No. 20-

IN THE

Supreme Court of the United States

WILLIE TYLER,

Petitioner,

v.

UNITED STATES,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

JEFFREY T. GREEN
NAOMI IGRA
STEPHEN CHANG
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

CLAIRE LABBE
NORTHWESTERN SUPREME COURT PRACTICUM
375 East Chicago Avenue
Chicago, IL 60611
(312) 503-0063

HEIDI R. FREESE
CHIEF FEDERAL PUBLIC DEFENDER
RONALD A. KRAUSS
FIRST ASSISTANT FEDERAL PUBLIC DEFENDER
QUIN M. SORENSON*
ASSISTANT FEDERAL PUBLIC DEFENDER
100 Chestnut Street
Suite 306
Harrisburg, PA 17101
(717) 782-2237
Quin_Sorenson@fd.org

Counsel for Petitioner

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* Counsel of Record

QUESTION PRESENTED

The federal witness tampering statute, 18 U.S.C. § 1512, permits conviction of any individual who "prevent[s] the communication by any person to a [Federal] law enforcement officer . . . of information relating to the commission . . . of a Federal offense." 18 U.S.C. § 1512(a)(1)(C). The statute requires proof beyond a reasonable doubt that the defendant acted with the specific intent to prevent the witness from communicating with *federal* officials. *Id.* This Court held in *Fowler* v. *United States*, 563 U.S. 668 (2011), that, when the defendant did not have a particular official or group of officials in mind, but acted with an intent to prevent communications to any and all officials – including federal officers – the statute may be satisfied by proof that there was a "reasonable likelihood" that the witness would have spoken to a federal official about the offense. 563 U.S. at 677–78.

The question presented is whether, as some circuits (including the court of appeals in this case) have held, that the "reasonable likelihood" standard applies even in cases in which the defendant acted with the intent to prevent communications only to state officials, and that the statute permits conviction in those cases if there was a probability (or even just a possibility) that the defendant would have communicated with a federal officer.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The petitioner herein, who was the appellee below, is Willie Tyler. The respondent herein, which was the defendant-appellant below, is the United States of America. Neither party is a corporation.

RULE 14.3(b)(iii) STATEMENT

This case arises from the following proceedings in the United States District Court for the Middle District of Pennsylvania and the United States Court of Appeals for the Third Circuit:

United States v. *Tyler*, No. 17-2613 & 18-1319 (3d Cir. Apr. 14, 2020)

United States v. *Tyler*, No. 1:96-cr-106 (M.D. Pa. Feb. 14, 2018)

There are no other proceedings in state or federal trial or appellate courts, or in this Court, that are directly related to this case.

TABLE OF CONTENTS

TABLE OF CONTENTS—continued

TABLE OF AUTHORITIES

CASES Page

TABLE OF AUTHORITIES—continued

STATUTES

PETITION FOR A WRIT OF CERTIORARI

The petitioner, Willie Tyler, hereby petitions this Court for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Third Circuit.

OPINIONS BELOW

The opinion of the court of appeals is reported at 956 F.3d 116, and reproduced in the appendix to this petition. Petition Appendix ("Pet. App.") 1a–38a. The opinion of the district court is unpublished, but is available at 2018 WL 10322201, and reproduced at Pet. App. 39a–78a.

JURISDICTION

The judgment sought to be reviewed was entered by the court of appeals on April 14, 2020. Pet. App. 1a. A petition for rehearing of the judgment was timely filed thereafter, and denied by the court of appeals on July 2, 2020. Pet. App. 85a. This Court has jurisdiction over this petition pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

The federal witness tampering statute, 18 U.S.C. § 1512, is set forth in full in the appendix to this petition, Pet. App. 81a–84a, and provides in pertinent part as follows:

> Whoever 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 [is guilty of federal witness tampering].

18 U.S.C. § 1512(a)(1)(C).

STATEMENT OF THE CASE

This case concerns the repeated attempts of federal authorities over the course of nearly thirty years to investigate, prosecute, and convict the petitioner, Willie Tyler, of federal witness tampering. Pet. App. 77a–78a.

I. STATE PROCEEDINGS

The case arose from an investigation by local authorities into street-level drug deals. Pet. App. 6a. A cooperating witness, Doreen Proctor, made "controlled buys" of small amounts of cocaine from others in the town of Carlisle, Pennsylvania during January and February of 1991, and then shared information about the dealers with investigators. *Id*. at 6a. One of those dealers was Mr. Tyler's brother, David Tyler. *Id*. David Tyler was charged with drug distribution in the town's trial court; Ms. Proctor testified at his preliminary hearing, and was scheduled to testify at his trial, to be held on April 21, 1992, but she could not do so – as she was murdered the evening before. *Id*. at 6a–7a, 33a.

State prosecutors charged David Tyler with murder and state witness intimidation, and charged David Tyler's girlfriend, Roberta Bell, and Mr. Tyler as accomplices. *Id*. at 39a–40a. David Tyler was convicted of all charges; Roberta Bell was acquitted. *Id.* at 125a. Mr. Tyler was acquitted of murder, but convicted of witness intimidation, and sentenced to a two-to-four year term of imprisonment. *Id*. at 91a. He was released from state prison in July 1994. *Id.*

II. FEDERAL PROCEEDINGS

Federal authorities began investigating Mr. Tyler's case in 1992, after learning that the state jury had acquitted Mr. Tyler of murder. In 1996, they secured an indictment against him, charging him with federal witness intimidation under 18 U.S.C. § 1512 based upon the same facts that were the subject of the state court prosecution. Pet. App. 3a. He was tried and convicted in 1996, but the verdict was overturned because local law enforcement violated Mr. Tyler's rights against self-incrimination. *Id.* at 3a n.3. He was again tried and convicted in 2000, but the verdict was overturned as a result of intervening changes in law (including this Court's decision in *Fowler* v. *United States*, 563 U.S. 668 (2011)) that required the government to prove that the crime was connected to an actual federal investigation or proceeding. Pet. App. 3a n.3. Mr. Tyler was then tried and convicted yet again, in 2017, in the trial at issue here. *Id.* at 4a.

That verdict was, once again, overturned – this time based on insufficiency of the evidence. *Id.* at 4a. The district court held that the federal witness tampering statute, by its terms and as construed in *Fowler*, requires proof beyond a reasonable doubt that the defendant acted with the specific intent to prevent communications about a *federal* offense to a *federal* law enforcement official. *Id.* at 65a–67a. In this case, though, the underlying crimes (*viz.*, street-level drug dealing) were essentially local in nature; federal authorities had not been in any way involved in the investigation or prosecution; and there was no reason for Mr. Tyler or anyone else to believe that Ms. Proctor – who had at the time of her murder been cooperating with local authorities for more than a year, and already shared all pertinent information

she had – would speak to federal officials about the offenses. *Id.* at 67a–75a. Because the record supported at most an inference that Mr. Tyler (assuming he was complicit in the murder) acted with an intent to prevent communications only to state officials, it was insufficient to sustain a conviction of federal witness tampering. *Id.* at 63a.

The district court rejected the government's contention that Mr. Tyler's conviction could stand because *Fowler* requires only a "'reasonable likelihood' of communication with a hypothetical federal officer." *Id.* at 72a. "After a thorough reading of *Fowler*, with a particular eye toward its language to limit its applicability and its caution against expanding the scope of [18 U.S.C.] § 1512," the court held that the "evidence presented did not bring the *Fowler* 'reasonable likelihood' standard into play." *Id.* at 73a. In the court's view, any other holding "would allow federal authorities to transform any witness tampering on a state level into a federal offense." *Id.* at 77a.

A divided panel of the court of appeals reversed. *Id.* at 2a. The majority rejected the district court's view as an "incorrect" interpretation of *Fowler*, and held that a defendant may be convicted under 18 U.S.C. § 1512 if there existed a "reasonable likelihood" – whether or not the defendant was aware of that likelihood – that the communications would be transmitted at some point to a federal officer. *Id.* at 20a. Finding that in this case information concerning the drug offenses might have been forwarded to federal officials, given the working relationship between local and federal officials in drug matters, the majority concluded that the record was sufficient to support conviction, and directed the judgment to be reinstated. *Id.* at 26a.

The third member of the panel, Judge Marjorie O. Rendell, dissented. *Id.* at 27a. She found "no evidence from which a jury could infer that [Mr. Tyler] was motivated in any way by a desire to prevent [Ms.] Proctor's future communication with law enforcement," much less *federal* law enforcement. *Id.* at 29a. (Rendell, J., dissenting). Rejecting the majority's view of *Fowler*, Judge Rendell explained that "[a]llowing the jury to infer that [Ms.] Proctor would have a future role in a federal investigation is a far cry from allowing them to conclude that [Mr.] Tyler knew this and acted with an intent to prevent it." *Id.* at 32a. Like the district court, Judge Rendell saw the majority's expansive interpretation of *Fowler* as "circumvent[ing] the federal nexus requirement" and "permitting federal prosecution of a murder intended only to prevent state court testimony." *Id.* at 38a. The result would be that "any murder of a known informant could become a federal crime." *Id.*

This timely petition for a writ of certiorari followed.

REASONS FOR GRANTING THE PETITION

The courts of appeals are divided on the interpretation and application of the federal witness tampering statute, 18 U.S.C. § 1512, under *Fowler* v. *United States*, 563 U.S. 668 (2011). In *Fowler*, this Court held that "where [a] defendant kills a person with an intent to prevent communication with law enforcement officers generally" the government must show that the defendant was aware that it "is reasonably likely . . . one of the relevant communications would have been to a federal officer." *Id.* at 677–78. Since then, *Fowler*'s standard has taken on a life of its own in the lower courts, with some circuits (including the court of appeals in this case) holding that *Fowler* expanded the reach of the statute to encompass any

case in which there exists a "reasonable likelihood" that the witness *might* have communicated with a federal official – even when the defendant had only state officials in mind. *E.g.*, Pet. App. 1a–38a.

That view represents a divergence not only from *Fowler* itself, but from basic principles of federalism and statutory interpretation. *Fowler* by its terms did not expand the statute's scope, or authorize conviction without proof that the defendant acted with the specific intent to prevent communications to federal officials; quite the opposite, it *restricted* the statute's reach. 563 U.S. at 677–78. It held that, in those cases in which the prosecution can prove beyond a reasonable doubt that the defendant intended to prevent the witness from communicating with any and all officials (including federal officials) but cannot show that the defendant had a particular federal officer or officers in mind, the government must additionally establish a "reasonable likelihood" that the witness would have spoken to a federal officer. *Id.* Phrased differently, Fowler affirmed that in all cases the statute requires proof of a specific intent to prevent communications to federal officers, but clarified that conviction is nevertheless prohibited – even when such proof is offered – if it is not "reasonably likely" that the witness would in fact have communicated with a federal official. *Id.*

Courts that have held to the contrary (such as the panel majority here) have fundamentally misread *Fowler*, created a split among the circuits, and criminalized a wide range of state crimes that neither the states nor Congress intended would be subject to federal penalty. Those conflicts, particularly in light of the exceptional importance of this issue as a matter

of federalism and statutory construction, warrant review by this Court.

I. INTERPRETATION OF THE FEDERAL WITNESS TAMPERING STATUTE, 18 U.S.C. § 1512, HAS DIVIDED THE CIRCUITS

To say that the circuits are divided on their interpretation of the federal witness tampering statute, 18 U.S.C. § 1512, in light of *Fowler* – and the "reasonable likelihood" standard in particular – is an understatement. They have disagreed on essentially all aspects of the standard: *when* it applies (*infra* Part I.A), *what* it requires (*infra* Part I.B), and *how* it applies (*infra* Part I.C). The confusion among the lower courts, which has resulted in a range of unpredictable and often contradictory outcomes, can be resolved only by this Court.

A. The Circuits Disagree on When the "Reasonable Likelihood" Standard Applies.

Several circuits (as well as the district court and dissenting circuit judge in this case, see Pet App. 27a–38a; 39a–78a) have recognized that *Fowler* meant exactly what it said. The Sixth, Seventh, Tenth, and Eleventh Circuits have all held that before the "reasonable likelihood" standard may even be applied, the government must prove that the defendant acted with the intent to prevent communications to federal law enforcement. See, *e.g.*, *Stuckey* v. *United States*, 603 F. App'x 461, 462 (6th Cir. 2015) (limiting *Fowler*'s reasonable likelihood standard to "when the defendant acts with an intent to prevent communication to law enforcement officers in general"); *United States* v. *Snyder*, 865 F.3d 490, 496 (7th Cir. 2017) (similar); *United States* v. *Smalls*, 752 F.3d 1227, 1249 (10th Cir. 2014) (similar); *United States* v.

Kostopoulos, 766 F. App'x 875, 882 (11th Cir. 2019) (similar). Such proof may take the form of evidence that the defendant had a particular federal officer in mind, or that he or she acted with an intent to prevent communications to any and all officials, *i.e.*, law enforcement writ large. *E.g.*, *Smalls*, 752 F.3d at 1249. In the latter instance, where the government has offered proof that the defendant intended to prevent communications to a group of officials that includes federal officers, but not a particular federal officer, the "reasonable likelihood" standard is applied to limit the statute's reach to those cases in which there is an actual probability – rather than merely a hypothetical possibility – that the witness would have talked to a federal official. *E.g.*, *id.* at 1250. When the government has not offered such proof, or has established only that the defendant intended to prevent communications to state or local officials, the standard simply does not apply, and conviction cannot be had. *E.g.*, *id.*

Other courts, including the Third and Fourth Circuits, have instead applied the "reasonable likelihood" standard even when the record showed that the defendant intended to prevent communications only to state officials. *E.g.*, Pet. App. 13a–28a; *United States* v. *Smith*, 723 F.3d 510, 516 (4th Cir. 2013). They have reasoned that, once *any* intent to prevent a communication concerning an offense is shown, the government's burden is satisfied, and conviction is available if there is a "reasonable likelihood" that the communication would have been transmitted at some point to federal officials. *E.g.*, Pet. App. 13a–24a. These courts seem to base this reading of *Fowler* on language in the opinion stating that "[t]he [g]overnment need not show that such a communication, had it occurred, would have been federal beyond

a reasonable doubt, nor even that it is more likely than not[, but] must show [only] that the likelihood of communication to a federal officer was more than remote, outlandish, or simply hypothetical." *E.g.*, *id.* at 19a (quoting *Fowler*, 563 U.S. at 678).

This language did not, however, alter the government's burden, or permit conviction based on anything less than proof beyond a reasonable doubt that the defendant *intended* to prevent communications to federal officials. Quite the opposite, *Fowler* explicitly confirms that the "reasonable likelihood" standard applies only after "[t]he [g]overnment [has] already shown beyond a reasonable doubt that the defendant possessed the relevant broad indefinite intent, namely, the intent to prevent the victim from communicating with (unspecified) law enforcement officers" – *including* federal officers. 563 U.S. at 674. Nothing in *Fowler* allows for conviction in cases (like this one) in which the government proves only that the defendant intended to stop communications to state or local officials.

This divide among the circuits – regarding the essential question of when the "reasonable likelihood" standard applies – flows from a misunderstanding of the language of this Court's opinion in *Fowler*.

B. The Circuits Disagree on What the "Reasonable Likelihood" Standard Requires.

The circuits are split on more than the applicability of the "reasonable likelihood" standard. They also disagree on what the standard requires, and specifically whether it may be satisfied 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." *E.g.*, *United States* v.

Veliz, 800 F.3d 63, 74–75 (2d Cir. 2015) (internal citations omitted).

Some courts of appeals, including the Third Circuit, have recognized that this "additional appropriate evidence" test – which the Third Circuit itself developed prior to *Fowler* – is inconsistent with the "reasonable likelihood" standard and can no longer govern. *E.g.*, *United States* v. *Tyler*, 732 F.3d 241, 251–52 (3d Cir 2013); see also, *e.g.*, *Lobbins* v. *United States*, 900 F.3d 799, 803 (6th Cir. 2018); *Snyder*, 865 F.3d at 496–97. That test had allowed the defendant's intent to prevent a federal communication to be inferred simply from the federal nature of the offense at issue, so long as it was plausible that the communications regarding the offense would be made to a federal official. *Tyler*, 732 F.3d at 252 (citing *United States* v. *Stansfield*, 101 F.3d 909, 918 (3d Cir. 1996)). The "reasonable likelihood" standard, by contrast, demands proof that the defendant actually had federal officials in mind when committing the offense – either a particular federal officer or law enforcement in general – and cannot be met by proof that it was simply plausible that information concerning a federal offense would be transmitted to federal officials. *E.g.*, *id.* Rather, as *Fowler* held, there must be proof of specific intent to prevent communications to federal officers combined with a "reasonable likelihood" that those communications would actually have occurred. *E.g., id.*

Other courts, including the Second Circuit, have nevertheless continued to apply the "additional appropriate evidence" test after *Fowler*. *E.g.*, *Veliz*, 800 F.3d at 74–75; see also, *e.g.*, *United States* v. *Ramos-Cruz*, 667 F.3d 487, 497 (4th Cir. 2012). They have explained that, in their view, the "reasonable likeli-

hood" standard is really no different than the prior test, and thus that a "'reasonable likelihood' can[ ] be shown through the same means that [they] previously permitted 'plausibility' to be shown." *E.g.*, *Veliz*, 800 F.3d at 74–75. Under this view, intent may continue to be inferred from the federal nature of the offense, with "additional appropriate evidence" such as "proof that there was a federal investigation in progress at the time . . . or that the defendant had actual knowledge of the federal nature of the offense." *E.g.*, *id.* (quoting *United States* v. *Lopez*, 372 F.3d 86, 91–92 (2d Cir. 2004)).

These courts have, in essence, held that *Fowler* effected no change in the law whatsoever. That is, of course, not true. *Fowler* specifically cited the "additional appropriate evidence" test employed by the Second Circuit and others at the outset, see 563 U.S. at 671 (citing *Lopez*, 372 F.3d at 91–92) and it then held that a different standard – *i.e.*, the "reasonable likelihood" standard – was the only one consistent with the statutory language, see *id.* at 674–78. *Fowler* cannot reasonably be read as both rejecting the "appropriate additional evidence" test while simultaneously permitting its continued use.

The split among the circuits on the meaning of the "reasonable likelihood" standard and viability of the "additional appropriate evidence" test – a split that has been explicitly acknowledged by at least one circuit, see *United States* v. *Johnson*, 874 F.3d 1078, 1082 (9th Cir. 2017) – means that the statute will be applied in fundamentally different ways in different circuits. Some courts will permit convictions based on a mere plausibility of federal communications, while others will demand proof of actual likelihood that federal officials would become involved. Only

the latter is consistent with the language of the statute, and with *Fowler*.[1]

C. The Circuits Disagree on How the "Reasonable Likelihood" Standard Applies.

These divisions among the circuits, over when the "reasonable likelihood" standard applies and what it requires, have manifested themselves further in confusion over *how* the standard should be applied in any given case. That confusion is reflected in the disparate analyses employed, and results reached, in these cases.

Fowler admonishes courts to focus on the likelihood that the witness will communicate with a federal officer, see 563 U.S. at 678, and some courts have recognized – in accord with that directive – that the standard requires proof not merely that a federal investigation might have commenced, but that a federal law enforcement official would actually have communicated with the witness, see*, e.g.*, *Dhinsa* v. *Krueger*, 917 F.3d 70, 83 (2d Cir. 2019); *Lobbins*, 900 F.3d at 804; *Johnson*, 874 F.3d at 1083. But others, including those courts that retain the "additional appropriate evidence" test, have continued to routinely (and improperly) uphold convictions based solely on evi-

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[1] It is not entirely clear whether the Third Circuit, which was the first to abandon the "additional appropriate evidence" test, still adheres to that position. The court subsequently, in *Bruce* v. *Warden Lewisburg USP*, 868 F.3d 170 (3d Cir. 2017), seemed to reverse course and reinstate the "additional appropriate evidence" test, citing Second and Fourth Circuit precedent. *Id.* at 185–86. Regardless of which approach the Third Circuit now follows, however, the divide among the circuits remains, and indeed the internal inconsistency among Third Circuit decisions simply confirms the division among courts over the impact of *Fowler* and meaning of the "reasonable likelihood" standard.

dence that the offense at issue was "federal" in nature. See, *e.g.*, *Bruce* v. *Warden Lewisburg USP*, 868 F.3d 170, 186 (3d Cir. 2017); *Veliz*, 800 F.3d at 75.

That was precisely the situation here. There was no evidence in this case that the witness would have communicated with federal law enforcement officials – as she had been cooperating exclusively with local law enforcement about local drug crimes – and yet the court of appeals upheld the conviction on grounds that "federal authorities . . . *might* have investigated and prosecuted the activities." Pet. App. 18a. (emphasis added). As the dissenting judge noted, that holding is flatly contrary to *Fowler*, as it effectively presumes that federal communications are "reasonably likely" based on nothing more than that the crime could be classified as federal in nature. *Id.* at 131 (Rendell, J., dissenting); see also *Fowler,* 563 U.S. at 677 (identifying marijuana offenses as an example of a crime "purely state in nature").

Confusion also abounds as to whether "reasonable likelihood" should be assessed as of the time when the witness intimidation occurred, or should include consideration of subsequent events. Several circuits require that a "reasonable likelihood" of federal communication be established as of the time of the crime. See, *e.g.*, *Dhinsa*, 917 F.3d at 83–84; *Lobbins*, 900 F.3d at 804; *Johnson*, 874 F.3d at 1082–83; *Snyder*, 865 F.3d at 496–97; *United States* v. *Jimenez-Bencevi*, 788 F.3d 7, 24–25 (1st Cir. 2015). Others have approved convictions based on evidence that the witness might have communicated with federal officials in light of future events, although there was no reason for the witness to do so when the offense was committed. See, *e.g.*, *Ramos-Cruz*, 667 F.3d at 491.

A particularly egregious example is *Bruce*, 868 F.3d 170. The defendant in that case murdered two individuals who had witnessed his burglary of a local business, and the crime was investigated solely by local law enforcement for several years. *Id.* at 184–86. Had the witnesses lived, and been available to local officers, the crime presumably would have been solved and the defendant prosecuted in state court, with no federal involvement whatsoever. *Id.* Because the witnesses were unavailable, however, local officials could not solve the case, and petitioned federal authorities for assistance, leading federal officials to commence their own investigation and prosecution. *Id.* at 187. The court of appeals held that this was sufficient to show a "reasonable likelihood" of a federal communication – even though, as stated, no federal investigation would have been started if the witnesses been available. *Id.*

Results such as that in *Bruce*, as well as this case, highlight the disparate conclusions among the circuits concerning the interpretation of the federal witness tampering statute, 18 U.S.C. § 1512, and *Fowler*.

II. INTERPRETATION OF THE FEDERAL WITNESS TAMPERING STATUTE, 18 U.S.C. § 1512, IMPLICATES ISSUES OF EXCEPTIONAL IMPORTANCE

This case, in addition, implicates issues of exceptional importance, from fundamental questions regarding the relationship between states and the federal government to individual concerns over the prosecution of the defendant in this case.

1. This prosecution highlights the phenomenon and the flaw in federal over-criminalization. The Court has long recognized the need to exercise restraint, out of deference to the prerogatives of states

and the authority of Congress, in expanding the reach of federal criminal statutes that cover conduct traditionally governed by state law. See*, e.g.*, *Arthur Andersen LLP* v. *United States*, 544 U.S. 696, 703 (2005). This imperative is reflected in *Fowler* itself, which rested its limited construction of the witness tampering statute – as authorizing conviction only when the defendant acted with the specific intent to prevent communications to *federal* officials regarding a *federal* crime – largely on the concern that allowing the statute to apply more broadly could "bring within the scope of this statute many instances of witness tampering in purely state investigations and proceedings, thus extending the scope of this federal statute well beyond the primarily federal area that Congress had in mind." 563 U.S. at 675.

The decision of the court of appeals, however, would expand the universe of defendants in "federal" witness tampering cases to include *any* individual involved in the intimidation of a witness to *any* offense, even purely state offenses, if the crime could violate federal law, even if the defendant had no knowledge of the potentially federal nature of the crime and had no intent (and no reason) to prevent communications regarding it to federal officials. See Pet. App. 1a–26a. As the dissent explained, the majority's approach would "allow the [g]overnment to circumvent the federal nexus requirement of the official proceeding provisions, permitting federal prosecution of a murder intended only to prevent state court testimony" and allowing "any murder of a known informant [to] become a federal crime." Pet. App. 38a.

Congress is understood to act – and its statutes are interpreted accordingly – on the principle that states are constitutionally entitled to delineate for them-

selves the conduct within their borders that will be deemed criminal and to set the associated penalties in line with their own judgment, without federal interference. See, *e.g.*, *Jones* v. *United States*, 529 U.S. 848, 858 (2000). Prosecutions such as the one in this case undercut that very principle, and render superfluous the specific-intent requirement that Congress incorporated into the witness tampering statute to ensure that state-law offenses of this sort would remain the province of state-law prosecutions and courts.

This same concern – over expanding the reach of a federal statute to cover state-law offenses – animated the decisions of both the dissenting circuit judge and the district judge in this case. Pet. App. 38a (stating that, if the evidence in this case sufficed to support conviction, "any murder of a known informant could become a federal crime[, allowing] the [g]overnment to circumvent the federal nexus requirement of the official proceeding provisions[and] permitting federal prosecution of a murder intended only to prevent state court testimony."); Pet. App. 77a ("To [up]hold [conviction] on this record would allow federal authorities to transform any witness tampering on a state level into a federal offense[, a]n interpretation of the statute that is so over-broad runs counter not just to the teachings of *Fowler*, but also to the most fundamental precepts of our system of criminal justice."). The statute should be cabined and restrained within the limits placed upon it by Congress, with respect to the deference traditionally given to states, to assure fidelity to legislative intent and avoid the over-federalization of criminal law.

2. This case itself demonstrates the problems with unrestrained federalization of traditionally state

criminal law. The defendant, Willie Tyler, was charged and prosecuted in state court with murder and witness intimidation, arising from the killing of a local resident (Ms. Proctor) who was cooperating with local law enforcement in a local drug dealing investigation, and he was ultimately convicted by state jury of abetting in witness intimidation – but acquitted of murder. Pet. App. 77a–78a. He served a term of incarceration for the crime, and was released in 1994. *Id.* at 91a. His interactions with the criminal justice system should have ended then and there.

They did not. Federal authorities, "troubled by" the result of Mr. Tyler's prosecution in state court, brought their own prosecution in federal court – a prosecution that has now continued for the better part of twenty-four years. *Id.* at 91a. Mr. Tyler has been subjected to no less than three federal trials (in addition to his initial state trial), and in each the verdict of guilt was overturned by either the district court or court of appeals. *Id.* at 3a. Yet, in each, the federal government pushed forward in its efforts to relitigate the case. *Id.* at 3a–5a.

The federal judiciary should not be (in the words of the district court) a "forum for the do-over of a failed state court prosecution." *Id.* at 77a. Whether or not the federal prosecution of Mr. Tyler may formally be deemed a constitutional double jeopardy violation, see*, e.g.*, *Gamble* v. *United States*, 139 S. Ct. 1960, 1979–80 (2019), there can be no doubt that the prosecution was brought only because federal authorities disagreed with the verdict issued by the state jury in Mr. Tyler's original trial. Such a disagreement is not a legitimate basis for prosecution. See*, e.g.*, *United States* v. *All Assets of G.P.S. Automotive Corp.*, 66 F.3d 483, 498 (2d Cir. 1995) (warning against federal

and state officials taking a "second bite at the apple" because "[i]n recent years . . . the scope of federal criminal law has expanded enormously").

The problem is compounded here because in this case there was no federal crime or federal interest. The underlying drug offenses were state crimes; the investigations into both those offenses and Ms. Proctor's murder were handled exclusively by state authorities; the offenses were prosecuted in state courts by state officials; and the defendants (including Mr. Tyler) faced trial in state courts before state juries and were sentenced to terms of imprisonment in state courts. Pet. App. 3a. There is not, and never was, any reason to believe that federal authorities would be involved, as the underlying offenses in this case – even if they could be reframed as federal – were so relatively minor (involving only small amounts of drugs, distributed among local residents) that they would never have attracted the attention of federal officials. See *id.* at 27a–38a. It is only because Ms. Proctor was murdered, and because a state jury acquitted Mr. Tyler of that crime, that federal authorities became involved. See Pet. App. 9a n.2.

In fact, this case presents among the most extreme examples of the circumstances identified in *Fowler*, in which a federal prosecution under the witness tampering statute *may not* be brought. *Fowler* admonished that the statute should not be applied when the underlying crimes are "as a practical matter . . . purely state in nature." 563 U.S. at 677. The drug dealing offenses in this case plainly are. See Pet. App. 28a. It held that a person may be convicted under the statute only if there was a "reasonable likelihood" that federal authorities would have become involved in the investigation and spoken to the witness.

Fowler, 563 U.S. at 677–78. No such likelihood existed here. See Pet. App. 73a. And it reiterated the need for proof that the defendant acted with the specific intent to prevent the witness from communicating with federal law enforcement. *Fowler*, 563 U.S. at 672–74. In this case, the witness, Ms. Proctor, was cooperating exclusively with local law enforcement, and indeed had already relayed all incriminating information she had regarding Mr. Tyler or others to them, meaning that neither Mr. Tyler nor anyone else had any reason to believe at the time of the murder that federal authorities would commence an investigation or speak with her. See Pet. App. 36a–37a ("the evidence presented at [Mr. Tyler's] trial offered no reason to believe [Mr. Tyler] was involved in his brother's drug trade, knew [Ms.] Proctor, or had reason to believe she had information about him").

The prosecution and conviction of Mr. Tyler contravened *Fowler*, and violated basic principles of fairness in the criminal justice system. To allow that conviction to be reinstated would do worse. Mr. Tyler (now 70 years old) was released from incarceration nearly three years ago, after nearly three decades of imprisonment based upon infirm federal charges. See *id.* at 110a. Mr. Tyler should never have been federally prosecuted. He should not be returned to prison.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

JEFFREY T. GREEN
NAOMI IGRA
STEPHEN CHANG
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

CLAIRE LABBE
NORTHWESTERN SUPREME COURT PRACTICUM
375 East Chicago Avenue
Chicago, IL 60611
(312) 503-0063

HEIDI R. FREESE
CHIEF FEDERAL PUBLIC DEFENDER
RONALD A. KRAUSS
FIRST ASSISTANT FEDERAL PUBLIC DEFENDER
QUIN M. SORENSON*
ASSISTANT FEDERAL PUBLIC DEFENDER
100 Chestnut Street
Suite 306
Harrisburg, PA 17101
(717) 782-2237
Quin_Sorenson@fd.org

Counsel for Petitioner

* Counsel of Record

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