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How **Strong** a **Nexus** Required for Witness Tampering?

Third Circuit 'Norris' ruling suggests a looser standard.

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'UNDER THE DISSENT'S theory, a man could be found guilty [of obstruction of justice] under §1503 if he knew of a pending investigation and lied to his wife about his whereabouts at the time of the crime, thinking that an FBI agent might decide to interview her and that she might in turn be influenced in her statement to the agent by her husband's false account of his whereabouts."[1]

In *United States v. Aguilar*, the U.S. Supreme Court foreclosed this scenario under the omnibus clause of 18 U.S.C. §1503, which makes it a crime to "endeavor[] to influence, obstruct, or impede, the due administration of justice." The Court held that the law requires a "nexus" between an obstructive act and an official proceeding. "In other words, the endeavor must have the 'natural and probable effect' of interfering with the due administration of justice."[2]

Since *Aguilar*, the nexus requirement has proved to be an important check on prosecutions brought under the federal obstruction statutes. In a number of high-profile cases before the Second Circuit, such as the sexual assault of Abner Louima,[3] the murder of Sabatino Lombardi of the Genovese crime family,[4] and the prosecution of Frank Quattrone,[5] obstruction convictions have run afoul of the nexus requirement.

In general, obstruction prosecutions have attracted a great deal of attention recently, as seen in the high-profile criminal charges filed, and dismissed after the government's case, against a former senior in-house attorney at GlaxoSmithKline.[6]

A recent prosecution in the Third Circuit, *United States v. Norris*,[7] raises serious questions about the strictness of *Aguilar*'s nexus test under the witness tampering statute, 18 U.S.C. §1512(b). This article explores the implications of *Norris* and explains why defense counsel should reconsider whether the scenario contemplated by the majority in *Aguilar* is really foreclosed under the law as it has developed.

Background

From 1998 through 2002, Ian Norris was the CEO of the Morgan Crucible Company (Morgan), headquartered in the United Kingdom.

In April 1999, the Antitrust Division of the Department of Justice (Division) was conducting a federal grand jury investigation into antitrust violations involving Morgan's sale of carbon products in the United States. The Division served on Morganite Industries, a U.S. subsidiary of Morgan, a document subpoena requiring Morganite and its affiliates to produce documents related to the carbon products industry.[8]

After a lengthy and high-profile extradition battle, Norris was extradited from the United Kingdom on charges of witness-tampering in violation of 18 U.S.C. §1512(b) and conspiracy to violate §1512(b). At trial, Norris was acquitted on the substantive witness-tampering charges, but convicted of conspiracy.

Beyond the most basic facts, the prosecution and the defense sharply disputed what occurred in response to

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the grand jury subpoena to Morganite and what various Morgan officers intended. In its denial of Norris's post-trial motion for acquittal, the district court held that the government had adduced sufficient evidence to prove the following version of events.

After Norris was given a copy of the subpoena, he became concerned about a number of meetings at which Morgan had discussed price-fixing with its competitors in Europe. Norris met with various Morgan employees, showed them the subpoena, and directed them to create a series of false meeting summaries stating that the meetings between Morgan and its competitors were devoted to discussion of joint-venture plans and acquisitions, rather than price-fixing.

Norris and his co-conspirators agreed to repeat the cover story contained in the summaries if questioned about the meetings. Morgan employees parroted the summaries in interviews with Morgan's outside counsel, and with Norris's consent, Morgan's counsel provided the meeting summaries to the Division.[9]

In his post-trial motion for acquittal, Norris argued, among other things, that the evidence showed at most a conspiracy to influence Morgan's outside counsel and Division attorneys, not testimony before a grand jury.[10] Therefore, Norris argued, the Division did not prove a nexus between Norris's corrupt agreement and the object of the charged conspiracy.

High Court's Key Obstruction Rulings

Norris's nexus argument turns on the interpretation of two key U.S. Supreme Court decisions on the breadth of the obstruction statutes, *Aguilar* and *United States v. Arthur Andersen*.

In *Aguilar*, the defendant, a district judge, was under investigation for attempting to influence the outcome of a habeas petition before another judge in his district, and improperly disclosing a wiretap. When two FBI agents questioned Aguilar, he lied about his involvement in the habeas petition and his disclosure of the wiretap. Moreover, Aguilar lied with the knowledge that a grand jury was investigating the issues he lied about.[11]

The Supreme Court held that the evidence was insufficient to establish the requisite nexus between Aguilar's conduct and the grand jury proceeding. The Court explained that "uttering false statements to an investigating agent… who might or might not testify before a grand jury" does not have the "natural and probable" effect of interfering with a grand jury proceeding.[12] Thus, *Aguilar* stands for the proposition that "if the defendant lacks knowledge that his actions are likely to affect the judicial proceeding, he lacks the requisite intent to obstruct."[13]

> In 'United States v. Aguilar,' the U.S. Supreme Court required a '**nexus**' between an **obstructive act** and an **official proceeding** under the omnibus clause of 18 U.S.C. §1503. 'Norris' now raises **serious questions** about the **strictness** of this nexus test under the witness tampering statute, 18 U.S.C. §1512(b).

In *Arthur Andersen v. United States*, the Supreme Court addressed the nexus requirement in the context of 18 U.S.C. §1512(b), which punishes anyone who "knowingly…corruptly persuades another person…with intent to (1) influence…the testimony of any person in an official proceeding," or "(2) cause…any person to…impair [an] object's integrity or availability for use in an official proceeding."[14]

Unlike §1503, which requires an ongoing judicial proceeding at the time of the offense,[15] §1512 provides that "an official proceeding need not be pending or about to be instituted at the time of the offense."[16] Nonetheless, the Supreme Court held that §1512 imposes a nexus requirement:

> A "knowingly…corrup[t] persaude[r]" cannot be someone who persuades others to shred documents under a document retention policy when he does not have in contemplation any particular official proceeding in which those documents might be material.[17]

Although the Court's analysis makes clear that contemplation of a particular proceeding is necessary for a §1512(b) violation, the Court did not say whether mere contemplation is sufficient. The Court just stated that some nexus is required.[18] Thus, *Arthur Andersen* left open whether §1512(b) requires that the defendant acted "in contemplation" of an official proceeding, or as required by *Aguilar*, that the defendant had "knowledge that his actions [were] likely to affect" an official proceeding.

After 'Arthur Anderson'

In the wake of *Arthur Andersen*, three circuit courts, including the Second Circuit, have strongly suggested that *Aguilar*'s "likely to affect" standard applies to §1512(b).[19] Indeed, the Second Circuit vacated Frank Quattrone's conviction under §1512(b) because the district court instructed the jury that the nexus requirement, that Quattrone was "aware[] that [his] conduct was *likely to affect* the proceeding," did not apply.[20]

In addition, several circuit courts have also extended *Aguilar*'s nexus requirement to the omnibus obstruction provision of §1512(c),[21] which punishes anyone who "corruptly…obstructs, influences or impedes any official proceeding."[22] In a recent case in the Eleventh Circuit, *United States v. Friske*,[23] the court strictly applied the nexus requirement to §1512(c).

A friend of Friske, who was in jail

pending drug charges for a marijuana-growing operation, asked Friske to do a "little repair job" under the pool deck at the friend's house. After hearing a recording of the conversation, law enforcement agents went to the friend's house and recovered $375,000 from under the pool deck.

Friske was later found at the house attempting to recover the money. He was convicted under §1512(c) for attempting to obstruct a forfeiture proceeding against his friend. Notwithstanding the seemingly common sense inference that the government would likely seek to recover his friend's ill-gotten profits, the court reversed Friske's conviction because there was "no evidence that Friske knew his actions were likely to affect a forfeiture proceeding."[24]

In contrast, the Third Circuit has suggested that a more permissive nexus standard applies to §1512(b). In *United States v. Vampire Nation*,[25] the defendant was charged with corruptly persuading his fraud victim to withhold a forged check from the grand jury. The district court did not specifically instruct the jury on the nexus requirement. The court's instructions provided that the defendant must have "acted knowingly and with the specific intent to cause or induce any person to withhold a record document…from an official proceeding."[26]

On plain error review, the Third Circuit held that this instruction adequately conveyed the nexus requirement: "We read this instruction as requiring the jury to find *some connection*—i.e., a nexus—between [the defendant's] actions and an official proceeding."[27] Of course, "some connection" is not necessarily the same as "contemplation of" an official proceeding, must less conduct that is "likely to affect" an official proceeding.

The 'Norris' Rulings

Norris's post-trial motion for acquittal squarely raised the issue left open by *Arthur Andersen*: what kind of nexus is required by §1512(b)? Norris argued that *Aguilar*'s nexus standard applies to §1512(b).[28] The Division contended that it had to prove only that Norris "*contemplated* a particular proceeding, even if it was not yet instituted."[29]

The district court held that *Arthur Andersen* "did not adopt precisely the same nexus requirement [as *Aguilar*]—it merely stated that one is required and that the defendant must have some contemplation of the official proceeding he or she is charged with obstructing."[30] Although the district court did not specify the applicable nexus test under §1512(b), the court analyzed the sufficiency of the evidence under the Division's proposed "contemplation" standard.

The court found sufficient evidence to conclude that Norris and his co-conspirators agreed to misrepresent Morgan's price-fixing meetings "via false non-contemporaneous scripts they and others were to parrot when questioned."[31] This evidence satisfied §1512(b), according to the court, because the jury could reasonably infer that Norris and his co-conspirators acted with "the purpose of influencing testimony they believed *might* be given to the grand jury—i.e., the knowledge required to effectuate a violation of Section 1512(b)(1)."[32]

The court cited evidence that Norris wanted various employees of Morgan to tell a cover story when questioned.[33] But the evidence was at best ambiguous as to whether these employees believed they might be interviewed by the government or actually testify in the grand jury, and the court did not cite evidence that Norris thought these witnesses were "likely" to testify before the grand jury. The closest the court came to connecting Norris's conduct to grand jury testimony was its assertion that, based on Norris's review of the subpoena for documents, he was "aware people *could* be called to testify in the grand jury proceedings."[34]

The Third Circuit affirmed in a brief, non-precedential opinion. The court cited a single piece of evidence to establish the requisite connection between Norris's false meeting summaries and testimony before the grand jury. Jack Kroef, a Morgan executive, testified as to the scope of the conspiracy:

> Q: [Y]ou memorized the notes for what purpose?
>
> A: To be used later, if you would be questioned.
>
> Q: Questioned by who?
>
> A: By—it could be anybody.[35]

Relying on Kroef's testimony, the Third Circuit found sufficient evidence that the false meeting summaries "were to be used by Morgan's employees if 'questioned…by anybody,'" and therefore, "a rational trier of fact could certainly conclude that Norris corruptly persuaded others with the intent to influence their grand jury testimony."[36] The ease with which the Third Circuit dispatched Norris's nexus argument is troubling; it certainly suggests that the court was not concerned with the district court's apparent relaxation of the important nexus requirement.[37]

A Different Standard?

It is difficult to square the district court's and the Third Circuit's reasoning in *Norris* with *Aguilar*'s nexus requirement.

Aguilar held that lying to a government investigator who "may or may not testify before the grand jury" does not establish the requisite nexus to obstruct grand jury proceedings. Yet Kroef's "it could be anybody" testimony suggests, at most, that Norris intended to influence a wide variety of persons, e.g., outside counsel, Division investigators, and witnesses to Morgan's price-fixing meetings, who "may or may not" testify before the grand jury. The testimony says nothing about whether Norris and his co-conspirators had knowledge that the persons they influenced were likely to testify before the grand jury.

By citing to Kroef's "it could be anybody" testimony without further explanation, the Third Circuit

suggested that the district court's use of a looser nexus standard under §1512(b) was appropriate.

The Third Circuit's affirmance may also reflect acceptance of a relaxed specific intent standard. Proof of a conspiracy requires that the defendant enter into an agreement for the specific unlawful purpose required for the substantive offense that is the object of the conspiracy.[38] This specific intent element has been an important limitation in obstruction of justice prosecutions.

For example, in *United States v. Schwarz*, arising from the assault on Abner Louima, the Second Circuit reversed the defendants' conspiracy conviction under §1503 because "there was no showing that [a co-conspirator]…knew that the allegedly false statements he made to the federal investigators…would be conveyed to the grand jury."[39]

The Second Circuit made the same point in *United States v. Bruno*, a Genovese crime family case, in which the defendants lied to relatives about their participation in a mob-related shooting. The court reversed their convictions for conspiracy under §1503 because no evidence suggested that the defendants "intended that the statements they made…to their respective relatives would eventually be passed along to the grand jury."[40]

Norris's conspiracy had the same object as the conspiracies charged in *Schwarz* and *Bruno*: to influence testimony before the grand jury. The district court and the Third Circuit, however, seemed to accept the validity of inferring the requisite specific intent from Kroef's "it could be anybody" testimony.

It is questionable whether this testimony constitutes evidence that Norris contemplated a "*particular* official proceeding," as required by *Arthur Andersen*.[41] More importantly, the decisions in *Norris* glossed over the distinction, which was emphasized by both the Supreme Court in *Aguilar* and the Second Circuit in *Schwarz* and *Bruno*, between the intention to lie to government investigators or potential witnesses on the one hand, and the intention to pass one's lies to a grand jury on the other.

Conclusion

The *Norris* conviction is a wake up call to defense counsel. The defense bar cannot take for granted that the strictures of *Aguilar* will be applied to the witness tampering statute, or other obstruction provisions. It remains an open question how far courts might be willing to stretch the nexus requirement in §1512(b) cases.

Adoption of a weak nexus test, such as mere "contemplation," would vastly expand the reach of §1512. If a husband lies to his wife about his whereabouts at the time of his crime, expecting that she will repeat his false alibi to "anybody" who asks, including investigators who might testify before the grand jury, does he not act in contemplation of an official proceeding? Depending on the trajectory of §1512(b) case law, *Aguilar*'s hypothetical may not be a stretch; it could be the law.

1. *United States v. Aguilar*, 515 U.S. 593, 602 (1995).
2. Id. at 599.
3. *United States v. Schwarz*, 283 F.3d 76 (2d Cir. 2002).
4. *United States v. Bruno*, 383 F.3d 65 (2d Cir. 2004).
5. *United States v. Quattrone*, 441 F.3d 153 (2d Cir. 2006).
6. See *United States v. Lauren Stevens*, Case No. 10-00694 (filed Nov. 8, 2010).
7. See *United States v. Norris*, No. 10-4658, 2011 WL 1035723 (3d Cir. March 23, 2011).
8. *United States v. Norris*, 719 F. Supp. 2d 557, 561 (E.D. Pa. 2010).
9. See *United States v. Norris*, 753 F.Supp. 2d 492, 508-09 (E.D. Pa. 2010); see also *United States v. Norris*, 2011 WL 1035723, at *3-*4 (3d Cir. 2011); *United States v. Norris*, 722 F.Supp.2d 632, 635 (E.D. Pa. 2010).
10. *Norris*, 2010 WL 4872987, at *5.
11. *United States v. Aguilar*, 515 U.S. 593, 600-01 (1995); see also id. at 596-97.
12. Id. at 600-01.
13. Id. at 599.
14. 18 U.S.C. §§1512(b)(1) and 1512(b)(2)(B).
15. *United States v. Reed*, 773 F.2d 477, 485 (2d Cir. 1985); *United States v. Nelson*, 852 F.2d 706, 710 (3d Cir. 1988).
16. 18 U.S.C. §1512(f).
17. *Arthur Andersen v. United States*, 544 U.S. 696, 707-08 (2006).
18. See *United States v. Byrne*, 435 F.3d 16, 25 (1st Cir. 2006).
19. See *United States v. Phillips*, 583 F.3d 1261, 1264 (10th Cir. 2009); *United States v. Kaplan*, 490 F.3d 110, 125 (2d Cir. 2007); *United States v. Matthews*, 505 F.3d 698, 708 (7th Cir. 2007).
20. *United States v. Quattrone*, 441 F.3d 153, 181 (2d Cir. 2006) (emphasis added).
21. See *United States v. Friske*, __F.3d__, 2011 WL 1878776, at *3 (11th Cir. 2011); *Phillips*, 583 F.3d at 1264; *United States v. Reich*, 479 F.3d 179, 186 (2d Cir. 2007).
22. 18 U.S.C. §1512(c).
23. *United States v. Friske*, __F.3d__, 2011 WL 1878776 (11th Cir. 2011).
24. Id. at *4. The "likely to affect" standard is given further support by the U.S. Supreme Court's recent interpretation of the "federal nexus" required by 18 U.S.C. §1512(a)(1). Section 1512(a)(1) punishes "[w]hoever kills or attempts to kill another person, with intent to…prevent the communication by any person to a law enforcement officer or judge *of the United States* of information relating to the commission or possible commission of a Federal offense" (emphasis added). In *Fowler v. United States*, 131 S. Ct. 2045 (2011), the Court held that when the murderer has no identifiable federal officer in mind, it is insufficient for the government to show that it was "reasonably possible" that the communication the murder was intended to prevent would have been with a federal officer. Instead, the Court required a tighter link between the obstructive conduct and the federal officer: "… the Government must show a *reasonable likelihood* that, had, e.g., the victim communicated with law enforcement officers, at least one relevant communication would have been made to a federal officer." Id. at 2052. (emphasis in original).
25. *United States v. Vampire Nation*, 451 F.3d. 189, 205 (3d Cir. 2006).
26. Id. at 205.
27. Id. (emphasis added).
28. *Norris*, 753 F.Supp. 2d at 506.
29. Government Brief at 5, *United States v. Norris*, No. 03-362, 2010 WL 4872987 (E.D. Pa. 2010) (emphasis added).
30. *Norris*, 753 F.Supp. 2d at 506-07.
31. Id. at 508.
32. Id. at 509 (emphasis added).
33. See id. at 508-10.
34. Id. at 507 n.7 (emphasis added).
35. Joint Appendix at 1230-31,*United States v. Norris*, No. 10-4658, 2001 WL 1035723 (3d Cir. March 23, 2011).
36. *Norris*, 2011 WL 1035723, at *3.
37. Interestingly, neither the district court nor the Third Circuit cited arguably important evidence that Norris believed his actions were "likely to affect" the grand jury proceedings: Norris was aware that Morgan's outside counsel had told that Division that counsel was willing to make Norris and his associates available for testimony before the grand jury. See Joint Appendix at 3279-80, *United States v. Norris*, No. 10-4658, 2011 WL 1035723 (3d Cir. March 23, 2011). The fact that neither court saw a need to cite this evidence highlights the apparent lowering of the nexus standard they applied.
38. *Schwarz*, 283 F.3d at 108; *United States v. Schramm*, 75 F.3d 156, 159 (3d Cir. 1996).
39. *Schwarz*, 283 F.3d at 109.
40. *Bruno*, 383 F.3d at 88.
41. *Arthur Andersen*, 544 U.S. at 708 (emphasis added).

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