No. 20-6484

IN THE

Supreme Court of the United States

WILLIE TYLER,

Petitioner,

v.

UNITED STATES,

Respondent.

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

REPLY OF PETITIONER

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

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

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

Counsel for Petitioner

* Counsel of Record

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—continued

REPLY BRIEF

The government does not dispute that the interpretation of the federal witness tampering statute implicates issues of exceptional importance. See Brief for the United States in Opposition ("Opp.") 9–18. Instead, it argues that the petition should be denied because the decision below presents a question of fact rather than a question of law, does not deepen any conflict among the circuits, and constitutes an interlocutory order that is a poor vehicle for deciding the question presented. *Id.* Each of these arguments relies on a mischaracterization of the decision below. Contrary to the government's view, the Third Circuit's decision represents a material departure from the legal standard announced in *Fowler* v. *United States*, 563 U.S. 668 (2011), that widens the existing split among the circuits, and offers an excellent vehicle for the court to address the important and recurring question presented. See Petition for a Writ of Certiorari ("Pet.") 7–19.

1. The government's principal argument against review appears to be that the opinion of the court of appeals resolved only a question of fact, not one of law, and so does not implicate any divide among the circuits. Opp. 10–17. That argument is belied by the opinion itself.

The opinion discusses *Fowler*'s "reasonable likelihood" standard, as it has been interpreted by the Third Circuit and other courts, in depth. See Petition Appendix ("Pet. App.") 13a–28a. The Third Circuit's view is that the standard requires proof only that the defendant intended to prevent communications to "law enforcement officers generally," and that if such proof is offered, the statute is satisfied if it was reasonably likely that any of those communications

would in fact have gone to a federal officer. *Id.* at 19a. The court did address the sufficiency of the evidence (understandably, given that the appeal was one from entry of a judgment of acquittal) but clearly and necessarily resolved legal issues concerning the meaning and application of the "reasonable likelihood" standard in reversing the judgment of the district court. See *id.*

The manner in which it did so reveals the conflict with *Fowler*, and among the circuits. *Fowler* holds, as several circuits have recognized (and as the government seems tacitly to agree, see Opp. 11–13), that the "reasonable likelihood" standard applies only after the prosecution has offered proof that the defendant acted with an intent to prevent the witness from communicating with federal officials. *Fowler,* 563 U.S. 677–78; see*, e.g.*, *Stuckey* v. *United States*, 603 F. App'x 461, 462 (6th Cir. 2015); *United States* v. *Snyder*, 865 F.3d 490, 496 (7th Cir. 2017); *United States* v. *Smalls*, 752 F.3d 1227, 1250 (10th Cir. 2014); *United States* v. *Kostopoulos*, 766 F. App'x 875, 882 (11th Cir. 2019). However, the court of appeals in this case, following the approach of at least one other circuit court (the Fourth Circuit), applied the standard – and reinstated the conviction – based on evidence that the defendant intended to prevent communications only to state officials. Pet. App. 13a–28a; see *United States* v. *Smith*, 723 F.3d 510, 516 (4th Cir. 2013). It reasoned that, because (in its view) the evidence in this case showed that the defendant intended to prevent communications to law enforcement "in general," the statute was satisfied. Pet. App. 21a.[1]

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[1] The government suggests that the Fourth Circuit has not explicitly adopted the relaxed standard of the Third Circuit, since it has not "directly consider[ed] a legal contention of the

The problem with this analysis is with the Third Circuit's interpretation of "in general." Whereas *Fowler* requires proof that the group of law enforcement "in general" to whom the defendant intended to prevent communications specifically include federal officials, 563 U.S. 677–78, the court of appeals assumed that the "reasonable likelihood" standard applies whenever the defendant acts without a specific official or group in mind. See Pet. App. 13a–28a. This is a distinction with a critical difference. The Third Circuit's interpretation of "in general" allows a conviction based on evidence of intent to prevent communication to any law enforcement, even if the evidence pertains only to state officials. See *id.* But, properly understood, *Fowler*'s reference to law enforcement officers "in general" or "generally" must require that the government prove beyond a reasonable doubt that a defendant's intent is broad enough that it encompasses federal law enforcement. Pet. 5–7. Otherwise, *Fowler*'s standard loses all meaning and allows for purely state crimes to be transformed into violations of federal law. *Id.*

The Third Circuit's decision illustrates the problem. The only evidence of intent in the record related solely to the defendant's alleged intent to prevent communications to *state* officials, and the only intent the court found to be established was the intent to stop the witness from speaking to *state* officials. See Pet. App. 13a–28a. The dissenting member of the panel made precisely this point, in explaining why the

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sort petitioner asserts here." Opp. 14. But, whether or not that court has "directly considered" the issue, it has upheld convictions – like the Third Circuit in this case – based solely on evidence that the defendant intended to prevent communications to state officials, if there existed a probability that the communications would later be transmitted to federal officers. *E.g.*, *Smith*, 723 F.3d at 516; *see* Pet. App. 13a–28a.

Fowler standard was not satisfied and the conviction could not be upheld. See Pet. App. 27a–38a. The complete lack of evidence of intent concerning *federal* law enforcement communications confirms that the Third Circuit has adopted a relaxed standard that is fundamentally inconsistent with *Fowler*.

By eliminating the requirement that the government prove intent to prevent communications with federal law enforcement, the Third Circuit has expanded the reach of the witness tampering statute to encompass any case in which there exists a "reasonable likelihood" that the witness might have communicated with a federal official – even when the defendant had only state officials in mind. Pet. 7–9.[2]

2. The government also asks the Court to ignore conflicts that have developed among the circuits as to what the "reasonable likelihood" standard requires and how it applies, on grounds that those issues are not encompassed within the question presented and do not implicate true splits. Opp. 13–17. That is simply incorrect.

To be sure, the question presented in this petition is focused on whether the standard announced in

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[2] The government at one point describes the opinions that have rejected the Third Circuit's approach as "stand[ing] 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.'" Opp. 14 (quoting *Stuckey*, 603 Fed. App'x at 462. The petitioner agrees that those decisions are "unremarkable," insofar as they correctly interpret and apply *Fowler*. What *is* remarkable is how some courts have done otherwise, and overlooked *Fowler*'s essential holding that the statute may be satisfied only if the "general" group of law enforcement that the defendant had in mind included federal officials. *See Fowler*, 563 U.S. at 672.

Fowler requires proof of an intent to prevent communications to a federal official. See Pet. i. But the issues of what the standard demands and how it applies are inextricably intertwined with that question. See Pet. 5–7. Once it is determined, for instance, that proof of federal intent is necessary, it must then be determined what form that proof must take to support conviction (as indeed the court of appeals in this case considered). See Pet. App. 13a–28a. A decision that addresses *when* the "reasonable likelihood" standard applies is also an opportunity to resolve *how* it applies.[3]

A clear and deep division among the circuits makes these issues ripe for review. Pet. 9–12. Several courts have held, for instance, that a defendant's intent to prevent communications to federal officials may be inferred from the fact that the offense in question is federal in nature, so long as there is "additional appropriate evidence" of federal involvement. *E.g.*, *United States* v. *Veliz*, 800 F.3d 63, 74–75 (2d Cir. 2015); *United States* v. *Ramos-Cruz*, 667 F.3d 487, 491–98 (4th Cir. 2012). Others have held to the contrary, recognizing that *Fowler* implicitly abrogated the "additional appropriate evidence" test in favor of the "reasonable likelihood" standard. *E.g.*, *United States* v. *Tyler*, 732 F.3d 241, 251–52 (3d Cir 2013); *Lobbins* v. *United States*, 900 F.3d 799, 803 (6th Cir. 2018); *Snyder*, 865 F.3d at 496–97. And some courts

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[3] The case cited by the government in support of ignoring these issues, *Yee* v. *City of Escondido*, 503 U.S. 519 (1992), is plainly inapposite. *Yee* declined to consider new arguments raised after the Court granted certiorari on the ground that the respondent did not have notice of the arguments, and therefore no opportunity to "argue[ ] as to why certiorari should not be granted" as to them. *Id.* at 536. The government is undoubtedly on notice of the issues in this case. Opp. 15-17.

have said that a "reasonable likelihood" of federal communications may be established by proof that the witness might have communicated with federal officials in the future, even if there was no reason for the witness to do so when the offense was committed. *E.g.*, *Ramos-Cruz*, 667 F.3d at 495–98. Others have rejected this view, reasoning that under *Fowler* "reasonable likelihood" must be assessed as of the time when the witness intimidation occurred. *E.g.*, *Dhinsa* v. *Krueger*, 917 F.3d 70, 83–84 (2d Cir. 2019).

These conflicts are not merely "terminological." Opp. 15. They represent fundamental disagreements over the meaning and application of *Fowler* and the "reasonable likelihood" standard; indeed, at least one court has explicitly acknowledged the "diverge[nce]" among the circuits. *United States* v. *Johnson*, 874 F.3d 1078, 1082 (9th Cir. 2017) ("Our sister circuits' approaches have diverged in the wake of *Fowler*."). The government nevertheless suggests that these divisions might be irrelevant because at least one Third Circuit case decision adopted the view for which the petitioner advocates here. Opp. 15–16; see *Tyler*, 732 F.3d 251–52. But confusion within the circuits – with the Third Circuit itself adopting conflicting approaches to the "additional appropriate evidence test" in different cases, compare *Tyler*, 732 F.3d 251–52, with *Bruce* v. *Warden Lewisburg USP*, 868 F.3d 170 (3d Cir. 2017) – only emphasizes the need for the Court to unify the standards at issue.

Though it is striking that the circuits have become so divided in the short time since *Fowler*, it is not unprecedented. This is another case where the Court must step in and mend a division among the circuits resulting from some circuits' impermissible expansion of federal criminal law, notwithstanding this Court's admonitions. See*, e.g.*, *Kelly* v. *United States*, 140 S.

Ct. 1565, 1571 (2020); *Bond* v. *United States*, 572 U.S. 844, 865–66 (2014); *Fowler*, 563 U.S. at 677; *Arthur Anderson LLP* v. *United States*, 544 U.S. 696, 703 (2005); *Cleveland* v. *United States*, 531 U.S. 12, 24–25 (2000).

3. The government's remaining argument is that the Third Circuit's decision is a poor vehicle for review because it is "interlocutory," and because "[the] petitioner affirmatively requested [in the district court] an instruction . . . acknowledg[ing] the applicability of *Fowler*'s reasonable-likelihood standard." Opp. 9–10, 17–18. The government is wrong on both counts.

The decision under review is not "interlocutory." A judgment of acquittal is considered a final order, and; a decision by the court of appeals that the judgment should be reversed does not permit the district court to reconsider the matter. See*, e.g.*, *Smith* v. *Massachusetts*, 543 U.S. 462, 473 (2005); *Fong Foo* v. *United States*, 369 U.S. 141, 143 (1962). By contrast, each of the cases cited by the government involved a court of appeals decision remanding the case for the express purpose of allowing the district court to reconsider the order. See*, e.g.*, *NFL* v. *Ninth Inning, Inc.*, 141 S. Ct. 56, 57 (2020); *Abbott* v. *Veasey*, 137 S. Ct. 612, 613 (2017). In such cases, because the district court's reconsideration could directly impact this Court's consideration of the order – or moot the question entirely – review was justifiably denied, as the order had been effectively rendered "interlocutory." See*, e.g.*, *Abbott*, 137 S. Ct. at 613. Here, by contrast, the court of appeals did not remand for reconsideration of the judgment of acquittal, but for reinstatement of the conviction and sentencing. Pet. App. 26a. Nothing that the district court will do following remand would have any effect on the issues presented here, and indeed –

unlike a true "interlocutory" case – considering those issues now would promote judicial efficiency because restoring the district court's judgment would obviate the need for further proceedings.

The government's argument regarding the jury instructions also misses the mark. The petition highlights discrepancies in the interpretation and application of *Fowler* (what, who, when) and whether only a reasonable likelihood of communication with a hypothetical federal officer satisfies the standard. To be clear, contrary to the government's suggestion (Opp. 17–18), the petitioner's view is that *Fowler* applies in this case – and in any other witness-intimidation prosecution – but that the "reasonable likelihood" standard comes into play only after the government satisfies its burden of proving an intent to prevent communications to a group that includes federal officials. Pet. 7–9. That position is wholly consistent with the jury instructions proposed in the district court, as well as the arguments presented by the petitioner in the court of appeals. See Opp. 17 ("the Government must establish a reasonable likelihood that [Proctor] would in fact make a relevant communication with a federal law enforcement officer") (citing D. Ct. Doc. 513, at 2 (July 12, 2017)).

This case presents a clean opportunity for the Court to clarify *Fowler*'s application in a case that illustrates the gravity of the issue. The petitioner, Willie Tyler, was acquitted of murder in state court in 1993, but he has since been subject to repeated federal prosecutions for that same murder, resulting in his imprisonment for more than twenty years. He has now been out of prison for three years, living and working in his community, after the district court found (properly) that his offense was a state crime, and nothing more. His petition offers the Court an

opportunity to reaffirm limits on the reach of the federal criminal law in a case that vividly illustrates why those limits matter.

CONCLUSION

For the foregoing reasons, and those set forth in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted,

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

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

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

Counsel for Petitioner

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* Counsel of Record