

13-914-cr (L)
U.S. v. Veliz, Veliz Novack

1
2 **UNITED STATES COURT OF APPEALS**
3 **FOR THE SECOND CIRCUIT**
4

5
6 August Term, 2014
7

8 (Argued: May 6, 2015 Decided: August 19, 2015)
9

10 Docket No. 13-914-cr; 13-953-cr
11

12
13 UNITED STATES OF AMERICA,
14

15 *Appellee,*
16

17 — v. —
18

19 CRISTOBAL VELIZ, NARCISA VELIZ NOVACK,
20 also known as Narcy Novack,
21

22 *Defendants-Appellants,*
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24 DENIS RAMIREZ, JOEL GONZALEZ,
25

26 *Defendants.*
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28
29 **B e f o r e:**
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31 LEVAL, LYNCH, and LOHIER, *Circuit Judges.*
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33

1 GERARD E. LYNCH, *Circuit Judge*:

2 Narcisa Veliz Novack (“Novack”) and her brother Cristobal Veliz (“Veliz”)
3 appeal from judgments of conviction entered following a two-month jury trial in
4 the United States District Court for the Southern District of New York (Kenneth
5 M. Karas, *Judge*). Both were convicted of numerous offenses, including one
6 count of racketeering in violation of the Racketeer Influenced and Corrupt
7 Organizations Act (“RICO”), 18 U.S.C. § 1962(c), and one count of RICO
8 conspiracy, 18 U.S.C. § 1962(d).¹ Those charges arose from defendants’
9 participation in an association-in-fact RICO enterprise with the primary purpose
10 of assaulting Novack’s husband, Ben Novack, and her mother-in-law, Bernice
11 Novack, in order to gain control of their assets. Defendants raise a host of
12 challenges to their convictions and their sentences of life imprisonment, most of

1 ¹ In addition to those charges, both Novack and Veliz were convicted of four
2 counts of violent crime in aid of racketeering, 18 U.S.C. §§ 1959(a)(2), (a)(3), (a)(6);
3 one count of interstate domestic violence, 18 U.S.C. § 2261(a)(1); one count of
4 interstate stalking, 18 U.S.C. § 2261A(1); and one count of conspiracy to commit
5 interstate domestic violence and stalking, 18 U.S.C. § 371. Novack was also
6 convicted of one count of interstate transportation of stolen property, 18 U.S.C. §
7 2314, and two counts of money laundering, 18 U.S.C. § 1957(a); Veliz was also
8 convicted of two counts of witness tampering, 18 U.S.C. § 1512(b)(3). Both were
9 acquitted of a violent crime in aid of racketeering for the murder of Ben Novack,
10 and the corresponding racketeering act of the murder of Ben Novack was found
11 not proven.

1 which we reject in a summary order issued simultaneously with this opinion.

2 See United States v. Veliz, – F. App'x –, No. 13-914-cr, 13-953-cr (2d Cir., Aug. 19,
3 2015). This opinion addresses Veliz's challenges to his witness tampering
4 convictions, which warrant greater discussion.

5 Veliz was convicted of two counts of witness tampering in violation of 18
6 U.S.C. § 1512(b)(3), which provides that "[w]hoever knowingly uses intimidation,
7 threatens, or corruptly persuades another person, or attempts to do so, or
8 engages in misleading conduct toward another person, with intent to . . . hinder,
9 delay, or prevent the communication to a law enforcement officer or judge of the
10 United States of information relating to the commission or possible commission
11 of a Federal offense" shall be guilty of a crime.² Those charges arose from two
12 occasions on which Veliz solicited associates to murder Alejandro Garcia – whom
13 Veliz had hired to assault Ben and Bernice Novack – in order to prevent Garcia
14 from communicating information about those crimes to law enforcement.

1 ² The same acts of witness tampering were also charged and found proven as
2 predicate racketeering acts in support of Veliz's conviction for substantive and
3 conspiracy RICO offenses. In challenging his convictions for witness tampering,
4 Veliz maintains that his substantive RICO conviction must be vacated as well,
5 because without the witness tampering charges the government did not prove at
6 least two predicate acts required to sustain the conviction.

1 First, Veliz argues that his conduct did not violate § 1512(b)(3) because
2 solicitation to murder does not constitute the use or attempted use of
3 “intimidation, threat[s], or corrupt[] persua[sion].” We reject that argument,
4 because solicitation of a third party to murder a witness constitutes attempted
5 corrupt persuasion under the statute.

6 Second, Veliz contends that the evidence was insufficient to show, as
7 required by § 1512(b)(3), “that there was a *reasonable likelihood* that a relevant
8 communication would have been made to a *federal* officer.” Fowler v. United
9 States, 131 S. Ct. 2045, 2048 (2011) (second emphasis added). That argument fails
10 because the evidence that Veliz had committed multiple related crimes across
11 multiple states was sufficient to support the jury’s finding that communication
12 with a federal investigator was reasonably likely.

13 Third, Veliz argues that his witness-tampering convictions must be vacated
14 because the district court’s jury charge erroneously instructed that § 1512(b)(3)
15 could be violated by the use or attempted use of “physical force,” in addition to
16 “intimidation, threat[s], or corrupt[] persua[sion].” Reviewing that unpreserved
17 challenge for plain error, we reject Veliz’s argument because he has not shown a
18 reasonable probability that the challenged instruction affected the jury’s verdict.

1 and to knock off [sic] her teeth.” Trial Tr. 870. Despite those chilling but limited
2 instructions, there was sufficient evidence for the jury to conclude that Veliz and
3 Novack intended that the assault on Bernice Novack would be fatal, so that her
4 wealth would be inherited by Novack’s husband Ben, whom Novack and Veliz
5 intended to kill or incapacitate in turn, leaving Novack in control of the assets of
6 both victims. Garcia, lurking behind trash cans until Bernice Novack arrived,
7 followed her into the garage and beat her to death with a wrench. Veliz then
8 paid Garcia for his participation, and the following day told him that he had
9 done a “good job.” Trial Tr. 371.

10 Shortly after the attack on Bernice Novack, Veliz recruited Garcia for a
11 “larger job” that entailed assaulting Ben Novack at a convention in New York.
12 Trial Tr. 374-75, 381. The purpose of the assault, Veliz explained, was to disable
13 Ben Novack so that Veliz and Novack could take control of his business, and to
14 punish him for his sexual abuse of Novack. In early July 2009, Veliz, Garcia, and
15 Joel Gonzalez (whom Garcia had enlisted in the plot on Veliz’s instructions)
16 drove from Florida to New York, purchased weapons and other tools for use in
17 the assault, and checked in at a hotel near the Hilton Hotel in Rye Brook, New
18 York, where the attack would take place. In the early morning of July 12, 2009,

1 Novack let Garcia and Gonzalez into the Novacks' room, and directed them to
2 her sleeping husband. The two assailants, with Novack's encouragement, then
3 tied up Ben Novack, cut out his eyes, and beat him to death with a pair of
4 dumbbells. In the weeks following the attack, Novack secured control of assets
5 of Ben and Bernice Novack.³

6 On August 13, 2009, Westchester County Police officers investigating the
7 Ben Novack murder questioned Veliz at his apartment in Philadelphia. During
8 that interview, the officers observed a Western Union receipt for \$500 addressed
9 to Alejandro Garcia in Miami. Two weeks later, Veliz told one of the
10 investigating officers that he had discovered that Garcia was the perpetrator. On
11 November 18, 2009, Garcia was arrested in Miami on unrelated theft charges.
12 After learning of the arrest, the investigating officers traveled to Florida to
13 question Garcia about Ben Novack's murder. Garcia initially refused to
14 cooperate. In January 2010, the Federal Bureau of Investigation joined the

1 ³ Later that summer, Veliz approached Garcia with yet another assignment. That
2 time, Veliz sought to have May Abad, Novack's daughter from a previous
3 marriage, arrested by planting drugs and weapons in her vehicle and calling the
4 police. Garcia received further instructions from Veliz and Novack's brother,
5 Carlos Veliz, to "beat up [Abad] and leave her [a] cripple" because she was
6 "interfering in the inheritance" of Ben Novack's estate. Trial Tr. 580. The
7 contemplated framing and assault of Abad never occurred, however.

1 investigation of Ben Novack's murder.

2 Veliz, unaware of the arrest, believed that Garcia had fled to Nicaragua, his
3 home country. In late 2009, to prevent Garcia from resurfacing and revealing
4 Veliz's involvement, Veliz approached Yader Tinoco, an associate who had
5 played an ancillary role in the killings. Veliz told Tinoco that Garcia "was
6 opening his mouth," and asked him to "go to Nicaragua . . . [s]o you can go hush
7 his mouth." Trial Tr. 1830. Tinoco declined. Undeterred, Veliz in late 2009 or
8 early 2010 contacted Melvin Medrano – who had assisted in planning the attack
9 on Bernice Novack – in Nicaragua through a mutual acquaintance, Juan Carlos
10 Castillo. On a three-way conference call, Veliz stated that he "wanted to know
11 where [Garcia] was," and that he "was worried because [Garcia] could talk to the
12 cops about something they have done." Trial Tr. 1874. Veliz asked Medrano "to
13 work [Garcia], to make him disappear," which Castillo interpreted to mean "to
14 have him killed." Id. Medrano agreed, but with Garcia in jail in Miami, nothing
15 came of Veliz's solicitation.

16 In April 2010, after pleading guilty to the Florida theft offense, Garcia was
17 transferred to the Southern District of New York, where he admitted his role in
18 the crimes and implicated his accomplices, including Veliz and Novack.

1 Pursuant to a plea agreement, Garcia pleaded guilty on June 28, 2010 to one
2 count of interstate domestic violence in connection with the death of Ben Novack.
3 Gonzalez eventually pleaded guilty as well, and he, Garcia, and several other
4 coconspirators agreed to testify as cooperating witnesses against Veliz and
5 Novack.

6 Veliz and Novack were indicted in the Southern District of New York on
7 July 7, 2010. A superseding indictment filed on April 3, 2012 (the "Indictment")
8 charged Veliz with, among other crimes, two counts of witness tampering,
9 alleging that Veliz violated § 1512(b)(3) in "the fall of 2009" and again in "January
10 and February of 2010" by "solicit[ing] an associate to murder [Garcia] in order to
11 prevent [Garcia] from reporting information to law enforcement authorities
12 concerning the murders of Bernice Novack and Ben Novack." J.A. at 83-84. The
13 witness tampering allegations were also charged against Veliz as two predicate
14 racketeering acts in support of the substantive and conspiracy RICO charges.

15 The jury found Veliz guilty of both witness tampering counts (as well as
16 other crimes), and also found the corresponding predicate acts to be proven.
17 Veliz and Novack, who was also convicted as described above, were sentenced to
18 life imprisonment.

DISCUSSION

A. Sufficiency of the Evidence: Intimidation, Threats, or Corrupt Persuasion

Section 1512(b)(3) penalizes “[w]hoever knowingly uses intimidation, threatens, or corruptly persuades another person, or attempts to do so, or engages in misleading conduct toward another person, with intent to . . . hinder, delay, or prevent the communication to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense.” 18 U.S.C. § 1512(b)(3).

On appeal, Veliz does not dispute that the evidence at trial was sufficient to permit the jury to find beyond a reasonable doubt that he solicited Garcia’s murder in order to prevent him from communicating with law enforcement. Instead, he argues that his conduct did not violate § 1512(b)(3) because solicitation to murder does not constitute the use of intimidation, threats, or corrupt persuasion.⁴ Under the statute, Veliz maintains, a defendant must intend that an effort to intimidate, threaten, or corruptly persuade reach, directly or

⁴ Technically, Veliz argues that the evidence was insufficient to support conviction under the statute charged. Because he argues that the conduct proven was as a matter of law insufficient to constitute the charged offense, we review his claim *de novo*. See United States v. Grillo, 160 F.3d 149, 150 (2d Cir. 1998).

1 indirectly, the person whose cooperation with law enforcement the defendant
2 seeks to prevent. Veliz asserts that he had no such intent because he certainly
3 did not want Garcia to learn of the murder plot, and that a surreptitious effort to
4 eliminate the witness by killing him is not covered by § 1512(b)(3).

5 In response, the government argues that under § 1512 a “threat” means “an
6 expression of intention to inflict evil, injury, or damage on another.” United
7 States v. England, 507 F.3d 581, 589 (7th Cir. 2007), quoting Webster’s Third Int’l
8 Dictionary 2382 (1981). According to the government, Veliz’s conduct satisfies
9 that definition because he expressed to Tinoco and Medrano an intent to inflict
10 injury on Garcia. Under this reading, it does not matter that Veliz never intended
11 that Garcia perceive the expression; it suffices that Veliz intended that *someone*
12 perceive it.

13 The government cites England for the proposition that a defendant may
14 “threaten” a witness in violation of § 1512 even absent an intent that the witness
15 perceive the threat. The dictionary definition of “threat” adopted in England –
16 “an expression of intention to inflict evil, injury, or damage on another,” 507 F.3d
17 at 589 (internal quotation marks omitted) – would appear on its face to cover a
18 case like this one. But the facts of England, and therefore the actual holding of

1 the case, are far narrower. England was charged with witness tampering under
2 § 1512(a)(2)(A) – which punishes “[w]hoever uses physical force or the threat of
3 physical force against any person, or attempts to do so,” 18 U.S.C. § 1512(a)(2)(A)
4 – based on his request to his father to “relay a message” to a potential witness
5 that England would murder him if he testified. England, 507 F.3d at 584. The
6 Seventh Circuit rejected England’s argument that he had not threatened the
7 witness because the witness never received the message. Because England
8 *intended* (and indeed specifically requested) that the threat be conveyed to the
9 witness, however, the Seventh Circuit was not confronted with the question
10 whether the defendant’s statement would have violated the statute absent such
11 an intent.

12 This Court has not addressed what meaning of “threat” Congress intended
13 in § 1512(b)(3). The word “threat” can mean, as the government contends and as
14 the England court suggested, the mere “expression of intention to inflict evil,
15 injury, or damage on another,” without any intent that the threat be
16 communicated to the person threatened in order to influence that person’s
17 behavior. Indeed, the word has been so interpreted in at least one other federal
18 criminal statute. It has long been a crime to mail a letter “containing any threat to

1 take the life of . . . the President of the United States,” or to “otherwise make[]
2 any such threat against the President.” 18 U.S.C. § 871(a). That statute has
3 consistently been held to apply not only to statements addressed to the President
4 himself, but also to the announcement to random listeners of an intention to kill
5 the President. See, e.g., United States v. Patillo, 431 F.2d 293, 297-98 (4th Cir.
6 1970); United States v. Jasick, 252 F. 931, 932-33 (E.D. Mich. 1918). It would do no
7 violence to the English language to say that someone who announced an
8 intention to kill a witness, or to have him killed, had “threatened” the witness –
9 just as Jasick, who announced an intention to kill President Wilson, had
10 threatened the President.

11 The context here, however, is arguably different. Section 871(a) aims to
12 protect the President by permitting the prosecution of those who pose a danger
13 to our highest elected official, as indicated by their threatening words. In
14 § 1512(b)(3), by contrast, the act of “threatening” is linked to other verbs – “uses
15 intimidation” and “persuades” – which suggest an effect on the person to whom
16 the threat is communicated. Moreover, the effect in question is specifically
17 described, and must be intended by the threatener: the threat must be made with
18 the intent to prevent the communication of information to a law enforcement

1 officer or judge. It can thus be plausibly contended that, in the full context of
2 § 1512(b)(3), the threat itself (as opposed to its execution) must be intended to
3 prevent the communication of information, which it cannot do unless the threat
4 is communicated either to the witness or to another person with the intent that
5 that person somehow interfere with the witness's giving of information.

6 We need not decide here, however, whether a solicitation to murder a
7 witness constitutes "threatening" within the meaning of § 1512(b)(3), because in
8 any event Veliz's conduct falls within the statute as the attempted "corrupt[]
9 persua[sion] [of] another person." Veliz attempted to persuade Tinoco and
10 Medrano to act in such a way as to prevent Garcia from communicating to the
11 authorities information about the Novack murders.

12 By its plain language, § 1512(b)(3) forbids "corruptly persuad[ing] *another*
13 *person*, or attempt[ing] to do so, . . . with intent to . . . prevent the communication
14 . . . of information relating to . . . a Federal offense." 18 U.S.C. § 1512(b)(3)
15 (emphasis added). The statute conspicuously avoids the use of language that
16 would require that the person threatened or persuaded be the person with
17 information to provide to the authorities. Congress did not, for example, prohibit
18 the use of corrupt persuasion of another person with the intent to prevent *that*

1 *person* from communicating with law enforcement. Moreover, in a parallel
 2 provision of § 1512(b) – which prohibits the same conduct with intent to withhold
 3 testimony or documents in an official proceeding – Congress expressly provided
 4 to the contrary: subsection (b)(2) prohibits corrupt persuasion of “another
 5 person” with the intent to cause “any person” to withhold evidence. 18 U.S.C.
 6 § 1512(b)(2). We can think of no logical reason to read subsection (b)(3)
 7 differently in this respect.⁵ Because the potential object of the persuasion is not
 8 limited to the person whose communication the defendant seeks to prevent, an
 9 attempt to persuade one person (here, Tinoco or Medrano) to prevent another
 10 person (here, Garcia) from communicating information about a crime to a law
 11 enforcement officer by killing him violates the statute.

1 ⁵ Our reading of § 1512(b)(3) as prohibiting corruptly persuading one person
 2 with the intent to prevent communication by another person to federal law
 3 enforcement officers is further bolstered by the fact that the statute must be read
 4 that way with respect to the parallel acts of intimidation and threats. Had Veliz
 5 told Medrano that he would be killed unless he silenced Garcia, Veliz would
 6 certainly be guilty of threatening Medrano “with intent to . . . prevent the
 7 communication to a law enforcement officer” of information relating to an
 8 offense. By using the broad term “another person,” Congress evinced an intent
 9 to reach proscribed conduct calculated to interfere with federal investigations,
 10 regardless of whether the prohibited conduct is directed at the witness or at a
 11 third party, where it is intended to prevent the witness from conveying
 12 information.

1 That persuasion, moreover, was clearly “corrupt.” We have defined
 2 “corrupt persuasion” under § 1512(b) to mean persuasion “motivated by an
 3 improper purpose.” United States v. Thompson, 76 F.3d 442, 452 (2d Cir. 1996);
 4 accord, United States v. Gotti, 459 F.3d 296, 343 (2d Cir. 2006). The qualifying
 5 term “corruptly” clarifies that the statutory prohibition is “limited to
 6 constitutionally unprotected and purportedly illicit activity.” Thompson, 76 F.3d
 7 at 452 (alterations and internal quotation marks omitted).⁶ Veliz was “motivated
 8 by [the] improper purpose,” id., of preventing through violence Garcia’s
 9 cooperation with law enforcement, and Veliz attempted to persuade his
 10 associates to engage in the “illicit activity,” id., of murder. Few acts are as
 11 “wrongful,” Arthur Andersen, 544 U.S. at 705, or demonstrate such “conscious
 12 . . . wrongdoing,” id. at 706, as soliciting the murder of a potential witness in

1 ⁶ As the Supreme Court explained in Arthur Andersen LLP v. United States, the
 2 “corruptly” qualifier is particularly important in the context of § 1512(b), “where
 3 the act underlying the conviction – ‘persua[sion]’ – is by itself innocuous.” 544
 4 U.S. 696, 703 (2005) (alteration in original). In interpreting “corruptly” under the
 5 statute, Arthur Andersen instructed that “the natural meaning . . . provides a
 6 clear answer” that the term is “normally associated with wrongful, immoral,
 7 depraved, or evil” conduct. Id. at 705; see also Oxford English Dictionary, vol. III
 8 at 972 (2d ed. 1989) (defining “corrupt” as “debased in character; infected with
 9 evil; depraved”). The statute therefore extends only to “persuaders conscious of
 10 their wrongdoing.” Arthur Andersen, 544 U.S. at 706.

1 order to conceal one's involvement in two other murders.⁷

2 While it is a question of first impression for this Court whether solicitation
3 to murder constitutes "corrupt persuasion," we note that the Third Circuit has
4 addressed the question, and reached the same conclusion we do, on highly
5 similar facts. See United States v. Davis, 183 F.3d 231 (3d Cir. 1999), as amended,
6 197 F.3d 662 (3d Cir. 1999). Davis was convicted under § 1512(b) after he
7 "suggested that [his associate] should kill [a cooperator] and asked [his associate]
8 for a gun so that Davis himself could kill [the cooperator]." Id. at 250. On
9 review, the Third Circuit held that Davis had attempted to corruptly persuade
10 his associate by urging him "to violate his legal duty not to kill [the suspected
11 cooperator] or aid in [the cooperator's] death." Id. It found "irrelevant" the fact
12 that Davis had no direct contact with the cooperator, since the statute required
13 only "that a defendant corruptly persuade 'another person' with the requisite

1 ⁷ No direct evidence showed that Veliz's solicitation of Tinoco and Medrano
2 included an offer of consideration in exchange for murder, but such evidence is
3 not required. We have repeatedly found "corrupt persuasion" under § 1512(b)(3)
4 without any indication that the defendant offered a bribe or consideration. See,
5 e.g., Thompson, 76 F.3d at 452 ("corrupt persuasion" found where defendant
6 urged an associate to lie to grand jury); Gotti, 459 F.3d at 343 (same, where
7 defendant used position in criminal organization to command subordinate to
8 invoke Fifth Amendment privilege before grand jury).

1 intent. That person need not be the witness.” Id. Thus, just as we conclude here,
2 the Third Circuit held that Davis violated § 1512(b)(3) by corruptly persuading
3 another person by urging him to “violate his legal duty,” with the intent to
4 prevent a communication to law enforcement by a third-party witness
5 concerning a federal offense.

6 Veliz contends that interpreting § 1512(b)(3) to cover solicitations to
7 murder “ignores the organizational structure of § 1512[,] which delineates
8 separate offenses for witness intimidation utilizing physical force, i.e.,
9 § 1512(a)(2)(A), and those that do not, i.e., § 1512(b)(3).” Veliz Reply Br. 26-27.

10 Thus, Veliz seems to argue, the government charged his conduct under the
11 wrong subsection of § 1512.

12 It is true that the different subsections of § 1512 prohibit different conduct
13 intended to interfere with a federal investigation or proceeding. Subsection (a)(1)
14 covers the “kill[ing] or attempt[ed] kill[ing] [of] another person”; subsection
15 (a)(2) the use or attempted use of “physical force or the threat of physical force
16 against any person”; subsection (b) the use or attempted use of “intimidation,
17 threat[s], . . . corrupt[] persua[sion] . . . or misleading conduct”; subsection (c)
18 certain conduct relating to a “record, document, or other object”; and subsection

1 (d) the “intentional[] harass[ment] [of] another person.” 18 U.S.C. § 1512(a)–(d).

2 But we reject the argument that § 1512 permits no overlap among its various

3 subsections. For example, using the two subsections identified by Veliz, a

4 defendant’s statement to a witness that he will be murdered if he testifies might

5 constitute a “threat of physical force” under subsection (a)(2), as well as a

6 “threat[]” under subsection (b). Compare England, 507 F.3d at 588-90 (affirming

7 conviction under subsection (a)(2) where defendant threatened to murder

8 witness), with United States v. Hertular, 562 F.3d 433, 443-44 (2d Cir. 2009)

9 (affirming conviction under subsection (b)(3) where defendant “threatened the

10 lives of DEA agents” to prevent their communication with other law enforcement

11 officials). Similarly, a defendant who follows a witness’s every move might be

12 guilty of “intimidation” under subsection (b) or “harass[ment]” under

13 subsection (d). See United States v. Chaggar, 197 F. App’x 704, 707 (9th Cir. 2006)

14 (holding that “harassment” of witness under subsection (d) was a lesser-included

15 offense of “intimidation” of the witness under subsection (b)). The fact that

16 Veliz’s conduct might also violate a separate prohibition under § 1512 therefore is

1 not dispositive.⁸

2 Moreover, it is not obvious that solicitation to murder is covered under a
 3 different subsection of § 1512. While Veliz's conduct arguably falls within
 4 subsection (a)(1) as an "attempt[ed] kill[ing]," courts interpreting § 1512 have
 5 hesitated to conclude that a solicitation to murder a witness, without more,
 6 constitutes an attempt. See United States v. Irving, 665 F.3d 1184, 1202 (10th Cir.
 7 2011) (declining, in light of additional "substantial step[s]," to decide "whether
 8 [defendant's] active solicitation of someone to kill [a witness] would be sufficient
 9 in itself to establish a substantial step under the law of attempt, such that
 10 [defendant] could be convicted of witness tampering" under subsection (a)(1)
 11 (emphasis omitted)); United States v. Rovetuso, 768 F.2d 809, 822-23 (7th Cir.

1 ⁸ Veliz's contention that "corruptly persuades" does not reach conduct involving
 2 physical force might at first appear to find support in the fact that "[t]he 1988
 3 amendment to section 1512 inserted the phrase 'or corruptly persuades' within
 4 the proscribed conduct, thus providing for non-coercive witness tampering."
 5 United States v. Aguilar, 21 F.3d 1475, 1485 (9th Cir. 1994) (en banc), rev'd in part
 6 on other grounds, 515 U.S. 593 (1995). Indeed, the term "persuade" ordinarily
 7 indicates non-coercive behavior. But that "corrupt persuasion" covers non-
 8 coercive conduct is of no avail to Veliz, because his solicitation to murder Garcia
 9 was non-coercive with respect to Tinoco and Medrano, the objects of his corrupt
 10 persuasion. The fact that the corrupt persuasion was an inducement to violence
 11 does not take the conduct outside the statutory prohibition.

1 1985) (same).⁹ Veliz could have similarly argued that his conduct was not
2 covered by the statute had he been charged with the attempted “use[] [of]
3 physical force” under subsection (a)(2).

4 Veliz does not make clear whether he contends that solicitation to murder
5 a potential witness falls entirely outside the reach of § 1512, or only that it is
6 outside subsection (b)(3). But to the extent he takes the former position, we reject
7 it as well. Section 1512 was enacted as part of the Victim and Witness Protection
8 Act of 1982, with the purpose of “provid[ing] additional protections and
9 assistance to victims and witnesses in Federal cases.” Pub. L. No. 97-291, 96 Stat.
10 1248 (1982). We find it inconceivable that in such a statute, which prohibits a
11 broad constellation of methods of wrongfully impeding witness cooperation,
12 Congress did not intend to reach the conduct at issue here. The apparent
13 comprehensiveness of § 1512 also reinforces our conclusion that the text of
14 subsection (b)(3) encompasses solicitation of a third party to murder a potential
15 witness.

1 ⁹ Although the common law treatment of solicitation is not uniform, the
2 majority view was that a mere solicitation is not an attempt. See, e.g., Wayne R.
3 LaFave, Criminal Law § 11.1(f) at 577-78 (4th ed. 2003); American Law Institute,
4 Model Penal Code and Commentaries § 5.02 at 367-70 (1985).

1 Finally, although the government has not argued the “corrupt persuasion”
2 theory on which we rely, “it is well-settled that a reviewing court
3 may affirm on any grounds for which there is a record sufficient to permit
4 conclusions of law.” United States v. Glover, 957 F.2d 1004, 1013 (2d Cir. 1992)
5 (internal quotation marks omitted). There can be no question that the theory was
6 available to the jury based on the Indictment and the court’s instructions, both of
7 which recited the entire text of § 1512(b)(3), including “corruptly persuades” as
8 well as “intimidates or threatens,” and did not limit the jury’s consideration to
9 one or another of these verbs. Indeed, the district court instructed the jury on the
10 meaning of “corruptly persuades,” defining the term as “to act knowingly and
11 with a wrongful, immoral or evil purpose to convince or induce another person
12 to engage in certain conduct.” Trial Tr. 5062. The Indictment, both in the witness
13 tampering counts and in the parallel racketeering act specification in the RICO
14 counts, did not distinguish among the three operative verbs, specifying only that
15 the *manner* in which Veliz “attempt[ed] to intimidate, threaten, and corruptly
16 persuade another person” was that he “solicited an associate to murder
17 [Garcia].” J.A. 69-70, 83-84. Nor did the government’s (or for that matter Veliz’s)
18 summation focus on the wording of the statute. Rather, the government argued

1 only that the evidence supported the factual conclusion that Veliz attempted “to
2 get Mr. Tinoco and Mr. Medrano to kill Alejandro Garcia.” Trial Tr. 4717. The
3 evidence was amply sufficient to permit the jury to conclude that Veliz did
4 exactly that, and as a matter of law, that conduct violated § 1512(b)(3).

5 **B. Sufficiency of the Evidence – Federal Nexus**

6 Veliz next argues that the evidence was insufficient to support a finding of
7 the federal nexus required by § 1512(b)(3).¹⁰ While the statute requires “a specific
8 intent to interfere with the communication of information,” United States v.
9 Genao, 343 F.3d 578, 586 (2d Cir. 2003), under § 1512 “no state of mind need be
10 proved with respect to the circumstance . . . that the law enforcement officer is an
11 officer . . . of the Federal Government,” 18 U.S.C. § 1512(g)(2); see also Fowler v.
12 United States, 131 S. Ct. 2045, 2049 (2011) (explaining that § 1512 applies where
13 defendant seeks to prevent a communication “to law enforcement officers in
14 general rather than to some specific law enforcement officer”).

1 ¹⁰ We analyze the sufficiency of the evidence “in the light most favorable to the
2 government, crediting every inference that could have been drawn in the
3 government’s favor, and deferring to the jury’s assessment of witness credibility
4 and its assessment of the weight of the evidence.” United States v. Chavez, 549
5 F.3d 119, 124 (2d Cir. 2008) (internal quotation marks, citations, and alterations
6 omitted).

1 In Fowler, the Supreme Court held that a defendant who does not intend
2 to interfere with a communication specifically to *federal* law enforcement has
3 violated § 1512 “only if it [was] reasonably likely under the circumstances that . . .
4 at least one of the relevant communications would have been made to a federal
5 officer.” Id. at 2052. A “reasonable likelihood” need not be “more likely than
6 not,” but it must be “more than remote, outlandish, or simply hypothetical.” Id.
7 Veliz contends that that standard is not met here because his prosecution “is a
8 classic state case consisting of classic state charges,” and thus, at the time he
9 solicited Garcia’s murder, it was not foreseeable that the crimes would be
10 investigated federally. Veliz Br. 50.

11 As an initial matter, we conclude that although Fowler concerned the
12 murder of a witness in violation of subsection (a)(1)(C), the “reasonable
13 likelihood” test likewise applies to subsection (b)(3). “Fowler was a prosecution
14 under § 1512(a)(1)(C), which, like § 1512(b)(3), is an investigation-related
15 provision aimed at protecting the communication of information to law
16 enforcement.” United States v. Shavers, 693 F.3d 363, 378-79 (3d Cir. 2012),
17 vacated and remanded on other grounds, 133 S. Ct. 2877 (2013). And before
18 Fowler, we applied the same federal nexus test to both subsections “because the

elements of subsection (b)(3) are similar to the elements of subsection (a)(1)(C)."

United States v. Diaz, 176 F.3d 52, 91 (2d Cir. 1999).¹¹

Fowler "le[ft] it to the lower courts to determine whether, and how, the [‘reasonable likelihood’] standard applies" to the conduct at issue in that case. 131 S.Ct. at 2053. This Court has not had previous occasion to apply that standard. Prior to Fowler, we had held that to satisfy the federal nexus requirement under § 1512(a)(1)(C) "the government must adduce evidence from which a rational juror could infer that the victim *plausibly* might have turned to federal officials." United States v. Lopez, 372 F.3d 86, 92 (2d Cir. 2004) (emphasis in original), vacated and remanded on other grounds, 544 U.S. 902 (2005). That burden could be carried "by showing that the conduct which the defendant believed would be discussed in these communications constitutes a federal offense, so long as the government also presents additional appropriate evidence." Id. at 91, quoting United States v. Bell, 113 F.3d 1345, 1349 (3d Cir. 1997). We declined to comprehensively define "additional appropriate evidence," because it "by its nature will require careful, case-by-case analysis."

¹¹ The parties appear to agree that the "reasonable likelihood" test applies to Veliz's offense.

1 Id. (internal quotation marks omitted). But we provided as examples of such
2 evidence “proof that there was a federal investigation in progress at the time” of
3 the witness tampering, or “that the defendant had actual knowledge of the
4 federal nature of the offense.” Id. (internal quotation marks omitted).

5 Since Fowler, the Fourth Circuit has continued to follow that framework,
6 holding that “the federal nexus element of § 1512(a)(1)(C) ‘may be inferred by the
7 jury from the fact that the offense was federal in nature, plus additional
8 appropriate evidence.’” United States v. Ramos-Cruz, 667 F.3d 487, 497 (4th Cir.
9 2012), quoting Bell, 113 F.3d at 1349. We likewise conclude that the “federal
10 offense” plus “additional appropriate evidence” framework remains valid in
11 light of Fowler. While Fowler may have increased the likelihood that must be
12 demonstrated, it does not follow that a “reasonable likelihood” cannot be shown
13 through the same means that we previously permitted “plausibility” to be
14 shown.

15 Under that framework, sufficient evidence supports the jury’s finding that
16 Garcia’s communication with federal law enforcement was reasonably likely.¹²

1 ¹² The district court instructed the jury, in accordance with Fowler, as follows:

2
3 [I]f you find that the defendant was not acting with the

1 Veliz was, of course, convicted of federal offenses based in part on Garcia's
 2 information. And contrary to Veliz's assertions, those offenses were not merely
 3 "classic state charges." Fowler cautions us, in our federal nexus inquiry, not to
 4 afford undue weight to the mere fact that the defendant was convicted of a
 5 federal crime. A state crime often "will violate federal criminal law as well . . .
 6 because of the frequent overlap between state and federal crimes," and we must
 7 avoid "transform[ing] a federally oriented statute into a statute that would deal
 8 with crimes, investigations, and witness tampering that, as a practical matter, are
 9 purely state in nature." Fowler, 131 S. Ct. at 2051-52. But Veliz's offenses were
 10 not "purely state in nature" – he committed multiple related crimes across
 11 multiple states, with multiple accomplices that a jury found to constitute an
 12 association-in-fact RICO enterprise. That is a long way from a murder-weapon-

1 intent to hinder communication to a particular officer or
 2 group of officers, then this element is satisfied only if you
 3 find that there was a reasonable likelihood that, had the
 4 victim been able to communicate with law enforcement
 5 officers, at least one relevant communication would have
 6 been made to a federal law enforcement officer. That
 7 means that the government must show that the likelihood
 8 of communication to a federal officer was more than
 9 remote, outlandish or simply hypothetical.

10
 11 J.A. at 290.

1 that-traveled-in-interstate-commerce theory of federal jurisdiction. Given the
2 ongoing and interstate nature of the offenses, the jury reasonably found that
3 federal involvement was “more than remote, outlandish, or simply hypothetical.”
4 Id. at 2052. Moreover, at the time of Veliz’s second act of witness tampering, a
5 federal investigation into his crimes had in fact commenced.

6 One difference between Fowler and the instant case bears note: unlike the
7 potential witness in Fowler, Garcia was not murdered and did in fact
8 subsequently communicate with federal law enforcement. Arguably, the very
9 fact that communication with federal officials took place months after Veliz’s
10 solicitations lends some support to a finding that the communications were
11 reasonably likely at the time of the solicitations. But we need not decide what
12 weight, if any, may be given to the fact that Garcia ultimately cooperated with
13 federal law enforcement. Nor need we explore what gap, if any, exists between
14 Fowler’s “reasonable likelihood” standard and our previous “plausibility”
15 formulation. Whatever the contours of that standard, in this case we have no
16 difficulty concluding, based on the nature of the offenses, that sufficient evidence
17 supported the jury’s finding.

C. Jury Instruction: Physical Force

Veliz challenges the district court's jury instruction regarding the witness tampering predicate racketeering acts, which stated in relevant part:

The first element the Government must prove beyond a reasonable doubt is that the Defendant used intimidation, threatened, or corruptly persuaded another person or attempted to do so. . . . [T]his element may be satisfied if the Defendant actually used intimidation, *physical force* or threats, or corrupt persuasion, or if he attempted to do so. A Defendant may be found to have *attempted to use force* or threats or corrupt persuasion if his conduct constituted a substantial step towards committing the crime.

J.A. 180-81 (emphasis added).¹³ Veliz notes that the term "physical force" does not appear in § 1512(b)(3). Instead, the term "physical force" is used in subsection (a)(2) of § 1512, which punishes "[w]hoever uses physical force or the threat of physical force against any person, or attempts to do so." 18 U.S.C. § 1512(a)(2). Thus, Veliz maintains, his witness tampering convictions and the

¹³ The "physical force" term that Veliz challenges was not repeated during the district court's instructions with respect to the two standalone witness tampering counts. However, for those counts the district court instructed the jury that it had "already instructed you on the law regarding these crimes in connection with [the predicate racketeering acts] and you should follow those instructions here." J.A. 322. Accordingly, we consider Veliz's challenge to the jury instruction with respect to both the predicate racketeering acts and the standalone witness tampering counts.

1 findings with respect to the witness tampering predicate acts must be vacated
2 because the instruction erroneously permitted conviction on a ground not found
3 in the statute under which he was charged. See United States v. Ekinici, 101 F.3d
4 838, 840 (2d Cir. 1996) (reversing conviction where “jury charge included an
5 element that is not found in the statute”). The government concedes that the
6 instruction “mistakenly used the term ‘physical force,’” Gov. Br. 159, but argues
7 that any error was harmless because the term was only a “superfluous
8 elaboration” of the conduct that could violate § 1512(b)(3), id. at 164.

9 Because Veliz did not challenge the jury instruction below, we review his
10 claim for plain error. See United States v. Ghailani, 733 F.3d 29, 52 (2d Cir. 2013).
11 Under that standard, for this Court to correct an error Veliz must show that “(1)
12 there is an error; (2) the error is clear or obvious, rather than subject to reasonable
13 dispute; (3) the error affected [his] substantial rights, which in the ordinary case
14 means it affected the outcome of the district court proceedings; and (4) the error
15 seriously affects the fairness, integrity or public reputation of judicial
16 proceedings.” United States v. Marcus, 560 U.S. 258, 262 (2010) (internal
17 quotation marks and alterations omitted).

18 Veliz has not met that standard because he has not demonstrated that the

1 purported error affected his substantial rights. “In the ordinary case, to meet this
2 standard an error must be ‘prejudicial,’ which means that there must be a
3 reasonable probability that the error affected the outcome of the trial.” Id. No
4 such probability has been shown here. The government presented to the jury
5 only one factual theory of guilt of witness tampering. The Indictment charged
6 that Veliz violated § 1512(b)(3) by soliciting Garcia’s murder, the evidence offered
7 at trial supported that theory and no other, and the government argued in its
8 summation that that is what occurred. We can therefore conclude with
9 confidence that the jury convicted Veliz of witness tampering based on a finding
10 that he solicited Garcia’s murder. Veliz offers no reason to doubt that the jury
11 would have returned the same verdict had it been instructed that “physical
12 force” was not an element of the statute. Thus, on plain error review, Veliz’s jury
13 instruction challenge fails because he was convicted of conduct covered by the
14 statute and the challenged instruction did not affect the verdict. The “fairness,
15 integrity, or public reputation of judicial proceedings,” Marcus, 560 U.S. at 262, is
16 not undermined by affirming a conviction for conduct that was charged in the
17 Indictment, that the jury found occurred, and that as a matter of law constitutes a
18 violation of the statute referenced in the Indictment.

D. Constructive Amendment

Relatedly, Veliz contends that the inclusion of the term “physical force” in the jury instruction constructively amended the Indictment. Tracking the text of the statute, the Indictment alleged that Veliz violated § 1512(b)(3) by “attempt[ing] to intimidate, threaten, and corruptly persuade another person” – not by attempting to use “physical force.” J.A. 83-84.¹⁴ Veliz argues that the jury charge, by instructing that he could be found guilty based on the use of “physical force,” permitted conviction based on conduct not alleged in the Indictment.¹⁵

¹⁴ The witness tampering counts of the Indictment alleged that “[i]n or about the fall of 2009” and [i]n or about January and February of 2010”:

Veliz . . . knowingly did attempt to intimidate, threaten, and corruptly persuade another person, with intent to hinder, delay, and prevent the communication to a law enforcement officer of the United States of information relating to the commission and possible commission of a Federal offense, to wit, Veliz solicited an associate to murder [Garcia] in order to prevent [Garcia] from reporting information to law enforcement authorities concerning the murders of Bernice Novack and Ben Novack.

J.A. 83-84.

¹⁵ The Grand Jury Clause of the Fifth Amendment states in part that “[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury.” U.S. Const. amend. V. Accordingly,

1 We review the constructive amendment claim for plain error because Veliz did
2 not raise it below. See United States v. Bastian, 770 F.3d 212, 219 (2d Cir. 2014).

3 A constructive amendment occurs when “the jury charge operates to
4 broaden the possible bases for conviction from that which appeared in the
5 indictment.” United States v. McCourty, 562 F.3d 458, 470 (2d Cir. 2009) (internal
6 quotation marks omitted). To prevail on such a claim, Veliz must demonstrate
7 that the “jury instructions . . . so modify essential elements of the offense charged
8 that there is a substantial likelihood that the defendant may have been convicted
9 of an offense other than that charged in the indictment.” United States v. Vilar,
10 729 F.3d 62, 81 (2nd Cir. 2013) (internal quotation marks and emphasis omitted).
11 We have “consistently permitted significant flexibility in proof” of the charges, so
12 long as the Indictment provided the defendant “notice of the core of criminality
13 to be proven” at trial. United States v. D’Amelio, 683 F.3d 412, 417 (2d Cir. 2012)

1 “a court may not alter or amend the indictment, literally or constructively, once it
2 has been returned by the grand jury.” United States v. McCourty, 562 F.3d 458,
3 470 (2d Cir. 2009). There are “two constitutional requirements for an indictment:
4 first, that it contains the elements of the offense charged and fairly informs a
5 defendant of the charge against which he must defend, and, second, that it
6 enables him to plead an acquittal or conviction in bar of future prosecutions for
7 the same offense.” United States v. Rigas, 490 F.3d 208, 228 (2d Cir. 2007)
8 (internal quotation marks omitted).

(internal quotation marks and emphasis omitted). “The critical determination is whether the allegations and the proof substantially correspond.” United States v. Danielson, 199 F.3d 666, 670 (2d Cir. 1999) (internal quotation marks omitted).

On plain error review, we reject Veliz’s unpreserved constructive amendment claim for essentially the same reason that we reject his argument that the jury charge permitted conviction on a ground not covered in the statute. The government’s theory of the witness tampering charges was entirely consistent from indictment to summation. The Indictment alleged that Veliz twice “solicited [an associate] to murder [Garcia],” J.A. 83-84, witnesses testified that Veliz sought to “hush [Garcia’s] mouth” and “to make [Garcia] disappear,” Trial Tr. 1830, 1874, and the government argued in summation that those statements were solicitations to murder Garcia. Thus, as discussed above, in finding that Veliz violated § 1512(b)(3), the jury must have found that he had solicited Garcia’s murder – the precise conduct alleged in the Indictment that does in fact violate § 1512(b)(3). Moreover, Veliz does not point to any evidence that he engaged in any conduct other than attempting to persuade Tinoco and Medrano to kill Garcia that might have constituted the use of “physical force” against Garcia, or against anyone else, to keep Garcia from communicating with law

1 enforcement. There is therefore not a “substantial likelihood that [Veliz] may
2 have been convicted of an offense other than that charged in the indictment.”
3 Vilar, 729 F.3d at 81 (internal quotation marks omitted).

4 Since the jury clearly found proven conduct that violates the statute
5 charged in the Indictment, and the Indictment gave the defendant clear notice of
6 the conduct to be proved, any error in the jury instruction did not “affect[] the
7 outcome of the district court proceedings” or “the fairness, integrity or public
8 reputation of judicial proceedings,” Marcus, 560 U.S. at 262.

9 CONCLUSION

10 For the reasons given in this opinion and in the accompanying summary
11 order, we AFFIRM the judgments of conviction.