No. _____

In the Supreme Court of the United States

PAUL M. WEADICK,

Petitioner

v.

UNITES STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United State Court of Appeals for the First Circuit

PETITION FOR A WRIT OF CERTIORARI

Mark W. Shea
Counsel of Record
Shea and LaRocque
929 Massachusetts Avenue, Suite 200
Cambridge MA 02139
617.577.8722
markwshea@shearock.com

QUESTION PRESENTED

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

The question presented is whether, as some circuits (including the court of appeals in this case) have held, that the "reasonable likelihood" standard applies even in cases in which the witness may not have made any communication to any officials at all.

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption of this petition, the following individual was party to the proceeding before the court whose judgment is sought to be reviewed:

FRANCIS P. SALEMME

CORPORATE DISCLOSURE

There are no corporate entities involved in this case.

RELATED CASES

United States v. Salemme
No. 21-7133
United States Supreme Court

United States v. Salemme
No. 18-1933
United States Court of Appeals for the First Circuit

United States v. Salemme and Weadick
No. 1:16-cr-10258-ADB
United States District Court, District of Massachusetts

TABLE OF CONTENTS

APPENDIX

TABLE OF AUTHORITIES

Cases

Statutes

PETITION FOR A WRIT OF CERTIORARI

Petitioner **Paul M. Weadick** respectfully petitions for a writ of certiorari to the United States Court of Appeals for the First Circuit to review the judgment against him in *United States v. Paul M. Weadick*.

OPINION BELOW

The opinion of the Court of Appeals for the First Circuit is reported at 15 F.4th 1, and reproduced in the appendix to this petition. Petition Appendix ("Pet. App.") 1a-14a. The order of the First Circuit on Weadick's petition for rehearing and rehearing *en banc,* dated December 29, 2021, is reproduced at Pet. App. 15a.

JURISDICTION

The court of appeals' judgment was entered on September 24, 2021. A petition for rehearing and suggestion for rehearing *en banc* was filed on October 29, 2021, and was denied on December 29, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The district court had jurisdiction under 18 U.S.C. § 3231, which grants exclusive jurisdiction over all offenses against the laws of the United States. The court of appeals had jurisdiction over the appeal pursuant to 28 U.S.C. § 1291, which grants jurisdiction to review all final decisions of the district courts. This petition is

timely filed pursuant to Sup. Ct. R. 13, ¶ 3.

STATUTORY PROVISION INVOLVED

The federal witness tampering statute, 18 U.S.C. § 1512, provides, in relevant part:

(a)

> (1) Whoever kills or attempts to kill another person, with intent to—
>
> ****
>
> (C) prevent the communication by any person to a law enforcement officer … of the United States of information relating to the commission or possible commission of a Federal offense ….

shall be punished….

STATEMENT OF THE CASE

1. The District Court Proceedings

On August 8, 2016, a criminal complaint was filed in the United States District Court of Massachusetts, charging Francis P. Salemme with murder of a witness, Steven DiSarro, in violation of 18 U.S.C. § 1512(a)(1)(C). On September 1, 2016, a federal grand jury returned an indictment charging Salemme and Paul M. Weadick with one count of murder of a witness in violation of 18 U.S.C. § 1512(a)(1)(C).

The government argued that DiSarro was murdered to prevent his communication to law enforcement of information relating to the commission of a federal offense. Specifically, it was alleged that DiSarro owned a night club known as The Channel, and that Salemme and his son ("Salemme Jr.")

had a hidden interest in that club; that they were under federal and state investigations to which The Channel was relevant; that the Salemmes and Weadick had participated in the murder; and that Salemme transported DiSarro's body to associates of his who arranged to have it buried.

The government argued at trial that in May of 1993, in Salemme's home in Sharon, Massachusetts, Salemme Jr.[2] choked DiSarro to death while Weadick held his legs. Salemme was said to have disposed of the body by contacting his associate, Robert DeLuca; driving the body to Providence, Rhode Island; and giving it to Joseph DeLuca (Robert's brother). The DeLuca brothers were said to have arranged with an individual named Billy Ricci to bury the body behind a mill that Ricci owned in Providence. Over 23 years later, negotiating with the government while facing legal troubles of his own, Ricci offered the government DiSarro's body and the link to the DeLuca brothers.

Jury selection took place on April 24 to 30, 2018. The jury was sworn and trial began on May 9, 2018. The district court instructed the jury that, in order to convict, the Government had to prove, *inter alia*, "that at least some part of a defendant's motive in killing Steven DiSarro was to prevent a communication *or possible communication* to a federal officer or judge." Weadick did not object to this instruction at trial. The verdict was reached on June 22, 2018.

On September 13, 2018, Weadick was sentenced to life imprisonment. Judgment entered on September 14, 2018, and an amended judgment issued on September 25, 2018. The conviction was affirmed by the by the First Circuit on September 24, 2021. Pet. App. 1a-14a.

2. The Court of Appeals Decision

On appeal, Weadick argued, under the plain error standard, that the district court gave erroneous jury instructions on the federal witness tampering charge. Weadick argued that the instruction did not comport with this Court's decision in *Fowler v. United States*, 563 U.S. 668, 676 (2011), which held that, for a conviction under 18 U.S.C. § 1512(a)(1)(c) for killing a person with intent to prevent the person's communication with law enforcement officers in general, the government must show a reasonable likelihood that the relevant communication would have occurred.

The First Circuit panel held Weadick could not show that *Fowler's* "reasonable likelihood" standard applies to a situation where no communication would have been made to law enforcement at all:

> Weadick and Salemme argue, perhaps DiSarro would not have made any communication at all. Whether *Fowler*'s "reasonable likelihood" standard applies equally to that issue is unclear. We have not considered the question previously, but two circuits that have considered it have concluded that *Fowler* does not apply. *See United States v. Tyler*, 956 F.3d 116, 127 n.15 (3d Cir. 2020); *Stuckey v. United States*, 603 F. App'x 461, 461-62 (6th Cir. 2015).

Pet. App. 13a.

REASON FOR GRANTING THE PETITION

Interpretation Of The Federal Witness Tampering Statute, 18 U.S.C. § 1512, Has Divided The Circuits

Certiorari is warranted to resolve a circuit conflict regarding the interpretation and application of the federal witness tampering statute, 18 U.S.C. § 1512, under *Fowler,* in which this Court held that "where [a] defendant kills a person with an intent to prevent communication with law enforcement officers generally" the government must show that the defendant was aware that it "is reasonably likely . . . one of the relevant communications would have been to a federal officer." 563 U.S. at 677–78.

This Court specifically considered the scenario described in the panel's decision when it is unlikely that any communication would have been made: "a defendant can kill a victim with *an intent* to prevent the victim from communicating with federal law enforcement officers even if there is some considerable doubt that any such communication would otherwise have taken place." *Id*. at 674 (emphasis in original).

The circuits are divided on their interpretation of the federal witness tampering statute, 18 U.S.C. § 1512, in light of *Fowler* – and the "reasonable likelihood" standard in particular. They have disagreed on essentially all aspects of the standard: what it requires, how it applies, and when it applies.

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

The circuits disagree on what the "reasonable likelihood" standard requires, and specifically whether it may be satisfied by "showing that the conduct which the defendant believed would be discussed in these communications constitutes a federal offense, so long as the government also presents additional appropriate evidence." *See, e.g.*, *United States v. Veliz*, 800 F.3d 63, 74-75 (2d Cir. 2015) (internal citations omitted).

Some courts of appeals have recognized that this "additional appropriate evidence" test is inconsistent with the "reasonable likelihood" standard and can no longer govern. *See, 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); *United States v. Snyder*, 865 F.3d 490, 496-497 (7th Cir. 2017). That test had allowed the defendant's intent to prevent a federal communication to be inferred simply from the federal nature of the offense at issue, so long as it was plausible that the communications regarding the offense would be made to a federal official. *Tyler*, 732 F.3d at 252 (citing *United States v. Stansfield*, 101 F.3d 909, 918 (3d Cir. 1996)). The "reasonable likelihood" standard, by contrast, demands proof that the defendant actually had federal officials in mind when committing the offense – either a particular federal officer or law enforcement in general – and cannot be met by proof that it was simply plausible that information

concerning a federal offense would be transmitted to federal officials. See id. Rather, as *Fowler* held, there must be proof of specific intent to prevent communications to federal officers combined with a "reasonable likelihood" that those communications would actually have occurred. See id.

Other courts have nevertheless continued to apply the "additional appropriate evidence" test after *Fowler*. *See, e.g.*, *Veliz*, 800 F.3d at 74-75; *United States v. Ramos-Cruz*, 667 F.3d 487, 497 (4th Cir. 2012). They have explained that, in their view, the "reasonable likelihood" standard is really no different than the prior test, and thus that a "'reasonable likelihood' can[ ] be shown through the same means that [they] previously permitted 'plausibility' to be shown." *Veliz*, 800 F.3d at 74-75. Under this view, intent may continue to be inferred from the federal nature of the offense, with "additional appropriate evidence" such as "proof that there was a federal investigation in progress at the time . . . or that the defendant had actual knowledge of the federal nature of the offense." *Id.* (quoting *United States v. Lopez*, 372 F.3d 86, 91-92 (2d Cir. 2004)).

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

674-678. *Fowler* cannot reasonably be read as both rejecting the "appropriate additional evidence" test while simultaneously permitting its continued use.

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

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

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

Fowler admonishes courts to focus on the likelihood that the witness will communicate with a federal officer, *see* 563 U.S. at 678, and some courts have recognized – in accord with that directive – that the standard requires proof not merely that a federal investigation might have commenced, but that a federal law enforcement official would actually have communicated with the witness, *see, e.g., Dhinsa v. Krueger*, 917 F.3d 70, 83 (2d Cir. 2019);

Lobbins, 900 F.3d at 804; *Johnson*, 874 F.3d at 1083. But others, including those courts that retain the "additional appropriate evidence" test, have continued to routinely (and improperly) uphold convictions based solely on evidence that the offense at issue was "federal" in nature. *See, e.g., Bruce v. Warden Lewisburg USP*, 868 F.3d 170, 186 (3d Cir. 2017); *Veliz*, 800 F.3d at 75.

Here there was no evidence in this case that the witness, DiSarro, would have communicated with federal law enforcement officials and yet the court of appeals upheld the conviction on grounds that "it is at least reasonably likely that any relevant communication made by DiSarro would have been directed to the federal agents who had recently sought his cooperation." Pet. App. 9a.

That holding is flatly contrary to *Fowler*, as it effectively presumes that federal communications are "reasonably likely" based on nothing more than that the crime could be classified as federal in nature. *See Fowler,* 563 U.S. at 677 (identifying marijuana offenses as an example of a crime "purely state in nature").

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

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

The Sixth, Seventh, Tenth, and Eleventh Circuits have all held that before the "reasonable likelihood" standard may even be applied, the government must prove that the defendant acted with the intent to prevent communications to federal law enforcement. *See, e.g., Stuckey*, 603 F. App'x at 462 (limiting Fowler's reasonable likelihood standard to "when the defendant acts with an intent to prevent communication to law enforcement officers in general"); *Snyder*, 865 F.3d at 496 (similar); *United States v. Smalls*, 752 F.3d 1227, 1249 (10th Cir. 2014) (similar); *United States v. Kostopoulos*, 766 F. App'x 875, 882 (11th Cir. 2019) (similar). Such proof may take the form of evidence that the defendant had a particular federal officer in mind, or that he acted with an intent to prevent communications to any and all officials. *See Smalls*, 752 F.3d at 1249. In the latter instance, where the government has offered proof that the defendant intended to prevent communications to a group of officials that includes federal officers, but not a particular federal officer, the "reasonable likelihood" standard is applied to limit the statute's reach to those cases in which there is an actual probability – rather than merely a hypothetical possibility – that the witness would have talked to a federal official. *Id.* at 1250. When the government has not offered such proof, or has established only that the defendant intended to prevent communications to state or local officials, the standard simply does not apply, and conviction cannot be had. *See id.*

Other courts, including the panel in this case, and the Third and Fourth Circuits, have instead applied the "reasonable likelihood" standard even when the record showed that the defendant intended to prevent communications to law enforcement in general. Pet. App. 9a. *See Tyler*, 956 F.3d at 124-130; *United States v. Smith*, 723 F.3d 510, 516 (4th Cir. 2013). These courts have reasoned that, once *any* intent to prevent a communication concerning an offense is shown, the government's burden is satisfied, and conviction is available if there is a "reasonable likelihood" that the communication would have been transmitted at some point to federal officials. *See Tyler*, 956 F.3d at 124-129. These courts appear to base this reading of *Fowler* on language in the opinion stating that "[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[, but] must show [only] that the likelihood of communication to a federal officer was more than remote, outlandish, or simply hypothetical." *Id.* at 126 (quoting *Fowler*, 563 U.S. at 678).

This language did not, however, alter the government's burden, or permit conviction based on anything less than proof beyond a reasonable doubt that the defendant *intended* to prevent communications to federal officials. Quite the opposite, *Fowler* explicitly confirms that the "reasonable likelihood" standard applies only after "[t]he Government [has] already shown beyond a reasonable doubt that the defendant possessed the relevant

broad indefinite intent, namely, the intent to prevent the victim from communicating with (unspecified) law enforcement officers" – *including* federal officers. 563 U.S. at 674. Nothing in *Fowler* allows for conviction in cases, like this one, in which the government proves only that the defendant intended to stop communications to law enforcement in general.

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

CONCLUSION

The petition for a writ of certiorari should be granted and the decision of the First Circuit should be reversed.

Respectfully submitted,

/s/ Mark W. Shea
Mark W. Shea
Counsel of Record
Shea and LaRocque, LLP
929 Massachusetts Avenue, Suite 200
Cambridge MA 02139
617.577.8722
markwshea@shearock.com

March 29, 2022