No. _____

IN THE

SUPREME COURT OF UNITED STATES

SAMUEL FRANCIS WHITE HORSE - PETITIONER

vs.

UNITED STATES OF AMERICA – RESPONDENT

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1) Does a conviction for Tampering with Evidence in violation of 18 U.S.C. § 1512(c)(1) require a jury to find that the natural and probable effect of defendant's conduct would be the interference with the due administration of justice?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

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IN THE

SUPREME COURT OF UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit appears at Appendix A to the petition and is reported at 35 F.4th 1119.

JURISDICTION

The date on which the United States Court of Appeals for the Eighth Circuit decided this case was June 3, 2022. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 1512(c), Tampering with a witness, victim, or an informant states:

(c) whoever corruptly –

> (1) alters, destroys, mutilates, or conceals a record, document, or other object, or attempts to do so, with the intent to impair the object's integrity or availability for use in an official proceeding; or
>
> (2) 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.

STATEMENT OF THE CASE

Samuel Francis White Horse was indicted for Second-Degree Murder, Assault with a Dangerous Weapon, Assault Resulting in Serious Bodily Injury, and Tampering with Evidence. At a jury trial, he was acquitted of Second-Degree Murder, the lesser included offense of Voluntary Manslaughter, Assault with a Dangerous Weapon, and Assault Resulting in Serious Bodily Injury. He was convicted of Assault by Striking, Beating, and Wounding and Tampering with Evidence, in violation of 18 U.S.C. § 1512(c)(1). Appendix A at A-1.

The only evidence presented to the jury relating to the Tampering with Evidence count was White Horse's custodial interview, where White Horse admitted he moved a garden hoe (which his father had used to strike the victim) beneath the porch of White Horse's residence (which was located at scene of the crime). *Id.* at A-2. The garden hoe was later found hidden in a vehicle on the same property. White Horse admitted he moved it under the porch "to hide [the hoe]" because he "didn't want [his father] to get in trouble." *Id.* No evidence was presented at trial as to how the garden hoe ended up in the minivan where it was found by law enforcement the following day.

At and before trial, consistent with *United States v. Aguilar*, 515 U.S. 593 (1995), White Horse requested the jury be instructed that to be convicted for tampering with evidence in violation of 18 USC 1512(c)(1), the government must

prove that "the natural and probable effect of defendant's conduct would be the interference with the due administration of justice." Appendix A at A-2. This instruction went to the heart of the defense as to the tampering with evidence count. Specifically, the defense's theory was that, despite White Horse's intent to conceal the object in the heat of the moment, the conduct admitted to by White Horse (placing a garden hoe under a porch located at the crime scene) would not have the "natural and probable effect" of "the interference with the due administration of justice" because throwing a garden hoe a few yards under a porch would not have the natural and probable effect of preventing law enforcement from locating the garden hoe. The district court did not include such language in the final instruction.

The Eighth Circuit Court of Appeals received this case on March 16, 2022, and later affirmed the District Court's failure to include the proper jury instruction on June 3, 2022. *See generally United States v. White Horse,* 35 F.4th 1119 (U.S. 8th Cir. 2022).

REASONS FOR GRANTING THE PETITION

I. REVIEW IS NECESSARY TO ENSURE UNFORM AND PROPER APPLICATION OF OBSTRUCTION OF JUSTICE LAWS IN LIGHT OF THIS COURT'S PRECEDENT IN *UNITED STATES V. AGUILAR*, 515 U.S. 593 (1995).

In *United States v. Aguilar*, 515 U.S. 593 (1995), the Court analyzed 18 USC § 1503 and found that the phrase "corruptly endeavors" includes a nexus requirement which essentially provides two separate elements: "the defendant acts with an intent to obstruct justice, and in a manner that is likely to obstruct justice[.]" *Id.* at 602. To meet the second prong of that standard, the Court formulated an additional element that an "endeavor must have the 'natural and probable effect' of interfering with the due administration of justice." *Id.* at 599. While *Aguilar* dealt with the influence or injury of an officer or juror under 18 U.S.C. § 1503, the same language, "corruptly," that is considered in *Aguilar* is also part of 18 U.S.C. § 1512(c)(1) and § 1512(c)(2). 18 U.S.C. §§ 1503(a), 1512(c)(1), and 1512(c)(2). *See Aguilar*, 515 U.S. at 599, 602. This Petition seeks that the Court issue a writ of certiorari to address a matter of public importance and resolve the discrepancies between the Circuit Courts as to 18 U.S.C. § 1512(c)(1), with particular attention on whether a jury must be instructed that, in order to be convicted for a violation of Section 1512(c)(1), that the government must prove that "the natural and probable effect of defendant's conduct would be the interference with the due administration of justice."

The Eighth Circuit Court of Appeals correctly reasoned that "White Horse is correct that a conviction under § 1512(c)(1) requires proof of a nexus between the defendant's action and an official proceeding. . . [.]" Appendix A at A-3. However, the Eighth Circuit reasoned it was sufficient that "the jury instruction properly framed [the nexus] requirement as an implication of the statute's *mens rea* terms rather than as an independent element of the offense." *Id.*

This creates an important question for this Court: whether a conviction for 18 U.S.C. § 1512(c)(1) includes a requirement that a jury find that "the natural and probable effect of defendant's conduct would be the interference with the due administration of justice." The Eighth Circuit found that this could be done solely with an instruction on intent. White Horse submits review is appropriate under the precedent of this Court because the Eighth Circuit decision conflicts with this Court's previous decision in *United States v. Aguilar*, 515 U.S. 593 (1995), there is division among the circuit courts as to how to handle this issue, and this is an important issue within federal law that should be settled by this Court.

The United States Supreme Court in *Aguilar,* analyzing 18 USC § 1503, reasoned that the phrase "corruptly endeavors" includes a nexus requirement which requires that "the defendant acts with an intent to obstruct justice, and in a manner that is likely to obstruct justice, but is foiled in some way." *Id*. at 602. To meet the second prong of that standard, the Court formulated an element that states an

"endeavor must have the 'natural and probable effect' of interfering with the due administration of justice." *Id.* at 599.

Then, in *Arthur Andersen LLP v. United States*, 544 U.S. 696 (2005), the Court reviewed Section 1512(b). The Court reasoned, relying on *Aguilar*'s definition of "corruptly," that Section 1512(b) includes a nexus requirement. *Id.* at 706-708. The Court did not spell out the exact elements for a proper jury instruction but remanded that issue to the Court of Appeals to apply the nexus requirement while specifically citing *Aguilar's* nexus requirements." *Id*., at 708 (*citing Aguilar*, 515 U.S. at 599).

Until the Eighth Circuit's decision in this case, other Circuit Courts have routinely found that the nexus requirement requires the government prove that a defendant's actions have the "'natural and probable effect' of interfering with the due administration of justice" for a conviction under Section 1512. *See United States v. Desposito*, 704 F.3d 221, 231 (2d Cir. 2013) (*citing United States v. Reich*, 479 F.3d 179, 185-86 (2d Cir. 2007) (in § 1512(c)(2) prosecution, "the government had to show that [defendant's] letters had the natural and probable effect of obstructing his criminal trial"); *United States v. Smalls*, 752 F.3d 1227, 1249 n.10 (10th Cir. 2014) ("natural and probable effect" test applies to § 1512(c)(2) and § 1512(a)(1)(A) and (C)); "*United States v. McGarity*, 669 F.3d 1218, 1273 (11th Cir. 2012) (*citing United States v. Mintmire*, 507 F.3d 1273, 1289 (11th Cir. 2007)

(identifying as elements of a § 1512(c)(2) offense as including "(4) 'the natural and probable effect of [the defendant's] conduct would be the interference with the due administration of justice'"). The Eighth Circuit Court of Appeals decision in this case, however, departs from precedent of other circuits, and focuses solely on an accused intent rather than a review of an accused actions.

The Eighth Circuit's opinion correctly finds the nexus requirement in *Aguilar* is incorporated into Section 1512(c)(1) by use of the word "corruptly." It also correctly found that that *Aguilar* requires that the defendant acts with an intent to obstruct justice. However, the Eighth Circuit opinion misapplies the *Aguilar* nexus requirement because it omits the additional requirement that the Government must prove a defendant acted in a manner that is likely to obstruct justice. *See Aguilar*, 515 U.S. at 602 (the nexus requirement requires "the defendant acts with an intent to obstruct justice, and in a manner that is likely to obstruct justice[.]"). This application of Section 1512 looks solely to intent, and not at all to the manner in which the alleged obstructive conduct was taken. This, along with the inconsistency that now exists in between the Circuits, greatly expands the scope of potential Section 1512 prosecutions and is a matter of great public concern.

Section 1512 was passed by Congress as part of the Sarbanes-Oxley Act of 2002 in response to the 2001 and 2002 accounting scandals involving corporate luminaries such as Enron, WorldCom, Global Crossing, and Adelphia. Sarah

O'Rourke Schrup, Criminal Law: Obstruction of Justice: Unwarranted Expansion of 18 U.S.C. § 11512(c)(1), 102 J. Crim. L. & Criminology 25, 25-26. Although the Act's preamble is clear that Congressional intent in passing the legislation was to "protect investors by improving the accuracy and reliability of corporate disclosures made pursuant to the securities laws," the Government has since its enactment endeavored to expand its reach far beyond the corporate fraud context. *Id.* at 26. Omitting the government's burden to prove that a defendant has acted in a manner that is likely to obstruct justice, as required by *Aguilar*, would open nearly every person who is subject to a federal criminal investigation to additional prosecution for actions which, in reality, would be inconsequential to the actual underlying investigation. Authorization of a drastic expansion for the government to prosecute obstruction of justice cases by weakening the nexus requirements of *Aguilar* goes far beyond this specific case, this specific statute, and this specific context.

In *United States v. Pugh*, 937 F.3d 108 (2d Cir. 2019), Judge Guido Calabresi echoed "a concern with how broad obstruction of justice prosecutions under 18 U.S.C. § 1512(c) have become." *Id.* at 126 (Calabresi, J., concurring). He reasoned: "As construed by federal courts, the crime has been applied expansively, as a tacked-on charge in everything from attempted robbery and murder cases to run-of-the-mill drug busts. . . . It is at least arguable that this law

was never intended to be used so broadly. 18 U.S.C. § 1512(c) was enacted as part of the Sarbanes-Oxley Act of 2002, a major white-collar reform bill, largely prompted by reports of corporate accounting fraud at Enron and other major blue-chip companies. See H. R. Rep. No. 107-414 at 18-19 (2002). Accordingly, as judges, we should be careful, in examining obstruction of justice cases, to make our review searching and contextual." *Id.* White Horse submits that the Eighth Circuit Court of Appeals decision should not survive this "searching and contextual" review.

White Horse was acquitted of every other crime in which he was indicted, including Murder, Assault with a Dangerous Weapon, and Assault resulting in bodily injury, only to be convicted for tampering with evidence for, in the heat of the moment, moving a garden hoe a few yards and leaving it on the crime scene because he didn't want his dad to get in trouble. As it relates to the sole offense of conviction, White Horse repeatedly asked before and during trial for a jury instruction which required the Government to prove that his conduct had a natural and probable effect of interfering with the due administration of justice. That instruction would have helped define the nexus requirements that exists in Section 1512(c)(1) under this Court's precedent. Other defendants in the Eighth Circuit have had that benefit. *See United States v. Mann*, 685 F.3d 714 (8th Cir. 2012). Defendants outside the Eighth Circuit have had that benefit. *McGarity*, 669 F.3d at

1273 (11th Cir. 2012) (identifying as elements of a § 1512(c)(2) offense as including "(4) 'the natural and probable effect of [the defendant's] conduct would be the interference with the due administration of justice'"). But based on the district court's instruction that has now been approved of by the Eighth Circuit Court of Appeals, White Horse was foreclosed from having a jury consider whether, despite his admitted intent, that his action was not significant enough to "the natural and probable effect" of it to interfere with the due administration of justice. Because of that, Sam was convicted of an offense subject to twenty-year federal prison sentence, in comparison to his father facing fifteen years of federal prison for being convicted of voluntarily manslaughter. This is not the type of action, or result, Congress intended to reach when it passed Section 1512 in the Sarbanes-Oxley Act of 2002.

Although White Horse does not go as far as some commentators and advocate that Section 1512 should be limited to fraud cases,[1] at a minimum, White Horse, and like suited defendants, should be entitled to a clear instruction that, in order to be convicted, the Government must prove that the natural and probable effect of a defendant's conduct was the interference with the due administration of justice, as required by *Aguilar*. The district court did not give an instruction for

[1] *See generally* Sarah O'Rourke Schrup, Criminal Law: Obstruction of Justice: Unwarranted Expansion of 18 U.S.C. § 11512(c)(1), 102 J. Crim. L. & Criminology 25, 25-26 (contending that Courts should limit use of § 1512(c)(1) to fraud crimes)

such in this case, and, contrary to other circuits, the Eighth Circuit Court of Appeals opinion erroneously allows for that practice to continue into the future. That error should be addressed by this Court.

CONCLUSION

For the foregoing reasons, White Horse respectfully requests that the petition for a writ of certiorari should be granted.

Dated this 2nd day of August, 2022.

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