No. 20-6484

IN THE SUPREME COURT OF THE UNITED STATES

WILLIE TYLER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether sufficient evidence supported petitioner's convictions for tampering with a witness by murder, in violation of 18 U.S.C. 1512(a)(1)(C), and tampering with a witness by intimidation, in violation of 18 U.S.C. 1512(b)(3).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-38a) is reported at 956 F.3d 116. The opinion of the district court (Pet. 39a-78a) is not published in the Federal Supplement but is available at 2018 WL 10322201.

JURISDICTION

The judgment of the court of appeals was entered on April 14, 2020. A petition for rehearing was denied on July 2, 2020 (Pet. App. 79a-80a). The petition for a writ of certiorari was filed on November 25, 2020. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Middle District of Pennsylvania, vacatur on appeal, retrial, vacatur on post-conviction review, and a second retrial, petitioner was found guilty of tampering with a witness by murder, in violation of 18 U.S.C. 1512(a)(1)(C) (1988), and tampering with a witness by intimidation and threats, in violation of 18 U.S.C. 1512(b)(3) (1988). Pet. App. 3a & n.3, 9a. The district court granted petitioner's motion for judgment of acquittal on both counts. Id. at 39a-78a. The court of appeals reversed the judgment, reinstated the guilty verdicts, and remanded the case for sentencing. Id. at 1a-38a.

1. The federal witness-tampering statute makes it a felony to kill "another person, with intent to * * * prevent the communication by any person to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense." 18 U.S.C. 1512(a)(1)(C). The statute also makes it a felony to threaten or intimidate "another person, with intent to * * * hinder, delay, or prevent the communication to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense." 18 U.S.C. 1512(b)(3). A separate provision defines the term "law enforcement officer" to mean "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). The statute also provides that, "[i]n a prosecution for an offense under this section, no state of mind need be proved with respect to the circumstance * * * that the law enforcement officer is an officer or employee of the Federal Government." 18 U.S.C. 1512(g)(2). In Fowler v. United States, 563 U.S. 668 (2011), this Court held that, "where the defendant kills a person with an intent to prevent communication with law enforcement officers generally," the government may obtain a conviction under Section 1512 only if it shows that "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 677-678.

2. Petitioner and his brother David Tyler were members of a drug-trafficking ring in central Pennsylvania. Pet. App. 5a-8a. A group of state and local law enforcement officers known as the Tri-County Drug Task Force was responsible for investigating drug trafficking in that area. Id. at 5a. The Task Force "frequently worked with federal agencies, including the Drug Enforcement Administration ('DEA')." Ibid. The Task Force's coordinator met with DEA agents "multiple times a month, or more frequently as needed, to discuss the DEA's interest in the Task Force's cases." Ibid.

In 1990, Doreen Proctor became a confidential informant for the Task Force. Pet. App. 6a. As relevant here, Proctor made three controlled purchases of cocaine that led to the arrest of multiple individuals, including petitioner's brother. Ibid. She was scheduled to testify against petitioner's brother at his trial on April 21, 1992. Id. at 7a.

The day before the scheduled testimony, petitioner and his brother "spotted Proctor" while driving. Pet. App. 7a. They said that they "were going to do something to her then, but there were too many cars." Ibid. (citation omitted). Later that day, petitioner's brother retrieved a gun, and petitioner showed him how to cock it. Ibid. Then, the following morning, one of petitioner's associates "lured Proctor from her house by offering her cocaine," "convinced Proctor to take a ride in [the associate's] car," and brought Proctor to petitioner and his brother. Ibid. Proctor was "beaten, shot in the chest, and then shot in the head while on the ground." Id. at 8a.

Following a jury trial in state court, petitioner's brother was convicted of murder. See United States v. Tyler, 281 F.3d 84, 89 n.1 (3d Cir.), cert. denied, 537 U.S. 858 (2002). Petitioner was acquitted in state court of murder but convicted of intimidating a witness. See id. at 88-89. He was sentenced to two to four years in state prison. See id. at 89.

3. In 1996, after petitioner's release from state custody, a federal grand jury indicted petitioner for conspiring to kill a witness, in violation of 18 U.S.C. 371 (1988); tampering with a witness by murder, in violation of 18 U.S.C. 1512(a)(1)(A) and (C) (1988); tampering with a witness by intimidation and threats, in violation of 18 U.S.C. 1512(b)(1)-(3) (1988); and using a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c)(1) and (2) (1988 & Supp. IV 1992). C.A. App. 77-90. Petitioner was convicted on all counts and sentenced to imprisonment for life. See Tyler, 281 F.3d at 89. The court of appeals reversed and remanded on the ground that the district court had erroneously admitted a statement petitioner made to state police on the night of his arrest. See United States v. Tyler, 164 F.3d 150, 151, 159 (3d Cir. 1998).

Following retrial, petitioner was acquitted of conspiring to kill a witness, but convicted of tampering with a witness by murder, tampering with a witness by intimidation and threats, and using a firearm during and in relation to a crime of violence. United States v. Tyler, 207 Fed. Appx. 173, 175 & n.1 (3d Cir. 2006). The court of appeals affirmed, Tyler, 281 F.3d at 88, and this Court denied certiorari, 537 U.S. 858 (2002). On post-conviction review, however, petitioner's convictions for witness tampering were vacated on the ground that one of the alternative theories underlying petitioner's prosecution for witness tampering

was invalid because of this Court's intervening decision in Fowler. See Pet. App. 3a-4a n.3.

In 2017, petitioner was retried again for tampering with a witness by murder, in violation of 18 U.S.C. 1512(a)(1)(C) (1988), and tampering with a witness by intimidation and threats, in violation of 18 U.S.C. 1512(b)(3) (1988). See Gov't C.A. Br. 17 & n.2. As relevant here, the district court instructed the jury that it could find petitioner guilty of witness tampering by murder only if it found (1) petitioner murdered Proctor; (2) petitioner "acted with intent to hinder, delay, or prevent Doreen Proctor from communicating to law enforcement authorities information relating to the commission or possible commission of an offense"; (3) a reasonable likelihood that at least one of Proctor's communications would have been made to a qualifying law-enforcement officer; and (4) the information Proctor would have communicated related to the possible commission of a federal offense. C.A. App. 909. The jury found petitioner guilty on both counts. Pet. App. 40a.

The district court, however, granted petitioner's post-trial motion for judgment of acquittal on both counts. Pet. App. 39a-78a. The court found sufficient evidence as to the first and fourth elements that it had conveyed to the jury as described in the paragraph above, but insufficient evidence as to the second and third elements. See id. at 53a-55a, 66a-67a. On the second

element, the court deemed the evidence insufficient to permit a reasonable jury to find that petitioner intended to prevent a communication from Proctor to a law-enforcement officer; in the court's view, the evidence instead proved only that petitioner intended to prevent Proctor from testifying at his brother's trial. Id. at 59a-65a. On the third element, the court deemed the evidence insufficient to permit a reasonable jury to find a reasonable likelihood that the communication would have been made to a qualifying law-enforcement officer. Id. at 70a-71a. The court concluded that the trial evidence showed that Proctor reported only to state law-enforcement officers, who are not qualifying law-enforcement officers for purposes of the witness-tampering statute. Ibid.

4. The court of appeals reversed and remanded for sentencing. Pet. App. 1a-39a.

The court of appeals found sufficient evidence that petitioner "killed or intimidated Proctor, at least in part, with the intent to prevent her communication with law enforcement." Pet. App. 14a. The court emphasized Proctor's "well known" cooperation with law enforcement against people with whom petitioner had a close relationship, "the evidence about [petitioner's] own illegal activities," and Proctor's continuing provision of information to law-enforcement officials even after she stopped making controlled drug purchases. Id. at 15a-17a &

n.11. The court acknowledged that "'the evidence may lend itself more obviously to the theory that [petitioner] killed Proctor in order to prevent her from testifying a few hours later at [his brother's] trial,'" but explained that "the record in [petitioner's] trial 'also supports the inference that [petitioner] believed Proctor was going to continue to communicate with the Task Force concerning drug crimes that [petitioner] and others had committed.'" Id. at 15a (citation omitted).

The court of appeals also found sufficient evidence of "a reasonable likelihood that one of Proctor's communications would have been to a qualifying law enforcement officer." Pet. App. 18a. The court determined that the qualifying law enforcement officers here included both the Task Force coordinator (because he advised and consulted with federal officers) and DEA agents (because they were federal officers). Id. at 22a; see 18 U.S.C. 1515(a)(4)(A). And the court found sufficient evidence that it was reasonably likely that petitioner would have communicated with both the Task Force coordinator and DEA agents. Pet. App. 22a-25a.

Judge Rendell concurred in part and dissented in part. Pet. App. 27a-38a. Judge Rendell found the evidence insufficient to show that petitioner "acted with the intent to prevent Proctor from communicating with law enforcement." Id. at 27a. Judge Rendell believed that, "[w]hile there is little doubt that the

evidence demonstrated that [petitioner] 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." Id. at 29a.

ARGUMENT

Petitioner contends (Pet. 5-19) that the court of appeals misinterpreted the federal witness-tampering statutes, but does not directly challenge the jury instructions or sufficiency of the evidence. The petition for a writ of certiorari arises in an interlocutory posture, which in itself provides a sufficient reason to deny it. In any event, the decision was correct and does not conflict with any decision of this Court or any other court of appeals. This case also would be a poor vehicle for reviewing the question that petitioner presents. No further review is warranted.

1. As a threshold matter, the decision below is interlocutory; the court of appeals reversed the district court's judgment and remanded the case for sentencing. The interlocutory posture of the case "alone furnishe[s] sufficient ground for the denial of the application." Hamilton-Brown Shoe Co. v. Wolf Bros. & Co., 240 U.S. 251, 258 (1916); see, e.g., National Football League v. Ninth Inning, Inc., 141 S. Ct. 56, 57 (2020) (statement of Kavanaugh, J., respecting the denial of certiorari); Abbott v.

Veasey, 137 S. Ct. 612, 613 (2017) (statement of Roberts, C.J., respecting the denial of certiorari). The Court routinely denies interlocutory petitions in criminal cases. See Stephen M. Shapiro et al., Supreme Court Practice 4-55 n.72 (11th ed. 2019).

That practice promotes judicial efficiency, because the proceedings on remand may affect the consideration of the issues presented in a petition. It also enables issues raised at different stages of lower-court proceedings to be consolidated in a single petition for a writ of certiorari. See Major League Baseball Players Ass'n v. Garvey, 532 U.S. 504, 508 n.1 (2001) (per curiam) ("[W]e have authority to consider questions determined in earlier stages of the litigation where certiorari is sought from the most recent of the judgments of the Court of Appeals."). This case presents no occasion for this Court to depart from its usual practice.

2. In any event, the decision below was correct. The federal witness-tampering statute makes it a felony to kill or intimidate "another person, with intent to * * * prevent the communication by any person to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense." 18 U.S.C. 1512(a)(1)(C); see 18 U.S.C. 1512(b)(3). The statute provides that "no state of mind need be proved with respect to the

circumstance * * * that the law enforcement officer is an officer or employee of the Federal Government." 18 U.S.C. 1512(g)(2).

In Fowler v. United States, 563 U.S. 668 (2011), this Court considered how the statute would apply to a defendant who "was not thinking specifically about federal officers" when he tampered with the witness, but who "would nonetheless have wanted to prevent communication with federal officers from taking place (had he considered the matter)." Id. at 672. The Court recognized that it could not "insist that the defendant have had some general thought about federal officers in mind because the statute says that 'no state of mind need be proved' in respect to the federal nature of the communication's recipient." Id. at 673 (quoting 18 U.S.C. 1512(g)(2)). The Court concluded, however, that "where the defendant kills a person with an intent to prevent communication with law enforcement officers generally," the government may obtain a conviction "only if it is reasonably likely under the circumstances that (in the absence of the [tampering]) at least one of the relevant communications would have been made to a federal officer." Id. at 677-678. The Court explained that this reasonable-likelihood standard does not require proof "beyond a reasonable doubt (or even that it is more likely than not) that the hypothetical communication would have been to a federal officer." Id. at 674. Rather, the evidence need only show that

"the likelihood of communication to a federal officer was more than remote, outlandish, or simply hypothetical." Id. at 678.

The court of appeals applied the standard set out in Fowler. The court found that, "[a]s in Fowler, evidence was presented that [petitioner] 'killed [Proctor] with an intent to prevent [her] from communicating with law enforcement officers in general' but that [petitioner] 'did not have federal law enforcement officers (or any specific individuals) particularly in mind.'" Pet. App. 21a (quoting Fowler, 563 U.S. at 670). "Applying the Fowler standard," the court then found "that it was 'reasonably likely' that Proctor would have communicated with a [qualifying] 'law enforcement officer.'" Id. at 22a; see id. at 22a-25a.

Petitioner's contentions rely on a mistaken view of the court of appeals' analysis. Petitioner characterizes the decision below as holding that the witness-tampering statute "encompass[es] any case in which there exists a 'reasonable likelihood' that the witness might have communicated with a federal official -- even when the defendant had only state officials in mind." Pet. 6 (emphasis added). The court of appeals, however, did not conclude that petitioner "had only state officials in mind," Pet. 6, and this case accordingly does not implicate Fowler's suggestion that a different inquiry might apply when the defendant had "a particular individual in mind" as the recipient of the victim's communication, 563 U.S. at 673. To the contrary, the court found

sufficient evidence that petitioner "killed Proctor with an intent to prevent her from communicating with law enforcement officers in general" and that petitioner "did not have * * * any specific individuals * * * particularly in mind." Pet. App. 21a (quoting Fowler, 563 U.S. at 670) (emphasis added; brackets omitted). Petitioner has not sought review of that fact-bound evidentiary determination, and in any event, that determination would not warrant this Court's review. See Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings."); United States v. Johnston, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts.").

3. Petitioner errs in contending (Pet. 7-9) that the decision below conflicts with the decisions of other courts of appeals. Petitioner's contention rests on his mistaken premise (Pet. 8) that the record established that petitioner "intended to prevent communications only to state officials." As just shown, the court of appeals instead found sufficient evidence that petitioner "'killed Proctor with an intent to prevent her from communicating with law enforcement officers in general.'" Pet. App. 21a (quoting Fowler, 563 U.S. at 670) (emphasis added).

Petitioner likewise errs in arguing (Pet. 8) that, in United States v. Smith, 723 F.3d 510 (2013), cert. denied, 572 U.S. 1043 (2014), the Fourth Circuit held that Fowler's reasonable-

likelihood standard applies "even when * * * the defendant intended to prevent communications only to state officials." The Fourth Circuit in Smith did not directly consider a legal contention of the sort petitioner asserts here. Rather, the question in Smith was merely whether a defendant suffered prejudicial error as a result of pre-Fowler jury instructions that required the government to prove that "there was a possibility or likelihood" that the communication would reach a federal officer. 723 F.3d at 513, 517-518 (emphases omitted). The court determined that, on the facts of the case, any error was harmless. Id. at 517-518.

In any event, any conflict involving the Fourth Circuit would not warrant certiorari in this case. Furthermore, the decisions that petitioner cites on the opposite side of the claimed conflict stand only for the unremarkable proposition that Fowler's reasonable-likelihood standard applies "when the defendant acts with an intent to prevent communication to law enforcement officers in general." Stuckey v. United States, 603 Fed. Appx. 461, 462 (6th Cir.), cert. denied, 577 U.S. 886 (2015); see United States v. Snyder, 865 F.3d 490, 496 (7th Cir. 2017); United States v. Smalls, 752 F.3d 1227, 1249 (10th Cir. 2014); United States v. Kostopoulos, 766 Fed. Appx. 875, 882 (11th Cir.), cert. denied, 140 S. Ct. 203 (2019). None of those decisions directly addresses

whether the government could obtain a conviction when the defendant "had only state officials in mind." Pet. 6.

4. Petitioner separately contends (Pet. 9-14) that the courts of appeals disagree about other aspects of the reasonable-likelihood standard. Petitioner, however, has not sought a writ of certiorari as to those additional issues. See Pet. i. This case presents no occasion for the Court to consider those issues. See Sup. Ct. R. 14.1(a) ("Only the questions set out in the petition, or fairly included therein, will be considered by the Court."); Yee v. City of Escondido, 503 U.S. 519, 535 (1992) ("The framing of the question presented has significant consequences.").

In any event, petitioner fails to identify any disagreement among the circuits warranting this Court's review. To start, petitioner errs in asserting (Pet. 10) that the Second and Fourth Circuits adhere to what he calls the "additional appropriate evidence" test, but that the Third Circuit has adopted a conflicting approach "recogniz[ing] that this 'additional appropriate evidence' test * * * is inconsistent with [Fowler] and can no longer govern." The disagreement petitioner identifies is purely terminological; as another court of appeals has explained, "the Second and Fourth Circuits * * * require that the 'additional appropriate evidence' satisfy Fowler's reasonable likelihood standard." United States v. Johnson, 874 F.3d 1078, 1082 (9th Cir. 2017) (citation omitted). In addition, even

assuming the existence of a circuit conflict, petitioner explains (Pet. 10-11) that he agrees with the Third Circuit's position and disagrees with the Second and Fourth Circuit's asserted position. Because the Third Circuit applied the very test that petitioner advocates, petitioner has no sound basis to seek review of its decision here. See Camreta v. Greene, 563 U.S. 692, 704 (2011) ("Our practice reflects a 'settled refusal' to entertain an appeal by a party on an issue as to which he prevailed.") (brackets and citation omitted).

Petitioner also errs in asserting (Pet. 12-13) that, in conflict with the decisions of other courts of appeals, the decision below upheld his conviction "based solely on evidence that the offense at issue was 'federal' in nature." The court of appeals' finding of sufficient evidence of a reasonable likelihood that Proctor would have communicated with a qualifying federal officer rested on far more than the federal nature of the offense. The court relied on Proctor's extensive prior contacts with a qualifying officer; Proctor's continuing provision of information about petitioner's brother's interstate drug activities in particular, which would have been outside the jurisdiction of the Task Force; and evidence demonstrating close coordination between the Task Force and the DEA. See Pet. App. 22a-25a; see also Snyder, 865 F.3d at 499 & n.1 (collecting cases relying on similar factors). The court's fact-bound application of the reasonable-

likelihood standard neither conflicts with the decision of any other court of appeals nor warrants this Court's review. See Sup. Ct. R. 10; Johnston, 268 U.S. at 227.*

5. The petition should, moreover, be denied for the additional reason that this case would be a poor vehicle for reviewing petitioner's contentions. The jury instructions in this case made clear to the jury that the government bore the burden of proving that "there was a reasonable likelihood that at least one of the communications * * * by Doreen Proctor would have been made to a federal officer." C.A. App. 909. Petitioner did not contest that instruction in the district court or court of appeals. To the contrary, in the district court, petitioner affirmatively requested an instruction that "the Government must establish a reasonable likelihood that [Proctor] would in fact make a relevant communication with a federal law enforcement officer." D. Ct.

* Petitioner contends that, in an earlier case, the court of appeals "approved convictions based on evidence that the witness might have communicated with federal officials in light of future events, although there was no reason for the witness to do so when the offense was committed." Pet. 13; see id. at 13-14 (citing Bruce v. Warden Lewisburg USP, 868 F.3d 170 (3d Cir. 2017)). This case does not present that issue, because petitioner does not contend that the court of appeals considered such evidence here. Moreover, the case that petitioner cites arose in a materially different procedural posture: it involved a habeas corpus proceeding in which a defendant was required to prove actual innocence in order to prevail. Bruce, 868 F.3d at 188. The court in that case concluded that "post-offense acts" were "appropriately considered here given the wide-open evidentiary universe that attends this actual innocence proceeding." Ibid.

Doc. 513, at 2 (July 12, 2017). And in the court of appeals, petitioner acknowledged the applicability of Fowler's reasonable-likelihood standard in the circumstances of this case. See Pet. C.A. Br. 30, 54. In addition, at an earlier stage of these criminal proceedings, petitioner obtained habeas corpus relief by arguing that "Fowler is on all fours, and so the Fowler standard of reasonable likelihood applies to [petitioner's] case." D. Ct. Doc. 336, at 13 (June 30, 2011); see United States v. Tyler, 732 F.3d 241, 251-252 (3d Cir. 2013). Under a number of doctrines, petitioner's previous acceptance of the reasonable-likelihood standard precludes him from obtaining relief on the ground that the standard should not have been applied at all. See, e.g., United States v. Olano, 507 U.S. 725, 733 (1993) (waiver and forfeiture); United States v. Wells, 519 U.S. 482, 488 (1997) (invited error); New Hampshire v. Maine, 532 U.S. 742, 749 (2001) (judicial estoppel); City of Springfield v. Kebbe, 480 U.S. 257, 259-260 (1987) (per curiam) (prudential concerns about entertaining arguments inconsistent with a party's proposed jury instructions).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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