The omnibus clause of 18 U.S.C. § 1503 prohibits an “endeavor” to obstruct justice, which sweeps more broadly than Section 1512’s attempt provision. See United States v. Sampson, 898 F.3d 287, 302 (2d Cir. 2018); United States v. Leisure, 844 F.2d 1347, 1366-1367 (8th Cir. 1988) (collecting cases). “It is well established that a[n] [obstruction-of-justice] offense is complete when one corruptly endeavors to obstruct or impede the due administration of justice; the prosecution need not prove that the due administration of justice was actually obstructed or impeded.” United States v. Davis, 854 F.3d 1276, 1292 (11th Cir. 2017) (internal quotation marks omitted).

B. Investigative and Evidentiary Considerations

After the appointment of the Special Counsel, this Office obtained evidence about the following events relating to potential issues of obstruction of justice involving the President:

(a) The President’s January 27, 2017 dinner with former FBI Director James Comey in which the President reportedly asked for Comey’s loyalty, one day after the White House had been briefed by the Department of Justice on contacts between former National Security Advisor Michael Flynn and the Russian Ambassador;

(b) The President’s February 14, 2017 meeting with Comey in which the President reportedly asked Comey not to pursue an investigation of Flynn;

(c) The President’s private requests to Comey to make public the fact that the President was not the subject of an FBI investigation and to lift what the President regarded as a cloud;

(d) The President’s outreach to the Director of National Intelligence and the Directors of the National Security Agency and the Central Intelligence Agency about the FBI’s Russia investigation;

(e) The President’s stated rationales for terminating Comey on May 9, 2017, including statements that could reasonably be understood as acknowledging that the FBI’s Russia investigation was a factor in Comey’s termination; and

(f) The President’s reported involvement in issuing a statement about the June 9, 2016 Trump Tower meeting between Russians and senior Trump Campaign officials that said the meeting was about adoption and omitted that the Russians had offered to provide the Trump Campaign with derogatory information about Hillary Clinton.

Taking into account that information and our analysis of applicable statutory and constitutional principles (discussed below in Volume II, Section III, infra), we determined that there was a sufficient factual and legal basis to further investigate potential obstruction-of-justice issues involving the President.

Many of the core issues in an obstruction-of-justice investigation turn on an individual’s actions and intent. We therefore requested that the White House provide us with documentary evidence in its possession on the relevant events. We also sought and obtained the White House’s concurrence in our conducting interviews of White House personnel who had relevant information. And we interviewed other witnesses who had pertinent knowledge, obtained documents on a
voluntary basis when possible, and used legal process where appropriate. These investigative steps allowed us to gather a substantial amount of evidence.

We also sought a voluntary interview with the President. After more than a year of discussion, the President declined to be interviewed. During the course of our discussions, the President did agree to answer written questions on certain Russia-related topics, and he provided us with answers. He did not similarly agree to provide written answers to questions on obstruction topics or questions on events during the transition. Ultimately, while we believed that we had the authority and legal justification to issue a grand jury subpoena to obtain the President’s testimony, we chose not to do so. We made that decision in view of the substantial delay that such an investigative step would likely produce at a late stage in our investigation. We also assessed that based on the significant body of evidence we had already obtained of the President’s actions and his public and private statements describing or explaining those actions, we had sufficient evidence to understand relevant events and to make certain assessments without the President’s testimony. The Office’s decision-making process on this issue is described in more detail in Appendix C, infra, in a note that precedes the President’s written responses.

In assessing the evidence we obtained, we relied on common principles that apply in any investigation. The issue of criminal intent is often inferred from circumstantial evidence. See, e.g., United States v. Croteau, 819 F.3d 1293, 1305 (11th Cir. 2016) (“[G]uilty knowledge can rarely be established by direct evidence... Therefore, mens rea elements such as knowledge or intent may be proved by circumstantial evidence.”) (internal quotation marks omitted); United States v. Robinson, 702 F.3d 22, 36 (2d Cir. 2012) (“The government’s case rested on circumstantial evidence, but the mens rea elements of knowledge and intent can often be proved through circumstantial evidence and the reasonable inferences drawn therefrom.”) (internal quotation marks omitted). The principle that intent can be inferred from circumstantial evidence is a necessity in criminal cases, given the right of a subject to assert his privilege against compelled self-incrimination under the Fifth Amendment and therefore decline to testify. Accordingly, determinations on intent are frequently reached without the opportunity to interview an investigatory subject.

Obstruction-of-justice cases are consistent with this rule. See, e.g., Edlind, 887 F.3d at 174, 176 (relying on “significant circumstantial evidence that [the defendant] was conscious of her wrongdoing” in an obstruction case; “[b]ecause evidence of intent will almost always be circumstantial, a defendant may be found culpable where the reasonable and foreseeable consequences of her acts are the obstruction of justice”) (internal quotation marks, ellipses, and punctuation omitted); Quattrone, 441 F.3d at 173-174. Circumstantial evidence that illuminates intent may include a pattern of potentially obstructive acts. Fed. R. Evid. 404(b) (“Evidence of a crime, wrong, or other act... may be admissible... to prove motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident.”); see, e.g., United States v. Frankhauser, 80 F.3d 641, 648-650 (1st Cir. 1996); United States v. Arnold, 773 F.2d 823, 832-834 (7th Cir. 1985); Cintolo, 818 F.2d at 1000.

Credibility judgments may also be made based on objective facts and circumstantial evidence. Standard jury instructions highlight a variety of factors that are often relevant in
assessing credibility. These include whether a witness had a reason not to tell the truth; whether the witness had a good memory; whether the witness had the opportunity to observe the events about which he testified; whether the witness’s testimony was corroborated by other witnesses; and whether anything the witness said or wrote previously contradicts his testimony. See, e.g., First Circuit Pattern Jury Instructions § 1.06 (2018); Fifth Circuit Pattern Jury Instructions (Criminal Cases) § 1.08 (2012); Seventh Circuit Pattern Jury Instruction § 3.01 (2012).

In addition to those general factors, we took into account more specific factors in assessing the credibility of conflicting accounts of the facts. For example, contemporaneous written notes can provide strong corroborating evidence. See United States v. Nobles, 422 U.S. 225, 232 (1975) (the fact that a “statement appeared in the contemporaneously recorded report . . . would tend strongly to corroborate the investigator’s version of the interview”). Similarly, a witness’s recitation of his account before he had any motive to fabricate also supports the witness’s credibility. See Tone v. United States, 513 U.S. 150, 158 (1995) (“A consistent statement that predates the motive is a square rebuttal of the charge that the testimony was contrived as a consequence of that motive.”). Finally, a witness’s false description of an encounter can imply consciousness of wrongdoing. See Al-Adahi v. Obama, 613 F.3d 1102, 1107 (D.C. Cir. 2010) (noting the “well-settled principle that false exculpatory statements are evidence—often strong evidence—of guilt”). We applied those settled legal principles in evaluating the factual results of our investigation.