No. 23-7668

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IN THE SUPREME COURT OF THE UNITED STATES

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ROYLEE RICHARDSON, PETITIONER

v.

UNITED STATES OF AMERICA

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

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# BRIEF FOR THE UNITED STATES IN OPPOSITION

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## QUESTION PRESENTED

Whether sufficient evidence supported one of petitioner's convictions for witness tampering, in violation of 18 U.S.C. 1512(b)(1), on the theory that the government did not prove that the "official proceeding" was objectively foreseeable.

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## OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-8) is reported at 92 F.4th 728. The order of the district court denying petitioner's motion for a judgment of acquittal is unreported.

## JURISDICTION

The judgment of the court of appeals (Pet. App. 9) was entered on February 7, 2024. A petition for rehearing was denied on March 12, 2024 (Pet. App. 18). The petition for a writ of certiorari was filed on June 5, 2024. 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 Southern District of Iowa, petitioner was convicted on one count of possessing a firearm following a felony conviction, in violation of 18 U.S.C. 922(g)(1) and 924(a)(2), and two counts of witness tampering, in violation of 18 U.S.C. 1512(b). Judgment 1-2. He was sentenced to 240 months of imprisonment, to be followed by three years of supervised release. Judgment 3-4. The court of appeals affirmed. Pet. App. 1-8.

1. On February 7, 2021, petitioner and his romantic partner A.D. had an argument in A.D.'s apartment in Davenport, Iowa. Presentence Investigation Report (PSR) ¶¶ 10-12, 26. Petitioner struck A.D. several times in the head with a gun, broke her nose, and strangled her. PSR ¶¶ 26-27. A.D. ran outside and tried to flee by getting into a vehicle occupied by unknown individuals. PSR ¶ 28. But as the vehicle pulled away, petitioner fired multiple shots, and the vehicle crashed into a snowbank. PSR ¶¶ 12, 28. Petitioner pointed his gun at the driver, told him to unlock the doors, and ordered A.D. out of the vehicle. Ibid. A.D. then fled to a nearby apartment. Ibid.

Police officers, who had been alerted to shots fired by multiple 911 calls, arrived and arrested petitioner. PSR ¶¶ 10, 15. From a search of A.D.'s apartment, officers recovered a loaded firearm hidden in her one-year-old child's toy crate. PSR ¶ 23. Officers also found one spent shell casing, one bullet,

and two bullet fragments on the driveway outside the apartment. PSR ¶ 24. Further examination showed that the shell casing, bullet, and one of the bullet fragments were shot from the gun recovered from A.D.'s apartment. PSR ¶ 29. The other bullet fragment was too damaged for examination. Ibid.

Petitioner was initially held in state custody. PSR ¶ 32. In a recorded jailhouse call three days after his arrest, he was warned by an unknown associate that he was "gonna go federal" and was "facing like 10, 15 years if the feds pick everything up right now." Pet. App. 4 (emphases omitted). Despite the warnings, petitioner indicated that he would "take" a "felon in possession" charge. Ibid. (emphases omitted). Then, about 20 minutes later, in a recorded call with A.D., petitioner professed his love for her and urged her to "say nothing," explaining that he feared "spending his life in prison." Ibid. (brackets omitted). Petitioner offered to "be cool" if she refused to appear in court or "got on the stand and said [] that she had lied" to law enforcement. Ibid. (brackets omitted). In a subsequent call, petitioner stated that the discovery of the gun "might" mean that he "goes fed" and instructed A.D. to change her story. Ibid. (brackets and emphasis omitted).

In December 2021, a federal grand jury in the Southern District of Iowa charged petitioner with possessing a firearm following a felony conviction, in violation of 18 U.S.C. 922(g)(1) and 924(a)(2). Indictment 1. Petitioner's trial, originally set

to begin in June 2022, was continued shortly before the scheduled start date. PSR ¶ 33. Shortly thereafter, petitioner began asking others to contact A.D. to change her testimony. Ibid.; Pet. App 5. Petitioner told his go-betweens to emphasize to A.D. that he had children and was fighting for his life, and to "put some umph" into those conversations. PSR ¶ 33. He also questioned why A.D. had to go to court. Ibid.

2. In a second superseding indictment, a grand jury in the Southern District of Iowa charged petitioner not only with one count of possessing a firearm following a felony conviction, in violation of 18 U.S.C. 922(g)(1) and 924(a)(2), but also with one count of witness tampering, in violation of 18 U.S.C. 1512(b), for conduct between February 7, 2021 and July 22, 2021, and another count of witness tampering, in violation of 18 U.S.C. 1512(b), for conduct between June 25, 2022 and June 27, 2022. Second Superseding Indictment 1-2. Section 1512(b)(1) 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[] influence, delay, or prevent the testimony of any person in an official proceeding." 18 U.S.C. 1512(b)(1).

Petitioner proceeded to a jury trial. The district court instructed the jury that the witness-tampering counts required, among other things, proof that petitioner intended to influence or prevent the testimony of A.D. in an "official proceeding."

Preliminary Jury Instructions 5; Final Jury Instructions 14-15. The court further instructed the jury that the government must prove that petitioner "contemplated some particular official proceeding in which the testimony might be material." Preliminary Jury Instructions 7; see Final Jury Instructions 17. At trial, petitioner argued that he was not guilty on the first witness-tampering count, asserting that there was "no indication that he was contemplating a federal charge" in February 2021. Trial Tr. 596.

The jury found petitioner guilty on all counts. Verdict 1-2. The district court denied petitioner's motion for a judgment of acquittal, finding that, among other things, sufficient evidence supported petitioner's conviction on the first witness-tampering count. D. Ct. Doc. 160 (Dec. 8, 2022). The court sentenced petitioner to a total term of 240 months of imprisonment, consisting of 120 months on the felon-in-possession offense and 240 months on each of the witness-tampering counts, all to be served concurrently, to be followed by three years of supervised release. Judgment 3-4.

3. The court of appeals affirmed. Pet. App. 1-9. Among other things, the court rejected petitioner's challenge to the sufficiency of the evidence supporting the first witness-tampering count, finding sufficient evidence that he was "'contemplating' a federal felon-in-possession charge" even while in state custody and that petitioner's "'particular' federal prosecution" for

possession was "'foreseeable.'" Id. at 3-4 (brackets and citations omitted); see id. at 4 ("[T]he jury drew the reasonable inference that [petitioner]'s attempts at 'corruptly persuading' [A.D.] to lie or refuse to testify had a nexus to the lengthy sentence he would face from a federal felon-in-possession charge.") (brackets and citations omitted).

ARGUMENT

Petitioner contends (Pet. 5-7) that the court of appeals erred in rejecting his challenge to the sufficiency of the evidence supporting his witness-tampering conviction on Count Two because the court did not consider whether an official proceeding was objectively foreseeable. That contention, which was not properly raised below, lacks merit. In any event, this case would be a poor vehicle to consider the question presented, and the petition for a writ of certiorari should be denied.

1. As a threshold matter, this Court should not consider petitioner's claim because he raised it for the first time in a petition for rehearing en banc. Before then, in his arguments challenging the sufficiency of the evidence in the courts below, petitioner had focused on his subjective belief, arguing that the evidence did not show that "[he] actually contemplated an official (federal court) proceeding at the time of the alleged tampering charged in Count 2." Pet. C.A. Br. 27; see id. at 27-32. Although petitioner made a passing reference to whether the government had established "that federal charges were reasonably likely at the

time of the relevant communications," id. at 27, he did not posit objective reasonableness as a standalone requirement. On the contrary, petitioner referenced the likelihood of federal charges only as evidence of his subjective mental state. See ibid. (arguing that the communications did not show what petitioner "actually contemplated" and "d[id] not prove [petitioner's] mental state"); id. at 31 ("In this case, the government failed to establish that [petitioner] was ever truly aware that federal charges were a realistic possibility at the time of the communications at issue in Count 2."); Pet. C.A. Reply Br. 6 ("[Petitioner]'s focus at the time of the alleged tampering at issue in Count 2 was on his pending state charges."); Pet. Br. in Support of Mot. for Judgment of Acquittal 2.

Petitioner's contention (Pet. 5) that the court of appeals erred by "focus[ing] entirely on subjective foreseeability and not at all on objective foreseeability" is accordingly misplaced. It is well established that courts of appeals are not obligated to address matters first raised in petitions for rehearing. See, e.g., United States v. Replogle, 678 F.3d 940, 942 (8th Cir.), cert. denied, 568 U.S. 1053 (2012); United States v. Lewis, 412 F.3d 614, 615-616 (5th Cir. 2005) (per curiam); United States v. Patzer, 284 F.3d 1043, 1045 (9th Cir. 2002). And federal courts generally "refuse to take cognizance of arguments that are made in passing without proper development." Johnson v. Williams, 568 U.S. 289, 299 (2013). Because petitioner did not advance his

objective-foreseeability theory before the appellate panel, the court did not err by not addressing it in its decision.

This Court is "a court of review, not of first view." Cutter v. Wilkinson, 544 U.S. 709, 718 n.7 (2005). Its "traditional rule * * * precludes a grant of certiorari" on a question "'not pressed or passed upon below.'" United States v. Williams, 504 U.S. 36, 41 (1992) (citation omitted); see Byrd v. United States, 584 U.S. 395, 404 (2018) (noting that "it is generally unwise" for the Court "to consider arguments in the first instance"). Petitioner identifies no sound reason for this Court to depart from that rule here.

2. Even assuming that petitioner's claim had been properly preserved, the claim lacks merit. Section 1512(b)(1) prohibits knowingly intimidating, threatening, or corruptly persuading, or engaging in misleading conduct toward another person, with intent to "influence, delay, or prevent the testimony of any person in an official proceeding." 18 U.S.C. 1512(b)(1). An "official proceeding" is defined to include "a proceeding before a judge or court of the United States." 18 U.S.C. 1515(a)(1). The statute specifies that "an official proceeding need not be pending or about to be instituted at the time of the offense." 18 U.S.C. 1512(f)(1). It further specifies that "no state of mind need be proven with respect to the circumstance * * * that the official proceeding before a judge [or] court * * * is before a judge or court of the United States." 18 U.S.C. 1512(g)(1).

Petitioner asserts (Pet. 5-6) that the court of appeals should have considered whether the official proceeding contemplated by him was "objectively foreseeable" and whether petitioner's "fears about a federal firearm prosecution" were "objectively reasonable." But he fails to explain how the decision below failed to do so. Relying on circuit precedent, the court of appeals in this case reasoned that the evidence of witness tampering would be sufficient so long as it permitted the jury to draw a reasonable inference that "a 'particular, foreseeable' federal proceeding was 'contemplated' at the time the 'intimidation, threat, or corrupt persuasion' took place." Pet. App. 3 (quoting United States v. Petruk, 781 F.3d 438, 445 (8th Cir. 2015) and 18 U.S.C. 1512(b)) (brackets omitted; emphasis added by court of appeals). And it found the evidence sufficient to show that a "'particular' federal prosecution was 'foreseeable.'" Id. at 4 (quoting Petruk, 781 F.3d at 445). Petitioner fails to explain how his current proposed standard would be different, let alone how the evidence in his case was insufficient to satisfy it.

Petitioner's claim (Pet. 7-8) of a conflict among the courts of appeals on this issue is similarly misplaced. In United States v. Sutton, 30 F.4th 981 (2022), the Tenth Circuit stated that Section 1512(b)(2)(A) requires "[a] reasonable likelihood" that the official proceeding contemplated by the defendant "would be federal." Id. at 989. And in United States v. Shavers, 693 F.3d 363 (2012), judgment vacated on other grounds, 570 U.S. 913 (2013),

the Third Circuit stated that "a successful prosecution under § 1512(b)(1) requires proof, beyond a reasonable doubt, that the defendant contemplated a particular, foreseeable proceeding, and that the contemplated proceeding constituted an 'official proceeding,' as defined by § 1515(a)(1)(A)," id. at 379, and reversed a witness-tampering conviction where the defendants "were clearly contemplating their upcoming hearings in Pennsylvania state court, and not any federal proceeding, when they sought to tamper with potential witnesses," id. at 381. Here, however, the court of appeals found that petitioner "was already 'contemplating' a federal felon-in-possession charge" at the time of the charged conduct, Pet. App. 3 (brackets and citation omitted), and that he sought to persuade A.D. "to lie or refuse to testify" to avoid "the lengthy sentence he would face from" that "'foreseeable'" and "'particular' federal prosecution," id. at 4 (citation omitted). Accordingly, petitioner is incorrect in claiming (Pet. 8) that his "conviction would not stand under Sutton or Shavers."

3. Finally, even if the question presented would otherwise warrant this Court's review, this case would be a poor vehicle for considering it because even assuming that petitioner's argument were adequately presented to the court of appeals, he forfeited it in the district court. Indeed, during the district court proceedings, petitioner agreed to jury instructions explaining that the government must "prove that the Defendant contemplated

some particular official proceeding in which the testimony might be material" without mention of some separate, additional requirement of objective reasonableness. Final Jury Instructions 17; see Trial Tr. 466-468, 472-484 (discussing jury charge).

Although petitioner's position on the jury instructions does not itself foreclose his challenges to the sufficiency of the evidence, see Musacchio v. United States, 577 U.S. 237, 243-244 (2016), it does make this case an inappropriate vehicle for reviewing the question presented. This Court has "treated an inconsistency between a party's request for a jury instruction and its position before this Court" as a relevant "consideration[] bearing on" whether to grant the petition for a writ of certiorari. United States v. Wells, 519 U.S. 482, 488 (1997). "[T]here would be considerable prudential objection to reversing a judgment because of instructions that petitioner accepted, and indeed itself requested." City of Springfield v. Kibbe, 480 U.S. 257, 259 (1987) (per curiam).

At all events, petitioner's challenge is at best reviewable only for plain error. See Fed. R. Crim. P. 52(b); United States v. Olano, 507 U.S. 725, 731-732 (1993). To establish reversible plain error, petitioner must demonstrate (1) error; (2) that is plain or obvious; (3) that affected substantial rights; and (4) that seriously affected the fairness, integrity, or public reputation of judicial proceedings. Olano, 507 U.S. at 732-736;

see, e.g., Puckett v. United States, 556 U.S. 129, 135 (2009). He cannot do so.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 2024