Levitz & Melissa Korn, *The Making of a College-Admissions Con Man*, WALL ST. J. (July 17, 2020, 11:02 AM), https://www.wsj.com/articles/the-making-of-a-college-admissions-con-man-11594998156 [https://perma.cc/D6PE-S3JN].

4. *Id.*

5. United States v. Sutherland, 921 F.3d 421, 427–28 (4th Cir. 2019), *cert. denied*, 140 S. Ct. 1106 (2020); *see also infra* notes 119–126 and accompanying text for an overview of the circuit split.

6. *Sutherland*, 921 F.3d at 427–28; United States v. Bedoy, 827 F.3d 495, 510 (5th Cir. 2016); United States v. Coppin, 569 F. App'x 326, 334 (5th Cir. 2014); United States v. Friske, 640 F.3d 1288, 1292–93 (11th Cir. 2011).

7. United States v. Pugh, 945 F.3d 9, 21–22 (2d Cir. 2019); United States v. Phillips, 583 F.3d 1261, 1264–65 (10th Cir. 2009).

8. Sutherland v. United States, 140 S. Ct. 1106 (2020).

9. 515 U.S. 593 (1995).

10. *Id.* at 599–600.

11. *Id.* at 599.

12. *See infra* notes 36–53 and accompanying text (describing the nexus requirement in obstruction-of-justice cases).

§ 1512(c)(2). The Second and Tenth Circuits have seized on the Court's subsequent use of the term "natural and probable effect" to conclude that *Aguilar* requires only that obstruction of an official proceeding is reasonably foreseeable.[13] Conversely, the Fourth, Fifth, and Eleventh Circuits have emphasized the Court's "knowledge" language to conclude that "knowledge that [one's] actions are likely to affect" an official proceeding remains an essential element of § 1512(c)(2) obstruction of justice.[14] These diverging interpretations of *Aguilar* are the basis of the current split on knowledge in obstruction of justice.

Three subsidiary questions arise when addressing this knowledge split. First, how should *Aguilar*'s interpretation of § 1503 apply to other obstruction-of-justice statutes, in particular § 1512(c)(2)? Second, is the nexus requirement a *mens rea* element or part of the *actus reus*? Third, are the Court's various restatements of the nexus requirement articulations of the element itself or rather descriptions of circumstantial evidence that can establish the nexus to an official proceeding?

This Note argues that the Fourth, Fifth, and Eleventh Circuits take the correct approach in the knowledge split. In particular, this Note argues that the Supreme Court should clarify that the nexus requirement is a *mens rea* element requiring knowledge that one's "actions are likely to affect [a] judicial proceeding,"[15] and that the availability of circumstantial evidence to establish knowledge in some circumstances does not reduce the nexus requirement to a reasonable-foreseeability element.

To argue for a knowledge-based understanding of the *Aguilar* nexus and to address the subsidiary questions raised by the split, this Note will proceed as follows. First, this Note will carefully analyze the *Aguilar* opinion in subpart I(A) to conclude that the Court intended the nexus to be a *mens rea* element. Second, in subpart I(B), this Note will address the Court's most recent obstruction-of-justice decision—*Marinello v. United States*[16]—which offers a textual hook for a *mens rea* understanding of the nexus requirement in the word "corruptly."[17] Finally in Part II, this Note will analyze both sides of the knowledge split, and it will argue that a knowledge-based understanding of the nexus requirement is the best interpretation of obstruction-of-justice law.

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13. United States v. Pugh, 945 F.3d 9, 21–22 (2d Cir. 2019); United States v. Phillips, 583 F.3d 1261, 1264–65 (10th Cir. 2009).

14. *Aguilar*, 515 U.S. at 599; United States v. Sutherland, 921 F.3d 421, 427–28 (4th Cir. 2019), *cert. denied*, 140 S. Ct. 1106 (2020); United States v. Bedoy, 827 F.3d 495, 506, 510 (5th Cir. 2016); United States v. Friske, 640 F.3d 1288, 1292–93 (11th Cir. 2011).

15. *Aguilar*, 515 U.S. at 599.

16. 138 S. Ct. 1101 (2018).

17. *Id.* at 1108.

I. The *Aguilar* Nexus—A *Mens Rea* or *Actus Reus* Element?

The Court introduced the *Aguilar* nexus into a wide body of obstruction-of-justice law, consisting of a myriad of general and specific statutory prohibitions. These various statutes are aimed at addressing "the variety of corrupt methods by which the proper administration of justice may be impeded or thwarted."[18] The core provisions are codified at 18 U.S.C. §§ 1501–1521, but other obstruction-of-justice-provisions exist throughout the U.S. Code.[19] Some of the specific provisions cover only a narrow type of activity, such as document destruction.[20]

Other provisions, however, reach a broad swath of activity by following a far-reaching formula: (i) describe the underlying conduct in the general terms of influencing, obstructing, or impeding; (ii) define the object of the obstruction; and (iii) establish some sort of *mens rea*. Broad provisions of this type include the omnibus clauses in 18 U.S.C. § 1503,[21] 18 U.S.C. § 1512(c)(2),[22] and 26 U.S.C. § 7212(a).[23] The far-reaching language in these omnibus clauses does not, on its own, offer clear guidance to distinguish permissible from impermissible activity.

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18. NORMAN ABRAMS, SARA SUN BEALE & SUSAN RIVA KLEIN, FEDERAL CRIMINAL LAW AND ITS ENFORCEMENT 1203 (6th ed. 2015) (quoting Catrino v. United States, 176 F.2d 884, 887 (9th Cir. 1949)).

19. *See, e.g.*, 26 U.S.C. § 7212 (2018) (enumerating an obstruction-of-justice offense). This was the offense at issue in *Marinello*. *Marinello*, 138 S. Ct. at 1105.

20. *See, e.g.*, 18 U.S.C. § 1519 (2018). Proscribing various obstructive practices involving documents relevant to an investigation or proceeding, the statute provides:

> Whoever knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States or any case filed under title 11, or in relation to or contemplation of any such matter or case, shall be fined under this title, imprisoned not more than 20 years, or both.

Id. The potentially broad term "tangible object" in § 1519 has been narrowly interpreted as an object "used to record or preserve information." Yates v. United States, 574 U.S. 528, 532 (2015) (plurality opinion).

21. 18 U.S.C. § 1503 (1988) ("Whoever . . . corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be fined not more than $5,000 or imprisoned not more than five years, or both.").

22. 18 U.S.C. § 1512(c)(2) (2018) ("Whoever corruptly . . . otherwise obstructs, influences, or impedes any official proceeding, or attempts to do so, shall be fined under this title or imprisoned not more than 20 years, or both.").

23. The language of § 7212(a) closely mimics the language in § 1503 and reads:

> Whoever . . . in any other way corruptly or by force or threats of force []including any threatening letter or communication obstructs or impedes, or endeavors to obstruct or impede, the due administration of this title, shall, upon conviction thereof, be fined not more than $5,000, or imprisoned not more than 3 years, or both . . . .

26 U.S.C. § 7212(a) (2018).

In *United States v. Aguilar*, the Supreme Court addressed this problem for the obstruction statute before it—the omnibus clause in 18 U.S.C. § 1503—by adopting a "nexus" requirement.[24] That requirement limits the reach of § 1503 by requiring an "intent to influence judicial or grand jury proceedings," as shown by the commission of acts that "have a relationship in time, causation, or logic with the judicial proceedings" in which justice is being administered.[25] *Aguilar* is the seminal Supreme Court case in the gradual spread of the nexus requirement to obstruction-of-justice statutes beyond § 1503,[26] and so *Aguilar* must be examined first.

A. Development of the Nexus Requirement in United States v. Aguilar

United States v. Aguilar involved the obstruction-of-justice conviction of then-active U.S. District Judge Robert Aguilar under 18 U.S.C. § 1503 for lying to Federal Bureau of Investigation agents about his involvement in a case against a labor-union official and about his knowledge of a wiretap.[27] An associate of the labor-union official initially approached Aguilar hoping he would intervene on behalf of the official in a post-conviction proceeding for habeas relief.[28] That associate later became the subject of a judicially authorized secret wiretap.[29] "[C]oncerned with appearances of impropriety," the district's chief judge warned Aguilar that he was communicating with someone who "might be connected with criminal elements because [the associate's] name had appeared on a wiretap authorization."[30] Aguilar then disclosed the wiretap to his nephew "with an intent that his nephew relay the information to" the associate.[31] The basis for the obstruction-of-justice charge arose from what followed:

> Two months after the disclosure to his nephew, a grand jury began to investigate an alleged conspiracy to influence the outcome of [the

24. United States v. Aguilar, 515 U.S. 593, 599–600 (1995).

25. *Aguilar*, 515 U.S. at 599 ("Some courts have phrased this showing as a 'nexus' requirement—that the act must have a relationship in time, causation, or logic with the judicial proceedings."); *see also* Marinello v. United States, 138 S. Ct. 1101, 1106 (2018) (reaffirming the *Aguilar* nexus requirement, requiring "an intent to influence judicial or grand jury proceedings" shown by acts that "have a relationship in time, causation, or logic with the judicial proceedings.").

26. *See, e.g.*, *Marinello*, 138 S. Ct. at 1109 (applying the *Aguilar* nexus to 26 U.S.C. § 7212); United States v. Young, 916 F.3d 368, 386 (4th Cir. 2019) (applying the *Aguilar* nexus to 18 U.S.C. § 1512(c)(2)); United States v. Friske, 640 F.3d 1288, 1292 (11th Cir. 2011) (same).

27. *Aguilar*, 515 U.S. at 595–97.

28. *Id.* at 595–96.

29. *Id.* at 596.

30. *Id.*

31. *Id.* For disclosing the wiretap, Aguilar was charged with and convicted of an 18 U.S.C. § 2232(c) offense. *Id.* at 597. Unlike the obstruction-of-justice conviction, the § 2232(c) conviction withstood scrutiny on the merits before the Supreme Court. *Id.* at 606. The conviction, however, was ultimately reversed on remand for an erroneous jury instruction. United States v. Aguilar, 80 F.3d 329, 334 (9th Cir. 1996).

> labor union official's] habeas case. Two FBI agents questioned [Aguilar]. During the interview, [Aguilar] lied about his participation in [the labor-union official's] case and his knowledge of the wiretap.[32]

These somewhat complicated facts teed up the relatively simple legal question: did Aguilar obstruct justice by lying to the FBI agents? By adopting and applying the "nexus requirement," the Supreme Court concluded that he did not.[33] To understand the *Aguilar* opinion, it is critical to emphasize that Aguilar lied to FBI agents as part of an FBI investigation.[34] Relatedly, it is also critical to highlight the text of the § 1503 omnibus clause, which proscribes "corruptly" influencing, obstructing, or impeding the "due administration of justice."[35] The question whether Aguilar obstructed justice, then, transforms into the question of whether lying in the course of an FBI investigation constitutes "corruptly" obstructing the "due administration of justice." The nexus requirement is the basis of the Court's negative answer to those questions.

The nexus requirement was not an invention of the Court in *Aguilar*. Rather, the nexus requirement is traceable to at least four circuit court opinions and one late-nineteenth-century Supreme Court opinion.[36] The Court's reasoning for adopting the nexus requirement is worth quoting in its entirety prior to a step-by-step analysis:

> The first case from this Court construing the predecessor statute to § 1503 was *Pettibone v. United States*. There we held that "a person is not sufficiently charged with obstructing or impeding the due administration of justice in a court unless it appears that he knew or had notice that justice was being administered in such court." The Court reasoned that a person lacking knowledge of a pending proceeding necessarily lacked the evil intent to obstruct. Recent decisions of Courts of Appeals have likewise tended to place metes and bounds on the very broad language of the catchall provision. The action taken by the accused must be with an intent to influence judicial or grand jury proceedings; it is not enough that there be an intent to

32. *Aguilar*, 515 U.S. at 596–97.

33. *Id.* at 600–01.

34. *Id.* at 597.

35. 18 U.S.C. § 1503 (1988). Though the 1988 codification of § 1503 governed Aguilar's obstruction-of-justice charge, the relevant language of the omnibus clause remains the same today as it was then. *See* 18 U.S.C. § 1503 (2018) (proscribing "corruptly" influencing, obstructing, or impeding the "due administration of justice").

36. *See Aguilar*, 515 U.S. at 599 (citing to previous cases that had established a "nexus" requirement); Pettibone v. United States, 148 U.S. 197, 206–207 (1893) (formulating an early "nexus" requirement); United States v. Wood, 6 F.3d 692, 696 (10th Cir. 1993) (same); United States v. Thomas, 916 F.2d 647, 651 (11th Cir. 1990) (same); United States v. Brown, 688 F.2d 596, 598 (9th Cir. 1982) (same); United States v. Walasek, 527 F.2d 676, 679 & n.12 (3d Cir. 1975) (same).

> influence some ancillary proceeding, such as an investigation independent of the court's or grand jury's authority. Some courts have phrased this showing as a "nexus" requirement—that the act must have a relationship in time, causation, or logic with the judicial proceedings. In other words, the endeavor must have the "'natural and probable effect'" of interfering with the due administration of justice. This is not to say that the defendant's actions need to be successful; an "endeavor" suffices. But as in *Pettibone*, if the defendant lacks knowledge that his actions are likely to affect the judicial proceeding, he lacks the requisite intent to obstruct.
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> Although respondent urges various broader grounds for affirmance, we find it unnecessary to address them because we think the "nexus" requirement developed in the decisions of the Courts of Appeals is a correct construction of § 1503.[37]

The Court began by consulting the predecessor statute to § 1503 and its own 1893 decision, *Pettibone v. United States*.[38] The predecessor statute was structured much like the modern § 1503. First, it specifically barred corrupt interference with witnesses or officers "in any court of the United States."[39] Second, the omnibus clause of the statute broadly barred "corruptly" obstructing or impeding "the due administration of justice therein" (i.e., "in any court of the United States").[40] Accordingly, the only material difference between the omnibus clause in the predecessor statute and that in § 1503 is the explicit reference to United States courts in the former via the word "therein."

The Court in *Pettibone* narrowed the reach of the predecessor omnibus clause by holding "a person is not sufficiently charged with obstructing or impeding the due administration of justice in a court unless it appears that he knew or had notice that justice was being administered in such court."[41] The Court in *Aguilar* summarized its reasoning in *Pettibone*: "The Court [in *Pettibone*] reasoned that a person lacking knowledge of a pending proceeding necessarily lacked the evil intent to obstruct."[42] In the Court's view, knowledge of a proceeding was integral to the intent element limiting the reach of the predecessor statute at issue in *Pettibone*.

The Court then related its holding in *Pettibone* to the efforts of four courts of appeals to place "metes and bounds on the very broad language of

37. *Aguilar*, 515 U.S. at 599–600 (footnotes omitted) (citations omitted).

38. 148 U.S. 197 (1893); *Aguilar*, 515 U.S. at 599–600.

39. *Pettibone*, 148 U.S. at 197 (quoting 70 Rev. Stat. § 5399 (1873–74) (current version at 18 U.S.C. § 1503 (2018)).

40. *Id.*

41. *Id.* at 206.

42. *Aguilar*, 515 U.S. at 599 (citing *Pettibone*, 148 U.S. at 207).

the catchall provision [of the omnibus clause in § 1503]."[43] The Court summarized these metes and bounds as a limit on the intent element of § 1503; that intent must relate to "judicial or grand jury proceedings" and not simply to "some ancillary proceeding."[44] In the predecessor statute to § 1503, the connection to judicial proceedings arose directly from the text of the statute, which required that justice was being administered in a court.[45] In § 1503, however, there is no reference to a court of the United States within the omnibus clause. Rather, proceedings in court and before grand juries are distinguished from police investigations in caselaw.[46]

The Court then termed the lower courts' limit on the intent requirement the "'nexus' requirement" and restated the limitation: "the act must have a relationship in time, causation, or logic with the judicial proceedings."[47] With the very next sentence, however, the Court restated the nexus requirement once more: "In other words, the endeavor must have the 'natural and probable effect' of interfering with the due administration of justice."[48] These two articulations of the nexus requirement—the "relationship" articulation and the "natural and probable effect" articulation—are frequently cited, either together or separately, by lower courts applying the nexus requirement.[49]

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43. *Id.* (first citing United States v. Brown, 688 F.2d 596, 598 (9th Cir. 1982); then citing United States v. Wood, 6 F.3d 692, 696 (10th Cir. 1993); then citing United States v. Walasek, 527 F.2d 676, 679 & n.12 (3d Cir. 1975); and then citing United States v. Thomas, 916 F.2d 647, 651 (11th Cir. 1990)).

44. *Id.* (citing *Brown*, 688 F.2d at 598) ("The action taken by the accused must be with an intent to influence judicial or grand jury proceedings; it is not enough that there be an intent to influence some ancillary proceeding, such as an investigation independent of the court's or grand jury's authority.").

45. *Pettibone*, 148 U.S. at 204–05.

46. *Aguilar*, 515 U.S. at 599; *Brown*, 688 F.2d at 598.

47. *Aguilar*, 515 U.S. at 599 (first citing *Wood*, 6 F.3d at 696; and then citing *Walasek*, 527 F.2d at 679 & n.12). Though the Court only said "judicial proceedings" in this sentence, the use of the definitive article "the" implies that the Court is referring to the preceding sentence, where it referred to "judicial or grand jury proceedings." It would likely be fair to read the omission of "grand jury" in the current sentence to be unintentional and to interpret this articulation of the nexus requirement to apply to grand-jury proceedings as well as judicial proceedings. This generous reading is supported by the fact that a grand-jury proceeding was at issue in *Aguilar* and the Court applied the nexus requirement. *Id.* at 600.

48. *Id.* at 599 (first citing *Wood*, 6 F.3d at 695; then citing *Thomas*, 916 F.2d at 651; and then citing *Walasek*, 527 F.2d at 679).

49. *See, e.g.*, United States v. Sutherland, 921 F.3d 421, 426 (4th Cir. 2019), *cert. denied*, 140 S. Ct. 1106 (2020) ("Section 1512(c)(2) also requires proof that a particular grand jury proceeding was 'reasonably foreseeable' to a defendant who has been charged with obstructing that proceeding."); United States v. Young, 916 F.3d 368, 385 (4th Cir. 2019) ("The Supreme Court held that § 1503 required a greater connection between the obstructive act and an official proceeding than what the government had shown—specifically, a 'nexus' showing 'that the act [had] a relationship in time, causation, or logic with the judicial proceeding.'") (alteration in original); United States v. Bedoy, 827 F.3d 495, 504 (5th Cir. 2016) ("[T]he Supreme Court clarified that § 1503(a) imposes 'a "nexus" requirement'— 'the act must have a relationship in time, causation, or logic with the judicial proceeding. In other words, the endeavor must have the "natural and

After briefly clarifying that the nexus requirement allows for inchoate offenses,[50] the Court then finished its summary by returning to *Pettibone* and intent: "But as in *Pettibone*, if the defendant lacks knowledge that his actions are likely to affect the judicial proceeding, he lacks the requisite intent to obstruct."[51] In the very next sentence, the Court simply adopted "the 'nexus' requirement developed in the decisions of the Courts of Appeals" as "a correct construction of § 1503."[52] *Aguilar*'s final description, therefore, of the nexus requirement emphasizes both intent to obstruct and knowledge.

In those eight sentences, the Court used a basket of terms and phrases to describe and adopt the nexus requirement: "knew"; "had notice"; "intent to obstruct"; "intent to influence"; "judicial or grand jury proceedings"; "relationship in time, causation, or logic"; and "natural and probable effect." The terminology evokes not only *mens rea* but also the circumstances of the offense. This raises the question: where does the nexus requirement fit among the elements of § 1503's omnibus-clause offense? Is it part of the *mens rea* of the offense, or is it part of the *actus reus*? Does it arise primarily from the word "corruptly" in the statute, or does it primarily describe the relationship of the obstructive conduct to the object of the obstruction?[53]

Two key aspects of the application of the nexus requirement to the facts in *Aguilar* can help begin addressing these problems. First, the Court concluded: "We do not believe that uttering false statements to an investigating agent—and that seems to be all that was proved here—who might or might not testify before a grand jury is sufficient to make out a violation of the catchall provision of § 1503."[54] This fact-focused phrasing tends to indicate that the Court is concerned with the relationship of the obstructive conduct to the grand jury—an *actus reus* inquiry. Moreover, the statement relied on the previous conclusion that the object of the obstruction

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probable effect" of interfering with the due administration of justice.'") (citation omitted); United States v. Desposito, 704 F.3d 221, 230 (2d Cir. 2013) ("[For] the element of intent, the government must show a 'nexus' between the defendant's act and the judicial proceedings; that is, there must be 'a relationship in time, causation, or logic' such that the act has 'the natural and probable effect of interfering with the due administration of justice.'").

50. *Aguilar*, 515 U.S. at 599 ("This is not to say that the defendant's actions need be successful; an 'endeavor' suffices.") (citing United States v. Russell, 255 U.S. 138, 143 (1921)). Not only does the Court's citation to *Russell* support the notion that an endeavor suffices, but also § 1503 explicitly contemplates punishing "endeavors to influence, obstruct, or impede, the due administration of justice." 18 U.S.C. § 1503 (2018).

51. *Aguilar*, 515 U.S. at 599.

52. *Id.* at 600.

53. This Note uses the term "*actus reus*" expansively to include the circumstances surrounding the offense. *Cf.* Deborah W. Denno, *Criminal Law in a Post-Freudian World*, 2005 U. ILL. L. REV. 601, 641 (2005) (describing the "three main elements that may constitute the actus reus of a criminal offense" as "(1) the actor's conduct . . . , (2) the results of that conduct . . . , and (3) the attendant circumstances surrounding the actor's conduct").

54. *Aguilar*, 515 U.S. at 600.

must be the grand-jury investigation and not an ancillary proceeding, such as a criminal investigation.[55] That previous conclusion, however, was phrased in terms of "intent to influence"—a *mens rea* inquiry.[56]

But second, the Court considered evidence of Aguilar's knowledge and concluded:

> We think the transcript citation relied upon by the Government [showing that the FBI agent told Aguilar that a grand jury was convening] would not enable a rational trier of fact to conclude that respondent knew that his false statement would be provided to the grand jury, and that the evidence goes no further than showing that respondent testified falsely to an investigating agent.[57]

This conclusion can be restated simply: the circumstances surrounding Aguilar's lie did not establish knowledge. This conclusion is striking because, at the time, Aguilar was an active federal district court judge.[58] One would think that a U.S. judge, of all people, would be familiar enough with federal investigations and grand-jury proceedings to know that his misstatement to the FBI would likely end up before the grand jury. The Court asserted that "what use will be made of" a statement to an investigating agent is "speculative."[59] But there is a strong argument that a U.S. judge, knowledgeable of many of the facts of the investigation,[60] would understand that the FBI agent would more likely than not make his statement available to the grand jury. Nevertheless, the Court chose not to look at Aguilar's subjective experience to assess Aguilar's knowledge.

Instead, the inquiry is objective. The fact that the Court discounts Aguilar's personal experience and focuses on the relationship to the grand jury in its factual application of the nexus requirement could support the position that the nexus requirement is an *actus reus* element. The Court's use of the word "conduct" in discussing the speculation involved in finding knowledge here bolsters that interpretation.[61]

But a more sensible argument could be made as well that incorporates all of the *mens rea* language spread throughout the opinion while recognizing

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55. *See id.* at 599 ("The action taken by the accused must be with an intent to influence judicial or grand jury proceedings; it is not enough that there be an intent to influence some ancillary proceeding, such as an investigation independent of the court's or grand jury's authority.").

56. *Id.*

57. *Id.* at 600–01.

58. *Id.* at 595.

59. *Id.* at 601.

60. *See id.* at 595–96 (relating that Aguilar was approached by an associate of the labor-union official regarding his post-conviction proceeding).

61. *See id.* at 601 (explaining that the conduct of giving false testimony directly to a grand jury "all but assures that the grand jury will consider the material in its deliberations," whereas the conduct of giving false testimony to an investigating agent "cannot be said to have the 'natural and probable effect' of interfering with the due administration of justice" (citations omitted)).

the objectivity in the Court's factual assessment: the nexus requirement is a *mens rea* element that is judged objectively, taking into account—among other things—the circumstances surrounding the allegedly obstructive conduct. It is almost axiomatic in criminal law that a defendant's mental state can be proven through "reasonable inferences from the evidence of defendant's conduct" and from circumstantial evidence surrounding the conduct.[62] That is precisely what is going on in *Aguilar*. Interpretations of the objective language and conduct language in *Aguilar* as establishing an *actus reus* nexus requirement are—in this Note's view—misinterpretations of *Aguilar*'s evidentiary application of a *mens rea* nexus requirement.

The nexus requirement in *Aguilar* is best understood as a mental element requiring that the defendant's intent be specifically directed at a judicial or grand-jury proceeding, which can be established through the ordinary presentation of direct or circumstantial evidence.[63] Properly distinguishing the element from the evidence that can establish the element is critical to holding the government to its burden of proof on that element.[64] As will be shown below in Part 0, framing the nexus requirement as an *actus reus* element focused primarily on the circumstances of the offense effectively reduces the nexus element to a minimal evidentiary standard. Understanding the Court's statements on the nexus requirement as establishing a *mens rea* element, therefore, is critical to maintaining the vitality of the nexus requirement.

B. The Court's Most Recent Treatment of the Nexus Requirement: Marinello v. United States

After *Aguilar*, the Court's next treatment of the nexus requirement came in the context of 26 U.S.C. § 7212 in *Marinello v. United States*.[65] Two observations from *Marinello* are central to understanding the nexus requirement. First, the Court exported *Aguilar*'s nexus from Title 18 to the Internal Revenue Code, opening new questions on the meaning of

62. *See, e.g.*, Ratzlaf v. United States, 510 U.S. 135, 149 n.19 (1994) ("A jury may, of course, find the requisite knowledge on defendant's part by drawing reasonable inferences from the evidence of defendant's conduct . . . ."); United States v. MacPherson, 424 F.3d 183, 189–90 (2d Cir. 2005) (collecting cases).

63. *See Aguilar*, 515 U.S. at 599 ("[I]f the defendant lacks knowledge that his actions are likely to affect the judicial proceeding, he lacks the requisite intent to obstruct."); 1 STEPHEN E. ARTHUR & ROBERT S. HUNTER, FEDERAL TRIAL HANDBOOK: CRIMINAL § 20:18 (4th ed. 2019) ("Specific intent may be proved not only by what was said by the accused but also from his acts and conduct and the circumstances and reasonable inferences to be drawn from them.").

64. ARTHUR & HUNTER, *supra* note 63 ("When intent is an element of an offense it is constitutional error to charge a jury that this element may be supplied by a presumption rather than requiring the prosecution to prove it by evidence, direct or circumstantial. However, an instruction that the jury may infer intent from a defendant's acts but which does not include a presumption in this regard is proper." (citation omitted)).

65. 138 S. Ct. 1101 (2018).

"administration" and the object of the obstructive act.[66] Second, § 7212 caselaw already had a fairly stable understanding of the term "corruptly"—a possible textual hook for the nexus requirement[67]—well before the Court adopted the nexus requirement in *Marinello*.[68] While not settling the issue definitively, these observations from *Marinello* tend to favor a *mens rea* interpretation of the nexus requirement.

1. Due Administration of the Internal Revenue Code.—The Court in *Marinello* addressed the question of whether effectively lying on a tax return constitutes obstruction of justice under 26 U.S.C. § 7212(a).[69] Section 7212(a) contains an omnibus clause which heavily imitates the language in 18 U.S.C. § 1503's omnibus clause:

> Whoever . . . in any other way corruptly or by force or threats of force (including any threatening letter or communication) obstructs or impedes, or endeavors to obstruct or impede, the due administration of this title [i.e., Title 26, the Internal Revenue Code], shall, upon conviction thereof, be fined . . . or imprisoned . . . or both . . . .[70]

Section 7212's omnibus clause differs in material respect from § 1503's omnibus clause only in defining the object of the obstruction as the due administration of the Internal Revenue Code rather than the due administration of justice.[71] The similarity in these statutes counsels heavily in favor of interpreting them in the same way, but the material difference between the two statutes raises a basic but critical question: what is due administration of the Internal Revenue Code?[72]

Administration could be read broadly to include—as Justice Thomas argued in dissent—the whole process of administering taxes: "information

66. *See id.* at 1106–07 (determining that the omnibus clause in 26 U.S.C. § 7212 refers to "specific, targeted acts of administration" and that "the broader statutory context of the full Internal Revenue Code . . . counsels against" a broad understanding of due administration of the Internal Revenue Code).

67. *See infra* text accompanying notes 107–112. *But see Aguilar*, 515 U.S. at 612, 616–17 (1995) (Scalia, J., concurring in part and dissenting in part) (noting that "[t]he Court does not indicate where its 'nexus' requirement is to be found in the words of the statute" and discussing the traditional meaning of "corruptly").

68. Eric J. Tamashasky, *The Lewis Carroll Offense: The Ever-Changing Meaning of "Corruptly" Within the Federal Criminal Law*, 31 J. LEGIS. 129, 141 (2004).

69. *Marinello*, 138 S. Ct. at 1104–05.

70. 26 U.S.C. § 7212(a) (2018); *see also* 18 U.S.C. § 1503 (2018) ("Whoever . . . corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration or justice, shall be punished as provided in subsection (b).").

71. *Compare* 26 U.S.C. § 7212 ("due administration of this title"), *with* 18 U.S.C. § 1503 ("due administration of justice"); *see also Marinello*, 138 S. Ct. at 1105 ("In *United States v. Aguilar* . . . we interpreted a similarly worded criminal statute." (citation omitted)).

72. *Marinello*, 138 S. Ct. at 1104.

gathering, assessment, levy, and collection."[73] Under that approach, § 7212's omnibus clause would be read strictly on its literal text, without analogy to other obstruction of justice statutes, including 18 U.S.C. § 1503.[74] That interpretation is certainly reasonable and likely preferable as a method of statutory construction. But the Court's chosen approach—analogizing the omnibus clauses in 26 U.S.C. § 7212 and 18 U.S.C. § 1503—speaks more to the Court's understanding of obstruction of justice than it does to its preferred exercise of textual analysis.

The Court chose to interpret "due administration of this title" as referring to "specific, targeted acts of administration."[75] "[S]pecific, targeted acts of administration" means "particular administrative proceeding[s], such as an investigation, an audit, or other targeted administrative action" rather than "every act carried out by IRS employees in the course of their 'continuous, ubiquitous, and universally known' administration of the Tax Code."[76] The Court arrived at this conclusion by "follow[ing] the approach [it had] taken in similar cases," thus joining § 7212 to the broader body of obstruction-of-justice law.[77]

This is significant for understanding the nexus requirement because the Court's reasoning for adopting the nexus in § 7212 runs parallel to its reasoning for adopting it in 18 U.S.C. § 1503.[78] Just as in *Aguilar*, the Court in *Marinello* used precedent to read a proceeding requirement into a statute lacking an explicit reference to any proceeding. In *Aguilar*, the Court referenced *Pettibone* and its interpretation of a statue proscribing obstruction of the due administration of justice "in any court of the United States" in order to require an "intent to influence judicial or grand jury proceedings."[79] But *Aguilar*'s 18 U.S.C. § 1503 omnibus clause lacks a reference to a court of the United States; the basis for the judicial-or-grand-jury-proceeding requirement lies not in the text of § 1503 but in the historic body of obstruction-of-justice law.[80] Similarly, the Court in *Marinello* adopted an administrative-proceeding requirement not based on the text of 26 U.S.C.

73. *Id.* at 1113 (Thomas, J., dissenting).

74. *See id.* at 1112, 1115 (Thomas, J., dissenting) (explaining that "[t]he words 'this title' cannot be read to mean 'only some of this title'" and "[t]he differences between the Omnibus Clause [in § 7212] and those other obstruction statutes demonstrate why the former does not contain the Court's proceeding requirement").

75. *Id.* at 1106 (majority opinion).

76. *Id.* at 1109–10.

77. *Id.* at 1109.

78. *See id.* ("The language of some and the underlying principles of all these cases are similar. We consequently find these precedents—though not controlling—highly instructive for use as a guide toward a proper resolution of the issue now before us.").

79. United States v. Aguilar, 515 U.S. 593, 599 (1995) (citing United States v. Pettibone, 148 U.S. 197, 197 (1893)).

80. *See id.* (describing the statute at issue in *Pettibone* as the "predecessor statute to § 1503").

§ 7212 but rather on § 7212's place in the development of general obstruction-of-justice statutes:

> The dissent points out, for example, that the predecessor to the obstruction statute we interpreted in *Aguilar*, 18 U.S.C. § 1503, prohibited influencing, intimidating, or impeding "any witness or officer in any court of the United States" or endeavoring "to obstruct or imped[e] the due administration of justice *therein.*" *Pettibone v. United States* . . . (1893). But Congress subsequently deleted the word "therein," leaving only a broadly worded prohibition against obstruction of "the due administration of justice." Congress then used that same amended formulation when it enacted § 7212, prohibiting the "obstruction of the due administration" of the Tax Code. Given this similarity, it is helpful to consider how we have interpreted § 1503 and other obstruction statutes in considering § 7212.[81]

The Court's choice of citations to *Aguilar* in *Marinello* is chiefly instructive in articulating the Court's own understanding of the nexus requirement. And in *Marinello*, the Court primarily cited language in *Aguilar* tending to support a *mens rea* interpretation of the nexus requirement. The Court first stated that the *Aguilar* holding derived from "earlier cases" requiring proof of "an intent to influence judicial or grand jury proceedings."[82] The Court then summarized the *Aguilar* nexus as the requirement "that the defendant's 'act must have relationship in time, causation, or logic with the judicial proceedings.'"[83] Importantly, the Court framed the *Aguilar* nexus primarily in terms of intent and then referenced only *Aguilar*'s first explanatory restatement—"relationship in time, causation, or logic . . . ."[84] But nowhere in *Marinello* did the Court reference *Aguilar*'s second explanatory restatement of the nexus requirement—"natural and probable effect."[85] The phrase "natural and probable effect" does not appear anywhere in the Court's opinion.[86]

This omission is significant because *Marinello* abandons the problematic "natural and probable effect" language from *Aguilar* in favor of *Aguilar*'s *mens rea* based language. In his *Aguilar* dissent, Justice Scalia excoriated the Court for "deriv[ing] a '*natural and probable consequence*' requirement" from § 1503 where none was to be found in the text.[87] In Justice

81. *Marinello*, 138 S. Ct. at 1109 (alterations in original) (citations omitted).

82. *Id.* at 1106 (quoting *Aguilar*, 515 U.S. at 599).

83. *Id.* (quoting *Aguilar*, 515 U.S. at 599).

84. *Id.*; *see also supra* notes 47–49 and accompanying text.

85. *See id.* at 1101–11 (discussing *Aguilar* without referencing the "natural and probable effect" language); *see also supra* note 48 and accompanying text.

86. *Id.*

87. *Aguilar*, 515 U.S. at 612 (Scalia, J., concurring in part and dissenting in part) (emphasis in original).

Scalia's view, "[i]nstead of reaffirming that 'natural and probable consequence' is one way of establishing intent, [the Court] *substitutes* 'natural and probable effect' *for* intent, requiring that factor even when intent to obstruct justice is otherwise clear."[88] While this mischaracterizes the Court's statements in its opinion,[89] the mischaracterization does two things. First, it highlights the similarity of the term "natural and probable effect" to the term for the "natural and probable consequences" doctrine in co-conspirator and accomplice liability.[90] Second and relatedly, it emphasizes the distinction central to understanding the Court's various articulations of the nexus requirement—that is, the distinction between an element and the evidence required to establish that element.

The "natural and probable consequences" doctrine allows an accomplice or a co-conspirator to be held criminally liable for "unplanned misdemeanor or felony crimes that are reasonably foreseeable or the natural consequence of some other criminal activity."[91] When the natural-and-probable-consequences doctrine is applied in that context, there are always two crimes: the target crime intended by the accomplice or co-conspirator and the crime actually committed as a consequence of the intended criminal endeavor.[92] The interaction of the intent element and the circumstances is readily understandable here: the element of intent "attaches to the target crime," and then certain circumstances suffice to transfer the intent to the crime actually committed[93]—essentially, "intent to commit crime A transfers to crime B." The government remains free to meet its burden on intent to commit the target crime by whatever evidence it can muster—direct or circumstantial. The natural-and-probable-consequences doctrine, however, places an additional burden on the government to show a "close connection between the target crime . . . and the offense actually committed."[94] The *mens rea* element of intent always remains; showing a "natural and probable consequence" does not replace the burden of showing intent to commit the target crime.[95] So when Justice Scalia observes that "'natural and probable consequence' is one way of establishing intent,"[96] he actually slightly misses the mark. The

88. *Id.* at 611 (emphasis in original) (citations omitted).

89. *See supra* notes 47–48 and accompanying text.

90. *See* Kimberly R. Bird, *The Natural and Probable Consequences Doctrine: "Your Acts Are My Acts!,"* 34 W. ST. U. L. REV. 43, 49 (2006) (describing the natural and probable consequences doctrine).

91. *Id.*

92. *Id.*

93. *Id.* at 52.

94. *Id.* at 49.

95. *See id.* at 52 ("The intent requirement attaches to the target crime. If the accomplice intended the follow-through of the target crime, liability can be imposed for the resulting non-target crime.").

96. United States v. Aguilar, 515 U.S. 593, 611 (1995) (Scalia, J., concurring in part and dissenting in part).

natural-and-probable-consequences doctrine *transfers* intent that was already established for the target crime.

Nevertheless, Justice Scalia's dissent is correct to note that the Court's use of the term muddles the distinction between the intent element in obstruction of justice and the evidence that establishes intent. It is difficult to retain the same focus on intent as in the natural-and-probable-consequences doctrine when a similar term—natural and probable effects—is used in the context of a single obstruction-of-justice crime. First, because there is only the single offense, the simple formula "intent to commit crime A transfers to crime B" does not apply. Instead, the intent element and the idea of natural and probable effects relate to one single crime. Second, *Aguilar* and the circuit cases it cites use "natural and probable effect" not to transfer intent but to establish intent for inchoate obstruction offenses.[97] The upshot of both of these observations is that the general framework from the natural-and-probable-consequences doctrine does very little to help one understand where the nexus requirement belongs among the *mens rea* and *actus reus* elements of an obstruction-of-justice offense.

Lower courts citing *Aguilar*'s "natural and probable effect" language have struggled with its implications for the *mens rea* in obstruction of justice. For example, in *United States v. Phillips*,[98] the Tenth Circuit cited *Aguilar* as stating that "a conviction is proper under the statute if interference with the official proceeding is the 'natural and probable effect' of the defendant's conduct."[99] The court used this principle to support its assertion that the omnibus clause at issue "does not require that the defendant know of the existence of an ongoing official proceeding."[100] Similarly, the Second Circuit in *United States v. Pugh*[101] quoted *Aguilar*'s "natural and probable effect" language to support its conclusion that "[t]he existence of a nexus between

97. *See id.* at 599 (majority opinion) ("[T]he endeavor must have the 'natural and probable effect' of interfering with the due administration of justice. . . . That is not to say that the defendant's actions need be successful; an 'endeavor' suffices.") (citations omitted); *United States v. Wood*, 6 F.3d 692, 695 (10th Cir. 1993) ("Further, although the defendant need not succeed in his attempt to obstruct justice, his conduct must be such 'that its natural and probable effect would be the interference with the due administration of justice.'"); United States v. Thomas, 916 F.2d 647, 652 (11th Cir. 1990) ("Although, as in any section 1503 prosecution, the government need not show that the false statement actually obstructed justice, it is incumbent on the government to prove that the statements had the natural and probable effect of impeding justice.").

98. 583 F.3d 1261 (10th Cir. 2009).

99. *Id.* at 1264.

100. *Id. Phillips* addressed the omnibus clause in 18 U.S.C. § 1512(c)(2), which presents difficulties unique from those for 18 U.S.C. § 1503 and 26 U.S.C. § 7212. For a full discussion of *Phillips*'s application of the nexus requirement to 18 U.S.C. § 1512(c)(2) and *Phillips*'s role in the knowledge split, see *infra* notes 128–140 and accompanying text.

101. 945 F.3d 9 (2d Cir. 2019).

[a defendant's] action and the proceeding does not depend on the defendant's knowledge."[102]

To the extent that the term "natural and probable effect" raises confusion by blurring the line between an element and the evidence sufficient to establish that element, Justice Scalia is right to criticize *Aguilar*'s use of the term and *Marinello* is right to abandon it. Although *Marinello*'s refusal to use the problematic term does not itself settle the question of where the nexus requirement fits among the elements of obstruction of justice—and relatedly, whether the nexus requirement involves knowledge—the omission does place a thumb on the scale in favor of a *mens rea* understanding of the nexus. *Marinello* omits reference to "natural and probable effects" in favor of *Aguilar*'s language regarding "intent to influence judicial or grand jury proceedings" and the "relationship in time, causation, or logic with the judicial proceedings."[103]

2. Meaning of "Corruptly" in the Context of 26 U.S.C. § 7212.—Marinello lends further interpretive guidance because it applies the nexus requirement to a statute that already had a well-established understanding of the *mens rea* element explicitly in the omnibus clause: the word "corruptly."[104] Both Justice Scalia, dissenting from *Aguilar*, and Justice Thomas, dissenting from *Marinello*, criticized the Court for imposing a nexus requirement without a clear textual hook.[105] While there is likely no clear textual hook for a nexus requirement in the omnibus clauses of 18 U.S.C. § 1503 and 26 U.S.C. § 7212, this Note proposes that the word "corruptly" is not only a workable basis for rooting the nexus requirement in the statutory text but also an ideal vehicle for clarifying the nexus requirement.[106]

Caselaw interpreting 26 U.S.C. § 7212 is unique among federal-statutory-interpretation cases in applying a clear and consistent definition of "corruptly" that is directly traceable to the common law.[107] "'[C]orruptly' means acting with an 'intent to secure an unlawful advantage or benefit.'"[108] This definition of "corruptly" does more than simply require an "improper

102. *Id.* at 21–22 (alteration in original) (quoting United States v. Martinez, 862 F.3d 223, 237 (2d Cir. 2017).

103. Marinello v. United States, 138 S. Ct. 1101, 1106 (2018) (quoting United States v. Aguilar, 515 U.S. 593, 599 (1995)).

104. Tamashasky, *supra* note 68, at 141.

105. *Marinello*, 138 S. Ct. at 1113 (Thomas, J., dissenting); *Aguilar*, 515 U.S. at 612 (1995) (Scalia, J., concurring in part and dissenting in part).

106. *Cf.* United States v. Quattrone, 441 F.3d 153, 170 (2d Cir. 2006) ("The nexus limitation is best understood as an articulation of the proof of wrongful intent that will satisfy the *mens rea* requirement of 'corruptly' obstructing or endeavoring to obstruct.").

107. Tamashasky, *supra* note 68, at 141.

108. *Id.* (quoting United States v. Reeves, 752 F.2d 995, 1001 (5th Cir. 1985)).

purpose" or "evil and wicked intent."[109] Rather, "corruptly" defines the wrongful intent against a specific set of duties or rights in the relevant context.[110]

The intent-to-secure-an-unlawful-advantage definition of corruptly gives content to the term by defining a reference point—the relevant body of law. Professors Daniel Hemel and Eric Posner have framed the same idea slightly differently by expanding on the "improper purpose" definition of "corruptly," which they identify as the "near-consensus view among the courts of appeals" in the obstruction-of-justice context:

> Yet agreeing that "corruptly" refers to "improper purpose" still leaves the question of which purposes are "proper." The answer depends on the actor's role. The prosecutor who intervenes in an investigation because he thinks it represents a misallocation of law enforcement resources acts with a proper purpose. In general, prosecutors have broad discretion to bring or drop cases based on a range of logistical and administrative reasons, and any such decision made in good faith is not improper. In contrast, ordinary citizens are not vested with this discretion. The citizen activist who obstructs an investigation because he thinks it represents a misallocation of law enforcement resources might well be criminally liable.[111]

The role-based understanding of "improper purpose" refers essentially to the same idea as the intent-to-secure-an-unlawful-advantage definition of corruptly: whether somebody acts corruptly depends not only on his own individual intent but also on the duties he owes to others and the rights at issue. Though the shorthand phrase "improper purpose" is, as Professors Hemel and Posner point out, the dominant articulation of the "corruptly" definition in the courts of appeals,[112] the intent-to-secure-an-unlawful-advantage definition does a better job of explicitly giving content to the definition. In this Note's view, not only is that definition preferable, but it also clarifies the meaning of the nexus requirement.

Comparing this definition of "corruptly" to the succinct articulation of the nexus requirement in *Marinello* demonstrates this. The Court there said, "[T]he Government must prove 'an intent to influence judicial or grand jury proceedings.' We noted that some courts had imposed a '"nexus" requirement': that the defendant's 'act must have a relationship in time, causation, or logic with the judicial proceedings.'"[113] Just as in the intent-to-

109. *Id.* at 131.

110. *Id.*

111. Daniel J. Hemel & Eric A. Posner, *Presidential Obstruction of Justice*, 106 CALIF. L. REV. 1277, 1288 (2018).

112. *Id.*

113. Marinello v. United States, 138 S. Ct. 1101, 1106 (2018) (citations omitted).

secure-an-unlawful-advantage definition, this articulation of the nexus requirement has two parts: first, the government must show intent, and second, that intent must be related—in time, causation, or logic—to a particular proceeding. The second part, relating intent to a proceeding, analogizes to the "corrupt" intent's relationship to obtaining an unlawful benefit. The lawfulness of benefits accessible by interacting with the administration of justice relates to the rights and duties arising not only from the individual's position with respect to a particular proceeding—the circumstances of the offense—but also from the body of obstruction-of-justice law dating back to *Pettibone*.[114]

To be clear, rooting the nexus requirement in the word "corruptly" does not resolve the lack of a textual reference to a proceeding in 18 U.S.C. § 1503 or 26 U.S.C. § 7212, nor does it resolve Justice Thomas's textual objection to limiting the phrase "of this title" in § 7212.[115] But it does provide a textual basis for recognizing obstruction of justice as a body of law defining lawful and unlawful benefits in the administration of justice. And consequently, it also addresses Justice Thomas's concern that the nexus requirement is simply unnecessary in the Tax Code because of the grading of offenses by mental states.[116] Justice Thomas quotes the intent-to-secure-an-unlawful-advantage definition of "corruptly" and compares it to the meaning of "willfully" as used in some Tax Code misdemeanors.[117] Justice Thomas's point is that, without importing the nexus requirement into § 7212, the Tax Code already sets obstruction of justice apart from lesser offenses.[118] While true, there remains within the meaning of "corruptly" the issue of identifying the body of law that defines the duties and rights relevant to lawful and unlawful advantages in the administration of justice. *Pettibone* and *Aguilar* are the Court's own statements on this body of law.[119] Obstruction-of-justice caselaw, including the cases establishing the nexus requirement, defines the relevant rights and duties.

By applying the nexus requirement to § 7212, *Marinello* introduces the nexus requirement to a consistent definition of "corruptly" as "intent to secure an unlawful advantage or benefit." This definition not only gives a useful framework for understanding the nexus requirement as a *mens rea* element of intent directed at certain circumstances of the offense, but it also reaffirms the legal rationale of retaining the nexus requirement in the body of obstruction-of-justice law.

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114. Pettibone v. United States, 148 U.S. 197, 206–07 (1893) (formulating an early "nexus" requirement).

115. *See supra* notes 73–74 & 79–81 and accompanying text.

116. *Marinello*, 138 S. Ct. at 1114 (Thomas, J., dissenting).

117. *Id.*

118. *Id.*

119. *Id.* at 1109 (majority opinion).

II. 18 U.S.C. § 1512(c)(2) and the Knowledge Split

The Supreme Court's *mens rea*-based explanation of the nexus requirement in *Aguilar*, and the textual hook for the nexus requirement in the word "corruptly" highlighted by *Marinello*, together set the stage for a full discussion of the knowledge split in the lower courts. Though the Supreme Court has applied the nexus requirement only to 18 U.S.C. § 1503 and 26 U.S.C. § 7212, lower courts have applied the nexus to further statutes, in particular 18 U.S.C. § 1512(c)(2).[120] Arguably, the nexus requirement fits more naturally in § 1512(c)(2) than in § 1503 or § 7212 because § 1512(c)(2) explicitly refers to an official proceeding: "Whoever corruptly . . . otherwise obstructs, influences, or impedes any official proceeding, or attempts to do so, shall be fined under this title or imprisoned not more than 20 years, or both."[121] "[O]fficial proceeding" is defined elsewhere as:

> (A) a proceeding before a judge or court of the United States, a United States magistrate judge, a bankruptcy judge, a judge of the United States Tax Court, a special trial judge of the Tax Court, a judge of the United States Court of Federal Claims, or a Federal grand jury;
> (B) a proceeding before the Congress;
> (C) a proceeding before a Federal Government agency which is authorized by law; or
> (D) a proceeding involving the business of insurance whose activities affect interstate commerce before any insurance regulatory official or agency or any agent or examiner appointed by such official or agency to examine the affairs of any person engaged in the business of insurance whose activities affect interstate commerce.[122]

The explicit reference to and careful definition of an official proceeding in § 1512(c)(2) conclusively resolve the question of the object of obstruction and the scope of the nexus for that provision. Some type of relationship to an official proceeding arises directly from the text, just as in the statute at issue in *Pettibone*.[123] The question remains, however, what exactly that relationship demands. The § 1512(c)(2) nexus cases, therefore, isolate the question whether the nexus requirement is best understood as a *mens rea* element with some type of knowledge requirement or an *actus reus* element focusing solely on the circumstances of the conduct. Unfortunately, however, the circuits are split on this question.

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120. *See, e.g.*, United States v. Young, 916 F.3d 368, 386 (4th Cir. 2019) (applying the *Aguilar* nexus to 18 U.S.C. § 1512(c)(2)); United States v. Friske, 640 F.3d 1288, 1292 (11th Cir. 2011) (same).

121. 18 U.S.C. § 1512(c)(2) (2018).

122. 18 U.S.C. § 1515(a)(1) (2018).

123. *See supra* note 40 and accompanying text.

Two circuits—the Second and Tenth—have jettisoned knowledge from the *Aguilar* nexus, reducing the nexus element to a reasonable-foreseeability requirement.[124] Conversely, the Fourth, Fifth, and Eleventh Circuits have emphasized the intent and knowledge language in *Aguilar* to hold that knowledge remains an essential element of the nexus requirement in § 1512(c)(2).[125] The knowledge split arises directly from the two different restatements of the nexus requirement in *Aguilar* discussed above.[126] But just as a *mens rea* interpretation of the nexus requirement is more faithful to the language of *Aguilar* as a whole,[127] so too do the circuits that require knowledge that conduct is likely to affect a judicial proceeding more faithfully implement *Aguilar*'s nexus requirement.

A. No-Knowledge Cases: Emphasizing Reasonable Foreseeability to the Detriment of the Mens Rea

Phillips headlines the § 1512(c)(2) cases disclaiming knowledge as part of the nexus requirement. In *Phillips*, a police informant was convicted of a § 1512(c)(2) obstruction offense for disclosing the identity of an undercover officer to a methamphetamine distributor while a grand-jury investigation was pending.[128] Law enforcement officers had been working in conjunction with the grand jury, establishing a factual connection to an official proceeding.[129] Evidence showed only, however, that the defendant knew that the undercover officer was an officer, that the officer would attempt to purchase from the distributor, and that at least two other distributors had been arrested in the preceding ten months.[130] No evidence showed that the defendant knew of the grand-jury investigation or knew that his actions were likely to affect the investigation.[131] This is in contrast to *Aguilar*, where the defendant was told of the grand-jury investigation during his interview with law enforcement.[132]

Unlike in *Aguilar*, the Tenth Circuit upheld the obstruction conviction, explicitly disclaiming a knowledge requirement in the *Aguilar* nexus: "§ 1512(c)(2) does not require that the defendant know of the existence of an

124. United States v. Pugh, 945 F.3d 9, 21–22 (2d Cir. 2019); United States v. Phillips, 583 F.3d 1261, 1264–65 (10th Cir. 2009).

125. United States v. Sutherland, 921 F.3d 421, 427–28 (4th Cir. 2019), *cert. denied*, 140 S. Ct. 1106 (2020); United States v. Bedoy, 827 F.3d 495, 510 (5th Cir. 2016); United States v. Coppin, 569 F.App'x. 326, 334 (5th Cir. 2014); *Friske*, 640 F.3d at 1292–93.

126. *See supra* notes 47–49 and accompanying text.

127. *See supra* note 62 and accompanying text.

128. *Phillips*, 583 F.3d at 1262.

129. *Id.*

130. *Id.* at 1265.

131. *See id.* (describing the evidence in the case).

132. United States v. Aguilar, 515 U.S. 593, 600 (1995).

ongoing official proceeding."[133] The court justified this holding by citing to § 1512(f)(1) and § 1512(g)(1),[134] but neither provision supports the lack of a knowledge requirement. Section 1512(f)(1) states that "an official proceeding need not be pending or about to be instituted at the time of the offense."[135] This provision simply allows for prosecution of obstructive conduct that occurs before a proceeding is instituted. "But, as the Supreme Court observed in *Arthur Andersen*, '[i]t is . . . one thing to say that a 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.'"[136] The *Phillips* court does not go so far as to say interference with the proceeding need not be foreseen, but it nevertheless uses § 1512(f)(1) to reject the defendant's contention that he was not "aware of an ongoing or future federal grand jury investigation."[137] This rejection pulls the idea of reasonable foreseeability away from a *mens rea* element, reducing it to simply an examination of the circumstances.

Section 1512(g)(1) offers even less support for discarding a knowledge requirement. Section 1512(g)(1) states that:

> [N]o state of mind need be proved with respect to the circumstance that the official proceeding before a judge, court, magistrate judge, grand jury, or government agency is before a judge or court of the United States, a United States magistrate judge, a bankruptcy judge, a Federal grand jury, or a Federal Government agency. . . .[138]

Plainly this provision speaks only to the federal—as opposed to the state—character of a proceeding. Again, the *Phillips* court concedes this, but it still uses § 1512(g)(1) to support the notion that there is no knowledge requirement with respect to "an ongoing or future federal grand jury investigation."[139] Tellingly, a subsequent Tenth Circuit opinion corrected this misuse of § 1512(g)(1) by explicitly distinguishing between the knowledge of a proceeding—not addressed by § 1512(g)(1)—and the knowledge that the proceeding is federal—addressed by § 1512(g)(1).[140]

In a pair of recent cases, the Second Circuit joined the Tenth Circuit in disclaiming a knowledge requirement in the *Aguilar* nexus. In *United States v. Martinez*, the court said, "[T]he existence of a nexus between [the defendant's] action and the proceeding does not depend on the defendant's

133. *Phillips*, 583 F.3d at 1264.

134. *Id.* at 1264–65.

135. 18 U.S.C. § 1512(f)(1) (2018).

136. United States v. Friske, 640 F.3d 1288, 1292 (11th Cir. 2011) (quoting Arthur Andersen LLP v. United States, 544 U.S. 696, 707–08 (2005) (alterations in original)).

137. *Phillips*, 583 F.3d at 1264.

138. 18 U.S.C. § 1512(g)(1) (2018).

139. *Phillips*, 583 F.3d at 1264–65.

140. United States v. Ahrensfield, 698 F.3d 1310, 1324 (10th Cir. 2012).

knowledge. Rather, the existence of a nexus, for obstruction-of-justice purposes, is determined by whether the defendant's acts 'have a relationship in time, causation, or logic with the judicial proceedings.'"[141] This framing of the nexus requirement errs by severing the relationship between the nexus and the defendant's knowledge. *Aguilar* was clear that "if the defendant lacks knowledge that his actions are likely to affect the judicial proceeding, he lacks the requisite intent to obstruct."[142] The nexus *does* depend on the defendant's knowledge, and the "relationship in time, causation, or logic" is part of objectively establishing that knowledge.

The Second Circuit quoted this very passage from *Martinez* in *United States v. Pugh*, again erroneously setting the nexus requirement against a knowledge requirement.[143] The facts of *Pugh* are striking because of the tenuous relationship of the obstructive conduct to any proceeding. The defendant was a U.S. Air Force veteran who moved to the Middle East and became involved with propaganda from the Islamic State of Iraq and the Levant (ISIL).[144] When the defendant was denied entry to Turkey and later searched at an Egyptian airport, he "attempted to destroy, or succeeded in destroying, some of the electronic devices he was carrying with him."[145] The defendant was arrested shortly thereafter, arraigned two months later, and eventually convicted of obstruction of justice under § 1512(c)(2).[146]

The Second Circuit upheld the conviction "[g]iven the reasonable foreseeability of an official proceeding" against the defendant.[147] That reasonable foreseeability was based on the "cultural climate in America regarding terrorist organizations," the fact that Turkey is a well-known pathway to Syria, and the defendant's knowledge that another American was "arrested at JFK Airport for attempting to join ISIS in Syria" and charged with providing material support to a foreign terrorist group.[148] Not only is the connection between the defendant's conduct and an official proceeding far too tenuous to support a nexus under any articulation of the nexus requirement, but also the object of the knowledge considered by the court is misplaced. After rejecting knowledge as part of the nexus, the court relied on the defendant's knowledge of the American arrested at JFK Airport to establish the nexus.[149] But the nexus requirement does not rely on a

141. United States v. Martinez, 862 F.3d 223, 237–38 (2d Cir. 2017), *vacated on other grounds*, 139 S. Ct. 2772 (2019) (citations omitted); *see also* United States v. Rodriguez, 792 F.App'x. 105, 106 (2d Cir. 2020) (explaining the procedural history of *Martinez* and *Rodriguez*).

142. United States v. Aguilar, 515 U.S. 593, 599 (1995).

143. United States v. Pugh, 945 F.3d 9, 21–22 (2d Cir. 2019).

144. *Id.* at 15.

145. *Id.*

146. *Id.* at 15–16.

147. *Id.* at 23.

148. *Id.* at 22.

149. *Id.*

connection to enforcement proceedings generally; rather, there must be a connection to a "particular . . . proceeding."[150] At most the defendant's knowledge of the JFK Airport arrest establishes that he knew official proceedings sometimes result from arrests—this is far less than the defendant's knowledge in *Aguilar*[151] or in *Marinello*,[152] and it certainly does not constitute knowledge that his conduct is likely to affect a particular official proceeding.[153]

At root, the problem with *Pugh* is that it either completely disavows a knowledge requirement as in *Martinez*[154] or applies a knowledge requirement in a way directly contrary to the particularity of the *mens rea* element laid out in *Aguilar* and *Marinello*.[155] At the very least, the confused application of the nexus requirement is enough to place the Second Circuit alongside the Tenth Circuit on the no-knowledge side of the split.

B. Knowledge Cases: Circumstances Can Establish Knowledge

In contrast to the Tenth Circuit, the Eleventh Circuit, in *United States v. Friske*, has explicitly and forcefully recognized that the *Aguilar* nexus requires knowledge that a defendant's actions are likely to affect a specific official proceeding.[156] This approach should be recognized as a faithful application of *Aguilar*'s *mens rea*-based understanding of the nexus requirement.

The defendant in *Friske*, then living in Wisconsin, received a phone call from his friend who was in jail in Florida.[157] The friend asked the defendant to go to his Florida home for a "little repair job" near his pool, referencing "three things" near the pool pump under his pool.[158] The friend instructed the

150. Marinello v. United States, 138 S. Ct. 1101, 1109 (2018).

151. *See* United States v. Aguilar, 515 U.S. 593, 601 (1995) (describing that the defendant "knew of" the pending proceeding).

152. *See Marinello*, 138 S. Ct. at 1109–10 (reversing the defendant's conviction because the nexus required showing a connection to a particular IRS investigation rather than general knowledge that false statements may impede the IRS's daily functions).

153. *See Aguilar*, 515 U.S. at 599 ("[I]f the defendant lacks knowledge that his actions are likely to affect the judicial proceeding, he lacks the requisite intent to obstruct.").

154. United States v. Pugh, 945 F.3d 9, 21–22 (2d Cir. 2019) (quoting United States v. Martinez, 862 F.3d 223, 237–38 (2d Cir. 2017), *vacated on other grounds*, 139 S. Ct. 2772 (2019)).

155. *See id.* at 22 (relying on defendant's knowledge of proceedings generally).

156. *Compare* United States v. Friske, 640 F.3d 1288, 1293 (11th Cir. 2011) ("Because the government offered no evidence that [the defendant] knew that his actions were likely to affect a forfeiture proceeding, we conclude that a reasonable jury could not find, beyond a reasonable doubt, that [the defendant] had the requisite intent to obstruct."), *with* United States v. Phillips, 583 F.3d 1261, 1264 (10th Cir. 2009) ("§ 1512(c)(2) does not require that the defendant know of the existence of an ongoing official proceeding.").

157. *Friske*, 640 F.3d at 1289.

158. *Id.*

defendant to wear gloves and "to visit him at the jail afterwards."[159] Law enforcement agents intercepted the phone call from jail and went to the Florida home before the defendant.[160] There they found $375,000 hidden inside of PVC pipe under the pool.[161] The next day, law enforcement intercepted the defendant at the Florida home.[162] The defendant told law enforcement he had come to examine the pool for wood rot.[163] The defendant was later charged with, and convicted of, "attempting to obstruct an official proceeding, by attempting to dispose of and hide assets involved in a forfeiture proceeding" under § 1512(c)(2).[164]

That conviction could not withstand sufficiency-of-the-evidence review because there was "not one scintilla of evidence that [the defendant] knew he was obtaining something that was subject to forfeiture."[165] Though the facts of *Friske* clearly add up to something fishy—and the defendant's statement to law enforcement can be taken to indicate a guilty mind—the evidence does not establish knowledge that the defendant intended to affect an official proceeding.[166] In this case, the court reasoned that "without knowledge of the forfeiture proceeding, Friske could not know that his actions were likely to affect it."[167]

This assertion is in marked contrast to the Second Circuit's conclusion in *Pugh* that an official proceeding was foreseeable from the fact that another American had also been arrested at an airport for the same offense.[168] On the one hand, the difference could be viewed simply as a difference in the nature of the procedure at issue: grand juries, as in *Pugh*, are commonly known to follow arrests, whereas forfeiture proceedings, as in *Friske*, are not widely known. On the other hand, the difference could lie in each court's dissimilar approach to the elements: the Second Circuit in *Pugh* considered only the generalized circumstances of the offense to infer guilt, whereas the Eleventh Circuit examined the evidence to determine if it objectively established knowledge that the defendant's actions were likely to affect a particular forfeiture proceeding.[169]

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159. *Id.*

160. *Id.* at 1289–90.

161. *Id.* at 1290.

162. *Id.*

163. *Id.*

164. *Id.* at 1289.

165. *Id.* at 1290–92 (quoting and agreeing with Friske's motion for judgment of acquittal).

166. *Id.* at 1292.

167. *Id.*

168. United States v. Pugh, 945 F.3d 9, 22 (2d Cir. 2019).

169. *Compare Pugh*, 945 F.3d at 22 ("Accordingly, the jury could have reasonably concluded that a similar proceeding was foreseeable to [the defendant] at the time he was denied entry."), *with Friske*, 640 F.3d at 1292 ("Thus, in this case, the government was required to prove that [the defendant] knew of, or at least foresaw, the forfeiture proceeding.").

The former view overlooks two things in the *Pugh* and *Friske* opinions. First, the Second Circuit in *Pugh* simply did not adhere to the particularity requirement from *Aguilar*.[170] Even if grand juries in general are more readily foreseeable than forfeiture proceedings, a particular grand jury in the case at hand is not necessarily more foreseeable than a particular forfeiture proceeding. A distinction in the nature of the proceedings does not account for a difference in results consistent with the nexus requirement in *Aguilar*. Second, the Eleventh Circuit's conclusion in *Friske* was not based on generalized assumptions about forfeiture proceedings but rather on an objective analysis of the circumstances known to the defendant at the time of the offense.[171]

This second point is critical to understanding that the difference between *Pugh* and *Friske* amounts to a difference in the elements rather than a difference in the evidence. *Friske* begins with the strong principle from *Aguilar* that "if the defendant lacks knowledge that his actions are likely to affect the judicial proceeding, he lacks the requisite intent to obstruct."[172] The court then examines the circumstantial evidence before it to determine if a reasonable inference of knowledge could be made from the circumstances.[173] The element at issue is the knowledge aspect of the nexus requirement. This does not, in any way, preclude the use of circumstantial evidence and objective analysis to determine if the element is satisfied. But the knowledge element is the measure, not a generalized reasonable-foreseeability inquiry.[174]

The Eleventh Circuit's approach in *Friske* is consistent with *Aguilar*'s explanation of the nexus requirement.[175] While *Pugh*—alongside *Phillips* and the other cases on the no-knowledge side of the split—focuses primarily (if not solely) on *Aguilar*'s two restatements of the nexus requirement,[176] *Friske* incorporates the whole paragraph in *Aguilar* describing the nexus

170. *Pugh*, 945 F.3d at 22.

171. *Friske*, 640 F.3d at 1291, 1293 (stating that circumstantial evidence does not need to be "'inconsistent with every reasonable hypothesis except guilt, and the jury is free to choose between or among the reasonable conclusions to be drawn from the evidence presented at trial.' But '[w]hen the government relies on circumstantial evidence, reasonable inferences, not mere speculation, must support the conviction.'" (alteration in original) (citation omitted)).

172. *Id.* at 1292 (quoting United States v. Aguilar, 515 U.S. 593, 599 (1995)).

173. *Id.* at 1291–93.

174. *Compare id.* at 1292–93 ("[T]he government had to prove beyond a reasonable doubt that [the defendant] knew that the natural and probable result of his actions would be the obstruction of [the] forfeiture proceeding."), *with Pugh*, 945 F.3d at 21 ("In order to prove obstruction of justice in violation of section 1512(c)(2), 'the government must show that there was a "nexus" between the defendant's conduct and the pending, or foreseeable, official proceeding.'" (quoting United States v. Martinez, 862 F.3d 223, 237 (2d Cir. 2017), *vacated on other grounds*, 139 S.Ct. 2772 (2019))).

175. *See supra* note 37 and accompanying text.

176. *Pugh*, 945 F.3d at 21–22; *Martinez*, 862 F.3d at 237–38; United States v. Phillips, 583 F.3d 1261, 1264 (10th Cir. 2009).

requirement into its approach.[177] *Friske* recognizes that the nexus requirement is a *mens rea* element requiring intent to obstruct an official proceeding and knowledge that one's actions are likely to affect an official proceeding; this *mens rea* is shown through a relationship in "time, causation, or logic" between the act and the proceeding, and by the reasonable foreseeability of proceedings not yet pending.[178]

Two observations flow from *Friske*'s more complete application of the *Aguilar* nexus. First, *Friske* is careful to define the object of the defendant's knowledge as the likelihood that the defendant's actions will affect an official proceeding.[179] In the particular circumstances of *Friske*, that inquiry ultimately collapsed with knowledge of the proceeding itself: "[W]ithout knowledge of the forfeiture proceeding, [the defendant] could not have known that his actions were likely to affect it. . . . '[T]here was not one scintilla of evidence that [the defendant] knew he was obtaining something that was subject to forfeiture.'"[180] But ultimately it is the likelihood of affecting an official proceeding that is the object of the knowledge; certainty is not required.[181] The Fifth Circuit's opinion in *United States v. Bedoy* likewise framed the object of the defendant's mental state as whether "his statements 'are *likely* to affect the judicial proceeding.'"[182] The likelihood

177. *Friske*, 640 F.3d at 1291–92 (citing United States v. Aguilar, 515 U.S. 593, 599 (1995)).

178. *Id.*

179. *Id.* at 1292.

180. *Id.* at 1292–93 (quoting and agreeing with Friske's motion for judgment of acquittal).

181. *See* United States v. Kumar, 617 F.3d 612, 621 (2d Cir. 2010) ("Nevertheless, a defendant does not need to know with certainty that his conduct would affect judicial proceedings . . . ."). Both *Kumar* and *Quattrone*, 441 F.3d 153 (2d Cir. 2006), are older Second Circuit cases that predate the Second Circuit's joining the no-knowledge branch of the knowledge split. *See supra* notes 141–155 and accompanying text.

182. United States v. Bedoy, 827 F.3d 495, 505 (5th Cir. 2016) (quoting United States v. Aguilar, 515 U.S. 593, 599 (1995) (alteration in original)). The *Bedoy* opinion deserves careful reading because the Fifth Circuit there pushed back on the notion that certainty is required by the nexus, but its statements could be misread to dispose of a knowledge requirement. The court said, "The Court [in *Aguilar*], however, did not expressly hold that *actual knowledge* is a necessary element of the nexus requirement. Instead, the Court held that the nexus requirement only demands that the defendant believe his statements 'are *likely* to affect the judicial proceeding.'" *Id.* (second emphasis in original) (citations omitted). The distinction here is between "actual knowledge"—i.e., certainty—and belief—i.e., knowledge of the likelihood. Later in the opinion, the court confirmed that knowledge is part of the nexus requirement by approving of a jury instruction including "knowingly" as part of the meaning of "corruptly." *Id.* at 510 ("In this case, the jury instructions defined 'corruptly' as 'to knowingly and dishonestly act with the specific intent to obstruct, influence or impede a federal official proceeding.'"). In a separate opinion, *United States v. Coppin*, the Fifth Circuit again approved of a jury instruction for a § 1512(c)(1) offense that included "knowingly" in the definition of "corruptly." 569 F.App'x 326, 334 (5th Cir. 2014). Paragraphs 1512(c)(1) and (c)(2) share the same *mens rea* of "corruptly." 18 U.S.C. §§ 1512(c)(1)–(c)(2) (2018).

aspect of the object of the defendant's knowledge gives flexibility to the nexus requirement without jettisoning knowledge from the nexus.[183]

Second, as in *Friske*, circumstantial evidence plays a legitimate role in establishing the *mens rea* element, but the availability of circumstantial evidence must not be taken to dilute the burden of the nexus-requirement element itself. Because a defendant's mental state is not (usually) directly observable, circumstantial evidence must be part of the prosecutor's toolkit for proving a *mens rea*.[184] The element, however, is always what is ultimately at issue. As noted above, *Friske* contemplates the use of circumstantial evidence.[185] Similarly, *United States v. Sutherland* involves circumstantial evidence to show intent, but unlike in *Friske*, the conviction was upheld.[186] In upholding the conviction, *Sutherland* in no way dilutes the knowledge aspect of the nexus requirement.[187]

In *Sutherland*, the defendant was "served with grand jury subpoenas" in an investigation of a possible tax-evasion scheme.[188] In response, the defendant sent the U.S. Attorney's office an explanatory letter, with fabricated loan documents, purporting to account for suspicious transactions.[189] The circumstances surrounding the provision of these fabricated loan documents clearly tied the defendant's conduct to the grand

183. *Cf.* United States v. Young, 916 F.3d 368, 387 (4th Cir. 2019). In *Young*, the Fourth Circuit further clarified the object of the knowledge requirement by emphasizing the official-proceeding aspect of the object of the defendant's knowledge: "[T]he Government has similarly failed to provide evidence demonstrating that [the defendant] foresaw a specific grand jury investigation or that he designed his conduct to thwart such an investigation, rather than designing his conduct to obstruct an FBI inquiry—which he *did* foresee." *Id.* (emphasis in original). *Young* is noteworthy for the additional reason that it, like *Pugh*, involved a defendant giving material aid to ISIS. *Id.* at 373; *see supra* text accompanying note 144. Principles of criminal law, and the elements of obstruction of justice, need not be relaxed simply because terrorism is at issue.

184. 1 ARTHUR & HUNTER, *supra* note 63, § 20:18 ("Specific intent may be proved not only by what was said by the accused but also from his acts and conduct and the circumstances and reasonable inferences to be drawn from them."); *see also supra* note 62 and accompanying text.

185. *See supra* notes 172–174 and accompanying text.

186. United States v. Sutherland, 921 F.3d 421, 428–29 (4th Cir. 2019), *cert. denied*, 140 S. Ct. 1106 (2020); United States v. Friske, 640 F.3d 1288, 1292–93 (11th Cir. 2011).

187. The petition for certiorari following *Sutherland* was ultimately denied, but it is worth emphasizing that the petitioner was actually the defendant, Mr. Sutherland. *Sutherland v. United States*, 140 S. Ct. 1106 (2020). This might seem odd because *Sutherland* and the Fourth Circuit fall on the defendant-friendly side of the knowledge split by considering the nexus to be a *mens rea* element requiring knowledge. *Sutherland*, 921 F.3d at 428–29. The *Sutherland* petition, however, did not actually raise the split discussed throughout this Note but instead presented a question relating to the "objective institutional relationship" of the U.S. Attorney's office to the grand jury when a grand jury subpoena is issued. Petition for Writ of Certiorari at i, *Sutherland*, 140 S. Ct. 1106 (No. 19-433). This Note has identified the knowledge split as a lurking, but critical issue that could have been resolved had the Court taken the case. *See supra* notes 5–6 and accompanying text. A more suitable vehicle would be needed to directly present the knowledge-split question before the Court.

188. *Sutherland*, 921 F.3d at 424.

189. *Id.*

jury, but what is more, for purposes of the nexus requirement, the evidence was sufficient to infer intent.[190] Because the defendant provided falsified documents to the U.S. Attorney in response to a grand jury subpoena, it was inferred he knew it was likely that those documents would be transmitted to the grand jury:[191]

> In the instant case, Sutherland gave false documents to the U.S. Attorney's office. A prosecutor tasked with presenting to the grand jury is more akin to a witness who has been subpoenaed than one who has not. As with a subpoenaed witness, there is a strong likelihood that the U.S. Attorney's office would serve as a channel or conduit to the grand jury for the false evidence or testimony presented to it.[192]

The Fourth Circuit conducted this analysis of the circumstantial evidence with the intent element of the nexus requirement in clear view. The court spent two paragraphs carefully delineating the extent of the intent element.[193] For example, the court quoted *Aguilar* to say "it is not enough that there be an intent to influence some ancillary proceeding, such as an investigation independent of the court's or grand jury's authority."[194] More significantly, the court approved of a jury instruction using intent and knowledge language from *Marinello* and *Aguilar*:

> The jury instructions in this case drew directly from the principles in *Aguilar* and *Marinello*. The district court first instructed the jury that it must decide whether Sutherland "knew that" the grand jury proceeding "was pending" when he distributed the false loan documents. It instructed the jury that the defendant must have acted "corruptly with the intent to obstruct, influence or impede the official proceeding." And, finally, the district court crafted an instruction on the nexus requirement straight from *Aguilar*: "The government must prove that the defendant . . . *intended or knew his actions would have the natural and probable effect of interfering with the grand jury*." [citing *Aguilar*] ("[I]f the defendant lacks knowledge that his actions are likely to affect the [official] proceeding, he lacks the requisite intent to obstruct."). The jury instructions, in other words, properly

190. *Id.* at 428–29. The court held that the defendant's actions were "related to the grand jury in time, causation, *and* logic. The temporal and logical relationships are clear: [the defendant] distributed the false loan documents just months after the grand jury subpoena was served upon him, and those documents attempted to explain away transactions reflected in the subpoenaed documents." *Id.* at 428 (emphasis in original).

191. *Id.*

192. *Id.*

193. *Id.* at 426.

194. *Id.* (quoting United States v. Aguilar, 515 U.S. 593, 599 (1995)).

> stated the nexus requirement that the jury had to apply to Sutherland's case.[195]

The Fourth Circuit's language in its recitation of the law makes clear that knowledge is and should be central to the nexus requirement demanded by *Aguilar*. Even though circumstantial evidence is used to demonstrate that the defendant did, in fact, know that his actions were likely to affect an official proceeding, the nexus requirement itself should not be reduced to a set of circumstances—effectively another *actus reus* element. The Fourth Circuit's application of the nexus requirement here shows that insisting on a strong *mens rea* element in the nexus requirement in no way interferes with the ordinary use of circumstantial evidence. *Sutherland* should dispel any concerns that a *mens rea* understanding of the nexus requirement, demanding knowledge that the defendant's actions are likely to affect a grand jury proceeding, would be unworkable.

Conclusion: The *Aguilar* Nexus Is a *Mens Rea* Element Requiring Knowledge that the Conduct Is Likely to Affect an Official Proceeding

To quote *Sutherland* once more, "As so often in law, there is a balance to be struck."[196] The potential breadth of § 1512(c)(2) in particular demonstrates the need for clear and consistent constraints on the elements of obstruction-of-justice offenses.[197] Understanding the nexus requirement as an intent element that requires knowledge that one's actions are likely to affect an official proceeding is the best way to place the proper "metes and bounds" on obstruction offenses and strike a workable balance in this area of law. The circuits that embrace that understanding of the nexus requirement fall on the right side of this circuit split. In the appropriate case, the Supreme Court should take up the issue and resolve the split in favor of knowledge.

195. *Id.* at 427–28 (emphasis added) (citations omitted).

196. *Id.* at 426.

197. *See* Sean Lavin, Julia Bell, MaeAnn Dunker & Mitchell McBride, *Obstruction of Justice*, 56 AM. CRIM. L. REV. 1201, 1230–31 (2019) (commenting on the breadth of § 1512(c)(2)).