Petition Appendix

PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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Nos. 17-2613 & 18-1319

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UNITED STATES OF AMERICA,
Appellant in No. 18-1319

v.

WILLIE TYLER,
Appellant in No. 17-2613

_____

Appeal from the United States District Court
for the Middle District of Pennsylvania
(D.C. No. 1-96-cr-00106-001)
District Judge: Hon. John E. Jones, III

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Appeal No. 17-2613
Submitted Pursuant to Third Circuit L.A.R. 34.1(a)
February 4, 2020

Appeal No. 18-1319
Argued February 4, 2020

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Before: SHWARTZ, SCIRICA, and RENDELL,
Circuit Judges.

(Filed: April 14, 2020)

OPINION

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SHWARTZ, Circuit Judge.

Doreen Proctor reported drug activity in her neighborhood and decided to cooperate with law enforcement.

She was murdered. Willie Tyler was charged in state court with her murder. He was acquitted.

A federal grand jury thereafter charged Tyler with, among other things, witness tampering by murder, in violation of 18 U.S.C. § 1512(a)(1)(C),[1] and witness tampering by intimidation, in violation of 18 U.S.C. § 1512(b)(3).[2] Tyler has been tried three times on these charges.[3] Each jury returned a

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[1] Section 1512(a)(1)(C) makes it a crime to "kill[] or attempt[] to kill another person, with intent to . . . prevent the communication by any person to a law enforcement officer . . . of information relating to the commission or possible commission of a Federal offense."

[2] Section 1512(b)(3) makes it a crime to "knowingly use[] intimidation, threaten[], or corruptly persuade[] another person, or attempt[] to do so, or engage[] in misleading conduct toward another person, with intent to . . . hinder, delay, or prevent the communication to a law enforcement officer . . . of information relating to the commission or possible commission of a Federal offense."

[3] Tyler's first conviction was vacated on constitutional grounds. See United States v. Tyler (Tyler I), 164 F.3d 150, 151 (3d Cir. 1998); United States v. Tyler, No. 1:CR-96-106, 2000 U.S. Dist. LEXIS 21891 (M.D. Pa. Feb. 10, 2000). He was retried and convicted of two counts of witness tampering by murder and intimidation and one count of using and carrying a firearm in furtherance of a crime of violence, in violation of 18 U.S.C. § 924(c), and we affirmed the convictions on direct appeal. United States v. Tyler (Tyler II), 281 F.3d 84, 89, 101 (3d Cir. 2002). Tyler collaterally attacked this second jury's witness tampering verdicts based upon a change in the law, and we directed the District Court to hold a hearing on whether Tyler was now actually innocent of these

guilty verdict. The first two verdicts were overturned due to legal errors. The District Court set aside the third jury's guilty verdict pursuant to Federal Rule of Criminal Procedure 29, concluding that there was insufficient evidence for a reasonable juror to conclude that Tyler had the intent to murder or intimidate Proctor to prevent her from communicating with a qualifying officer.

Because (1) the District Court erred in ruling that Fowler v. United States, 563 U.S. 668 (2011), applies only to situations where a defendant does not know the identity of a specific law enforcement officer to whom the witness would have communicated; and (2) there was sufficient evidence upon which a rational juror could conclude that (a) Tyler acted with intent to prevent Proctor from communicating with law enforcement, and (b) there was a "reasonable likelihood" that she would have communicated with a qualifying law enforcement officer had she not been murdered, we will reverse and direct the District Court to reinstate the verdict and proceed to sentencing.

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crimes. United States v. Tyler (Tyler III), 732 F.3d 241, 243, 252-53 (3d Cir. 2013). On remand, the District Court held that Tyler had established actual innocence of witness tampering with intent to interfere with an official proceeding but not of witness tampering with intent to prevent communication with a law enforcement officer. United States v. Tyler, 35 F. Supp. 3d 650, 653-54 (M.D. Pa. 2014). Based upon this ruling, and consistent with our instructions, see Tyler III, 732 F.3d at 253, the District Court conducted a third trial on the witness tampering to prevent a law enforcement communication charges.

I

A

Proctor was a confidential informant for the Tri County Task Force ("Task Force"), which focused on drug crimes and was staffed with law enforcement officers from Pennsylvania's Cumberland, York, and Perry Counties. Agent Ronald Diller of the Pennsylvania Attorney General's Office coordinated the Task Force's activities. Detective David Fones, a Carlisle Police Officer, was a Task Force member.

The Task Force frequently worked with federal agencies, including the Drug Enforcement Administration ("DEA"). Agent Diller met with the DEA multiple times a month, or more frequently as needed, to discuss the DEA's interest in the Task Force's cases. If the DEA adopted a Task Force case, Agent Diller often became a co-case agent and had been deputized to handle specific cases. In any given year, Agent Diller referred between five and ten cases to the DEA.

DEA Special Agent David Keith Humphreys was the DEA's liaison to the Task Force and had regular contact with Agent Diller. Special Agent Humphreys testified that if Agent Diller approached him with information from a confidential informant, it "would be required almost" for Special Agent Humphreys to interview that informant. App. 670.

From 1984 to 1996, 65% of the 246 investigations that the Harrisburg, Pennsylvania DEA office initiated were jointly worked with state and local law enforcement.

B

In 1990, Proctor called a drug hotline in Carlisle, Pennsylvania to express concern about drug trafficking in her neighborhood. After speaking with Detective Fones, Proctor began working as a confidential informant for the Task Force. As a confidential informant, Proctor provided information, made controlled purchases, and testified in court. Specifically, Proctor made three controlled purchases of cocaine in Carlisle, leading to the arrests of four individuals, including David Tyler ("David T."), Tyler's brother, and Mary Jane Hodge, a woman with whom Tyler and his brother resided. All four were charged in state court, and Proctor testified at their preliminary hearings. Proctor also testified at Hodge's state jury trial. At Hodge's January 1992 trial, Proctor testified that she was "out of this business now," App. 118, which meant that she was no longer making covert drug purchases.

Proctor nonetheless continued to provide information about illegal drug activity to Detective Fones and Agent Diller. Among other things, over the course of the investigation, Proctor told Detective Fones that David T.'s cocaine supplier was in New York City and that David T. made trips to Jamaica. Detective Fones relayed this out-of-state drug activity to Agent Diller so that they could determine how to proceed.[4] This

[4] Agent Diller had frequent contact with Proctor. He met with her ten to fifteen times and used the information that she provided to obtain permission to record her interactions with suspected drug dealers. Agent Diller was also present for her controlled purchases, and debriefed her before and after each controlled buy, in part to determine whether she had

information, however, was not conveyed to the DEA before Proctor's death, and Special Agent Humphreys had not heard Proctor's name before her murder.

C

Proctor was murdered in the early morning hours of April 21, 1992, the day she was scheduled to testify at David T.'s trial.[5] The following events preceded her murder. On the day before Proctor was set to testify, Tyler was driving with David T. and Gwanda Campbell, a friend of Hodge's. Campbell testified that she knew Tyler because she "used to get high with him." App. 484. While they were driving, Tyler and David T. spotted Proctor and said that they "were going to do something to her then, but there were too many cars." App. 490. Campbell, Tyler, and David T. then drove to Hodge's house, where David T. and Tyler were living. There, David T. retrieved a gun and Tyler showed him how to cock it.

Early the next morning, Roberta Bell (David T.'s girlfriend) lured Proctor from her house by offering her cocaine. Eventually, Bell convinced Proctor to take a ride in Bell's car. David T. and Tyler were in a separate car. Bell and Tyler eventually pulled their cars over, and Bell exited her car, approached the Tylers, and told them, "I have her." App. 719. In a 1993 letter Tyler wrote, Tyler stated that he asked David T. what was going on, and David T. told Tyler that Bell "had a surprise for him." App. 719. Tyler claims that he then "hear[d] a shot." App. 719.

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obtained information concerning the sources of the drugs she purchased.

[5] Proctor was also scheduled to testify at two other trials.

Proctor's body was found on the side of a rural road. She had been beaten, shot in the chest, and then shot in the head while on the ground. After the murder, Tyler returned to Hodge's house and said, "[t]he bitch is gone" or "she's gone." App. 507, 514. Later that morning, David T. came to the house dressed for court and said, "I'll be at court and that bitch won't." App. 507.

Laura Barrett, who stayed with Bell's children while Bell was with the Tylers the night of the murder, said that Bell returned home carrying bloody clothes and told Barrett that, if anyone asked, Barrett should say Bell was home all night. Barrett testified that sometime later, Tyler, Bell, and David T. were at Bell's house arguing about drugs. She heard the three of them discussing that David T. gave Tyler drugs that were supposed to be given to Jerome King, Bell's uncle. During this argument, Barrett heard Bell say to Tyler that she (Bell) shot Proctor, but that "you killed her." App. 935. Tyler responded "You don't know who's listening. You don't know who hears this." App. 935. Tyler then said, "I'm leaving," and left. App. 935.[6] Hodge testified that Proctor was killed because she was set to testify against David T.

[6] Ola Woods, the mother of David T.'s children, said that sometime after the murder, Bell asked her to tell David T. that "[Bell] and her uncles," David and Jerome King, who were also present at Proctor's murder, "have their story together, and if worst comes to worst, to put it on Little Man," a reference to Tyler. App. 660.

D

Based upon this evidence, the jury found Tyler guilty on both witness tampering counts.[7] The District Court granted Tyler's post-trial motion for judgment of acquittal under Rule 29. The Court held that: (1) the evidence supported a finding that Tyler was guilty of murder under accomplice liability, United States v. Tyler, Case No. 1:96-cr-106, 2018 WL 10322201, at *6-7 (M.D. Pa. Feb. 14, 2018); (2) the evidence supported a finding that Proctor was murdered to prevent her from testifying at David T.'s trial but did not support a finding that Tyler acted with intent to prevent an investigation-related communication, id. at *10; (3) although the evidence supported a finding that any communication concerned the possible commission of a federal offense, id. at *11, the "reasonable likelihood" standard set forth in Fowler, 563 U.S. at 677, for determining whether such a communication would be made to a federal officer did not apply because it was known that Proctor served as an informant for Detective Fones, so any act of witness intimidation was directed at preventing a communication to a specific known person, Tyler, 2018 WL 10322201, at *13-14, and the Fowler standard only applies when the defendant did not have in mind "some specific law

[7] Because we vacated, and Tyler was only retried on, the witness tampering counts, his conviction following the second trial for using and carrying a firearm during a crime of violence, 18 U.S.C. § 924(c), was left undisturbed. Tyler has cross-appealed his conviction for that crime, contending that his conviction under § 924(c) following his second trial should be reversed because the Rule 29 order overturned the predicate crime of violence in which he allegedly used a firearm. We will discuss the merits of that appeal infra note 17.

enforcement officer or set of officers," id. at *12 (emphasis omitted), with whom the witness would communicate; and (4) the Government did not introduce any evidence from which a rational trier of fact could conclude that Detective Fones was a federal law enforcement officer, id. at *14.

The Government appeals the District Court's Rule 29 order.

II[8]

A

We exercise plenary review over the District Court's order granting a motion for judgment of acquittal based on the sufficiency of the evidence, United States v. Willis, 844 F.3d 155, 164 n.21 (3d Cir. 2016), and apply the same standard as the district court, United States v. Freeman, 763 F.3d 322, 343 (3d Cir. 2014). This standard requires that we view the evidence "in the light most favorable to the prosecution" to determine whether a "rational trier of fact could have found the essential elements of the crime[s] beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319 (1979). This review is "highly deferential" to the factual findings of the jury, and we "must be ever vigilant . . . not to usurp the role of the jury by weighing credibility and assigning weight to the evidence, or by substituting [our] judgment for that of the jury." United States v. Caraballo-Rodriguez, 726 F.3d 418, 430 (3d Cir.

[8] The District Court had jurisdiction under 18 U.S.C. § 3231, and we have jurisdiction under 28 U.S.C. § 1291.

2013) (en banc) (alteration and omission in original) (quoting United States v. Brodie, 403 F.3d 123, 133 (3d Cir. 2005)).

> Thus, even if the evidence adduced is consistent with multiple possibilities, our role as a reviewing court is to uphold the jury verdict . . . as long as it passes the bare rationality test. Reversing the jury's conclusion simply because another inference is possible—or even equally plausible—is inconsistent with the proper inquiry for review of sufficiency of the evidence challenges, which is that [t]he evidence does not need to be inconsistent with every conclusion save that of guilt if it does establish a case from which the jury can find the defendant guilty beyond a reasonable doubt. It is up to the jury—not the district court judge or our Court—to examine the evidence and draw inferences. Unless the jury's conclusion is irrational, it must be upheld.

Id. at 433 (alteration in original) (internal quotation marks and citation omitted).

Considering the evidence under this highly deferential standard, we conclude that the evidence supported each element of the offenses charged, that "the jury's verdict did not fall below the threshold of bare rationality," and that the verdict "should therefore be reinstated." Id. at 432-33 (internal quotation marks and citation omitted). We examine the evidence supporting each element in turn.

B

The Victim and Witness Protection Act of 1982, 18 U.S.C. §§ 1512-1515, 3663-3664, "was enacted to provide protection to witnesses in federal cases," Tyler III, 732 F.3d 241, 247 (3d Cir. 2013), and prohibits witness tampering by murder and by threats or intimidation. To prove witness tampering by murder, the Government must demonstrate that:

> (1) "the defendant killed or attempted to kill a person";
>
> (2) "the defendant was motivated by a desire to prevent the communication between any person and law enforcement authorities concerning the commission or possible commission of an offense";
>
> (3) "that offense was actually a federal offense"; and
>
> (4) "a reasonable likelihood that the person whom the defendant believes may communicate with law enforcement would in fact make a relevant communication with a federal law enforcement officer."

Bruce v. Warden Lewisburg USP, 868 F.3d 170, 184 (3d Cir. 2017) (emphasis omitted) (citing Tyler III, 732 F.3d at 252). Witness tampering by intimidation requires proof of the same elements as witness tampering by murder, except that the first element instead requires evidence that the defendant intimidated, threatened, or corruptly persuaded the witness. See § 1512(b)(3).

Viewing the evidence in a light most favorable to the Government, a rational juror could have concluded that the

evidence supported each element of the offenses charged beyond a reasonable doubt, and thus the District Court erred by entering a judgment of acquittal.

1

As to the first element, we must determine whether the evidence supports a finding that Tyler murdered or aided and abetted Proctor's murder. Section 1512 incorporates the definition of murder in 18 U.S.C. § 1111, which requires proof that Tyler: (1) unlawfully killed Proctor, (2) with malice aforethought, and (3) with premeditation. See 18 U.S.C. § 1111(a). For the jury to have found Tyler guilty of murder based on aiding and abetting, the Government had to prove that: (a) someone murdered Proctor, (b) Tyler knew the murder would be committed or was being committed by this actor, (c) Tyler knowingly performed an act for the purpose of aiding, assisting, soliciting, facilitating, or encouraging the actor and with the intent that the actor commit the murder, and (d) Tyler performed an act in furtherance of the murder. See United States v. Nolan, 718 F.2d 589, 592 (3d Cir. 1983).

The evidence provided a basis for a rational juror to conclude that Tyler murdered Proctor or aided and abetted her murder. The night before Proctor was scheduled to testify at David T.'s trial, Tyler and David T. spotted Proctor on the street but declined to do anything to her only because there "were too many cars" around. App. 490. Tyler and David T. thereafter went to the back of Hodge's house where David T. retrieved a gun and asked Tyler if Tyler knew how to cock it. Tyler said he did and showed David T. how to cock the gun. Hours later, Tyler drove David T. to the murder scene. Afterwards, Tyler told Campbell "[t]he bitch is gone," or

"she's gone." App. 507, 514. In discussing the murder, Bell said to Tyler, "I shot Doreen but you killed her," and Tyler responded, "You don't know who's listening. You don't know who hears this." App. 935. Proctor's autopsy confirmed that she was shot multiple times, with a shot to her body, followed by a shot to her head after she was lying on the ground. This evidence provided a basis for a rational juror to conclude that Tyler knew about a desire to harm Proctor, knew how to use a gun, drove with his brother to the murder scene, and played a role in her murder. In short, a rational juror had a sufficient basis to conclude beyond a reasonable doubt that Tyler killed Proctor or aided and abetted her murder.[9]

2

Sufficient evidence also establishes that Tyler killed or intimidated Proctor, at least in part, with the intent to prevent her communication with law enforcement. On direct appeal from accomplice Roberta Bell's conviction, we previously considered whether a reasonable juror could infer, from the facts adduced in Bell's case, an intent to hinder Proctor's future communication with law enforcement. Our Court considered and rejected the argument, accepted by the District Court here, that the only permissible inference was that Bell acted solely to prevent Proctor from testifying at David T's trial. United States v. Bell, 113 F.3d 1345, 1350 (3d Cir. 1997). Of course,

[9] Tyler did not challenge the sufficiency of the evidence on the jury's finding that he intimidated or threatened Proctor. Thus, he has waived any such argument. See Wood v. Milyard, 566 U.S. 463, 474 (2012); United States v. Dupree, 617 F.3d 724, 727 (3d Cir. 2010) ("[A]rguments not raised in the district courts are waived on appeal.").

the Bell trial transcript is not the transcript we are reviewing, but as in Bell, "while the evidence may lend itself more obviously to the theory that [Tyler] killed Proctor in order to prevent her from testifying a few hours later at [David T.'s] trial," the record in Tyler's trial "also supports the inference that [Tyler] believed Proctor was going to continue to communicate with the Task Force concerning drug crimes that [Tyler] and others had committed." Id. As we held in Tyler I, and do so again today, we apply Bell's reasoning to this record and conclude that a reasonable juror could infer Tyler acted with an intent to hinder Proctor from communicating with law enforcement. See Tyler I, 164 F.3d at 153 ("We reject Tyler's argument . . . for the same reasons that we rejected the identical arguments of Ms. Bell."). The fact the evidence "may be consistent with multiple possibilities" does not mean the verdict fails the "'bare rationality' test." Caraballo-Rodriguez, 726 F.3d at 432.

The evidence adduced at Tyler's third trial is sufficient to support an inference that Tyler acted with intent to prevent Proctor's communication with law enforcement. Proctor's cooperation with law enforcement was well known. She completed controlled drug buys from and testified against individuals with close relationships with Tyler: his brother and Hodge, a woman with whom he and his brother had lived. Even after Proctor stopped making covert purchases, she continued to provide information to Detective Fones and Agent Diller about, among other things, David T.'s New York drug supplier and his trips to Jamaica.

Moreover, Tyler himself was involved with drugs. The jury heard evidence that he used drugs**,** and was involved in a dispute with his brother and Bell about the fact that David T.

provided him drugs that were meant for Jerome King. During the argument, Bell was heard saying that Tyler had killed Proctor to which he retorted, "You don't know who's listening. You don't know who hears this." App. 935. Tyler's retort gives rise to an inference that he was concerned about others learning about his illegal activities, and "it was reasonable for the jury to infer that [Tyler] feared that Proctor's continued cooperation with the Task Force would have resulted in additional communications with law enforcement officers concerning drug crimes committed by [him], among others, and that at least part of [Tyler]'s motivation in killing Proctor was to prevent such communications."[10] Bell, 113 F.3d at

[10] Relying on United States v. Stansfield, 101 F.3d 909, 917-18 (3d Cir. 1996), the Dissent reasons that the evidence showed "that [Tyler] acted to prevent Proctor's testimony at his brother's trial or to retaliate for her past informant work," but that "there is no evidence from which a jury could infer that he was motivated in any way by a desire to prevent . . . Proctor's future communication with law enforcement." Dissenting Op. at 2-3. In Stansfield, however, we reasoned that evidence of the defendant's questions to the victim about why he had spoken to law enforcement was "sufficient for a jury to conclude beyond a reasonable doubt that [defendant] intended to prevent [the victim's] future communications with law enforcement officials, not merely that he intended to retaliate against [him] for past communications," and that "inherent in" pointing a loaded gun at the victim's throat "and asking, in effect, 'Why did you do it?' is the implicit message, 'Don't ever do it again.'" 101 F.3d at 917-18. Evidence of Proctor's past communications to law enforcement about David T. and Hodge, together with Tyler's own illegal activities, is sufficient for a rational juror to conclude that Tyler

1350. Based on this evidence, a rational juror could have found, beyond a reasonable doubt, that Tyler killed Proctor, at least in part, to prevent her from communicating with law enforcement.[11]

3

Sufficient evidence also establishes the third element—that the "offense" about which Proctor would have communicated "was actually a federal offense." Tyler III, 732 F.3d at 252 (quoting Stansfield, 101 F.3d at 918). The jury heard that Proctor provided information about the distribution of controlled substances, which is a federal crime. See 21

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acted, at least in part, to prevent Proctor's future communications.

[11] The Dissent's conclusion that "if evidence that [Tyler] knew Proctor had previously served as an informant was enough to establish the necessary intent, any murder of a known informant could become a federal crime," Dissenting Op. at 9, fails to account for the evidence that Tyler resided with two of the individuals about whom Proctor was communicating to law enforcement, that Tyler was involved with drugs, and that shortly after the murder, Tyler argued with his brother about receiving drugs meant for someone else. Proctor's known informant status was not the sole evidence supporting Tyler's intent, at least in part, to prevent Proctor's future communications. Instead, that evidence coupled with the evidence about Tyler's own illegal activities and his close relationship to others against whom Proctor had acted as an informant provided a basis for a rational juror to conclude that Tyler intended to kill Proctor, at least in part, to prevent a law enforcement communication.

U.S.C. § 841(a)(1). Indeed, federal authorities in the Harrisburg area might have investigated and prosecuted the activities about which Proctor had knowledge. In the Harrisburg region, the DEA often made small controlled buys to develop federal cases, and federal law does not set a minimum amount of controlled substances that must be involved for the conduct to violate federal law.

Moreover, Proctor told Detective Fones that David T.'s cocaine source was in New York and that he had travelled to Jamaica. This evidence shows that drug offenses about which Proctor had knowledge were federal, not "purely state in nature." Fowler, 563 U.S. at 677; see also United States v. Veliz, 800 F.3d 63, 75 (2d Cir. 2015) (holding that the offense was not "purely state in nature" and that sufficient evidence supported a federal nexus under § 1512(b)(3) where defendant "committed multiple related crimes across multiple states, with multiple accomplices"). Thus, the evidence was sufficient to satisfy the third element.

4

The Government also presented sufficient evidence upon which a rational juror could conclude that there was a reasonable likelihood that one of Proctor's communications would have been to a qualifying law enforcement officer, whether to Agent Diller or to a DEA agent.

To convict a defendant under the investigation-related provision of the witness tampering statute, the Government must show that the defendant tampered with a witness to hinder, delay, or prevent a communication from that witness to

a qualifying law enforcement officer.[12] § 1512(a)(1)(C), (b)(3). To satisfy this element, the Government must prove "a reasonable likelihood that, had, e.g., the victim communicated with law enforcement officers, at least one relevant communication would have been made to a federal law enforcement officer." Fowler, 563 U.S. at 677 (emphasis omitted). This standard "is a 'relatively low bar.'" Bruce, 868 F.3d at 185 (quoting United States v. Smith, 723 F.3d 510, 518 (4th Cir. 2013)). Indeed, to establish reasonable likelihood, "[t]he Government 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."[13] Fowler, 563 U.S. at 678. Instead, it "must show that the likelihood of communication to a federal officer was more than remote, outlandish, or simply hypothetical." Id.

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[12] The Government need not prove that the defendant knew that the law enforcement officer was federal or acting as an advisor or consultant to the federal Government. § 1512(g)(2).

[13] This is because "[t]he Government will already have 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." Fowler, 563 U.S. at 674. Thus, "where the defendant kills a person with an intent to prevent communication with law enforcement officers generally, that intent includes an intent to prevent communications with federal law enforcement officers only if it is reasonably likely under the circumstances that (in the absence of the killing) at least one of the relevant communications would have been made to a federal officer." Id. at 677-78 (emphasis omitted).

Before examining the proof concerning this element, we will address the District Court's incorrect view that this "reasonable likelihood" standard is limited to circumstances where the defendant does not have "some specific law enforcement officer or set of officers" in mind as the recipient of the witness's communication. Tyler, 2018 WL 10322201, at *12 (quoting Fowler, 563 U.S. at 672) (emphasis omitted).

a

Fowler instructs that the reasonable likelihood standard applies "where the defendant does not have particular federal law enforcement officers in mind," so long as "the Government . . . show[s] a reasonable likelihood that, had, e.g., the victim communicated with law enforcement officers, at least one relevant communication would have been made to a federal law enforcement officer." 563 U.S. at 677. Pursuant to Fowler, we held in Tyler III that the "reasonable likelihood" standard applied in determining whether Proctor would communicate with a qualifying federal officer, not a specific person, and directed the District Court to evaluate the evidence under this standard. Tyler III, 732 F.3d at 252-53. Later, in Bruce, we applied the "reasonable likelihood" standard where a defendant allegedly prevented witnesses from communicating with state law enforcement about a defendant's robbery and arson. 868 F.3d at 175-76, 181. Applying the "reasonable likelihood standard," id. at 181, we held that the Government must prove that there is "a reasonable likelihood that the person whom the defendant believes may communicate with law enforcement would in fact make a relevant communication with a law enforcement officer," id. at 184 (emphasis omitted). We observed that the statute "reaches conduct that 'takes place before the victim has engaged in any

communication at all with law enforcement officers—at a time when the precise communication and nature of the officer who may receive it are not yet known.'" Id. at 185 (quoting Fowler, 563 U.S. at 673).[14]

As in Fowler, evidence was presented that Tyler "killed [Proctor] with an intent to prevent [her] from communicating with law enforcement officers in general" but that Tyler "did not have federal law enforcement officers (or any specific individuals) particularly in mind." 563 U.S. at 670. Thus, Fowler's "reasonable likelihood" standard applies.[15]

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[14] Other Courts of Appeals have applied the "reasonable likelihood" standard where there was evidence that witnesses had already communicated with a specific law enforcement officer. See, e.g., Dhinsa v. Krueger, 917 F.3d 70, 82-84 (2d Cir. 2019) (applying the standard where defendant murdered witnesses after one witness started questioning the organization's illegal activities and the other began cooperating with state police); United States v. Johnson, 874 F.3d 1078, 1080-82 (9th Cir. 2017) (applying the standard where correctional officer kept his report of a use of force from reaching a specific prison sergeant allegedly to prevent the report from reaching a federal officer); Smith, 723 F.3d at 512-14 (applying the standard where defendant allegedly firebombed a witness's house in retaliation for her regular reports to local police about drug activity).

[15] Application of the "reasonable likelihood" standard may not always be necessary. Where there is sufficient evidence that a defendant intended to prevent a witness from communicating with a specific federal law enforcement officer, there would be no need to apply the "reasonable likelihood" standard to determine whether, had the witness

b

Applying the Fowler standard, the record shows that it was "reasonably likely" that Proctor would have communicated with a "law enforcement officer" as defined under § 1515(a)(4)(A). To satisfy this element, the Government must prove two things: (1) it is reasonably likely the witness would communicate information and (2) the person to whom she would communicate the information would be a "law enforcement officer" as defined under § 1515(a)(4)(A). The statute defines a "law enforcement officer" as an "officer or employee of the Federal Government, or a person . . . serving the Federal Government as an adviser or consultant . . . authorized under law to engage in or supervise the prevention, detection, investigation, or prosecution of an offense." § 1515(a)(4)(A). We will examine whether Agent Diller and Special Agent Humphreys qualify as § 1515(a)(4)(A) law enforcement officers and whether it was reasonably likely that Proctor would have communicated with them.

Agent Diller was a qualifying law enforcement officer because he advised and consulted with the DEA. Agent Diller coordinated the Task Force, and in that capacity met with the DEA frequently. Agent Diller referred up to ten cases per year

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"communicated with [that officer], at least one relevant communication would have been made to a federal law enforcement officer." Fowler, 563 U.S. at 677-78. This is because the statute "fits like a glove" when the defendant has a federal law enforcement officer in mind, since it would be undisputed that that officer is federal and thus the Government would not have to offer additional proof to establish the federal nexus. See id. at 672.

to the DEA, often to Special Agent Humphreys. For certain cases the DEA adopted, Agent Diller was deputized as a federal agent or served as a co-case agent. See Bruce, 868 F.3d at 186 (observing that state law enforcement officers who "participated in the investigation after federal intervention . . . would count as federal officers"). The evidence presented at Tyler's third trial again provided a basis for a rational juror to conclude that Agent Diller was a qualifying "law enforcement officer" under § 1515(a)(4)(A), as he worked closely with the DEA to both personally participate in cases and to advise whether a case should be pursued on the federal level. As we have concluded in the past, these facts demonstrate that Agent Diller was a "law enforcement officer" under 18 U.S.C. § 1515(a)(4). See Tyler II, 281 F.3d at 99.

The evidence also showed that it was reasonably likely that Proctor would have communicated with Agent Diller. Part of Agent Diller's role as the Task Force coordinator was to interview confidential informants. Not only did Agent Diller meet with Proctor more than ten times, he was also present for each of her controlled purchases and debriefed her before and after each buy. Even after the Task Force no longer used her to make controlled purchases, Proctor continued to provide information to the Task Force. Over the course of the investigation, Proctor also told Detective Fones that David T.'s cocaine supplier was in New York and that David T. made trips to Jamaica. Detective Fones relayed this information to Agent Diller to determine how it could be used and how Proctor could assist. Given how often Proctor met with Agent Diller, the information Proctor had concerning interstate drug activity, and the fact that she was continuing to provide information to law enforcement, it was far from "remote, outlandish, or simply hypothetical" that she would communicate with him

about David T.'s interstate drug connection and that Agent Diller would share that information with the DEA. Fowler, 563 U.S. at 678.

The jury also heard evidence from which it could conclude that Proctor was "reasonably likely" to communicate with a DEA agent such as Special Agent Humphreys, who is a qualifying law enforcement officer. Agent Diller and Special Agent Humphreys had regular contact. Among the criteria Agent Diller would have considered in determining whether to refer a case to the DEA was whether "the source was outside Pennsylvania." App. 596. Because the Task Force could only investigate crimes occurring in Pennsylvania, and the DEA has an interest in pursuing interstate drug activity, a reasonable juror could conclude that Proctor's information about David T.'s New York source and trips to Jamaica would have been relayed to the DEA. Special Agent Humphreys testified that had Agent Diller approached him with information from a confidential informant, it "would be required almost" that Special Agent Humphreys would interview the informant. App. 670. From this evidence, a juror could infer that Proctor was reasonably likely to communicate with Special Agent Humphreys or another DEA agent about the out-of-state drug activity.[16] See United States v. Johnson, 874 F.3d 1078, 1083

[16] The likelihood of such communication is further corroborated by how often the DEA and local law enforcement worked together. The jury heard evidence that 65% of the investigations that the Harrisburg DEA office initiated from 1984 to 1996, were worked jointly with state and local law enforcement. Over 50% of the time, the DEA worked with informants obtained from state and local task forces. Furthermore, federal authorities regularly prosecuted cases

(9th Cir. 2017) (suggesting that the reasonable likelihood standard would be fulfilled by evidence that federal officials were in contact with the county jail, had a policy or practice of investigating similar incidents, or assisted or shared information with state and local officials); Aguero v. United States, 580 F. App'x 748, 753 (11th Cir. 2014) (per curiam) (holding, in a police-related shooting, the reasonable likelihood standard satisfied where police had a working relationship with the federal government, investigations occurred after each police shooting, and there was a standard practice of forwarding information from shootings to the FBI); Smith, 723 F.3d at 518 (holding the reasonable likelihood standard satisfied where victim complained of gang activity and drug trafficking, and evidence showed that the DEA worked closely with the city police and that the police were its "biggest source of information"). Therefore, a rational juror had a basis to conclude it was reasonably likely that Proctor would have spoken to a qualifying law enforcement officer and that Tyler murdered or aided in her murder to prevent her from doing so.[17]

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involving small amounts of drugs, and such cases were often of interest even without evidence of an interstate source.

[17] We will also affirm the order denying Tyler's motion to dismiss his § 924(c) conviction. Tyler contends that because the commission of an underlying predicate is a necessary element of a § 924(c) conviction, and because this Court vacated his predicate witness tampering charges, dismissal of his § 924(c) conviction was required.

Tyler's argument fails for two reasons. First, because we direct the reinstatement of his witness tampering convictions, the basis for Tyler's argument challenging his § 924(c) conviction evaporates. Second, and in any event, our precedent forecloses Tyler's argument. A conviction under

III

For the foregoing reasons, we will reverse the District Court's order granting Tyler's motion for judgment of acquittal on the witness tampering charges, direct that the jury's verdict be reinstated, affirm the judgment on the firearms conviction, and remand for sentencing.

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§ 924(c) "requires that the government prove the defendant committed a qualifying offense but does not require that the defendant be charged or convicted of such an offense." United States v. Galati, 844 F.3d 152, 155 (3d Cir. 2016); see also United States v. Haywood, 363 F.3d 200, 211 (3d Cir. 2004) (holding that § 924(c) "requires only that the defendant have committed a violent crime for which he may be prosecuted in federal court" and "does not even require that the crime be charged; a fortiori, it does not require that he be convicted" (emphasis and citations omitted)).

RENDELL, Circuit Judge, concurring in part and dissenting in part:

I disagree with the Majority on one essential issue—Willie Tyler's intent. Judge Jones, an experienced trial judge, vacated the jury's verdict based on this issue, concluding that it was mere speculation that Willie acted with the intent to prevent Proctor from communicating with law enforcement. I was initially skeptical that this rejection of the jury's verdict was warranted, but upon further reflection have come to believe that it was entirely correct. Judge Jones stated:

> Based on the evidence presented, an inference that Willie acted with the distinct intent to prevent an investigation-related communication is far too speculative to withstand judicial review. At the end of the day, it is clear that Proctor was murdered because she was going to testify the next morning against [David] Tyler. Though an atrocious crime, it is one that falls under the purview of state charges unless the evidence can satisfy the specific intent element that brings it under the ambit of the federal witness tampering statute. Even in the face of the incredibly high standard of review for a Rule 29 post-trial motion for judgment of acquittal, we cannot hold that this evidence was sufficient to support any rational trier of fact to find guilt beyond a reasonable doubt for this element. This finding of intent was a necessary element for each of Willie's convictions under § 1512. We therefore must grant the Motion on this basis and vacate both of his convictions.

App. 29.

Noting the importance of evidence of such intent to federalize an otherwise state crime, Judge Jones observed that finding the evidence here sufficient "would essentially eviscerate any intent requirement at all and would allow federal witness tampering convictions against virtually all homicides of state and local police informants." *Id*. The federal statute has two distinct elements. The Government need only establish that there is a reasonable likelihood that any alleged communication would be made to a qualifying *federal* officer. That bar is quite low. The low bar of that element stands in contrast to the standard of proof beyond a reasonable doubt for the element of intent to prevent a communication. In fact, the Supreme Court found the low threshold of the reasonable likelihood standard permissible precisely because "[t]he Government will already have 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." *Fowler v. United States*, 563 U.S. 668, 674 (2011) (emphasis added). The Supreme Court has cautioned against "bring[ing] within the scope of [§ 1512] 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." *Id.* at 675. We would engage in just this sort of expansion of the statute if we were to allow a conviction to stand where the evidence cannot establish beyond a reasonable doubt the intent element necessary to make the offense a federal crime.

In order to convict Willie Tyler, the jury had to find beyond a reasonable doubt that he acted with intent to prevent

Doreen Proctor from communicating information to law enforcement. Importantly, the intent to prevent a communication differs from the intent to prevent a person's appearance in an official proceeding, which is an element of separate 18 U.S.C. § 1512 offenses, *see* 18 U.S.C. § 1512(a)(1)(A), (a)(1)(B), (b)(1), (b)(2),[1] and from the intent to retaliate for past communications with law enforcement. *See United States v. Stansfield*, 101 F.3d 909, 917–18 (3d Cir. 1996), *abrogated in part by Fowler*, 563 U.S. 668. While there is little doubt that the evidence demonstrated that Willie acted to prevent Proctor's testimony at his brother's trial or to retaliate for her past informant work, there is no evidence from which a jury could infer that he was motivated in any way by a desire to prevent Doreen Proctor's future communication with law enforcement.[2]

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[1] Following the Supreme Court's decision in *Arthur Andersen LLP v. United States*, the evidence in this case could not establish guilt under § 1512's official proceeding provisions, which require a nexus between the alleged conduct and a *federal* proceeding. *United States v. Tyler* (*Tyler III*), 732 F.3d 241, 245, 250–51 (3d Cir. 2013) (citing *Arthur Andersen LLP v. United States*, 544 U.S. 696, 707–08 (2005)). The official proceeding charges therefore were not advanced at the trial below.

[2] As the Majority points out, in *Stansfield*, we held that the evidence was "sufficient for a jury to conclude beyond a reasonable doubt that [the defendant] intended to prevent [the victim's] future communications with law enforcement officials, not merely that he intended to retaliate against [him] for past communications." *Id.* We reasoned that the defendant's questions to the victim about why he had spoken to law enforcement demonstrated the necessary intent because

The narrative that played out at Willie Tyler's trial—perhaps unlike evidence at previous trials—had very little to do with Willie Tyler. He was a peripheral player, while the evidence focused on Doreen Proctor and her relationships with David Tyler's cronies and with law enforcement. Willie's only drug activities were that he used to get high with Gwanda Campbell and, after the murder, his brother made Roberta Bell angry by giving Willie drugs. Much was made of Doreen Proctor's role in the state, and potentially federal, investigations and trials in order to satisfy the necessary element of a reasonable likelihood that, if she did make a communication to law enforcement, it would have been to a federal officer. The nature of her continued role was disputed, but it was never even urged that Willie knew of any such ongoing role, let alone that he had reason to care about or fear any future communication by her. In most cases in which the

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"inherent in . . . asking, in effect, 'Why did you do it?'" while pointing a loaded gun at the victim's throat "is the implicit message, 'Don't ever do it again.'" *Id*. at 918. In *Stansfield*, the defendant knew the victim had been communicating information to law enforcement regarding a pending investigation into the defendant's insurance fraud scheme. *Id.* at 911. The facts in *Stansfield* showed that the defendant was not merely retaliating for cooperation in a past investigation but attempting to prevent communication that would further law enforcement's *ongoing* investigation into his own illegal activity. Here, there was no investigation into Willie Tyler's activities, and no evidence that Willie Tyler knew of any ongoing investigation into his friends. I therefore disagree with the Majority's suggestion that the facts in *Stansfield* are analogous to the facts before us. *See* Maj. Op. at 16 n.10.

element of intent to prevent an investigation-related communication can be inferred, it is clear that the perpetrator had reason to fear that, had the victim lived, he or she would have gone to the police to tell them of the perpetrator's activities.[3] Here, there was no speculation, let alone evidence,

[3] Indeed, in each of the cases on which the Majority relies, the perpetrator had a clear reason to want to prevent the victim's communication with law enforcement, most often the victim's knowledge of the defendant's own criminal activity. *See Fowler*, 563 U.S. at 670 (defendant killed officer who witnessed defendant and others planning a robbery); *Dhinsa v. Krueger*, 917 F.3d 70, 82–83 (2d Cir. 2019) (defendant ordered murders of witnesses who confronted associates about defendant's racketeering organization or cooperated with police investigation into defendant's illegal activities); *Bruce v. Warden Lewisburg USP*, 868 F.3d 170, 175–76 (3d Cir. 2017) (defendant killed owner of the business he robbed, along with owner's fiancée who was present); *United States v. Veliz*, 800 F.3d 63, 67–68 (2d Cir. 2015) (defendant solicited murder of co-conspirator whom he feared would talk to police about defendant's role in two murders); *Aguero v. United States*, 580 F. App'x 748, 753 (11th Cir. 2014) (defendant, a police officer, planted weapons at scenes of shootings in which he was involved and provided misleading statements to investigators who would relay information to federal law enforcement); *United States v. Smith*, 723 F.3d 510, 512 (4th Cir. 2013) (defendant, a gang leader, orchestrated an attack on a witness who was communicating with police on a near-daily basis about the gang's drug activity in her neighborhood); *Stansfield*, 101 F.3d at 917–18 (defendant killed witness who was sharing information with law enforcement about defendant's insurance fraud scheme); *see also United States v. Johnson*, 874 F.3d

that Doreen Proctor posed any threat at all to Willie, or that Willie knew of any such threat to himself or others. Allowing the jury to infer that Proctor would have a future role in a federal investigation is a far cry from allowing them to conclude that Willie Tyler knew this and acted with an intent to prevent it.

If Willie was portrayed as part of David's group, perhaps the result would be different. But Willie was not a drug dealer, and he had to be asked by his brother if he knew how to cock a gun. At one point, he had to be told his brother was in town, and at the time of the murder, when he asked his brother what was going on, he was told that it was not his business. The most damning evidence of Willie's involvement was his accompanying his brother to the murder, his declaration that "the bitch is gone" or "she's gone" the following morning, App. 507, 514, and Bell's statement, purportedly to Willie, that "you killed her," App. 935. But, again, that proves nothing as to his fear of Proctor's prospective communications, only his desire that she not be alive to testify against his brother.

The intent element requires a showing that the defendant "was motivated by a desire to prevent the communication" between the victim and law enforcement. *Stansfield*, 101 F.3d at 918. Such motivation is impossible

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1078, 1079–80, 1083 (9th Cir. 2017) (defendant allegedly withheld information from supervisor about an assault in which defendant was purportedly involved, but evidence was insufficient to demonstrate reasonable likelihood of communication to a federal officer); *see also United States v. Bell*, 113 F.3d 1345, 1350 (3d Cir. 1997) discussed *infra*.

unless the defendant knew or believed that the victim would, in fact, communicate with law enforcement. *See United States v. Kozak*, 438 F.2d 1062, 1065–66 (3d Cir. 1971). There is simply no evidence from which this intent on Willie's part can be inferred. At most, there is evidence to allow two inferences: (a) Willie knew that Proctor had provided information about his brother and others, that she had testified against Hodge, and that she was going to testify the next morning against his brother; and (b) Proctor had continued to communicate information to Detective Fones despite the apparent end to the investigation. Lacking, however, is evidence that Willie *knew or believed* Proctor was going to have any future communication with law enforcement or acted to prevent it.[4]

[4] If anything, the evidence shows that Willie had reason to believe Proctor was *finished* working as an informant. Proctor testified publicly at Hodge's trial that she was "out of this business." App. 462. There is no suggestion in her testimony—of which the Government asks us to assume Willie was aware—that she still worked with law enforcement. Further, the preliminary hearings, where Proctor's identity as an informant was revealed, occurred in late July and early August 1991, but the murder did not occur until April 1992, after Proctor had testified against Hodge and just before she was expected to testify against David Tyler. Although the timing shows that Willie and others sought to prevent the testimony against David, it cuts against the idea that they wanted to prevent investigation-related communications by Proctor. Such a motive would have warranted earlier timing of the murder to prevent law enforcement building a case against Hodge and David. By the time of the murder, the evidence indicates that, from Willie Tyler's perspective, Doreen Proctor was a trial witness who was done serving as an informant.

The evidence similarly fails to support the Majority's inference that Willie Tyler sought to prevent Proctor from communicating with law enforcement about his own drug activity. Nothing in the record suggests that Willie knew Proctor or was familiar with her other than through her testimony against his brother and Hodge. The record thus contains zero evidence that Proctor knew about any drug activity in which Willie was involved. The only evidence of Willie engaging in drug activity at all before Proctor's death is Campbell's testimony that she "used to get high with him." App. 484. There is no evidence that Proctor was present for or aware of this drug use or that Willie believed she knew about it. The same can be said of Willie's receipt of drugs from his brother after Proctor's death, when Proctor could neither have known nor communicated about the drug possession. Given the lack of evidence that Willie Tyler had anything to fear from Proctor's communications to law enforcement, it would be irrational to conclude on this record that his participation in Proctor's murder was motivated by a desire to prevent such communications.

The Majority makes much of Willie's response to Bell's statement that he killed Proctor, suggesting that his reaction "gives rise to an inference that he was concerned about others learning about his illegal activities." Maj. Op. at 16. In response to Bell saying, about Proctor, "you killed her," Willie said, "You don't know who's listening. You don't know who hears this." App. 935. This certainly gives rise to an inference that Willie was concerned about others learning of his involvement *in Proctor's murder*, but no greater inference follows from the exchange. Notably, Willie did not try to silence Bell during the preceding argument that revealed his possession of unlawful drugs. Willie's response to the murder

accusation does not show that he believed Proctor had continued to cooperate with the Task Force or had any information about drug crimes committed by him. One therefore cannot rationally infer from Willie's exchange with Bell that he "feared that Proctor's continued cooperation with the Task Force would have resulted in additional communications with law enforcement officers concerning drug crimes committed by [him]" and that such a fear motivated the killing. Maj. Op. at 16 (alteration in original) (quoting *United States v. Bell*, 113 F.3d 1345, 1350 (3d Cir. 1997)).

The Majority makes that inference largely by importing our analysis from *United States v. Bell*, but the factual records of the two cases differ in dispositive ways.[5] In *Bell*, we found that "it was reasonable for the jury to infer that Bell feared that Proctor's continued cooperation with the Task Force would have resulted in additional communications with law enforcement officers concerning drug crimes committed by

[5] The Majority contends otherwise, claiming that we applied the *Bell* reasoning in Willie Tyler's first direct appeal and should do so here. Maj. Op. at 15. I disagree. In *Tyler I*, we rejected Willie "Tyler's argument that the evidence did not establish federal jurisdiction under [18 U.S.C. § 1512] for the same reasons that we rejected the identical arguments of Ms. Bell." *United States v. Tyler* (*Tyler I*), 164 F.3d 150, 153 (3d Cir. 1998). We did not discuss Willie's sufficiency of the evidence arguments, and we did not describe the evidence introduced at the trial at all. In my view, our scant reasoning in *Tyler I* does not provide a basis from which we can conclude that *Bell*'s reasoning with respect to intent to prevent a communication should apply to the record before us.

Bell." 113 F.3d at 1350. We reached that conclusion based in part on evidence that Bell was involved in the drug trade with David Tyler, about whom Proctor had provided information and against whom she planned to testify. *Id.*[6] The evidence in *Bell* showed that "Bell was personally and heavily involved" in the drug trade in Carlisle and Harrisburg about which Proctor had provided information. *Id.* Indeed, we noted that there was "evidence that Bell was at least as heavily implicated as [David] Tyler in the drug trade for which Tyler was on trial." *Id.* Even on the current record in Willie's case, we have evidence that Bell engaged in drug distribution and specifically distributed drugs to Proctor. Bell *knew* that Proctor had information about her that Bell would not want communicated to law enforcement. In contrast, the evidence presented at Willie's trial offered no reason to believe Willie was involved in his brother's drug trade, knew Proctor, or had reason to

[6] Our emphasis in *Bell* on Bell's involvement in the drug trade was consistent with our case law, which has held evidence sufficient to support a conviction for witness tampering with intent to prevent a communication under § 1512 when the defendant was the subject of the information he feared the victim would communicate. *See, e.g.*, *Stansfield*, 101 F.3d at 917–19 (holding evidence sufficient where defendant sought to prevent informant from communicating information about defendant's insurance fraud scheme). Even the Government argues that the implication that an informant was murdered to prevent a communication with law enforcement arises "[i]f a known informant is murdered *by the subjects of her information*." Appellant's Br. at 33 (emphasis added). Here, there is no evidence that Willie Tyler would have been the subject of any information Proctor possessed.

believe she had information about him. Unlike Bell, Willie had nothing to fear from Proctor's potential communications with law enforcement that would allow us to infer a motive to prevent them.[7]

We also cannot rationally infer from knowledge of Proctor's *past* informant activities and plans to testify in state court proceedings that Willie sought to prevent Proctor's future communications with law enforcement. Rational inferences require "a logical and convincing connection between the facts established and the conclusion inferred." *United States v. Bycer*, 593 F.2d 549, 550 (3d Cir. 1979). Here, the admittedly rational inference that Willie knew of Proctor's past informant activities concerning his brother and associates does not logically or convincingly lead to the further conclusions that Willie believed Proctor had additional information, believed she would continue to communicate with law enforcement months after the investigation had apparently ended, and acted to prevent such communications. Those inferences are not rational and would not allow a jury to conclude beyond a reasonable doubt that Willie intended to prevent Proctor's future communications.

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[7] The Majority emphasizes Willie's "illegal activities" as evidence of his intent to prevent Proctor from communicating with law enforcement. Maj. Op. at 16, 16 n.10, 17 n.11. But, as discussed *supra*, the only illegal activity that could have contributed to his intent to participate in the murder was his personal drug use, and there is no evidence that Proctor knew anything about that use. Such illicit use is a far cry from Bell's heavy involvement in David Tyler's drug trade. *See Bell*, 113 F.3d at 1350.

As the District Court noted, if evidence that Willie knew Proctor had previously served as an informant was enough to establish the necessary intent, any murder of a known informant could become a federal crime. That approach would allow the Government to circumvent the federal nexus requirement of the official proceeding provisions, permitting federal prosecution of a murder intended only to prevent state court testimony. The District Court was correct in vacating Willie Tyler's conviction due to the absence of proof necessary for the jury to find the essential element of intent. I therefore respectfully dissent and would affirm.[8]

[8] I concur in the judgment as to Willie Tyler's cross appeal, case number 17-2613. Although I would not find the basis for the appeal moot, I agree with the Majority that our precedent forecloses his argument.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	1:96-cr-106
	:	
v.	:	
	:	Hon. John E. Jones III
WILLIE TYLER,	:	
Defendant.	:	

MEMORANDUM & ORDER

February 14, 2018

Presently pending before the Court is Defendant Willie Tyler's ("Willie")[1] post-trial motion for judgment of acquittal. (the "Motion") (Doc. 537). The Motion has been fully briefed (Docs. 538, 552, 555, 557) and is therefore ripe for our review.

I. BACKGROUND

This matter has a lengthy and complex procedural history, of which the parties are undoubtedly familiar. We will limit our recitation of the facts to those relevant to the subject of the instant Motion – Willie's most recent federal jury trial.

In July 1992, state authorities arrested Willie, along with his brother David Tyler ("Tyler") and Roberta Bell ("Bell"), for murder and related offenses in

[1] Because Willie Tyler's brother, David Tyler, is integral to the facts presented at trial, and another key person is David King, we refer to the Defendant as "Willie" and his brother as "Tyler" to avoid confusion from using "Tyler" or "David" more than once. We intend no disrespect nor imply familiarity with the Defendant in referring to him by his first name.

connection with the April 1992 death of Doreen Proctor ("Proctor"), a law enforcement informant. Proctor was a Commonwealth witness in the prosecution of Tyler for a drug trafficking offense, and she had been scheduled to testify the day of her murder. Tyler was convicted of Proctor's murder, Bell was acquitted, and Willie was acquitted of homicide charges but was convicted of witness intimidation. After serving his state sentence of imprisonment for witness intimidation, on April 17, 1996, Willie was charged with federal offenses relating to Proctor's murder.

Following two prior jury trials, appeals, post-conviction petitions, and intervening changes in interpretation of the law, and after the case's initial assignment to our now retired colleague, the Honorable William W. Caldwell, Willie's third federal jury trial commenced before this Court on July 12, 2017. On July 18, 2017, Willie was found guilty of witness tampering by murder in violation of 18 U.S.C. § 1512(a)(1)(C) ("Count II") and witness tampering by intimidation in violation of 18 U.S.C. § 1512(b)(3). ("Count III"). Count II carries a mandatory sentence of lifetime imprisonment. 18 U.S.C. § 1111. Willie filed a timely post-trial motion for judgment of acquittal pursuant to Federal Rule of Criminal Procedure 29. ("Rule 29") (Doc. 537). The Motion is now ripe for disposition.

II. LEGAL STANDARD

Pursuant to Rule 29, in ruling on a post-verdict motion for judgment of acquittal, a district court must "review the record in the light most favorable to the prosecution to determine whether any rational trier of fact could have found proof of guilt beyond a reasonable doubt based on the available evidence." *United States v. Wolfe*, 245 F.3d 257, 262 (3d Cir. 2001). The court is required to "draw all reasonable inferences in favor of the jury's verdict." *United States v. Anderskow*, 88 F.3d 245, 251 (3d Cir.1996). A finding of insufficiency should "be confined to cases where the prosecution's failure is clear." *United States v. Leon*, 739 F.2d 885, 891 (3d Cir. 1984). A district court must be careful "not to usurp the role of the jury by weighing credibility and assigning weight to the evidence, or by substituting [its] judgment for that of the jury." *United States v. Brodie*, 403 F.3d 123, 133 (3d Cir. 2005) (*citing United States v. Jannotti*, 673 F.2d 578, 598 (3d Cir. 1982)) (en banc).

III. DISCUSSION

Willie argues that the record, reviewed carefully and viewed in the light most favorable to the Government, does not provide a sufficient basis to find him guilty beyond a reasonable doubt on either Count II or III. We begin our analysis with a review of the elements for each offense. The jury found Willie guilty of 18 U.S.C. § 1512(a)(1)(C) and (b)(3). Both offenses require four elements to be

satisfied in order to sustain a verdict of guilty, and three of those elements are identical for each. The first element in each offense involves the actions of the defendant and the latter three elements pertain to the defendant's intent.

The first element of Count II, witness tampering by murder, is that Willie "kill[ed] or attempt[ed] to kill another person." 18 U.S.C. § 1512(a)(1). To establish this first element, the jury had to find that the evidence supported the three underlying elements of murder beyond a reasonable doubt, namely: (1) Willie unlawfully killed Proctor as charged; (2) Willie acted with malice aforethought; and (3) Willie acted with premeditation. *See* 18 U.S.C. § 1111. The first element of Count III, witness tampering by intimidation, is that Willie "knowingly use[d] intimidation, threaten[ed], or corruptly persuade[d] another person, or attempt[ed] to do so, or engage[d] in misleading conduct toward another person." 18 U.S.C. § 1512(b).

The Government argued that the jury could find either that Willie murdered Proctor or that he aided and abetted Tyler and Bell in her murder. For the jury to find Willie guilty of the elements of murder based on aiding and abetting, the evidence must satisfy four elements: (1) someone else committed the offense charged, namely, the murder of Proctor; (2) Willie knew that the murder was going to be committed or was being committed; (3) Willie knowingly did some act for the purpose of aiding, assisting, facilitating or encouraging the others in the murder

and with the intent that they commit the murder; and (4) Willie performed an act in furtherance of the murder. *See* Third Circuit Model Criminal Jury Instructions 7.02.

The latter three elements of each charge under 18 U.S.C. § 1512 relate to the defendant's intent and are as follows: (2) the defendant acted with an intent to prevent a communication; (3) the communication would concern the commission or possible commission of a federal offense; and (4) the communication would be addressed to "a law enforcement officer or judge of the United States." 18 U.S.C. § 1512(a)(1)(C) and (b)(3); *see also Fowler v. United States*, 563 U.S. 668, 672 (2011).

In his Motion, Willie argues that the trial evidence was insufficient for a jury to find beyond a reasonable doubt that the action element was satisfied for Count II, witness tampering by murder, and that the latter three intent elements were likewise unsatisfied for either count. Following Willie's lead, we shall begin our discussion with the action element of Count II, namely, the underlying offense of murder. We will then analyze the latter three elements for each offense.

A. Count II – Action Element

Willie argues that the trial evidence concerning the murder of Proctor, even when viewed in the light most favorable to the Government, cannot support a finding that Willie knowingly engaged in or aided and abetted the murder of

Proctor. The Court has thoroughly reviewed the factual testimony offered at trial, with a particular eye towards the evidence offered to support a finding of Willie's involvement.[2] We will first summarize the pertinent evidence presented to prove that Willie knowingly engaged in or aided and abetted the murder of Proctor, and then analyze the sufficiency of that evidence in light of the jury verdict.

1. Trial Evidence of Willie's Action

The Government's first relevant fact witness to testify was Gwanda Campbell. On direct examination, Campbell testified that on the day prior to Proctor's murder, April 20, 1992, she was at the house of Mary Jane Hodge with Willie. (Tr. 175).[3] She testified that she and Willie drove to the store to get Hodge a soda and ended up picking up Willie's brother, David Tyler. (*Id*.). Campbell testified that while the three of them were driving, they spotted Proctor and Tyler and that Willie said something to the effect of "they were going to do something to her then, but there were too many cars." (Tr. 177:19-20). She testified that the three then returned to Hodge's house. (Tr. 178). Tyler walked to the back of the house and picked something up "and he asked Willie did he know how to cock it." (Tr. 178:19-20). Campbell testified that Tyler was holding a long gun and Willie

[2] Willie did not dispute at trial, and the evidence presented unequivocally demonstrated, the circumstances and causes of Proctor's death. The Government recounts testimony relating to this in their brief in opposition to the Motion (Doc. 552, pp. 5-9), but we will focus on the factual evidence offered in support of who committed the murder as relevant to the Motion.

[3] Citations to the transcript of the proceedings shall be made as Tr. followed by the page number and, when applicable, line numbers.

cocked it. (Tr. 179). She then got scared and hurried inside of the house. (*Id*.). Campbell testified that Hodge was in the home, as well as Jerry King and David King, who are Roberta Bell's uncles. (Tr. 182). She further testified that Willie and Tyler eventually left the house, and, after some time, Jerry and David King left as well. (Tr. 187). While at Hodge's house, Campbell observed several phone calls. Roberta Bell, Tyler's girlfriend, first called Hodge. (Tr. 187). Tyler then called Hodge. (Tr. 188). Campbell testified that she spent the night at Hodge's house and that Willie returned in the morning and stated, "[t]he bitch is gone." (Tr. 194:5-6). An hour later, Tyler returned in a purple suit for court that morning and said, "I'll be at court and that bitch won't." (Tr. 194:13-14).

On cross examination, Campbell was presented with prior testimony from 1996 where she testified that she did not see Willie cock the gun at Hodge's house, but that she heard the gun cock. (Tr. 195). She was asked on cross-examination about her testimony that Willie returned in the morning and said "the bitch is gone." (Tr. 198). Defense counsel asked, "[t]hat statement was actually made by David Tyler, wasn't it?" and Campbell responded "I really can't recall." (Tr. 198:18-19). Defense counsel presented Campbell with her prior sworn testimony that all Willie said when he returned was simply "that he had to drive Mary Jane's car back to Gettysburg." (Tr. 199:3-4). On re-direct examination, Campbell testified that she remembered Willie "coming in saying something - - like I said, I

can't really recall, but I just know he said something like, she's gone." (Tr. 201:11-13).

The next relevant fact witness offered by the Government was Mary Jane Hodge. Hodge testified that on April 20th, 1992, she was driving around with Campbell when she saw David Tyler, David King, Jerry King, and Roberta Bell in front of a bar in a gray car. (Tr. 208). She continued driving and saw Willie standing on the corner. (*Id*.). Hodge testified that she told Willie, "your brother's in town" and gave him a ride to his brother. (Tr. 208:16). Willie and Tyler talked, and then Willie got in the car with Hodge and Campbell and went back to Hodge's house. (Tr. 208). At a later point, Willie and Campbell left to get Hodge a soda from the store. (Tr. 209-210). When they returned, they stayed out back for a moment and Campbell came in the back door visibly shaken up. (Tr. 210). Campbell told Hodge that she saw a gun. (*Id*.). Still later, Willie left with Tyler and Jerry King left as well. (Tr. 212-213).

Hodge testified that Roberta Bell came to her house later that night. (Tr. 213). Bell told Hodge that she was at Proctor's house and "could have killed her right there, but then her daughter was there, and she would have had to kill her daughter, too." (Tr. 214:1-2). Bell was "waiting on drugs," which were to be used to "lure" Proctor out of her apartment, and then Bell left. (Tr. 214-216).

Later in the evening, Tyler called Hodge and "said he lost" Bell due to the fog and asked Hodge to give Bell his phone number if she called the house. (Tr. 216). Bell then called Hodge from a car phone and "she said, I have her," referring to Proctor. (Tr. 217-218). David King, who was at Hodge's house, then called Bell back and gave her the phone number for Tyler. (Tr. 217-219). Hodge testified that the next morning, Tyler returned to the house and said "she's gone." (Tr. 220:6). Hodge testified that she did not see Willie that morning. (Tr. 220:11). Though the timeline was unclear, Hodge testified that at some point, Jerry King and Willie were sitting in her living room and "Jerry was saying how sloppy it was. He said it was a sloppy job they did, he said, because where he came from, they use binoculars and a time watch." (Tr. 212:4-6).

On cross-examination, defense counsel presented Hodge with her prior sworn testimony regarding the statement from Jerry King; in 1992, Hodge had testified that nobody was present when Jerry King discussed that it was a "sloppy" job. (Tr. 224). Defense counsel also presented Hodge with other examples of times where she lied; Hodge admitted that she lied when she initially spoke to state troopers in 1992 and lied when she previously testified under oath that she did not hear any conversations between any of the defendants. (*See,* Tr. 228, 230). She also admitted to lying under oath at her trial in January 1992 when she denied selling drugs to Proctor. (Tr. 230).

The Government's next witness to testify as to Willie's involvement was Laura Barrett – this testimony was actually read into the record from a transcript of prior trial testimony. The Government attached the transcript as an exhibit to their brief in opposition to the Motion. (Doc. 552, Ex. 1). Barrett testified that Roberta Bell was like a daughter to her and that she watched her kids and was around Bell's house often. (*Id*. at 281). Barrett testified that, prior to April 20, 1992, there was a time where Willie, Bell, Tyler, Hodge, and Jerry and David King were all at Bell's house. (*Id*. at 282). Bell told Barrett that she could not stay at the house because "they were having a family meeting." (*Id*.).

Barrett testified that on April 20, 1992, Bell called her and asked if Barrett would watch her children. (*Id*. at 285). Barrett went to Bell's house and saw Tyler, David King, and Jerry King at the house. (*Id*. at 286). Barrett testified that the next morning, she saw Bell come in the back of the house with "an arm full of bloody clothes." (*Id*. at 287). Bell told Barrett that "if anybody asked [], she was home all night, to tell them that she was." (*Id*.).

Finally, Barrett testified regarding a conversation that she overheard between Bell, Willie, and Tyler sometime after April 21, 1992. The three were arguing because Tyler gave Willie some drugs that he was supposed to give to Jerry King. (*Id*. at 289). Barrett testified, "I heard [Bell] tell David that she shot [Proctor]." (*Id*.). She testified that Bell said to Willie, "I shot [Proctor] but you

killed her" and that Willie then said "[y]ou don't know who's listening. You don't know who hears this" and left. (*Id*., at 290). Tyler then said to Bell, "I knew this shit was going to happen." (*Id*.). Barrett initially told police, and testified at Bell's first trial, that she and Tyler were at the house when she went to sleep and were there when she awoke, but did not relay any information regarding the bloody clothing or subsequent conversation. (Tr. 290-291). Defense counsel stressed that Barrett only overheard the conversation, rather than saw it, and thus could not positively identify to whom Bell was speaking when she stated that "you killed her."

The Government also presented Ola Woods. Woods has two children with Tyler. (Tr. 344). Woods testified that in 1992, she would receive phone calls from Bell to pass along to Tyler in prison. (Tr. 346). During one of those calls, Woods testified that Bell "told me to let David know that her and her uncles have their story together, and if worst comes to worst, to put it on Little Man." (Tr. 346:17-19). Woods made clear on cross-examination that "Little Man" is Willie Tyler. (Tr. 348:1-2). That was the extent of Woods' testimony.[4]

The Government also presented a portion of a letter written by Willie detailing his version of the events. The letter was Government Exhibit 18A. The letter is dated June 8, 1993 and is addressed to the sentencing judge in the state

[4] Indeed, the Court must express its curiosity as to the Government's purpose in presenting this witness at all, as her only effect was to cast doubt on its case.

court case in which he was acquitted of murder and found guilty of witness intimidation. The letter was certainly the clearest and most direct evidence of Willie's involvement. The parts of the letter introduced by the Government are as follows:[5]

> One night when I was at Mary Jane Hodge house, it was about 11:30 p.m. I was laying on the couch, watch TV half asleep. Mary and Gwanda came in the house, and she ask me to go to the store for her because she was expecting a telephone call. So I ask Gwanda out, she want to ride with me to the store to get a soda. That wasn't unusual because I had did that a number of time when I was live there.
>
> On my way there to the store, I run across my brother David. He ask me, he want me to take him someplace. That wasn't unusual, even because I always drove him different place. So I told him that I had to take Mary a soda and use the bathroom.
>
> When I got there, Jerry and David King was there, so when I went and use the bathroom upstair and came back down, Jerry had left. So on the way out the house, I ask him why did Jerry leave David King at the house, and he told me that they was going to pick him up because they had something to do.
>
> So he told me that he want me to take him across the mountain, that meant Gettysburg, because he had to pick up something from Mrs. Bell, and he didn't want Mary to know he was going to Mrs. Bell house. We wait at the fire station for Mrs. Bell, David, and Jerry for about 15-20 minute.
>
> So I follow them down 34 to Gettysburg that night. It was very foggy, and I had to drive slow, and we got lost. So David told me to stop at the High store to use the phone, and he call someone, but I

[5] While the letter is difficult to decipher in its original form, there were no objections to the accuracy of the content read into the record at trial. We thus will use the transcript of a Government witness reading the letter into the record.

> don't know who. So we left there about five minute lately after he got another phone call.
>
> So we left there and went down by the bank in Biglerville. That where he told me Mrs. Bell was taking Jerry home and want us to meet her in Arendtsville because she had his court paper with her.
>
> So on the way to Arendtsville, he told me to pull over, and Mrs. Bell was behind us at that time, because I ask him where we was going. So Mrs. Bell got out of the car and came where we was at and said that I have her. So I ask David what was going on. He told me that Mrs. Bell had a surprise for him.
>
> After she left the car, I'm not sure, but I believe she had a gun. About five second after that, I hear a shot. I ask him what was going on, and he told me it wasn't my business. In about 10 to 15, I was drove off and I hear another shot.
>
> On the way back to Gettysburg, I told him I would have did that to you, and I left him in Gettysburg.

(Tr. 404-405). Finally, the Government also presented Craig Fenstermacher, a Pennsylvania State Police trooper at the time of Proctor's death, to testify as to certain facts. He testified that Bell lived in Gettysburg at the time of the homicide. (Tr. 331). He also testified that Willie and Tyler had a sister who resided in the Arendtsville area, near where Proctor's body was found. (Tr. 332-333). He also recounted phone records that confirmed that there were a series of phone calls made from High's Dairy Store in Biglerville, Pennsylvania, Hodge's house, and the car phone in the gray Marquis. (Tr. 335-339, 341-342). Other evidence demonstrated that the gray Marquis was associated with Jerry King and Bell and that it contained evidence that Proctor had been in the vehicle.

2. Analysis of Evidence Presented Against Willie

Each of the Government's primary fact witnesses presented testimony that was riddled with memory failures and material inconsistencies from prior testimony. Mary Jane Hodge and Laura Barrett each admitted to previously lying under oath. Defense counsel further impeached Mary Jane Hodge with other information, most notably that she went from facing the death penalty for her involvement in Proctor's death to two to four years for her cooperation to testify against the others. (Tr. 237). However, notwithstanding our concerns, we are mindful that case law is abundantly clear that "the district court may not make credibility determinations when it rules on a motion for judgment of acquittal." *United States v. Giampa*, 758 F.2d 928, 935 (3d Cir. 1985). The Supreme Court clearly instructs that the trial court "is not to weigh the evidence or assess the credibility of witnesses when it judges the merits of a motion for acquittal." *Burks v. United States*, 437 U.S. 1, 16 (1978). We therefore will accept the testimony of each of the Government's witnesses at trial in analyzing whether the evidence was sufficient to support a finding of guilt.

To reiterate, the Government bore the burden to prove beyond a reasonable doubt that Willie "kill[ed] or attempt[ed] to kill another person." 18 U.S.C. § 1512(a)(1). To establish this first element based on principal liability, the jury had to find Willie guilty of the underlying three elements of murder: (1) Willie

unlawfully killed Proctor as charged; (2) Willie acted with malice aforethought; and (3) Willie acted with premeditation. See 18 U.S.C. § 1111. Alternatively, the jury could have found that the first element was satisfied because Willie aided and abetted the murder of Proctor. *See* Third Circuit Model Criminal Jury Instructions 7.02. This still requires a finding beyond a reasonable doubt that Willie knew that the murder was being committed or would be committed, knowingly performed an act for the purpose of aiding, assisting, facilitating, or encouraging the others, in committing the murder, and performed an act in furtherance of the murder.

In the Motion, the defense argues that "[w]hile the evidence may permit a reasonable inference that David Tyler and Roberta Bell murdered Doreen Proctor, it does not permit such an inference for Willie Tyler." (Doc. 538, p. 8). The defense argues that "such a finding is purely speculative." (Doc. 538, p. 9).

Viewing the evidence in the light most favorable to the Government, and constrained by the jury's credibility determinations, we cannot hold that no "rational trier of fact could have found proof of guilt beyond a reasonable doubt based on the available evidence." *United States v. Wolfe*, 245 F.3d 257, 262 (3d Cir. 2001). The evidence supports a finding that Willie is guilty of the underlying offense of murder under accomplice liability. The Defendant admits that the evidence is sufficient to support a finding that Tyler and Bell murdered Doreen Proctor. (Doc. 538, p. 9). The first element of murder by accomplice liability is that

someone else committed the crime charged; Willie's concession therefore satisfies the first element in establishing Willie's guilt as an accomplice to Proctor's murder. *See* Third Circuit Model Criminal Jury Instructions 7.02.

The next element to establish in order to find Willie guilty of murder as an aider and abettor is that Willie knew that the murder was going to happen. *See* Third Circuit Model Criminal Jury Instructions 7.02. Campbell testified that Willie showed Tyler how to cock a gun on the night of the murder – the night before Proctor was to testify against Tyler. (Tr. 178-179). A reasonable inference to draw from this evidence is that Willie was aware of Tyler's intention to use that gun on Proctor. This is a particularly reasonable inference to draw in light of Campbell's testimony that Willie and Tyler saw Proctor while driving earlier and said "they were going to do something to her then, but there were too many cars." (Tr. 177: 19-20).

The last two elements are that Willie knowingly did some act for the purpose of aiding, assisting, facilitating or encouraging Tyler and Bell in committing the murder and with the intent that they commit the murder, and that Willie performed an act in furtherance of the murder. *See* Third Circuit Model Criminal Jury Instructions 7.02. The same evidence of showing Tyler how to cock the gun can be used to satisfy these elements. In addition, Willie admitted in his letter that he drove Tyler to the murder scene that night – although he claims that he was

unaware of what was going to happen. It was reasonable for the jury to conclude that by showing Tyler how to cock the gun and by driving Tyler to the murder scene, Willie twice acted to assist, facilitate, and encourage the murder and acted in furtherance of that murder. The jury chose not to credit Willie's assertion in his letter that he was unaware of what was going to happen when he was driving Tyler and we are duty-bound to respect that credibility determination.

Despite the foregoing, the evidence implicating Willie in Proctor's murder was manifestly quite thin, and consisted primarily of testimony that raised considerable credibility issues. As a result, we paid careful attention during trial in order to analyze whether the Government had met its burden in its case-in-chief to establish the underlying offense of murder in the first element of Count II. The conclusion that we drew then is the same that we make now – viewing all of the evidence in the light most favorable to the Government, and drawing all inferences in its favor, it is possible for a rational trier of fact to find that Willie knowingly killed Proctor or aided and abetted Tyler and Bell in her murder. With a strict legal standard of review at play, and a jury's duly-rendered guilty verdict before us, we must hold that the evidence was sufficient to support the jury's finding that the first element of Count II, as it incorporates the underlying offense of murder, was satisfied.

B. Intent Elements

As previously stated, the latter three elements of each offense under 18 U.S.C. § 1512 require that the evidence establish, beyond a reasonable doubt, that: (2) the defendant acted with an intent to prevent a communication; (3) the communication would concern the commission or possible commission of a federal offense; and (4) the communication would be addressed to "a law enforcement officer or judge of the United States." 18 U.S.C. § 1512(a)(1)(C) and (b)(3); *see also Fowler v. United States*, 563 U.S. 668, 672 (2011). Willie argues that the trial evidence cannot support his convictions under either count because it does not establish any of the three required intent elements beyond a reasonable doubt. (Doc. 538, p. 10). We will address each element in turn.

1. Intent To Prevent a Communication

First, Willie argues that the evidence does not support a finding that he killed or intimidated Proctor with an intent to prevent a communication; rather, Willie argues that the only evidence offered suggested that his intent was to prevent Proctor from testifying at the state trial against Tyler the next day. (*Id*.). As the parties recognize, Proctor's testimony at the state trial against Tyler the next morning is separate from an investigation-related communication and cannot form the basis of convictions against Willie. For both witness tampering by murder and

witness tampering by intimidation, the statute outlines several distinct types of intent:

> 18 U.S.C. § 1512
>
> (a) (1) Whoever kills or attempts to kill another person, with intent to—
> (A) prevent the attendance or testimony of any person in an official proceeding;
> (B) prevent the production of a record, document, or other object, in an official proceeding; or
> (C) 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 or a violation of conditions of probation, parole, or release pending judicial proceedings;
>
> [. . .]
>
> (b) Whoever 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—
> (1) influence, delay, or prevent the testimony of any person in an official proceeding;
> (2) cause or induce any person to—
> (A) withhold testimony, or withhold a record, document, or other object, from an official proceeding;
> (B) alter, destroy, mutilate, or conceal an object with intent to impair the object's integrity or availability for use in an official proceeding;
> (C) evade legal process summoning that person to appear as a witness, or to produce a record, document, or other object, in an official proceeding; or
> (D) be absent from an official proceeding to which such person has been summoned by legal process; or
> (3) 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 . . .

The statute contemplates conduct intended to "prevent the attendance or testimony of any person in an official proceeding" at § 1512(a)(1)(A) and (b)(1), which are separate subsections from the ones that Willie was charged with and was ultimately convicted under. *See* 18 U.S.C. § 1512(a)(1)(A) and (b)(1). Willie was charged with and convicted of § 1512(a)(1)(C) and (b)(3), which require a finding of a specific intent to prevent investigation-related communications. Even if Willie was charged with § 1512 under the sections that criminalize killing or intimidation with an intent to prevent attendance or testimony at an official proceeding, following the reasoning of the Supreme Court in *Arthur Andersen LLP v. United States*, 544 U.S. 696 (2005), the Third Circuit has made explicit that the "official proceeding" language of § 1512 requires a finding that the official proceeding was federal in nature. No one contends this is applicable to Proctor's testimony at Tyler's state trial. *United States v. Shavers*, 693 F.3d 363, 378 (3d Cir. 2012), *vacated on other grounds by Shavers v. United States*, 133 S. Ct. 2877 (2013).

The Government, therefore, needed to establish Willie's intent to prevent Proctor from making a communication separate from her testimony at Tyler's state trial. Willie argues that no evidence, direct or circumstantial, was introduced to support an inference that his intent was to prevent any communication other than Proctor's testimony against Tyler in state court. (Doc. 538, p. 11).

The Government counters that the evidence was sufficient for a rational jury to find that Willie killed Proctor with an intent to prevent a communication. The Government maintains that the "evidence presented at trial proved that Proctor had access to David Tyler and his associates, and that she was aware of their collective nefarious activities." (Doc. 552, p. 45). From this, the Government argues, "[t]he reasonable inference is that [Willie] and his accomplices knew that Proctor had information about their illegal activities" and "acted to prevent what they perceived to be the inevitable, that Proctor would continue to inform on their criminal activities, so long as she was their neighbor in Carlisle." (*Id*.). The Government points to just three facts in the record to support this contention: that Proctor was providing information about drug dealing to the authorities, that Barrett and Campbell referenced ongoing drug use on the night before Proctor's murder, and that Proctor obtained cocaine from Bell on the night of her death. (Doc. 552, 44-45).

In addition to the aforestated three facts proffered by the Government, we have scoured the record to determine the existence of evidence that tends to prove that Willie's intent was anything other than to prevent Proctor's testimony. We can find none. The Government relies exclusively upon Proctor's status as an informant as circumstantial evidence of Willie's intent to prevent an investigation-

related communication; we will thus look to the evidence of Proctor's activities as an informant.

To start, and most obviously, we reiterate that the evidence firmly established that Proctor was scheduled to testify at the state court trial of Tyler the morning of her death. (Tr. 87). Detective David Fones testified that Proctor was "due to testify in court proceedings, and she was also providing information and intel of drug dealing that she knew was going on at the time." (Tr. 88). Proctor had also testified at the state court preliminary hearings of Mary Jane Hodge, Jerome Butchie Evans, Cindy Brooks, and David Tyler after making controlled purchases of cocaine from them. (Tr. 83-86, 125-126). Proctor testified at the state court jury trial of Hodge in January 1992 and Hodge was ultimately convicted. (Tr. 96). Proctor's identity as a police informant was therefore known at the time of her murder. The Government presented evidence that Bell sold cocaine to Proctor on the night of her murder even with the knowledge of her status as an informant, suggesting that Proctor had ongoing information that could be used to implicate Tyler and his associates. (Tr. 214-216).

Beyond the timing of Proctor's murder and her actions as an informant against members of Willie's group of friends, the only evidence relating to the intent behind Proctor's murder comes from the testimony of Campbell and Hodge – and, indeed, their testimony does not support an inference that Willie's intent

was something other than to prevent Proctor's testimony. To reiterate, Campbell testified that Willie returned to Hodge's house the morning after Proctor's murder – the morning of Tyler's state court trial – and said, "[t]he bitch is gone." (Tr. 194:5-6). She further testified that Tyler returned to Hodge's house an hour later dressed for court and said, "I'll be at court and that bitch won't." (Tr. 194:13-14). Hodge also testified that Tyler returned to her house that morning and said "she's gone." (Tr. 220:11).

The foregoing is the full extent of the evidence offered to prove intent at Willie's trial. The Government has not directed us to any other portion of the record, and our comprehensive review of all the testimony has yielded no other evidence, from which a jury could infer intent. Willie argues that "the evidence proved nothing more than that she was murdered for one purpose, and one purpose only: to prevent her from testifying against David Tyler in the County of Common Pleas of Cumberland County in April 1992." (Doc. 538, p. 10). The Government reasons, "even if a portion of their motivation and intent was to prevent her from testifying, it is not mutually exclusive to their larger goal of preventing her from communicating with law enforcement" as "they were also aware that she necessarily had ongoing relationships and contacts with law enforcement officers." (Doc. 552, p. 44).

Though we agree that a defendant can have multiple intentions behind his actions, we are now tasked with determining whether this evidence, viewed in a light most favorable to the government, was sufficient for any rational trier of fact to find beyond a reasonable doubt that Willie acted with an intent to prevent a communication. As we have already held, the evidence was sufficient to support a finding that Willie was involved with Proctor's murder in some capacity; as heinous and deplorable as this is, convictions under 18 U.S.C. § 1512(a)(1)(C) and (b)(3) require a finding that the specific intent of Willie's actions was to prevent investigation-related communications. This intent requirement is what makes § 1512 a federal crime and provides the very reason that the federal government was permitted to bring charges against Willie even after he was acquitted of homicide charges in state court for the same conduct. Put another way, without this specific intent requirement, the proceedings before us would have merely been a retrial on charges virtually identical to those for which Willie had been acquitted.

As aforementioned, this intent is separate from an intent to prevent a person from testifying at an official proceeding; the Government cannot subvert the federal requirement for the "official proceeding" subsections of § 1512 by morphing a state proceeding into a general investigation-related communication. To allow Willie's convictions to stand based upon evidence that is anything less than sufficient to establish guilt beyond a reasonable doubt that he intended to

prevent a communication other than Proctor's testimony at Tyler's trial would, in practicality, sidestep double jeopardy restrictions and allow him to be convicted purely for homicide when, as noted, he had already been acquitted of that charge.[6]

The timing of Proctor's murder and Tyler's statement that the "bitch" would not be at court point only to an inference that Willie killed Proctor to prevent her testimony at his state court proceeding – an inference that cannot be used to support the intent requirement for the investigation-related communication provisions. Apart from that, the only evidence offered to prove the relevant specific intent was Proctor's known status as an informant with information that could implicate Willie's brother and friends. The Government built off of Proctor's status as an informant and adduced much evidence to support the third intent element that Proctor would have made a relevant communication to a federal officer; yet, a review of the record makes clear that evidence to prove the crucial threshold intent to prevent that hypothetical future communication was severely lacking. Were we to hold that evidence that the defendant knew that the victim was

[6] It is worthwhile to note that Willie moved to dismiss the federal indictment on the grounds of double jeopardy. (Doc. 375). Our now retired colleague Judge Caldwell denied the motion based on well-established law that prosecution of the same crime in both federal and state systems is not violative of the Double Jeopardy Clause, and based upon clear instruction from the Third Circuit to conduct a retrial. (Doc. 412). The Third Circuit summarily affirmed. (Doc. 431). Willie filed a petition for a writ of certiorari with the Supreme Court on July 27, 2017. (Supreme Court No. 17-5410). The Supreme Court ordered a response from the Government and has scheduled the case for distribution for conference. The Constitutional Accountability Center, in partnership with the Cato Institute, has filed an amici curiae brief in support of Willie. The National Association of Criminal Defense Lawyers also filed an amici curiae brief in Willie's support, as well as a group named only as "Law Professors."

an informant with implicating information against his friends and family was sufficient to prove this specific intent, we would essentially eviscerate any intent requirement at all and would allow federal witness tampering convictions against virtually all homicides of state and local police informants.

Based on the evidence presented, an inference that Willie acted with the distinct intent to prevent an investigation-related communication is far too speculative to withstand judicial review. At the end of the day, it is clear that Proctor was murdered because she was going to testify the next morning against Tyler. Though an atrocious crime, it is one that falls under the purview of state charges unless the evidence can satisfy the specific intent element that brings it under the ambit of the federal witness tampering statute. Even in the face of the incredibly high standard of review for a Rule 29 post-trial motion for judgment of acquittal, we cannot hold that this evidence was sufficient to support any rational trier of fact to find guilt beyond a reasonable doubt for this element. This finding of intent was a necessary element for each of Willie's convictions under § 1512. We therefore must grant the Motion on this basis and vacate both of his convictions.

Though our holding that the evidence could not support a finding that Willie acted with an intent to prevent a communication is determinative, for the sake of clarity and completeness, we address the defense's arguments regarding the latter

two elements as well. In doing so, we have found an additional basis on which to vacate Willie's convictions.

2. Communication Concerning a Federal Offense

Willie next argues that even if he intended to prevent a communication, the evidence was insufficient to prove that the communication would concern the commission or possible commission of a federal offense. To this end, Willie argues that there was no evidence presented at trial to prove that Proctor would provide any communication of a *federal* offense, namely, interstate drug trafficking. (Doc. 538, p.11). Further, the defense maintains that the record is devoid of any evidence that Willie was aware of any interstate drug dealings, negating any alleged intent of Willie to prevent a communication regarding a federal offense. (Doc. 538, p. 12). The defense concedes "the record would support the inference that Willie Tyler knew about the allegations of David Tyler's ***local*** drug dealings," but the defense argued at trial that Tyler's drug dealings would not ultimately be prosecuted as federal offenses. (Doc. 538, p. 12) (emphasis in original).

The Government responds by pointing to the testimony from Gregory Lee, a retired agent with the Drug Enforcement Agency ("DEA"), that cocaine sold in Pennsylvania necessarily originated from outside of the country. (Tr. 510). The Government further presented testimony from DEA Special Agent David Keith Humphreys that he has "handled a multitude of [] cases and generally they are

small buys, and we try to make multiple buys in order to develop the case." (Tr. 353). He also testified that the distribution of *any* quantity of cocaine is a violation of the federal Controlled Substances Act. (Tr. 353). The Government presented substantial evidence to the jury concerning the DEA's process of selecting drug cases to prosecute and how a local drug investigation could transform into a federal prosecution. The jury thus accepted the Government's theory that Proctor would have made a communication concerning a federal offense because Tyler's drug activity constituted a potential federal offense.

The Government does not respond to Willie's assertion that this element was not satisfied because there was no evidence that Willie was aware of any of Tyler's interstate drug activities, but we can easily dispose of this argument. We find no indication that convictions under § 1512(a)(1)(C) and (b)(3) require a finding that the defendant was aware that the underlying offense was actually federal in nature – indeed, most lay people would not know what type of conduct constitutes a state or local crime as opposed to a federal offense. Moreover, in *United States v. Tyler*, the Third Circuit recited this element as requiring proof "that offense was actually a federal offense," without reference to the defendant's knowledge of the federal status. 732 F.3d 241, 252 (3d Cir. 2013) (*citing United States v. Stansfield*, 101 F.3d 909, 919 (3d Cir. 1996)). We therefore find that sufficient evidence supported

the jury's finding that the communication concerned the commission or possible commission of a federal offense, satisfying this element for both counts.

3. Communication Made to a Federal Law Enforcement Officer

Finally, assuming *arguendo* that Willie intended to prevent a communication and that communication concerned a federal offense, Willie argues that the evidence does not support a finding that Willie killed Proctor with an intent to prevent a communication to a *federal* law enforcement officer. (Doc. 538, p. 12). This argument is multifaceted. Willie first argues that this element cannot be satisfied because the evidence pointed to potential future communications to one specific non-federal law enforcement officer – Detective David Fones of the Carlisle Police Department. (Doc. 538, p. 14). With the evidence pointing to one specific law enforcement officer, Willie argues that the standard elucidated in *Fowler v. United States*, 663 U.S. 668 (2011), and relied upon by the Government's theory of the case, is inapplicable. (Doc. 538, pp. 12-18). Next, Willie argues that the evidence was insufficient to support a finding that he killed Proctor with an intent to prevent a communication to a federal law enforcement officer even under the *Fowler* standard because there was not a reasonable likelihood that a relevant communication would have been made to a federal officer. (Doc. 538, pp. 19-30).

The Government does not and cannot argue that Detective Fones was a federal law enforcement officer. Rather, the Government disputes Willie's contention that the *Fowler* analysis cannot apply where the defendant had a specific law enforcement officer in mind. (Doc. 552, p. 46). The Government argues that the existence of a "'known individual' with whom Proctor communicated" is not "mutually exclusive" with the application of *Fowler*. (*Id*.). The Government's theory at trial, and its present argument to uphold Willie's convictions, relies exclusively on an application of the "reasonable likelihood" analysis of *Fowler*.

Applying *Fowler*, the Government points to myriad evidence from which the jury could conclude that there was a reasonable likelihood that Proctor would have made a relevant communication to Detective Fones, who would then have put her in touch with fellow officer Ronald Diller. (Doc. 552, pp. 28-31). The Government then points to testimony regarding Diller's connection with federal law enforcement to argue that the jury could reasonably conclude that Diller was an "adviser or consultant" that qualifies as a federal law enforcement officer for purposes of § 1512. (*Id*.). In addition, the Government points to evidence presented to suggest that it was reasonably likely that Diller would then put Proctor in communication with DEA Special Agent Humphreys, who was a federal law enforcement officer by definition. (Doc. 552, p. 35).

We begin with a discussion of *Fowler*. In *Fowler v. United States*, the Supreme Court considered the "law enforcement officer . . . of the United States" element of the witness tampering by murder statute. 563 U.S. 668 (2011). The underlying facts of the case concerned a defendant who was with a group of men one evening discussing their plan to rob a bank. *Id*. at 670. When a local police officer came upon the group and addressed one of the men by name, the defendant shot and killed him. *Id*. The defendant challenged his conviction under § 1512(a)(1)(C), arguing that the evidence was insufficient to show that he intended to prevent a communication with a federal officer. *Id*., at 670-671.The Court vacated the defendant's conviction and remanded, revealing a new interpretation of the law and holding that, in order to establish the federal law enforcement officer requirement of § 1512, "the Government must show *a reasonable likelihood* that, had, *e.g.*, the victim communicated with law enforcement officers, at least one relevant communication would have been made to a federal law enforcement officer." *Id*. at 678 (emphasis in original). Writing for the majority, Justice Breyer outlined the scope of the Court's discussion several times:

> "We focus on instances where a defendant killed a person with an intent to prevent that person from communicating with law enforcement officers in general but where the defendant did not have federal law enforcement officers (or any specific individuals) particularly in mind." *Id*. at 670.

> "The question here is how this language applies when a defendant (1) kills a victim, (2) with an intent (a) to prevent a communication (b) about the commission or possible commission of a federal offense but (c) *to law enforcement officers in general rather than to some specific law enforcement officer or set of officers which the defendant had in mind*." *Id*. at 672 (emphasis in original).
>
> "And we must consequently decide what, if anything, the Government must show about the likelihood of a hypothetical communication with a federal law enforcement officer in circumstances where the defendant did not think specifically about any particular communication or recipient." *Id*. at 673.
>
> "The Government will already have 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." *Id*. at 674.
>
> "We consequently hold that (in a case such as this one where the defendant does not have particular federal law enforcement officers in mind) the Government must show a *reasonable likelihood* that, had, *e.g*., the victim communicated with law enforcement officers, at least one relevant communication would have been made to a federal law enforcement officer." *Id*. at 677 (parentheses and emphasis in original).

The Court, therefore, made it exceedingly clear that the "reasonable likelihood" analysis was limited to the specific circumstance where the defendant did not have "*some specific law enforcement officer or set of officers*" in mind. *Id*. at 672 (emphasis in original). The Third Circuit has recognized in dicta that *Fowler* was concerned with situations where the victim had not yet communicated with law enforcement; in *United States v. Tyler*, the Third Circuit stated, "[n]evertheless, just as *Fowler* specifically noted that § 1512 reaches conduct that

occurs before the victim had any communications with law enforcement officers . . .” 732 F.3d 241, 252 (3d Cir. 2013). The Government argues that this circumstance is not mutually exclusive with a situation where the defendant had a particular set of officers or a “known individual” in mind; the Government maintains that the *Fowler* analysis can apply even when the defendant did have a specific law enforcement officer or set of law enforcement officers with whom he wished to prevent the victim from communicating. (Doc. 552, p. 46). We disagree.

Not only did the Court in *Fowler* specifically delineate the circumstances to which their analysis applies, but it distinguished those circumstances from the situation where a defendant did have a known individual in mind: “When the defendant has in mind a particular individual or particular set of individuals with whom he fears the victim might communicate, the application of the statute is relatively clear.” *Fowler*, 563 U.S. at 672. The Court goes on to discuss the *alternative* instance “when the crime takes place before the victim has engaged in any communication at all with law enforcement officers – at a time when the precise communication and nature of the officer who may receive it are not yet known.” *Id*. at 673.

The Court created the “reasonable likelihood” standard for this situation because the application of the statute to these circumstances was unclear, not as an additional avenue to obtain convictions in the circumstances where the application

already "fits like a glove." *Id*. at 672. The Government's proposed interpretation of *Fowler* gives prosecutors a second bite at the apple and would allow the Government to bypass their burden to prove all criminal elements beyond a reasonable doubt; where the evidence points to identifiable officers with whom the victim would communicate, but they are unable to prove beyond a reasonable doubt that the officers qualified as law enforcement officers of the United States, they can instead illustrate a "reasonable likelihood" of communication with a hypothetical federal officer. We cannot agree that this was the Court's intent.

To read *Fowler* as creating an additional pathway to convictions under § 1512 in all circumstances would ignore the Court's express concern not to broaden the scope of the statute beyond its original purpose – a concern that it articulated numerous times in its opinion. In determining what level intent is required by statute, the Court cautioned that "to allow the Government to show no more than the broad indefinite intent . . . would 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." *Id*. at 675. Later in its opinion, the Court warned against a standard that "would transform a federally oriented statute into a statute that would deal with crimes, investigations, and witness tampering that, as a practical matter, are purely state in nature." *Id*. at 677.

The *Fowler* Court also noted with caution the "frequent overlap between state and federal crimes" and the "federal-state balance in the prosecution of crimes." *Id*. (quoting *Jones v. United States*, 529 U.S. 848, 858 (2000)). These dual-sovereignty concerns are not lost on us. The scope of the federal criminal law is significantly more expansive than it once was. A task force of the American Bar Association on the Federalization of Criminal law commented back in 1998, "[t]he expanding coverage of federal criminal law, much of it enacted in the absence of a demonstrated and distinctive federal justification, is moving the nation rapidly toward two broadly overlapping, parallel, and essentially redundant sets of criminal prohibitions, each filled with differing consequences for the same conduct." James A. Strazzella, The Federalization of Criminal Law: Task Force on Federalization of Criminal Law, 1998 A.B.A. Sec. Crim. Just., p. 55. That expansion has only continued in the recent years. Courts must be ever vigilant not to permit a statute designed for specific federal circumstances to be so portable as to gift authorities with a "do-over" when state prosecutions fail.

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 § 1512, we hold that the evidence presented did not bring the *Fowler* "reasonable likelihood" standard into play. The trial evidence demonstrated that Proctor's status as an informant was known and that she reported to Detective Fones of the

Carlisle Police Department. (Tr. 78-80). Assuming that the evidence was sufficient to prove that Willie killed Proctor with an intent to prevent an investigation-related communication, that intent was directed towards a "particular communication or recipient," namely, the law enforcement officers with whom Proctor was working as an informant. *Fowler*, 563 U.S. at 673. This was not a situation "when the crime takes place before the victim has engaged in any communication at all with law enforcement officers." *Id*. The evidence demonstrated that Proctor's status as an informant was known and that she was in communication with state law enforcement, subsequently testifying at preliminary hearings and trials in state court. (Tr. 83-86, 96, 125-126). The application of the statute for this situation "fits like a glove," rendering the *Fowler* "reasonable likelihood" standard inapplicable. *Fowler*, 563 U.S. at 672.

The Government cannot bypass its burden to prove beyond a reasonable doubt that the communication would be made to a federal law enforcement officer simply because the only officers in mind were not federal. The Government's interpretation that *Fowler* allows for alternative ways to prove the elements of § 1512 is inconsistent with concerns regarding scope and dual-sovereignty, and the general notion that the "beyond a reasonable doubt" burden applies to all elements of criminal prosecutions. The Government's interpretation stretches the law to the point of breaking. *Fowler* created a legal standard specifically to deal with the

problem of determining whether unknown officers were federal. Allowing the "reasonable likelihood" standard and "would've, could've, should've" evidence to support a conviction under any instance would secure federal convictions anytime drug trafficking crimes were at issue.

Because the evidence, assuming that it demonstrated an intent to prevent a communication, pointed only towards an inference that Willie had specific law enforcement officers and specific communications in mind, this element cannot be met using the hypothetical "reasonable likelihood" standard. The jury was instructed using the "reasonable likelihood" standard, which would usually require a new trial for a jury to consider the evidence in light of the proper legal standard. However, the Government did not introduce any evidence from which a rational trier of fact could have concluded that Detective Fones was a federal law enforcement officer, nor does it attempt to argue that to be the case. Rather, the evidence demonstrated that the officer with whom Proctor worked with as an informant was Detective Fones and that he was a state police officer. (Tr. 88). We therefore conclude that even if the evidence could have supported a finding by a rational trier of fact that Willie acted with an intent to prevent an investigation-related communication, we would nonetheless be required to vacate his convictions for a lack of evidence to prove this element under either subsection of § 1512.

IV. CONCLUSION

We do not view this result as an instance where strict legal interpretation yields injustice; in fact, we believe the opposite to be the case. Willie Tyler faced a murder charge for his actions in state court alongside his brother, and was acquitted of that crime. After serving his sentence for the lesser offense of witness intimidation, he was indicted under the federal witness tampering statute. He has since endured three federal trials for the exact same conduct, all the while fighting through the appellate and post-conviction relief process to correct legal errors in his first two trials. He has spent the entirety of this time, over twenty years, in federal prison.

Intervening changes in the law make crystal clear that Willie cannot be found guilty of witness tampering for an intent to prevent Proctor from testifying at the state proceeding, leaving the investigation-related communications provision of 18 U.S.C. § 1512 the only avenue for Willie to be convicted. *See United States v. Tyler*, 732 F.3d 241, 250-251 (3d Cir. 2013). In consideration of the scant evidence offered at trial pertaining to Willie's intent, and the Supreme Court's deliberate caution not to "extend[] the scope of this federal statute well beyond the primarily federal area that Congress had in mind," we hold that no rational trier of fact could have found that Willie acted with intent to hinder, delay, or prevent a

communication concerning the commission of a federal offense to a law enforcement officer of the United States. *Fowler*, 563 U.S. at 675.

To hold otherwise on this record would allow federal authorities to transform any witness tampering on a state level into a federal offense. An 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. By any measure, Willie's involvement in the senseless killing of Proctor is inexcusable. But a federal court is not a forum for the do-over of a failed state court prosecution. If the Government chooses a path such as it has in the case at bar, it must strictly adhere to its burden to prove the elements of the offenses charged beyond a reasonable doubt. This it has not done. The tragic death of Doreen Proctor, and the long and tortuous federal prosecution of Willie Tyler that ensued after his acquittal in state court have resulted in a saga that calls to mind Captain Ahab futilely pursuing Moby Dick in *The Whale*. Our task is to end this narrative and do justice, joyless though it may be.

After an acquittal of murder in state court, a state sentence served for witness intimidation, three federal trials, countless appeals and post-conviction petitions, and more than two decades in federal prison, we will now grant the Defendant's motion for judgment of acquittal and vacate his convictions under 18 U.S.C. § 1512(a)(1)(C) and (b)(3).

NOW, THEREFORE, IT IS HEREBY ORDERED THAT:

1. The Defendant's post-trial motion for judgment of acquittal (Doc. 537) is **GRANTED**.
2. The Defendant's convictions for witness tampering by murder in Count II and witness tampering by intimidation in Count III are hereby **VACATED**.

s/ John E. Jones III
John E. Jones III
U.S. District Judge

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 18-1319

UNITED STATES OF AMERICA,

Appellant

v.

WILLIE TYLER,

(D.C. No. 1-96-cr-00106-001)

SUR PETITION FOR REHEARING

Present: SMITH, Chief Judge, McKEE, AMBRO, CHAGARES, JORDAN, HARDIMAN, GREENAWAY, JR., SHWARTZ, KRAUSE, RESTREPO, BIBAS, PORTER, MATEY, PHIPPS, *SCIRICA, and *RENDELL, Circuit Judges

The petition for rehearing filed by Appellee in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the

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*Hon. Anthony J. Scirica and Hon. Marjorie O. Rendell vote are limited to panel rehearing only.

panel and the Court en banc, is denied.

BY THE COURT,

s/Patty Shwartz
Circuit Judge

Dated: July 2, 2020
ARR/cc: SRC; CDM; RAK; QMS

18 U.S.C. § 1512 – Tampering with a witness, victim, or an informant

***

(a)(1) Whoever kills or attempts to kill another person, with intent to--

> (A) prevent the attendance or testimony of any person in an official proceeding;
>
> (B) prevent the production of a record, document, or other object, in an official proceeding; or
>
> (C) 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 or a violation of conditions of probation, parole, or release pending judicial proceedings;

shall be punished as provided in paragraph (3).

(2) Whoever uses physical force or the threat of physical force against any person, or attempts to do so, with intent to--

> (A) influence, delay, or prevent the testimony of any person in an official proceeding;
>
> (B) cause or induce any person to--
>
> > (i) withhold testimony, or withhold a record, document, or other object, from an official proceeding;
> >
> > (ii) alter, destroy, mutilate, or conceal an object with intent to impair the integrity or availability of the object for use in an official proceeding;
> >
> > (iii) evade legal process summoning that person to appear as a witness, or to produce a record, document, or other object, in an official proceeding; or
> >
> > (iv) be absent from an official proceeding to which that person has been summoned by legal process; or
>
> (C) 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 or a violation of conditions of probation, supervised release, parole, or release pending judicial proceedings;

shall be punished as provided in paragraph (3).

(3) The punishment for an offense under this subsection is—

(A) in the case of a killing, the punishment provided in sections 1111 and 1112;

(B) in the case of—

(i) an attempt to murder; or

(ii) the use or attempted use of physical force against any person;

imprisonment for not more than 30 years; and

(C) in the case of the threat of use of physical force against any person, imprisonment for not more than 20 years.

(b) Whoever 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--

(1) influence, delay, or prevent the testimony of any person in an official proceeding;

(2) cause or induce any person to--

(A) withhold testimony, or withhold a record, document, or other object, from an official proceeding;

(B) alter, destroy, mutilate, or conceal an object with intent to impair the object's integrity or availability for use in an official proceeding;

(C) evade legal process summoning that person to appear as a witness, or to produce a record, document, or other object, in an official proceeding; or

(D) be absent from an official proceeding to which such person has been summoned by legal process; or

(3) 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 or a violation of conditions of probation1 supervised release,,2 parole, or release pending judicial proceedings;

shall be fined under this title or imprisoned not more than 20 years, or both.

(c) Whoever corruptly--

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

(2) otherwise obstructs, influences, or impedes any official proceeding, or attempts to do so,

shall be fined under this title or imprisoned not more than 20 years, or both.

(d) Whoever intentionally harasses another person and thereby hinders, delays, prevents, or dissuades any person from--

(1) attending or testifying in an official proceeding;

(2) reporting to a law enforcement officer or judge of the United States the commission or possible commission of a Federal offense or a violation of conditions of probation1 supervised release,,2 parole, or release pending judicial proceedings;

(3) arresting or seeking the arrest of another person in connection with a Federal offense; or

(4) causing a criminal prosecution, or a parole or probation revocation proceeding, to be sought or instituted, or assisting in such prosecution or proceeding;

or attempts to do so, shall be fined under this title or imprisoned not more than 3 years, or both.

(e) In a prosecution for an offense under this section, it is an affirmative defense, as to which the defendant has the burden of proof by a preponderance of the evidence, that the conduct consisted solely of lawful conduct and that the defendant's sole intention was to encourage, induce, or cause the other person to testify truthfully.

(f) For the purposes of this section--

(1) an official proceeding need not be pending or about to be instituted at the time of the offense; and

(2) the testimony, or the record, document, or other object need not be admissible in evidence or free of a claim of privilege.

(g) In a prosecution for an offense under this section, no state of mind need be proved with respect to the circumstance--

(1) that the official proceeding before a judge, court, magistrate judge, grand jury, or government agency is before a judge or court of the United States, a United States magistrate judge, a bankruptcy judge, a Federal grand jury, or a Federal Government agency; or

(2) that the judge is a judge of the United States or that the law enforcement officer is an officer or employee of the Federal Government or a person authorized to act for or on behalf of the Federal Government or serving the Federal Government as an adviser or consultant.

(h) There is extraterritorial Federal jurisdiction over an offense under this section.

(i) A prosecution under this section or section 1503 may be brought in the district in which the official proceeding (whether or not pending or about to be instituted) was intended to be affected or in the district in which the conduct constituting the alleged offense occurred.

(j) If the offense under this section occurs in connection with a trial of a criminal case, the maximum term of imprisonment which may be imposed for the offense shall be the higher of that otherwise provided by law or the maximum term that could have been imposed for any offense charged in such case.

(k) Whoever conspires to commit any offense under this section shall be subject to the same penalties as those prescribed for the offense the commission of which was the object of the conspiracy.

NO. 18-1319

IN THE

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

UNITED STATES OF AMERICA,
Appellant,

v.

WILLIE TYLER,
Appellee.

On Appeal from the Judgment of Acquittal entered in the United States District Court, Middle District of Pennsylvania, on February 14, 2018, at No. 1:96-CR-106 (Jones, C.J.)

PETITION FOR PANEL HEARING OR REHEARING EN BANC

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PETITION FOR PANEL REHEARING OR REHEARING EN BANC

The Appellee, Willie Tyler, petitions this Court for rehearing of this case before the Panel or en banc, under Federal Rules of Appellate Procedure 35 and 40.

LAR 35.1 STATEMENT OF COUNSEL IN SUPPORT OF REHEARING

I, Ronald A. Krauss, Esq., First Assistant Federal Public Defender, express a belief, based on a reasoned and studied professional judgment, that the Panel's opinion warrants rehearing because it is contrary to a decision of the United States Supreme Court—*Fowler v. United States*, 563 U.S. 668 (2011) (refining the scope of the "investigation-related" prong of 18 U.S.C. § 1512(a)(1), (b) (federal witness tampering)), and two decisions of this Court—*United States v. Tyler (Tyler III)*, 732 F.3d 241 (3d Cir. 2013), and *Bruce v. Warden Lewisburg USP*, 868 F.3d 170 (3d Cir. 2017)—and that this appeal involves a question of exceptional importance: whether, under *Fowler*, the federal witness tampering murder statute federalizes all state witness tampering prosecutions.

STATEMENT OF THE CASE

I. Introduction.

The federal witness murder statute, 18 U.S.C. § 1512(a)(1)(C), requires the Government to prove:

(1) a killing or attempted killing;

(2**) committed with a particular intent**, namely, an intent

(a) to "prevent" a "communication"

(b) about "the commission or possible commission of a **Federal offense**"

(c) to a **federal "law enforcement officer** or judge."

Fowler v. United States, 563 U.S. 668, 672 (2011)(emphasis added).

Four judges reviewed the jury's guilty verdict here.

Two judges—the district court judge and the dissenting member of the Panel in this appeal—held that the verdict could not stand because the Government presented no evidence that the defendant intended to prevent a local police informant from communicating with a federal officer about a federal offense. They viewed the record strictly through the *Fowler* lens, which cautions against "extending the scope of this federal statue well beyond the primarily federal area that Congress had in mind." *Fowler,* 563 U.S. at 675.

Two other judges—who joined in the Panel majority opinion opinion, which reversed the judgment of acquittal—concluded that

the statute does not require such specific proof of intent, and may be satisfied merely by evidence that the defendant intended to prevent communications to any law enforcement officer about any offense, so long as a federal offense might have also been discussed. The majority opinion viewed the record through a lens that distorts *Fowler*, effectively standing *Fowler* on its head, skewing the majority opinion's conclusions about the jury's inferences.

As the dissenting opinion showed, *Fowler*'s intent element requires proof beyond a reasonable doubt that the defendant intended to prevent witness communications regarding a federal offense to a federal official. The majority opinion's holding erroneously severs the required link between proof beyond a reasonable doubt of defendant's intent and communication to a federal official.

II. Brief background and procedural history.

In 1992, Willie Tyler ("Willie"), his brother David Tyler ("David Tyler") and Roberta Bell ("Bell") were involved in the early-morning murder of Doreen Proctor ("Proctor").[1] Proctor had

[1] The majority opinion refers to Willie Tyler as "Tyler" and his brother David Tyler as "David T." Judge Rendell's dissenting opinion and Chief Judge Jones's Memorandum refer to Willie Tyler as "Willie"; the dissenting

been a local-police informant who was scheduled to testify that day as a witness in David Tyler's drug trafficking trial. Local police arrested all three. A state-court jury convicted David Tyler of Proctor's murder and acquitted Bell. The jury acquitted Willie of murder but found him guilty of conspiracy to intimidate a witness; he was sentenced in June 1993 to two-to-four years, and paroled in July 1994.

A federal Grand Jury indicted Willie with federal witness tampering in April 1996, and in a third federal trial in July 2017, the jury found Willie guilty.[2] The jury heard evidence that Willie, David Tyler, and Bell were involved in Proctor's murder. The jury also heard evidence from which they could reasonably infer that when Proctor was murdered, Willie may have been concerned that she would disclose information to local law enforcement about his past personal drug use. But the jury heard no evidence that Willie

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opinion refers to David Tyler as "David Tyler", and the District Court refers to David Tyler as ("Tyler"). This Petition will refer to Willie Tyler as "Willie" and David Tyler as "David Tyler".

[2] This case has a long procedural history that began with the state court witness tampering trial of Willie and others for witness tampering in 1992. Willie's 1996 Indictment was prompted by an FBI agent who was "troubled" by Willie's acquittal of the state court murder charge. The majority opinion recounts the several direct appeals, collateral challenges, and remands. *See* Ex. A, Maj. Op. at 3-4. Willie was in federal custody from 1996 to 2018.

intended to prevent Proctor from communicating with any law enforcement official—local, state, or federal—or to prevent her from disclosing information about any federal offense.

Willie filed a Rule 29 motion for judgment of acquittal. The District Court granted the motion, ruling that the evidence did not permit the jury to find beyond a reasonable doubt that Willie intended to prevent Proctor from communicating with federal law enforcement about his possible commission of a federal offense. (App. 4-43.) The District Court reasoned that *Fowler* requires proof of intent to prevent an informant from communicating information on a federal offense to federal officials. Because the court found that, based on the record, the jury could only speculate that Willie intended to prevent Proctor from communicating with a federal law enforcement officer, the court ruled that the evidence did not satisfy the *Fowler* standard. (*Id*.) The Government filed this appeal.

The majority opinion read the *Fowler* standard to permit conviction so long as the evidence supported a "reasonable likelihood" that the witness would have communicated with a federal officer about a federal offense—even if the defendant did not intend to prevent that communication and even if the

defendant did not have that offense in mind. The majority reversed the District Court's order, directed that the jury's verdict be reinstated, and remanded for sentencing. Ex. A, Maj. Op. at 26.

Circuit Judge Rendell concurred in part and dissented in part. Most notably, the dissenting opinion disputed the majority opinion's analysis and application of *Fowler* on the intent requirement of § 1512. The dissenting opinion expressed concern that the majority opinion establishes a precedent that fails to follow the Supreme Court's caution in *Fowler* against "bring[ing] within the scope of [§ 1512] many instances of witness tampering in purely state investigations and proceedings . . . ." Ex. A, Dis. Op. at 2 (quoting *Fowler,* 563 U.S. at 675).

REASONS FOR GRANTING THE PETITION

Section 1512(a)(1)(C) prohibits killing "with intent to. . . prevent the communication by any person" to a federal law enforcement officer "relating to the commission. . . of a Federal offense." Before *Fowler*, this Court held that § 1512(a)(1)(C) required proof only that "the defendant believed that the [witness] **might** communicate with the federal authorities. . . . [and that the jury could infer this element] from the fact that the offense was federal in nature, plus additional appropriate evidence." *United*

States v. Tyler (*Tyler III*), 732 F.3d 241, 251 (3d Cir. 2013) (quoting *United States v. Stansfield*, 101 F.3d 909, 918 (3d Cir. 1996)) (emphasis added). *Stansfield* struck a balance "between the requirement that the government must prove [beyond a reasonable doubt] the defendant's specific intent to hinder a federal investigation without imposing an unnecessary hurdle by proving the defendant knew the federal status of any particular law enforcement officer involved in an investigation." *Id*. (internal quotation omitted).

Fowler did not alter § 1512(a)(1)(C)'s specific intent element—proof beyond a reasonable doubt of defendant's intent to prevent the witness from communicating with federal law enforcement. Rather, *Fowler* narrowed § 1512(a)(1)(C)'s reach by increasing the Government's burden to prove more than that "the officers with whom the defendant believed the victim **might** communicate would in fact be federal officers". Under *Fowler*, Section 1512(a)(1)(C) now required the Government to prove that it "was '**reasonably likely** under the circumstances that (in the absence of the killing) at least one of the relevant communications would have been made to a federal officer.'" *Bruce v. Warden Lewisburg USP*, 868 F.3d 170, 181 (3d Cir. 2017)(quoting *Fowler,* 563 U.S. at

677-78)(emphasis added). *Fowle*r increased the Government's burden out of concern that the lesser burden "'transform[ed] a federally oriented statute into a statute that would deal with crimes, investigations, and witness tampering that, as a practical matter, are purely state in nature.'" *Tyler III*, 732 F.3d at 251 (quoting *Fowler*, 563 U.S. at 677).

As the dissenting opinion observes, Section 1512(a)(1)(C) has "two distinct elements": 1) that a defendant, beyond a reasonable doubt, intended to prevent a witness's communication with law enforcement officials, one of whom would be a federal officer; and 2) a "reasonable likelihood" that the witness's communication would be made to a federal officer. Ex. A, Dis. Op. at 2. The dissenting opinion acknowledged that proof of the reasonable likelihood element has a low bar, and explained why the Supreme Court set it so low:

> The low bar of [the reasonable likelihood] element stands in contrast to the standard of proof beyond a reasonable doubt for the element of intent to prevent a communication. In fact, the Supreme Court found the low threshold of the reasonable likelihood standard permissible precisely because "[t]he Government **will already have 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." *Fowler v. United States*, 563 U.S. 668, 674 (2011) (emphasis added).

Ex. A, Dis. Op. at 2. The dissenting opinion further noted *Fowler*'s effort to prevent federal prosecutors from "bring[ing] within the scope of [§ 1512] many instances of witness tampering in purely state investigations and proceedings . . . ." Ex. A, Dis. Op. at 2 (quoting *Fowler,* 563 U.S. at 675).

Put simply, the statute requires, at its core, proof that the defendant intended to prevent the witness from communicating with a *federal* official about a *federal* crime. Only if the defendant had that intent—and, even then, only if there was a "reasonable likelihood" that the witness would in fact have talked to a *federal* officer about the *federal* crime—may a conviction stand. That is what *Fowler* holds, and what later opinions of this Court, including *Tyler III* and *Bruce,* demand.

Yet, the majority opinion holds otherwise, and fundamentally alters the *Fowler* standard when it holds that a defendant violates Section 1512(a)(1)(C) if it was "reasonably likely that [the witness] would have spoken to a qualifying law enforcement officer and that [defendant] murdered or aided in [the witness's] murder to prevent [the witness] from doing so." Ex. A, Maj. Op. at 25. This holding says nothing about the defendant's specific intent to prevent the witness from communicating about a federal offense

to a federal official. The majority's opinion thus holds that the "reasonable likelihood" standard applies so long as there is proof that the defendant intended to prevent communications of an offense to law enforcement, regardless whether the offense in the defendant's mind was federal, and regardless whether the law enforcement group included federal officials.

And the majority opinion appears to be creating a presumption that when the evidence does not show that the defendant had a specific officer or group in mind, the defendant intended to prevent communications to law enforcement in general—meaning that the "reasonable likelihood" standard applies. But *Fowler*'s rule is precisely the opposite: the Government must first prove beyond a reasonable doubt that the defendant had in mind law enforcement officers, one of whom was a federal officer, before applying the reasonable likelihood standard.

Because the majority opinion eliminates the federal component of the defendant's intent element, its application of *Fowle*r to the record is skewed. This distorted view of *Fowler* led the dissenting opinion to warn that because the intent element is critical to federalize an otherwise state crime, the majority opinion "would essentially eviscerate any intent requirement at all and

would allow federal witness tampering convictions against virtually all homicides of state and local police informants." Ex. A, Dis. Op. at 2.

These divergent readings of *Fowler* are reflected in the divergent conclusions about what inferences the jury could reasonably draw from the record evidence.

The dissenting opinion's proper application of *Fowler* to its comprehensive review of the record shows that no rational jury could reasonably infer that Willie intended to prevent Proctor from future communication with federal law enforcement. The record provided the jury with no basis to infer that Willie knew or believed that Proctor would communicate post-trial with any law enforcement officials. To the contrary, the record demonstrates that there was every reason for Willie to believe that Proctor would not communicate further with law enforcement: at an earlier public trial of one of David Tyler's crew, Proctor testified publicly that she was "out of this business" – i.e., done working as an informant. Ex. A, Dis. Op. at 7 & n.4. Without evidence that permits the jury to infer that Willie believed Proctor would continue to work as an informant, no rational jury could reasonably infer that Willie intended to prevent her

communications with law enforcement. At most, the evidence supported an inference that Willie intended to prevent Proctor's testimony at trial. Ex. A, Dis. Op. at 3. But as the District Court noted, if that evidence was enough to establish the necessary intent under Section 1512(a)(1)(C), then murder of any known informant working with local or state police—like Doreen Proctor—could become a federal crime. Ex. A, Dis. Op. at 2; App. 462.

The majority opinion's misreading of *Fowler* becomes evident in its assessment of the record. The majority opinion asserted that the jury had a reasonable basis to infer Willie's intent to prevent Proctor from communicating with law enforcement about his involvement with drug activities. But as the dissenting opinion pointed out, the record included "no speculation, let alone evidence, that Doreen Proctor posed any threat at all to Willie, or that Willie knew of any such threat to himself or others." Ex. A. Dis. Op. at 6. Given the lack of evidence that Willie Tyler had anything to fear from Proctor's communications to law enforcement, "it would be irrational [for a jury] to conclude . . . that his participation in Proctor's murder was motivated by a

desire to prevent" future communication with any law enforcement. Ex. A, Dis. Op. at 8. *See also* Ex. A, Dis. Op. at 11.[3]

But even more important to future cases is that the majority opinion's misreading of *Fowler* will empower federal prosecutors to use Section 1512 to prosecute any state witness-tampering charge. That result departs from the governing jurisprudence of *Fowler*, *Tyler III*, and *Bruce,* which acknowledge the importance of cabining Section 1512's reach. This Court should vacate the majority opinion, and rehear this case to restore a proper reading of *Fowler* and application of Section 1512.

[3] The dissenting opinion further explained:

> Here, the admittedly rational inference that Willie knew of Proctor's past informant activities concerning his brother and associates does not logically or convincingly lead to the further conclusions that Willie believed Proctor had additional information, believed she would continue to communicate with law enforcement months after the investigation had apparently ended, and acted to prevent such communications. Those inferences are not rational and would not allow a jury to conclude beyond a reasonable doubt that Willie intended to prevent Proctor's future communications.

CONCLUSION

WHEREFORE, for all the foregoing reasons, Appellee Willie Tyler respectfully requests that this Court grant his Petition for Rehearing En Banc, vacate the Panel decision, and rehear this appeal before the Panel or en banc.

Respectfully submitted,

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CERTIFICATION OF BAR MEMBERSHIP, WORD COUNT, IDENTICAL TEXT, AND VIRUS CHECK.

I, Ronald A. Krauss, Esquire, First Assistant Federal Public Defender, certify, in compliance with the Federal Rules of Appellate Procedure and the Third Circuit Local Appellate Rules, that:

1) I am a member in good standing of the bar of this Court;
2) This Petition for Rehearing En Banc contains 2,976 words, which is less than the 3,900 word limit;
3) The text of the electronic format of the Petition for Rehearing is identical to the hard copy format;
4) A virus check was performed on the Petition for Rehearing using Symantec Endpoint Protection, last update was June 11, 2020, and no virus was detected.

I make this combined certification under penalty of perjury, pursuant to 28 U.S.C. § 1746.

/s/ *Ronald A. Krauss*
RONALD A. KRAUSS, ESQ.

Date: June 12, 2020

CERTIFICATE OF SERVICE

I, Ronald A. Krauss, Esq., First Assistant Federal Public Defender, certify that I caused to be served on this date a hard copy of the attached Petition for Rehearing En Banc via Electronic Case Filing, and/or by placing a copy in the United States mail, first class in Harrisburg, Pennsylvania, and/or by hand delivery, addressed to the following:

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Appellee

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Date: June 12, 2020

NO. 18-1319

IN THE

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

UNITED STATES OF AMERICA,
Appellant,

v.

WILLIE TYLER,
Appellee.

On Appeal from the Judgment of Acquittal entered in the United States District Court, Middle District of Pennsylvania, on February 14, 2018, at No. 1:96-CR-106 (Jones, J.)

BRIEF FOR APPELLEE

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PREFATORY STATEMENT

On one point Appellee Willie Tyler agrees with the Government: that the jury got it right. But it was the 1992 Adams County jury that indeed got it right. That state jury found that Tyler did bear some blame in the horrific incident that led to Doreen Proctor's death, so they sent Tyler to state prison for two years. But those 12 jurors found Tyler not guilty of murder, instead finding that it was his brother, David Tyler, who murdered the woman about to testify against him.

One of the points that the Government's Brief gets wrong is trumpeting that 36 jurors in three federal trials found Tyler guilty, as if it were proof positive of justice prevailing. [Govt. Br.1.]

But it's not. The three verdicts have been nullified. No value attaches to verdicts rendered after trials marred by: (1) evidentiary error; (2) prejudicially erroneous jury instructions; and 3) insufficient evidence, where the District Court penetrated the dense fog of manufactured federal jurisdiction to vacate the jury verdict by granting a relatively rare Rule 29 Judgment of Acquittal. *See* MOORE'S FEDERAL PRACTICE—Fed. Procedure § 629.02 (2019).[1]

[1] "Rule 29 takes cognizance of the reality that jurors may not always be capable of applying strictly the instructions of the court, or of basing their verdict entirely on the evidence developed at trial."

So now Tyler—almost 69 years old, with some 22 years of federal prison behind him—has been living outside prison, without incident, for over a year. Case law and the record demonstrate why Tyler should live out the remainder of his life as a free man.

As discussed in detail below, what the 2017 federal jury got wrong—which the District Court had the dispassionate expertise to see—is that the federal Government had no business prosecuting Willie Tyler. Federal law enforcement agents initiated prosecution to correct—with a second bite of the apple—what they judged a too-soft state court verdict (App. 191). Federal prosecution here neither vindicated specific federal interests, nor properly served principles of federalism—as deference is reflected, if imperfectly, in the Justice Department's *Petite* Policy.[2]

In brief, evidence here of the requisite federal nexus is insufficient to permit federal conviction for witness/informant

[2] The *Petite* Policy derives its name from *Petite v. United States*, 361 U.S. 529 (1960). It "precludes the initiation or continuation of a federal prosecution, following a prior state or federal prosecution based on substantially the same act(s) or transaction(s), absent certain extenuating circumstances." *United States v. Wilson*, 413 F.3d 382, 388 n.7 (3d Cir. 2005)(internal quotations omitted). Discussing specifically federal prosecutions triggered by a state court's suppression of evidence, Judge Aldisert, dissenting, wrote: "I believe this policy generates serious problems. It increases the caseload in federal courts, runs counter to modern concepts of federalism, denigrates the quality of the state-court system, trial and appellate, [and] demeans the professionalism of state-court judges . . . ." *Id.* at 391.

murder under *Fowler v. United States* (U.S. 2011).[3] Nothing in the record supports a finding that: (1) Tyler acted with intent to prevent Ms. Proctor from communicating additional information to law enforcement about a federal offense; or (2) that had Doreen Proctor lived, she was "reasonably likely" to provide such additional information to a federal officer. To the contrary, Ms. Proctor was "out of the [witness/informant] business", and had no access to any additional information to provide later; but even if she did, the probability that any such information would travel up the investigatory chain from local law enforcement to federal hands was remote. Just as Ms. Proctor was "out of the business", federal prosecutors should have been out of Tyler's business—the Commonwealth and people of Adams County properly addressed his conduct, and the evidence at the 2017 trial, measured against *Fowler*, demonstrates this decisively.

The Government's legal arguments are a proverbial house of cards, built largely on the shaky, legally insupportable foundation of the Government's wrong-headed reliance on previous trial and appellate legal rulings, and law-of-the-case doctrine. Both are inapplicable and irrelevant here. Further, that effort to dodge what

[3] 563 U.S. 668.

happened at the 2017 trial by setting up false inconsistencies with previous Court opinions should not distract the Court from the real issue: the Government's failure to establish a federal nexus.

The Government seeks to demonstrate the requisite federal nexus—that if Doreen Proctor had lived she would have provided federal law enforcement with additional information about interstate drug dealing—by *post hoc* conjecture and speculation served up to manufacture jurisdiction out of whole cloth. In doing so, the Government's jurisdictional argument casts such a wide federal net that any defendant accused of tampering with any witness-victim in any state court drug case would be subject to federal prosecution—even if the state acquitted him, and even if federal law enforcement became involved for the first time years after the acquittal.

Expressing the court's insight at what lay at the heart of the Government's case, Judge Jones aptly concluded:

> The tragic death of Doreen Proctor, and the long and tortuous federal prosecution of Willie Tyler that ensued after his acquittal in state court have resulted in a saga that calls to mind Captain Ahab futilely pursuing Moby Dick in *The Whale* . . . Our task is to end this narrative and do justice, joyless though it may be.

(App. 42). This Court should end this saga here.[4]

[4] Similarly, this Court has recognized and admonished overheated prosecutorial zeal when it is all-too apparent. *United States v. Hadima*, 160

STATEMENT OF THE ISSUES AND STANDARDS OF REVIEW

A. Issues.

1. Witness-murder requires that defendant was involved in intentionally killing the victim. Here, Tyler merely showed his brother how to cock a gun for an undisclosed reason, gave him a ride for an undisclosed purpose, and participated in conversations about the murder.

Because no evidence supports a finding that Tyler engaged in Doreen Proctor's murder as a principal or aider and abettor, isn't the jury's verdict based solely on conjecture and speculation?

2. Witness-murder requires that defendant believes that the victim might later communicate federal crime-related information

---

Fed. Appx. 224 (3d Cir. 2005)(not precedential), involved a native Egyptian granted conditional permanent status after he married a U.S. citizen. Immigration documents that he needed to file for naturalization required both his and his wife's signatures. The documents were due while Hadimah was on active duty as a sergeant in the U.S. Army reserve. He signed his name and his wife's name—with her explicit permission. In the wake of September 11, 2001, the Government apparently felt a need to find a way to prosecute this native Egyptian. So the Government charged him, *inter alia*, with making a false statement (violating 18 U.S.C. § 1546). Ultimately, this Court stated that it would "refuse to find that signing a spouse's name, *with permission*, constitutes a 'false statement.'" *Id*. at 227 (emphasis in original). Vacating his conviction, and noting that a plea agreement would have permitted the Government to reinstate other charges dismissed earlier, the Court explicitly cautioned the Government to leave Hadimah alone: "*We are confident that the Government will let this case end—now.*" *Id*. at 228 n.3 (emphasis added).

to law enforcement, and then acts to prevent that specific communication. Here, Tyler did not know: (i) that Doreen Proctor had information about drug dealing other than David Tyler's local activities related to his state drug trial; or (ii) that post-trial, Doreen Proctor would have any reason to provide drug-related information to any law enforcement.

Because no evidence supports a finding that Tyler intended to prevent Doreen Proctor from later communicating additional information to law enforcement about David Tyler's purported multi-state drug connections, didn't the District Court properly hold the jury's finding as speculative?

3. Informant-murder requires that had the informant-victim lived, she was "reasonably likely" to provide additional information about a federal offense to a federal law enforcement officer. Here, Doreen Proctor provided information solely to state law enforcement officers about drug deals related to David Tyler's state court trial, and said that her work as informant-witness would end after her state court trial testimony.

Because Doreen Proctor, had she lived, would have been "out of the [witness/informant] business", didn't the District Court

properly hold the jury's finding—that she was reasonably likely to choose to communicate with law enforcement again—speculative, as the likelihood of her communication about federal crimes to federal officers was remote and hypothetical?

B. Standard of review.

This Court reviews "*de novo* an appeal of a district court's ruling on a Rule 29 motion and independently applies the same standard as the District Court. . . . [which must] review the record in the light more favorable to the prosecution to determine whether any rational trier of fact could have found proof of guilt beyond a reasonable doubt based on the available evidence" "*United States v. Freeman* (3d Cir. 2014).[5]

When the Court's review is plenary, the Court "may affirm the District Court on any grounds supported by the record, even if the court did not rely on those grounds." *MRL Dev. I, LLC v. Whitecap Inv. Corp.* (3d Cir. 2016).[6]

[5] 763 F.3d 322, 343 (internal quotation and citation omitted).

[6] 823 F.3d 195, 202 (internal quotations omitted).

STATEMENT OF THE CASE

The genesis of this appeal lies in the April 1992 death of Doreen Proctor, a local government informant who, on the day of her murder, was scheduled to testify in a Cumberland County (Pa.) drug-trafficking trial against David Tyler ("David T."), brother of Appellee Willie Tyler. Even if, without conceding, Willie Tyler played a secondary role in that tragic crime, his conduct—as the District Court ruled—was not a federal offense under *Fowler v. United States* (U.S. 2011).[7]

In this Response Brief, Tyler will not rehash facts—and particularly not procedural history—that the District Court's opinion and the Government's Opening Brief cover sufficiently. But, while recognizing the need to present facts in the light most favorable to the verdict, Tyler will paint a factual picture faithful to the record, in contrast to the Government's incomplete and thus somewhat distorted portrait.

A. Doreen Proctor cooperated only with state and local law enforcement, and then she was "out of the business."

Doreen Proctor moved to Carlisle, Pa. in February 1990, with two children (16 and 11) and no job, initially supporting her family on welfare. (App. 104-06.) About a year later, Ms. Proctor—angry

[7] 563 U.S. 668.

after seeing a drug dealer approach her daughter on her own street corner—decided to act to protect her family. So around the end of 1990 and beginning of 1991, she contacted local Carlisle police and asked how she could help clean up her streets. Carlisle police put her in touch with Detective David Fones, who recruited Ms. Proctor to work under his direction as an undercover drug buyer. (App. 93-94.) In addition to serving her community, Ms. Proctor learned that she would receive cash for her efforts. (App. 107.)

Detective Fones, along with Agent Ronald Diller, of the Pennsylvania Office of the Attorney General, were members of the Tri-County Drug Task Force ("Task Force"), charged with combatting local drug dealing (the Task Force is discussed in more detail below). In a January 1991 interview with Fones and Diller, Ms. Proctor told them about the drug dealing that she saw. After that interview, Fones prepared her to make four small street-level undercover controlled buys. (App. 205-14.)

Between January 11, 1991 and February 1, 1991, Ms. Proctor made undercover cocaine buys from four people: Mary Hodge—1.7 grams; Jerome Evans ("Butch") and Cindy Brooks—3.3 grams; and David Tyler ("David T.")—approx. 5 grams. These cocaine buys totaled approximately 10 grams (0.35 oz.). Police held off arresting

them so that Ms. Proctor's usefulness as a confidential information would not be compromised until she had to appear in court. Ultimately, all four were arrested on drug charges, and Ms. Proctor, as well as Detective Fones, testified at their preliminary hearings. (App. 382-87; 436-38.)

In January 1992, Ms. Proctor testified at Hodge's state court trial, resulting in a conviction. (App. 385.) Ms. Proctor testified about the details of the Hodge controlled buy, that the scope of her undercover work was limited solely to the controlled local buys with Fones in 1991, and that—noting that she was now gainfully employed—she did not contemplate any need for further involvement with law enforcement:

> Q. Since your buy [from Hodge], Ms. Proctor, how many other buys have you made?
>
> A. Two.
>
> Q. Just two?
>
> A. David [Tyler] and Butch [Jerome Evans].
>
> **Q. Are you out of this business now?**
>
> **A. Yes, I am.**
>
> Q. You don't need the money?
>
> A. I didn't need the money at first.
>
> Q. And you don't need the drugs?

A. No.

Q. What are you doing now?

A. I work for United Telephone.

(App. 117-18) (emphasis added).

Having testified in open court, Ms. Proctor's undercover persona was compromised, necessarily ending her usefulness for further controlled buys or obtaining new drug-related information as a confidential informant in the area. (App. 388.)

Fones's trial testimony, consistent with his testimony at several earlier proceedings, established that Ms. Proctor was not involved in any other current or planned investigations, prosecutions or proceedings—local, state, or federal. (App. 388.)

At the September 8, 1992 Preliminary Hearing in Tyler's Adams County prosecution, Fones testified that Ms. Proctor, at the time of her death, was cooperating with the Task Force only by testifying at preliminary hearings and trials about her 1991 controlled buys:

Q. Was Ms. Proctor still an active participant with you and with your force as of April 21st, 1992, when she was found dead?

A. There was no ongoing investigation. We hadn't been to trial on all four cases which she had been involved in and was still a Commonwealth witness at the time.

> Q. So she was not involved in any undercover work at that point in time, is that right?
>
> A. No, she wasn't.

(App. 129, 444-45.). Similarly, in 1993 Fones testified:

> Q. As of . . . April 21, 1992, was Miss Proctor working on any other active cases
>
> A. No, she wasn't. She was only involved with those four individuals and that only lasted for a month or two. Her only involvement with us still at the time was testifying at [state court] preliminary hearings and trials at the time. There was [sic] no active cases.
>
> Q. No other cases were pending in April of 1992 that Miss Proctor was involved in?
>
> A. No, there wasn't.

(App. 445.) [8]

The Government's Brief asserts that Ms. Proctor "was *continuing* to provide information to law enforcement about drug-trafficking activity." (Br. 34.)(emphasis added). That assertion is imprecise and somewhat misleading. Yes, perhaps Ms. Proctor could have been "continuing" in the narrow sense that she was available to talk and testify during the period between Hodge's

[8] Testimony of Adams County District Attorney Roy Keefer, during the April 1993 state court trial of Bell and David T. is not strictly part of the 2017 trial record, though it was in a filed pretrial document entered into the District Court docket at Doc.353-3. Keefer confirmed Fones's testimony, stating that Ms. Proctor: "was not doing anymore undercover work for Detective Fones up through that time. Her sole work was involved in the arrest and testimony regarding David Tyler, Mary Hodge, Butch Evans, Cindy Brooks, she had no other ongoing investigations at the time of her death." (App. 147.)

January trial and David T's April trial. But she had lost her confidential persona, so it is unclear how she could have possibly been providing *new* information. But there is no evidence that, had she lived, she would be "continuing" after David T.'s trial. The Government provides nothing about what additional information—other than related to the 1991 controlled drug buys, and vague comments about extra-state connections—Ms. Proctor was "continuing to provide."

The record lacks any evidence to contradict or even cast doubt on Ms. Proctor's testimony that her assistance to law enforcement would be ending as of April 1992. Nor does the record reflect any hint that Ms. Proctor intended to ever communicate again for any reason with any law enforcement officers—local, state, or federal: she was "out of the business". (App. 118, 129, 385-388.)

B. The events surrounding Doreen Proctor's death.

As the date for Butch and David T.'s drug trial approached, David T. and his girlfriend Roberta Bell hatched a plan to prevent Doreen Proctor from testifying. This plan unfolded on the evening of April 20, 1992, and into the early morning of April 21.

Sometime during the day on April 20, Tyler and Gwanda Campbell left Hodge's house and were driving in Carlisle where

they encountered David T. and picked him up. Driving back to Hodge's house, they spotted Ms. Proctor. David T. said that he "wanted to get her [Ms. Proctor] then but there were too many cars." (App. 490.) After arriving back at Hodge's house, David T. went to a shed and "picked something up" and asked Tyler "if he knew how to cock it." When David T. unwrapped the object, Campbell saw that it was a long gun or sawed-off shot gun. Campbell believed she heard—but did not see—the gun being cocked; she got scared and went inside the house. Campbell speculated that what she heard was Tyler showing David T. how to cock the gun. (App. 491-93, 507-09.)

Tyler and David T. left Hodge's house, Tyler driving Hodge's car to give David T. a ride to Gettysburg, in Adams County. During that ride, Tyler asked David T. what was going on, and David T. said that Bell had a surprise for him. When Tyler asked David T. again, David T. replied, "none of your business." (App. 716.)

While Willie and David were driving to Gettysburg, Bell showed up at Hodge's house. Bell said that she had been to Doreen Proctor's house and could have killed her right there but her daughter was there and she would have had to kill her too. Then Bell left. Hodge

guessed that Bell's intention was to use drugs to lure Ms. Proctor out of her house. (App. 527-28.)

Shortly after midnight, now April 21, Ms. Proctor left her house with Bell. Bell was driving a gray Mercury Marquis, which had a car phone. Ms. Proctor called a friend, Gwendolyn Palmer, at 1:00 a.m. Sometime during the early morning, both Bell and David T. called Hodge, learning that they were unable to find each other in the fog. David T. gave Hodge a pay phone number that she could give to Bell if Bell called looking for him. Bell called Hodge and said, "I have her." Inferring that Bell meant Ms. Proctor, Hodge replied, "you better hope she don't get to a phone." Bell got the number of the pay phone where David T. was waiting. (App. 529-33.)

Doreen Proctor was murdered in the early morning. According to Hodge, Ms. Proctor was killed "because she was set to testify against David Tyler." (App. 546.)[9]

Later in the morning of April 21, at Hodge's house, Campbell saw Tyler return. David T. had also returned and dressed in a purple suit for court. Hodge did not see Tyler come in that morning.

[9] At trial, Hodge agreed to this statement during cross. Significantly, the Government could have asked on redirect "Was David T's trial the only reason Ms. Proctor was killed?". But the Government did not, giving rise to the conclusion that Ms. Proctor was indeed killed for one reason and one reason only: not to testify at David T.'s trial, and her providing additional information after his trial was no one's concern.

But she did recall hearing David T. say "she's gone." Campbell testified to hearing something similar: that she heard someone say "the bitch is gone." On direct examination she said that it was Tyler; on cross-examination, when asked if it was actually David T. speaking—as Hodge had recalled—she stated that she "really can't recall." (App. 507-11.)

Meanwhile that morning, at Bell's home, Laura Barrett, who was babysitting Roberta's children, saw Roberta with an armful of bloody clothes. Bell told Barrett that if anybody asked about her whereabouts the night before, Barrett was to say that Bell was home all night. After David T. and Tyler arrived at Bell's house, Barrett overheard a conversation between Bell, David T., and Tyler in the next room. She heard Bell say that "she shot Doreen but you killed her." No testimony clarifies to whom the "you" referred. Barrett then heard Tyler say "you don't know who's listening. You don't know who hears this." Tyler then said he was leaving, and left. (App. 925-36.)

Finally, at some point that morning, Bell called Ola Brown, the mother of David T.'s children, and asked her to tell David T. that Bell had her story together and if worse came to worse they should "put it on Little Man." As Brown knew, Bell's reference to "Little

Man" meant Tyler—and "put it on" Tyler plainly meant to place the blame for the killing on him, rather than her and David T. (App. 668-72.)

After Doreen Proctor's death, the remaining drug trials were halted. Instead, the Commonwealth charged David T, Bell, and Tyler with criminal homicide and witness intimidation. The Adams County jury acquitted Tyler of murder but convicted him of witness-intimidation conspiracy, for which he served two years in state prison. David T. was convicted of murder, and Bell was acquitted of all charges.

After this trial, Judge Jones concluded—similar to the 1992 Adams County jury's conclusion—that "evidence implicating [Tyler] in Ms. Proctor's murder was manifestly quite thin . . . ." (App. 20.)

C. The Tri-County Drug Task Force, in 1991-92, operated solely as a local and state law enforcement entity, with no federal involvement.

1. The Task Force.

As noted above, Detective Fones's duties as a Carlisle Police Officer included assignment to the Task Force, comprised of state and local law enforcement officers from Cumberland, Perry, and York Counties. (App. 205-14, 375-81.) As its roster showed, no

federal agent or agency was part of the Task Force. (App. 231-34; 570). [10]

In 1992, Agent Diller served as the Task Force coordinator, working for the Pennsylvania Attorney General (App. 604). Diller confirmed that he was not a federal law enforcement officer. (App. 629.)

Diller testified concerning a 1991 Memorandum of Understanding signed by the then-Attorney General and President of the PA District Attorneys Association. (App. 937-42.) Diller confirmed that the Memorandum memorialized that the Task Force program was subject to the control and supervision of the district attorney of the county in which the Task Force operated and—other than a general prefatory statement recognizing the importance of drug law enforcement at all levels of government—did not include language concerning federal involvement with the Task Force program. (App. 604-16.)

[10] James Caggiano, who was the Director for the Bureau of Narcotics Investigation, Pennsylvania Office of Attorney General during the relevant time period, was not available to testify at the 2017 Trial. But in the July 31, 2000 Trial, he confirmed the non-federal composition of the Task Force roster as of 1991-92. (Doc. 265 at 146-47.)

2. The Government invents Agent Diller as a person serving the federal government as an "adviser" or "consultant."

Putting 2017 Trial testimony about the requisite federal nexus in proper context requires a brief digression to the Tyler 2000 trial, when the Government's efforts to establish the requisite federal jurisdictional element launched in earnest.

Because all agree that no federal law enforcement had been involved in any way in the David T. and cohorts drug dealing, the Government's prosecution had to produce testimony from someone who they could argue qualified under the federal nexus language of 18 U.S.C. § 1512: that a federal-offense communication must be with a "federal law enforcement officer", defined to include "a person. . . serving the Federal Government as an *adviser* or *consultant*." 18 U.S.C. § 1515(4) (emphasis added). Diller was to be that "adviser" or "consultant".

To address this jurisdictional need, the prosecutor ("G.Z.")[11] elicited from a DEA agent, Gregory Borland, an undated affidavit concerning Diller's role with DEA. G.Z. showed Borland the relevant statutory language before Borland wrote the affidavit. (*See*

[11] Because the identity of the prosecutor is not material, did not appear for the Government at trial, and is no longer a Justice Department employee, that prosecutor—to maintain a modicum of privacy—will be referred to by the initials "G.Z."

App. 260-61.) When drafted, the Borland affidavit used language that the DEA would accept cases "after *consult*ation with and upon the *advice* and recommendation of the state agent. (App. 190)(emphasis added). So, the Government would argue, if a state law enforcement agent could be viewed as serving the federal government as an "adviser" or "consultant", then that state agent would qualify as a federal officer under § 1512.

In a June 29, 2017 deposition that Judge Jones conducted in chambers—after defense counsel subpoenaed G.Z. as a witness to explore at trial Diller's purported federal status—G.Z. stated that while not recalling explicitly asking Borland to include the specific adviser and consultant language in the affidavit, G.Z.:

> [did] think it would have been inevitable. Given the fact that we are going over that language in the statute, I think that—it wouldn't surprise me if the court would conclude it was implicit in my request….

(App. 262). Later in that deposition, G.Z. admitted that he influenced Diller's self-described federal connection as stated in the Borland affidavit:

> The question was asked whether I suggested to Mr. Diller [in preparation for the Tyler 2000 trial] that he use the terms "adviser" and "consultant." I did not. But I think in fairness, I showed him the documents [statute and Borland affidavit]. Implicit in that was, what is your view, you know, how do you fit into that, do you agree with it, do you disagree with that, and I think clearly that affected his testimony. (App. 265.)

This issue arose in this trial because at the Tyler 2000 trial, Diller testified on cross-examination as follows:

> Q. Now on redirect you were asked about the term adviser, where did you get the term adviser and consultant. And your answer was you stole it from an affidavit; is that right?
>
> A. Yes. I borrowed it.
>
> Q. Who gave you that affidavit to review?
>
> A. The Assistant United States Attorney.
>
> Q. [G.Z.]
>
> A. Yes.
>
> Q. Was that in preparation for your testimony today?
>
> A. Yes. I reviewed my prior testimony and records in the trial.
>
> Q. So the term consultant then is not your term; is it?
>
> A. It is not my term, no.
>
> Q. And the term adviser is not your term; is it?
>
> A. No.

(App. 229-30.) Diller's purported status in earlier proceedings as a person "serving the Federal Government as an adviser or consultant"—tracking 1515(a)(4)'s jurisdictional hook—thus arose out of the prosecutor's zeal to establish the requisite federal nexus.

At the trial here, Diller explicitly avoided labelling himself as an "adviser" or "consultant" (App. 623.) Indeed, when counsel

confronted Diller with his previous testimony that he was an "adviser" and "consultant", and that the language came from G.Z., Diller flat-out denied it. He testified that "it was in the file, which [he] reviewed." (App. 624.)

D. When Doreen Proctor died, the federal government was not involved in any way with Ms. Proctor nor did she have additional information that would have interested them.

Doreen Proctor had cooperated with only state and local law enforcement. She never had contact with any federal law enforcement officer, nor did state and local law enforcement officers anticipate that she would contact federal law enforcement.

> Q. [Proctor] had not and was not scheduled to testify in any federal proceeding up that point [of her death]. Isn't that correct?
>
> A. That's correct.

(App. 425 (Fones reviewing testimony of 1/10/1996 pp. 53-53).)

Diller, as part of his Task Force duties, would meet with local officers about potential multi-jurisdictional involvement, and if it appeared that a case might be appropriate for federal referral, he would consider contacting federal law enforcement, such as the DEA. (App. 640.)

Diller never contacted the DEA about Ms. Proctor to see if any

federal law enforcement officers wanted to talk to her about a federal drug investigation or involve her in any federal proceeding:

> Q. [Y]ou never referred Ms. Proctor to the DEA, did you?
>
> A. No, I did not.
>
> Q. And there was no federal agent involved with Ms. Proctor at the time of her death. Is that right?
>
> A. Not that I'm aware of.
>
> Q. There was no federal involvement at the time of Ms. Proctor's death, was there?
>
> A. Not that I'm aware of.

(App. 641.)

DEA Agent Keith Humphreys confirmed that Ms. Proctor was not working for the DEA, nor were her activities on the DEA Radar:

> Q. You can agree, Mr. Humphreys, that in 1992, Doreen Proctor was not working for the DEA. Correct?
>
> A. That's correct.
>
> Q. Doreen Proctor was not an informant for the DEA, was she?
>
> A. She was not.
>
> Q. And no one ever called you and said—and asked you to talk to Doreen Proctor, did they?
>
> A. In 1992 or afterwards, no.
>
> Q. And before 1992?
>
> A. I was not contacted, correct.

Q. And Doreen Proctor never communicated with you, did she?

A. I never met with Doreen Proctor.

(App. 690.)

Diller did testify that Fones told him that Ms. Proctor had given him some information concerning David T.'s suppliers, that he may have had New York and Jamaica connections. But although Agent Diller was present for most if not all the meetings with Ms. Proctor he never heard Ms. Proctor state that David T. had ties to New York or Jamaica. (App. 634.)

In addition, in the drug cases that the Commonwealth prosecuted from 1992 to 1993, Fones never testified that David T. had ties to New York and Jamaica. And even during Bell's 1996 federal trial, Fones never testified that Ms. Proctor told him that David T. had drug connections in New York and Jamaica.

E. The federal government did not prosecute Willie Tyler based on the need to vindicate federal interests.

The first time that federal law enforcement involved itself in any matter related to Ms. Proctor or Tyler was on June 8, 1993—more than a year after Ms. Proctor's death, and while Willie Tyler was still in state prison. Before then, the activities of David T. and cohorts, and Ms. Proctor's connection to them, was not on federal law enforcement's radar. In a May 8, 2000 affidavit. FBI Special

Agent Patrick Kelly confirmed that the first time a federal law enforcement officer became involved in Doreen Proctor's death was when he initiated an investigation because he was "troubled" by the state court verdict that acquitted Bell and Tyler of murder. (App. 191-92; Doc. 168).

SUMMARY OF THE ARGUMENT

The District Court properly granted Willie Tyler's Rule 29 Motion for Acquittal because the record does not permit a jury to find the requisite elements for conviction under the federal witness-tampering statue, 18 U.S.C. § 1512, after the Supreme Court's decision in *Fowler v. United States.*

Fowler did not address the murder element of § 1512, and here the evidence was, as the District Court concluded, "manifestly quite thin." Just as the 1992 Adams County jury acquitted Tyler, the Court should echo the state jury and find insufficient evidence that Tyler committed murder.

But what *Fowler* did address is how to discern a sufficient federal interest and the proper federal scope in prosecutions for witness-tampering where the prosecution may rightly belongs in the state.

Under § 1512, *Fowler* requires that the defendant *intended* to prevent the witness-informant from providing relevant information about a possible federal offense to a law enforcement officer, and that there would be a reasonable likelihood that this officer would have been a federal law enforcement officer. Without such a restriction, a defendant tampering with any witness in any state

criminal case involving an offense that could also be prosecuted by the Federal Government would be subject to federal prosecution—even after a state court acquittal. *Fowler* teaches that—although we know that law enforcement officers at every level in the federal system must consult and advise each other all the time—every local and state law enforcement officer is not a "federal officer", and every state offense does not implicate federal interests for § 1512 purposes, Otherwise, the bulwark against federal overreach that *Fowler* establishes becomes meaningless.

This case presents that precise scenario of federal overreaching without any specific federal interest to protect. Here, as the District Court held, the trial evidence was insufficient for a jury to find that Tyler intended to prevent Doreen Proctor from communicating with a law enforcement officer about a federal offense. The record provides no evidence from which a jury could infer that intent; rather the record shows that Tyler had no reason to even consider preventing Doreen Proctor's future communications with law enforcement.

Further, the trial evidence was insufficient for a jury to find that, had Doreen Proctor lived, it was "reasonably likely" that she would have communicated information to a federal law

enforcement officer. To the contrary, the record establishes no likelihood that Ms. Proctor would have chosen to communicate information to any law enforcement officer, let alone a federal officer.

The lack of record evidence to support a § 1512 conviction requires this Court to affirm the District Court's grant of Tyler's Rule 29 Motion for Judgment of Acquittal. What the record does show is that the federal government did not prosecute Willie Tyler to vindicate federal interest, but simply to cure what they saw as a too-soft state verdict and sentence.

ARGUMENT

I. The District Court Properly Granted Tyler's Rule 29(a) Motion for Judgment of Acquittal.

Standard of Review:

> This Court reviews "*de novo* an appeal of a district court's ruling on a Rule 29 motion and independently applies the same standard as the District Court. . . . [which must] review the record in the light more favorable to the prosecution to determine whether any rational trier of fact could have found proof of guilt beyond a reasonable doubt based on the available evidence" "*United States v. Freeman* (3d Cir. 2014).[12]
>
> When the Court's review is plenary, the Court "may affirm the District Court on any grounds supported by the record, even if the court did not rely on those grounds." *MRL Dev. I, LLC v. Whitecap Inv. Corp.* (3d Cir. 2016).[13]

To uphold the jury's guilty verdict under 18 U.S.C. § 1512, this Court, exercising independent *de novo* review, must be convinced that a rational jury could find that the record supports three factual findings that establish § 1512's elements, that:

(1) Tyler killed or aided and abetted in the killing of Ms. Proctor;

(2) Tyler intended to prevent Ms. Proctor from communicating additional information—after David T.'s trial—to a law enforcement officer concerning the commission of a federal offense (David T.'s purported interstate drug connections);

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[12] 763 F.3d 322, 343 (internal quotation and citation omitted).

[13] 823 F.3d 195, 202 (internal quotations omitted).

(3) had Ms. Proctor lived, it was "reasonably likely" that she would have communicated additional information to a federal law enforcement officer about a federal offense.

See Bruce v. Warden Lewisburg USP (3d Cir. 2017).[14] Each will be addressed in turn below.[15]

A. The Government's Brief mistakenly relies on inapposite case law and irrelevant law of the case doctrine.

Before addressing the merits of Tyler's argument on the § 1512's elements, the Government's Brief demands a response to a global flaw. The Government's Brief reveals that flaw in its Introduction section, with a remarkable statement:

> *Based on this Court's prior decisions*, moreover, the evidence was more than sufficient to satisfy *Fowler*'s reasonable-likelihood standard. *This Court has already resolved the issues presented by this appeal*."

(Br. 2.)(emphasis added). The Government is mistaken.

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[14] 868 F.3d 170. 185-86.

[15] Because this case turns largely on whether the jury's findings were based on reasonable inference or speculation, including here a brief discussion of the distinction seems appropriate.

Black's Law Dictionary defines the words as follows:

Inference:	An inference is a conclusion reached by considering other facts and deducing a logical connection from them.
Speculation:	[T]heorizing about matters over which there is no certain knowledge.

BLACK'S LAW DICTIONARY 847, 1529 (9th ed. 2009).

This Court, defining a reasonable inference, stated: "It is essential . . . that there be a logical and convincing connection between the facts established and the conclusion inferred." *United States v. Bycer*, 593 F.2d 549, 550. (3d Cir. 1979).

To begin with, the Government's Brief is peppered with citations to previous Third Circuit *Tyler* opinions as precedential authority for critical rulings here, as well as explicit reliance on law-of the-case doctrine. An illustrative sampling includes:

(1) citing to *Tyler II* as precedent for Diller's status as a qualifying officer under the witness-tampering statute (Br. 10);

(2) stating that the District Court's holding that Tyler did not intend to prevent Ms. Proctor's future communications to law enforcement was "foreclosed by this Court's prior decisions." (Br. 28);

(3) citing *United States v. Bell*, 113 F.3d 1345, 1350 (3d Cir. 1997) as precedent that sufficient evidence supported Tyler's conviction (Br. 31);

(4) stating that law of the case compels the conclusion that sufficient evidence supported the verdict. (Br. 29-30).

The Government erroneously asserts that the factual findings, inferences, and holdings from Tyler's (and Bell's) previous trials and opinions are somehow binding here.[16] They're not, for two reasons.

The evidence introduced and issues addressed during the two previous Tyler trials and appeals (as well as the wholly separate trial and appeal of Roberta Bell) may share similarities, but they

[16] The Brief also includes a detailed analysis of Judge Shwartz's dissent in *Tyler III*. (Br. 14-15.) With respect, as thoughtful as Judge Shwartz's dissent may be, dissents lack any precedential value. And the Government's effort for an *en banc* Court to adopt that dissent proved unsuccessful.

involved different juries, different presentations of evidence, and were governed by different legal standards; notably, the cases were decided before *Fowler.* The *de novo* standard of review that governs here requires this Court to review the record "independently". *Freeman*. Surely, if independent *de novo* review does not permit this Court to defer to the trial judge—who presided over creation of this record—then it likewise prohibits deferring to 20 year-old opinions based on different records under different law. Resolution of the issues here require this Court to independently review the evidence actually admitted in this trial under the state of the law as it now stands.

In addition, law of the case doctrine is inapposite. Rulings in *United States v. Bell* (3d Cir. 1997)[17], are not law of the case because Tyler was not involved in her trial or appeal. S*ee W.R. Grace & Co. v. Chakarian* (3d Cir. 2009)(law of the case doctrine requires cases to involve the same parties).[18] And when the Court in *Tyler III* remanded with the possibility that the District Court would require a new trial, that effectively "wiped the slate clean" for the 2017 trial. *See Pepper v. United States* (U.S. 2011)(where

[17] 113 F.3d 1345.

[18] 591 F.3d 164.

court of appeals set aside defendant's entire sentence and remanded for a *de novo* resentencing, the Court of Appeals effectively "wiped the slate clean.")[19] Further, law of the case doctrine will not apply when: "(1) new evidence is available; [or] (2) a supervening new law has been announced. . . ." *Pub. Interest Research Group of N.J., Inc. v. Magnesium Elektron, Inc.*, (3d Cir. 1997).[20] And both exceptions apply here.

First, the 2017 trial involved new evidence and a new theory of the case. For example:

- in previous trials, Laura Barrett's testimony was live, providing the jury the opportunity to assess demeanor and gauge credibility. In this trial, a cold transcript of her testimony was read into the record (App. 925-36);

- as the District Court observed "[each] of the Government's primary fact witnesses presented testimony that was riddled with memory failures and material inconsistencies from prior testimony." (App. 17);

- in previous trials the Government elicited from Diller that he "advised" and "consulted" with the DEA to support the federal nexus. In this trial, he avoided using those terms. (App. 229-30);

- evidence came to light in June 2017 that the original federal prosecutor prepared Diller's testimony in a way that the prosecutor admitted "clearly affected [Diller's] testimony" as to whether he would qualify as a federal law enforcement officer. (App. 265).

Second, the first two trials and the opinions arising out of them were decided pre-*Fowler*. Because the burden of proof increased

[19] 562 U.S. 476, 507.

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[20] 123 F.3d 111, 117.

from "possible" to "reasonably likely", the presentation of evidence, counsel's arguments, and the courts instructions necessarily changed for the 2017 trial.

This Court has no need to look over its shoulder at proceedings held 20 or more years ago and superseded statutory construction to decide this case.

B. The record does not permit a rational jury to find Tyler guilty of murder.

The District Court here—constrained by the strict standard of review in ruling on a post-verdict Rule 29 motion—concluded that the evidence implicating Tyler in Ms. Proctor's death as an aider and abetter "was manifestly quite thin." (App. 20.) On close review, the record reveals that, as the 1992 Adams County jury found, even the "quite thin" evidence disappears. While the evidence may permit a reasonable inference that David T. and Bell murdered Ms. Proctor, it does not permit such an inference for Tyler. Tyler's alleged connection to the actual murder is based solely on speculation, not reasonable inference. Viewing the evidence in the light favoring the verdict, the few reasonable inferences to be drawn about Tyler's actions support only the following conclusions:

- Tyler showed David T. how to cock a gun the evening before the murder (App. 491-92, 495, 508);

- Tyler drove David T. in Hodge's car to Adam's County, where the murder occurred (App. 718-19);

- When Bell was talking with Tyler and David T., Barrett overheard Bell say "you" killed her, but because she was in the next room, she had no way to know whether Bell was referring to Tyler or David T. To conclude that "you" referred to Tyler, rather than David T., is impermissible speculation (App. 935);

- Ola Brown's testimony that Bell said that if necessary she and David T. could "put it [the murder] on Little Man [Tyler]"—supports the inference that Bell devised a plan to frame Tyler, and that Tyler was not involved. (App. 660-62.)

The only reasonable inference to be drawn from this evidence is that David T. used his brother to assist him in the most minimal way possible, and with the most minimal awareness of his plan.

No evidence suggests that Tyler intended to participate in Ms. Proctor's murder, or that he knew about it. Nobody—not the Government, not the District Court—contend that the evidence is sufficient to find that Tyler was personally involved in the actual act of killing. This puts Bell's comments in perspective: "you" killed her did not refer to Tyler, and her motivation for framing "Little Man' becomes clear.

Tyler's conviction is based on nothing more than evidence that he, at his brother's request, showed his brother how to cock a gun for an undisclosed reason, and gave his brother a ride for an undisclosed purpose. During that ride, David T. said that Bell had

"a surprise" for him—i.e., Tyler was unaware of what David T. was planning—and when Tyler pressed David T. for more information, David T. replied, "none of your business." (App. 716.) Both statements fail to comport with a finding that Tyler knew what was planned or would be taking part in it.

No evidence puts Tyler at the murder scene, only in a car somewhere in the vicinity. No evidence supports finding that Tyler was involved in or knew about the killing, except perhaps that he learned about it shortly after the fact. The facts taken together do not logically and convincingly connect to the jury's inference that Tyler engaged in the murder of Doreen Proctor as a principal or as an aider and abettor.[21]

[21] Because the Government's Brief refers to their opinions, it is worth noting here that neither Judge Shwartz's dissent nor Judge Caldwell's opinion addressed this murder element—with good reason. Neither was addressing a sufficiency claim of the type asserted here, which asks whether the evidence was adequate to support each and every element of the crime of conviction. Rather, they were addressing an "actual innocence" habeas claim, which asks whether a past conviction is insupportable based on a change in the law effected by an intervening Supreme Court decision—specifically, *Fowler* and *Arthur Andersen*. Those Supreme Court decisions did not address the murder element of the witness intimidation statute, and thus there was no reason and no basis for Judge Shwartz or Judge Caldwell to consider the sufficiency of the evidence on that element. Arguably, even if the evidence were inadequate it would not have supported an "actual innocence" claim since the insufficiency would not have been based on an intervening change in the law.

C. The trial evidence was insufficient for a jury to find that Tyler intended to prevent Ms. Proctor—after David T.'s trial—from communicating to a law enforcement officer relevant additional information concerning a federal offense.

Fowler requires for a conviction under Section 1512 that the defendant "was motivated by a desire to prevent the communication between [the victim] and law enforcement authorities concerning the commission or possible commission of . . . a federal offense." *Bruce*. Here, the record includes no evidence for the jury to find that Tyler intended to prevent Ms. Proctor, after David T.'s trial, to communicate additional information about a federal offense. That conclusion follows from the lack of any evidence that Tyler knew that Ms. Proctor had any additional information to communicate to law enforcement, let alone information about a federal offense. Without such evidence, the jury's finding rests on speculation. The record provides support for finding nothing more than that Ms. Proctor was murdered for one purpose only: to prevent her from testifying against David T. in the Court of Common Pleas of Cumberland County in April 1992.

True, the evidence does support a finding that Tyler knew that Ms. Proctor was an informant with information about local drug-related activities of David T. and cohorts: she testified publically at

Hodge's trial. But that fails to support an inference that Ms. Proctor would be communicating about additional information with law enforcement in the future.

To the contrary, with her confidential status compromised, Ms. Proctor's access to any additional drug-related information about David T. and cohorts ended. Nothing in the record supports the inference that Tyler had any reason to believe that Ms. Proctor had information about a federal offense that she had not already disclosed. At the time of Ms. Proctor's death, no federal law enforcement officials concerned about federal offenses were involved in any way in the investigation or trials of David. T. and his cohorts, or with any Commonwealth witnesses, including Ms. Proctor. Without any proof to suggest that Tyler believed Ms. Proctor had additional information relevant to a possible federal investigation, the jury had no basis to infer that Tyler had the requisite specific intent. So the jury's finding that Tyler believed that Ms. Proctor, after David T.'s trial, would be communicating with law enforcement about a federal offense is speculation.

Also significant is that Tyler—unlike David T. and cohorts—was not charged with any drug offenses, so nothing in the record suggest that Tyler would have felt at risk. To contend that Tyler

intended to prevent Ms. Proctor from communicating additional information about David T.'s activities assumes—without any record support—that Tyler was aware that David T.'s activities extended beyond the local small street-level dealing that Ms. Proctor was involved with.

The Government's argument on this point misses the mark in two respects: the sufficiency of the record evidence and the applicable legal standard.

First, the Government points out evidence that the jury heard that boils down to this: Ms. Proctor was a witness-informant working with local and state law enforcement who was testifying about the local drug-related activities of David T. and cohorts in state court. (Br. 30-31.) The Government then baldly asserts that "a reasonable jury could *easily conclude* from this evidence that Proctor would continue to provide information to law enforcement, including information about individuals who had not yet been charged. (Br. 31.)(emphasis added)

"Easily conclude"?—But why? Where is the logical and convincing connection between the evidence the Government cites—as well as evidence the Government does not cite, notably that Ms. Proctor testified that she was "out of the business." (App.

118)—and the conclusion that Ms. Proctor would continue to provide information to law enforcement? Ms. Proctor's past law enforcement communication—without more—in no way supports future law enforcement communication.

Further, the Government asserts as self-evident that "the jury had to make only a small (and reasonable) step to conclude" that Tyler intended to stop future communications. Balderdash. That conclusory conclusion is contrary to logic and human experience, and, as discussed above, the jury would have to make a large and unreasonable leap over the record evidence to get there.

Second, the Government's legal analysis underpinning this argument is incomplete: it fails to address § 1512 as written, treating § 1512's communication element far more broadly than the statutory language permits. The Government states its first issue as sufficiency of evidence to support a finding of murder "to prevent the victim's communication to law enforcement." (Br. 4.) And then in the Argument section, the Brief continues to treat the element as requiring proof that Tyler knew only that Ms. Proctor was cooperating with law enforcement. (Br. 28-34.) But the Government ignores critical language that materially narrows the evidence required to prove the communication element.

Conviction under § 1512 requires an element of specific intent: that the defendant knew and intended to prevent the victim from communicating to law enforcement specific information—namely, information about "the commission or possible commission of . . . a federal offense." And here, the record lacks evidence that Tyler would have known that Ms. Proctor had information related to a federal offense.

Even if David T. and his cohorts were involved in drug-related activities that had some minimal interstate or international connections, their activities were essentially local, and at the time only local and state law enforcement were investigating them. And again, the record lacks any evidence that Tyler knew about such extra-local activities: he was never charged as one of David T.'s drug-dealing crew, and there was no evidence that he had any hand in it. True, federal law enforcement can and does charge local drug activities as a federal crime. But *Fowler* stressed that in finding a § 1512 violation, the Government must establish the defendant's specific intent to prevent communication involving a *federal* offense.

The record here provides no reason for a jury to find that Tyler had any idea that law enforcement would have any additional

interest in David T.'s activities, or that Ms. Proctor had any information related to multi-state or international connections. Thus, the record fails to support a finding that Tyler could have formed the requisite specific intent.

D. The trial evidence was insufficient for a jury to find that had Doreen Proctor lived, it was "reasonably likely" that she would have communicated relevant additional information to a federal law enforcement officer about a federal offense.

A guilty verdict under 18 U.S.C. § 1512(a)(1)(C) (Count II) and § 1512(b)(3) (Count III) requires the Government to prove beyond a reasonable doubt a jurisdictional federal nexus, which the Supreme Court explained as follows:

> [T]he Government must show *a reasonable likelihood* that, had, e.g., the victim communicated with law enforcement officers, at least one relevant communication would have been made to a federal law enforcement officer. That is to say, where the defendant kills a person with an intent to prevent communication with law enforcement officers generally, that intent includes an intent to prevent communications with *federal* law enforcement officers only if it is reasonably likely under the circumstances that (in the absence of the killing) at least one of the relevant communications would have been made to a federal officer.

Fowler (emphasis in original)[22]. By "reasonable likelihood, the "Government must show that the likelihood of communication to a federal officer was more than remote, outlandish, or simply

[22] 563 U.S. at 677-78.

hypothetical." *Id.* And "federal law enforcement officer" includes a Federal Government employee, or a person "serving the Federal Government as an adviser or consultant". 18 U.S.C. § 1515(a)(4). The *Fowler* Court recognized the need to cabin federal jurisdiction to avoid overfederalization of the criminal justice system:

> [T]o allow the Government to show no more than the broad indefinite intent we have described (the intent to prevent communications to law enforcement officers in general) would 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.

Id. [23] The Supreme Court "[left] it to lower courts to determine whether, and how, the [reasonable likelihood] standard applies in [a] particular case." *Fowler*, 563 U.S. at 678. Courts have found future communication with a federal law enforcement officer to be reasonably likely in cases where, unlike here, the federal interest implicated was plain:

- addressing the claim in the context of the actual innocence standard of 28 U.S.C. § 2241, robbery and arson were undisputed federal offenses and defendants' long-held history of violence and their campaign of fear and witness intimidation stymied the state investigation making federal intervention essential, *Bruce*;

- the defendant's conduct was not purely state in nature but involved multiple offenses across state lines, *United States v. Veliz*, 800 F.3d

[23] 563 U.S. at 675.

63, 75 (2d Cir. 2015);

- the victim was already cooperating with the FBI and was a potential witness in a future federal trial, *United States v. Smalls*, 752 F.3d 1227 (10th Cir. 2014); and

- when the victim was communicating with a local police department practically every day about drug trafficking and that local department was the biggest source of referrals to the DEA field office, *United States v. Smith*, 723 F.3d 510, 513 (4th Cir. 2013).[24]

In contrast, here, where the Government offers only hypothetical scenarios where Ms. Proctor's statements to Fones might eventually be communicated to a federal law enforcement officer such as Humphreys, the federal nexus requirement is not satisfied.

Here, the Government's evidence established that a drug Task Force headed by a local district attorney was investigating drug trafficking in Carlisle and was using Ms. Proctor as a local confidential informant. Ms. Proctor was communicating with one local and one state member of the Task Force, Fones and Diller. No federal law enforcement officer even knew about David T. or Ms. Proctor at the time of her death.

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[24] Post-*Fowler*, both *Veliz* and *Smith* maintain that the "reasonable likelihood" standard is satisfied by showing the federal nature of the offense plus "additional appropriate evidence" relying on *United States v. Bell*, 113 F.3d 1345, 1349 (3d Cir. 1997). *Veliz*, 800 F.3d at 74; *Smith*, 723 F.3d at 518. The Third Circuit has not had occasion post-*Fowler* to consider whether there is in fact an "additional appropriate evidence" aspect of the "reasonable likelihood" standard, and what that "additional appropriate evidence" would need to be.

The Government seeks to widen the scope of the federal witness tampering statute beyond the federal boundaries that *Fowler* set. Assuming that a rational jury could find that Tyler intended to prevent Doreen Proctor from communicating with law enforcement officers in general, the record does not support a finding that, had she lived, there was a reasonable likelihood that her information related to a federal offense and that one of those officers would have been a federal law enforcement officer. Rather, the likelihood was hypothetical and remote.

1. No reasonable likelihood that Ms. Proctor would have communicated with any law enforcement officer.

The evidence does not support finding a reasonable likelihood that Ms. Proctor would have had any further communications with *any* law enforcement officer. The Government's Brief provides a fortune-telling crystal-ball picture of what various law enforcement officers *probably* would have done if Ms. Proctor had lived. Fones *probably* would have talked to Ms. Proctor more, and then Fones *probably* would have related her vague purported statement regarding David T.'s New York/Jamaica connections to Diller, and then Diller *probably* would have evaluated that information, and then—only *if* the information appeared potentially useful—he

probably would have passed it along to DEA Agent Humphreys, and then Agent Humphreys *probably* would have evaluated it, and then—only *if* the information appeared potentially useful—he *might* have decided he wanted to speak with Ms. Proctor. (App. 45-47.)

The Government's crystal ball fails to reveal one fact critical to the Government's hypothetical scenario: however much law enforcement officers believe that they would have wanted to communicate with Ms. Proctor, there is no evidence from which to even infer that Ms. Proctor would have agreed to communicate with them. The Government did not elicit any testimony or produce any documents indicating in any way that Ms. Proctor, had she lived, would have communicated with any law enforcement—local, state, or federal. Ms. Proctor provided the only directly relevant testimony at Hodge's trial, where she testified that because she did not need money or drugs, and was working for a telephone company, she was "out of this [the witness/informant] business." (App. 117-18.)

And ending her witness-informant activities was not only a matter of Ms. Proctor's choice about her future endeavors, but a practical law enforcement matter. Because Ms. Proctor testified in open court, her undercover persona was compromised, necessarily

ending her usefulness for further controlled buys or obtaining additional drug-related information. By late April 1992, as Fones testified, Ms. Proctor was no longer cooperating with the Task Force other than testifying at preliminary hearings regarding the four buyers, and at David T.'s scheduled April 21 trial. (App. 445.)

Further, the Government's speculation that Ms. Proctor, had she lived, would have spoken with law enforcement assumes a fact that neither evidence nor reasonable inference support: that Ms. Proctor was holding back information waiting to disclose it after David T.'s trial. As noted, Ms. Proctor met with Fones and Diller numerous times, and purportedly told only Fones "early" in their talks about David T.'s New York/Jamaica activities (apparently, the one talk where Diller was not present). And from early 1991, after the controlled buys, through April 1992, Ms. Proctor provided no additional information to anyone. Unless Ms. Proctor was secreting relevant information—and there is no evidence to suggest that—further communication with law enforcement would have been worthless. As an "outed" witness/informant, what possible information could she have had that she hadn't already communicated to law enforcement?

This evidence provides no basis for the jury to find that there was a reasonable likelihood that Ms. Proctor would have communicated with *any* law enforcement officer.

2. No reasonable likelihood that Ms. Proctor would have communicated with a federal law enforcement officer.

Even assuming that there was a reasonable likelihood that Ms. Proctor would have had further communication with some law enforcement officer, no evidence supports finding a reasonable likelihood that she would have communicated with a *federal* law enforcement officer: "an officer or employee of the Federal Government, or a person authorized to act for or on behalf of the Federal Government or serving the Federal Government as an *adviser* or *consultant*." 18 U.S.C. § 1515(a)(4)(emphasis added).

As noted above, Ms. Proctor was a confidential informant assigned to Carlisle Detective David Fones. If she would have had further communications with some law enforcement officer, the only reasonably likely officer was Fones. But he was not a federal law enforcement officer. In 1992, Detective Fones was a municipal police officer in Carlisle and also worked part time with the TTask Force, a municipal task force that in 1992 included only local police officers from Cumberland, York and Perry Counties—and did not

include any federal law enforcement officers. (App. 205-14, 375-81.)

The Task Force conducted its operations solely under the authority of state and local officials. In the 1991 Memorandum of Understanding, signed by the then-Attorney General and President of the PA District Attorneys Association (App. 937-42), the Memorandum memorialized that the Task Force program was subject to the control and supervision of the district attorney of the county in which the Task Force operated and—other than a general prefatory statement recognizing the importance of drug law enforcement at all levels of government—did not include language concerning federal involvement with the Task Force program. (App. 604-16.)

The next potential law enforcement candidate was Special Agent Ronald Diller. The Government's effort to cast Diller—a member of the Task Force in 1992—as a "federal law enforcement officer" does not comport with the record evidence.

Agent Diller, in 1990, began working in the Pennsylvania Office of Attorney General, Bureau of Narcotics Investigation. He was assigned to the Task Force as the coordinator, and the Task Force was comprised of members of local police departments who came

together, when off- duty, to investigate drug crimes that might cross their county lines.

Diller had occasion to meet with Ms. Proctor several times while she worked with Detective Fones. Even if it was reasonably likely that Ms. Proctor would have had further communication with Diller in connection with further drug investigations—and, again, unrefuted evidence establishes that she would not have involved herself in any further law enforcement activities—Diller was an agent for the state, serving the state of Pennsylvania. He was not "serving the federal government", and he was not employed by the Federal Government. Further, the Government did not present any testimony that Diller was "serving the Federal Government as an adviser or consultant". Diller did testify that because local police investigating drug activities did not have jurisdiction outside of the Commonwealth of Pennsylvania, when a local investigation suggested that drug activities involved out-of-state or international activities, Diller would sometimes contact an appropriate federal agency, such as the FBI, IRS, or DEA.

But any local or state law enforcement agent who got wind of such activities could pick up the phone and call the FBI, IRS, or DEA. Does every local and state law enforcement officer involved in

potential federal offenses, drug-related or otherwise, qualify as "serving as an adviser or consultant" to the Federal Government?

While DEA Agent Humphreys had communicated with Diller on occasion, he did not know Fones, never met Ms. Proctor, and no one ever asked him to interview her. Thus, even though Agent Humphreys qualifies as a federal law enforcement officer, there is no evidence from which the jury could conclude that it was reasonably likely that, had she lived, Ms. Proctor would have communicated with him.

As a final matter, if Ms. Proctor had lived, and David T. had been convicted of drug-trafficking in state court—as Hodge was convicted—there is no reasonably likelihood that federal law enforcement would have been interested in anything Ms. Proctor had to say about David T. If no federal investigation or prosecution followed Hodge's state court conviction, there is no reason to believe that federal law enforcement would have been interested in investigating or prosecuting such a small local street-level drug dealer as David T.

3. No reasonable likelihood that Ms. Proctor would have communicated with a federal law enforcement officer with relevant and material information.

Finally, even if Ms. Proctor would have changed her mind to

assist law enforcement officers and would have met with Agent Humphreys, the record includes no evidence to suggest that she had knowledge of any relevant and material information about drug trafficking. *Fowler* requires that the witness-victim's communication to law enforcement must be a relevant communication. *See Fowler*, 563 U.S. at 677. But the trial evidence was that at some point Doreen Proctor told Detective Fones in vague terms that David T.'s sources for cocaine might include a New York City source, and that David Tyler made trips Jamaica—though for reasons unstated. Significantly, Detective Fones testified that Ms. Proctor never named any actual supplier, and he did not memorialize these purported statements—which would seem critical in a drug investigation— in any official police report or personal notes. Nor did he discuss those purported statements with anyone. There is no evidence that Ms. Proctor knew any additional information about David T.'s alleged source in New York or any other detailed information about his trips to Jamaica or anything else.

As noted, the Government's argument hypothesizes that Fones *probably* would have related Ms. Proctor's vague statement regarding David T.'s New York source to Diller at the conclusion of

the state cases. And that Diller *probably* would have evaluated the information, and *perhaps* would have taken it "to the next level" by communicating that information to DEA Agent Humphreys, and Agent Humphreys *possibly* would have interviewed Doreen Proctor. But even if this string of uncertain events would have occurred, and even assuming that Ms. Proctor would have changed her mind about cooperating with law enforcement, by the time Agent Humphreys would have spoken with her, any information she had would have been stale and not relevant. Ms. Proctor began acting as a confidential informant in early 1991, David T. was arrested in July, 1991, his trial was scheduled for April, 1992. So David T. would not have had any contact with any supplier in New York or Jamaica for almost a year by the earliest possible time that Ms. Proctor might have communicated with Agent Humphreys.

So, even accepting that Ms. Proctor made statements to Fones that the Government asserts, and even if she had agreed to cooperate with the DEA if she had lived, and even if she repeated that statement to Agent Humphreys, that information does not qualify as a "relevant communication." The statement is vague, and does not involve any details relating to specific names or locations of the suppliers. The evidence does not establish the likelihood of

any "relevant" communication from Doreen Proctor.

* * * * * *

As a final matter that merits only a brief discussion, the Government's Brief spills much ink on the issue of the District Court's analytically provocative perspective on the application of *Fowler*'s reasonable-likelihood standard, and Tyler's purported "invited error." (Br. 34-42; App. 35-42.) The Government's discussion is gratuitous.

First, the Court's standard of review is *de novo*.

Second, the Court "may affirm the District Court on any grounds supported by the record, even if the court did not rely on those grounds." *MRL Dev. I, LLC v. Whitecap Inv. Corp.* (3d Cir. 2016).[25] Third, the District Court's legal analysis on reasonable likelihood was dicta. The District Court granted Tyler's motion on the basis "that the evidence could not support a finding that [Tyler] acted with an intent to prevent a communication [and that holding] is determinative." (App. 29.) The District Court stated explicitly that the analysis that followed—including the thought-proving *Fowler* discussion—was solely, "for the sake of clarity and completeness." *Id.*

[25] 823 F.3d 195, 202 (internal quotations omitted).

CONCLUSION

WHEREFORE, for all the foregoing reasons, Appellee Willie Tyler respectfully requests that this Court affirm the District Court's grant of Tyler's Rule 29(a) motion for judgment of acquittal.

Respectfully submitted,

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CERTIFICATION OF BAR MEMBERSHIP, WORD COUNT, IDENTICAL TEXT, AND VIRUS CHECK.

I, Ronald A. Krauss, Esquire, First Assistant Federal Public Defender, certify that:

1) I am a member in good standing of the bar of this Court;

3) This Response Brief of Appellee contains 12,310 words;

2) The text of the electronic format of the Response Brief of Appellee identical to the hard copy format;

3) A virus check was performed on the Response Brief of Appellee, using Symantec Endpoint Protection, last update was November 24, 2019, and no virus was detected.

I make this combined certification under penalty of perjury, pursuant to 28 U.S.C. § 1746.

/s/ Ronald A. Krauss
RONALD A. KRAUSS, ESQ.

Date: November 25, 2019

CERTIFICATE OF SERVICE

I, Ronald A. Krauss, Esq., First Assistant Federal Public Defender, certify that I caused to be served on this date a hard copy of the attached **Response Brief of Appellee** via Electronic Case Filing, and/or by placing a copy in the United States mail, first class in Harrisburg, Pennsylvania, and/or by hand delivery, addressed to the following:

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