

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA :

:

:

v.

: Case No. 1:21-cr-00552(DLF)

:

KENNETH JOSEPH OWEN :

THOMAS,

:

:

Defendant.

:

**DEFENDANT KENNETH JOSEPH OWEN THOMAS’
PROPOSED SECTION 1512 JURY INSTRUCTION IN LIGHT OF THE RECENT D.C.
CIRCUIT DECISION**

COMES NOW Defendant Kenneth Joseph Owen Thomas (“Defendant” or “Thomas”) by and through undersigned counsel, with this proposed jury instruction regarding 18 U.S.C. Section 1512:

Count 2, Obstructing an Official Proceeding (18 U.S.C. § 1512(c)(2))

Count 2 of the indictment charges the defendant with corruptly obstructing an official proceeding, which is a violation of the law.

The Court will first explain the elements of the substantive offense, along with its associated definitions.

Elements

In order to find the defendant guilty of corruptly obstructing an official proceeding, you must find that the government proved each of the following **five** elements beyond a reasonable doubt:

First, the defendant attempted to or did obstruct or impede an official proceeding.

Second, the defendant **individually** acted with the intent to obstruct or impede the official proceeding.

Third, the defendant knew an official proceeding was occurring and that his actions would likely end or thwart the outcome of the official proceeding.

Fourth, the defendant acted corruptly.

Fifth, that the defendant's conduct "impaired the integrity or availability of evidence."

United States v. Fischer, No. 22-3038, 2023 WL 2817988, at *44 (D.C. Cir. Apr. 7, 2023) (Katsas, J.)¹

Definitions.

The term "official proceeding" includes a proceeding before the Congress. The official proceeding ~~need not be pending or about to be instituted at the time of the offense.~~² **must be pending at the time of the offense.** ~~If the official proceeding was not pending or about to be instituted, the government must prove beyond a reasonable doubt that the official proceeding was reasonably foreseeable to the defendant.~~

A person acts "knowingly" if he realizes what he is doing and is aware of the nature of his conduct, and does not act through ignorance, mistake, or accident. In deciding whether the defendant acted knowingly, you may consider all of the evidence, including what the defendant did or said.

To act "corruptly," the defendant must **knowingly** use unlawful means and act with an immoral purpose. The defendant must act with "consciousness of wrongdoing." "Consciousness of wrongdoing" means with an understanding or awareness that what the person is doing is **morally** wrong.³

To prove that the Defendant acted "corruptly," the Government must prove more than the Defendant knowingly acted unlawfully. Not all attempts to obstruct or impede an official proceeding involve acting corruptly. For example, a witness in a court proceeding may refuse to testify by invoking his constitutional privilege against self-incrimination, thereby obstructing or impeding the proceeding, but he does not act corruptly. **And a demonstrator seeking in good faith to inspire officials in a proceeding to open additional proceedings or hearings or to examine or**

¹ This is based on Judge Walker's statement that his "reading of "corruptly" is necessary to my vote to join the lead opinion's proposed holding on "obstructs, influences, or impedes" an "official proceeding." 18 U.S.C. § 1512(c)(2). If I did not read "corruptly" narrowly, I would join the dissenting opinion. That's because giving "corruptly" its narrow, long-established meaning resolves otherwise compelling structural arguments for affirming the district court, as well as the Defendants' vagueness concerns."

United States v. Fischer, No. 22-3038, 2023 WL 2817988, at *27 (D.C. Cir. Apr. 7, 2023) (Walker, J.)

² The plain language of the statute suggests the official proceeding must be actually pending, existing and occurring. Literally nothing in the statute supports the government's proposed language that the proceeding can be conceptual, future-tense, or past-tense.

³ The addition of the word **morally** is necessary here because a person can innocently do something "wrong" without being corrupt. Consider efforts of abolitionists to stoke slave revolts or harbor fugitive slaves, or efforts of those who harbored Ann Frank, who were obviously doing something "wrong" but who were acting in accordance with their morals and in good faith.

consider some issue or argument is not acting corruptly. In contrast, an individual who obstructs or impedes a court proceeding by bribing a witness to refuse to testify in that proceeding, or by engaging in other independently unlawful conduct, does act corruptly.⁴

Remember that a conviction under this law must not be based on protected speech, expression, advocacy or petitioning for redress of grievances under the First Amendment.

⁴ See *United States v. Aguilar*, 515 U.S. 593, 616 (1995) (Scalia, J., concurring in part) (*emphases added*) for 18 U.S.C. 1503 must apply:

Finally, respondent posits that the phrase "'corruptly ... endeavors to influence, obstruct, or impede' may be unconstitutionally vague," in that it fails to provide sufficient notice that lying to potential grand jury witnesses in an effort to thwart a grand jury investigation is proscribed. Brief for Respondent 22, n. 13. Statutory language need not be colloquial, however, and the term "corruptly" in criminal laws has a longstanding and well-accepted meaning. It denotes **"[a]n act done with an intent to give some advantage inconsistent with official duty and the rights of others** It includes bribery but is more comprehensive; because an act may be corruptly done though the advantage to be derived from it be not offered by another." *United States v. Ogle*, 613 F.2d 233, 238 (CA10) (internal quotation marks omitted), cert. denied, 449 U. S. 825 (1980). See also Ballentine's Law Dictionary 276 (3d ed. 1969); Black's Law Dictionary 345 (6th ed. 1990). **As the District Court here instructed the jury:**

"An act is done corruptly if it's done voluntarily and intentionally to bring about either an unlawful result or a lawful result by some unlawful method, with a hope or expectation of either financial gain or other benefit to oneself or a benefit of another person." App. 117.

"Black's Law Dictionary defines 'corruptly' as used in criminal-law statutes as 'indicates a wrongful desire for pecuniary gain or other advantage.' Black's Law Dictionary 371 (8th ed. 2004)." *United States of America vs. Samuel Saldana*, U.S. Court of Appeals for the Fifth Circuit, Case No. 04-50527, Opinion, August 18, 2005, footnote 7.

Marinello v. United States, 138 Ct. 1101, 1114 (2018) is highly instructive:

The difference between these *mens rea* requirements is significant. While "willfully" requires proof only "that the law imposed a duty on the defendant, that the defendant knew of this duty, and that he voluntarily and intentionally violated that duty," *Cheek v. United States*, 498 U.S. 192, 201, 111 S.Ct. 604, 112 L.Ed.2d 617 (1991), "corruptly" requires proof that the defendant "act[ed] with an intent to procure an unlawful benefit either for [himself] or for some other person," *United States v. Floyd*, 740 F.3d 22, 31 (C.A.1 2014) (collecting cases); see also Black's Law Dictionary 414 (rev. 4th ed. 1951) ("corruptly" "generally imports a wrongful design to acquire some pecuniary or other advantage"). In other words, "corruptly" requires proof that the defendant not only knew he was obtaining an "unlawful benefit" but that his "objective" or "purpose" was to obtain that unlawful benefit. See 21 Am.Jur.2d, Criminal Law § 114 (2016) (explaining that specific intent requires both knowledge and purpose).

Dated: May 10, 2023

RESPECTFULLY SUBMITTED

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CERTIFICATE OF SERVICE

I hereby certify that this document is being filed on this May 10, 2023, with the Clerk of the Court by using the U.S. District Court for the District of Columbia's CM/ECF system, which will send an electronic copy of to all CM/ECF participants in the case.

/s/ John Pierce

John M. Pierce, Esq.