

Does the Federal Witness-Protection Murder Statute Require Proof that the Victim Would Have Communicated with a Federal Officer or Judge?

CASE AT A GLANCE

Charles Fowler was convicted of murder in federal court for killing a local police officer. The federal charge was premised on Fowler's intent to prevent the officer from reporting Fowler's involvement in federal offenses. The Eleventh Circuit held that the trial evidence sufficiently proved that Fowler killed the officer to prevent him from communicating information concerning federal offenses. The Supreme Court now must determine whether this federal murder statute requires the government to prove a "realistic likelihood" that the victim would have communicated information about a federal offense to a federal officer or judge.

Fowler v. United States
Docket No. 10-5443

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From: The Eleventh Circuit

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ISSUE

Does the federal witness-protection murder offense in 18 U.S.C. § 1512(a)(1)(C) require the government to prove that the victim would have communicated information about a federal offense to a federal officer or judge?

FACTS

In March 1998, Haines City, Florida, Police Officer Christopher Todd Horner was found dead at a cemetery. Officer Horner died from a single gunshot to the head, inflicted by his own service weapon. Shortly before Officer Horner's death, he reported to police dispatch that he was at the cemetery investigating a suspicious vehicle. Officer Horner did not report again, which prompted the police to search the cemetery, where they found Officer Horner's body.

Officer Horner's death remained unsolved until March 2002, when Christopher Gamble, serving a 20-year sentence for a 1999 robbery, contacted law enforcement to cooperate in several unsolved robberies. Gamble eventually identified Charles Fowler as Officer Horner's killer. In 2007, Fowler was indicted for Officer Horner's murder under 18 U.S.C. § 1512(a)(1)(C) and for using and carrying a firearm during federal crimes of violence under 18 U.S.C. 924(c)(1)(A). Fowler proceeded to trial where Gamble testified for the government.

Gamble testified that he and two other individuals recruited Fowler and Robert Winston to rob a bank. Gamble and his cohorts had robbed a Holiday Inn earlier that same day. Fowler and Winston had a stolen vehicle that the group intended to use during the bank robbery the next morning, and they gathered guns, masks, and gloves. The five men retired to the cemetery that night where they planned the robbery, drank, used drugs, and listened to music.

Before daybreak, Fowler walked away from the group to use cocaine by himself. During this time, Officer Horner appeared in his police vehicle and shined a spotlight on the stolen vehicle and its occupants. Gamble testified that the group was "caught in the act" and that Officer Horner must have known they planned to commit a robbery because they wore black clothing and gloves, and Officer Horner knew Gamble had a record for robberies. Officer Horner drew his gun, took the names of everyone to check for warrants, and returned to his vehicle, presumably to "call for backup."

Fowler grabbed Officer Horner from behind and subdued him with help from others in the group. Fowler took Officer Horner's gun, ordered Officer Horner to his knees, and pointed the gun at the back of Officer Horner's head. When Gamble tried to calm Officer Horner, Officer Horner said, "Chris, why are you doing this?" Fowler responded, "Oh, man, you know him? You know him? Oh, man, why? Now we can't walk away from this thing." Gamble asked Fowler to give him the gun, but another member of the group screamed, "kill that cracker." Fowler shot Officer Horner in the back of the head, killing him.

The government at trial asserted that Fowler killed Officer Horner to prevent him from reporting several federal offenses: the Holiday Inn robbery, the planned bank robbery, Fowler's possession of a firearm as a convicted felon, Fowler's possession of cocaine, and Fowler's possession of marijuana. Fowler argued that Officer Horner committed suicide, that Fowler had an alibi, and that Gamble testified falsely. The jury convicted Fowler, and the district court sentenced him to life in prison on the murder charge.

Fowler appealed to the Eleventh Circuit. See *United States v. Fowler*, 603 F.3d 883 (11th Cir. 2010). Fowler contended that the trial evidence failed to prove that Officer Horner likely would have communicated

information about the federal offenses to a federal officer or that a federal investigation likely would have resulted. Therefore, Fowler claimed, the government failed to prove the requisite federal nexus for this murder charge.

The Eleventh Circuit rejected Fowler's interpretation of the murder statute. The court observed, "[i]n construing the statute this way, Fowler focuses on the victim's state of mind instead of, as the statute requires, the defendant's state of mind." Noting that other federal circuit courts have rejected this reading of the statute, the court concluded: "[s]ubjective proof that the victim actually or likely would have provided information to federal authorities is not required; the defendant's intent is what matters." The court affirmed Fowler's conviction under this standard because the evidence demonstrated that Fowler killed Officer Horner to prevent investigation of federal offenses that "possibly" or "potentially" could have been communicated to federal authorities.

Fowler petitioned for a writ of certiorari on July 13, 2010. The Supreme Court granted the petition on November 15, 2010.

CASE ANALYSIS

Fowler does not contest the evidence that he killed Officer Horner or that Officer Horner possessed information connecting Fowler to federal offenses. Rather, Fowler argues that the evidence failed to prove a "realistic likelihood" that Officer Horner would have communicated this information to a federal officer. Fowler grounds the necessity of this proof in the language of 18 U.S.C. § 1512(a)(1)(C), the federal statute under which he was charged:

Whoever kills or attempts 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 . . . shall be punished [for murder].

"Law enforcement officer" is defined in § 1515(a)(4)(A) to include "an officer or employee of the Federal Government . . . authorized under law to engage in or supervise the prevention, detection, investigation, or prosecution of an offense."

Fowler contends that this language plainly requires proof "beyond a reasonable doubt that the communication would have been to a Federal officer." Fowler notes that if Congress wished to punish murders that are committed to prevent someone from reporting a federal offense generally, Congress would not have required a communication to a federal officer. Instead, Congress required that the obstructed communication be directed to a federal officer. Fowler contends that a "realistic likelihood," if not a certainty, of this communication must be proved. The trial evidence, Fowler argues, failed to establish that Officer Horner likely would have communicated to federal officers or that any federal investigation of Fowler would have occurred.

Fowler challenges the Eleventh Circuit's decision for incorrectly rendering the statute's federal officer language superfluous. Even worse, Fowler argues, the Eleventh Circuit improperly added the words *possible* or *potential* before the communication element, further lessening the government's statutory burden of proof.

The government acknowledges that "Section 1512 does not specify how likely it must have been that at least one of the communications that was obstructed or intended to be obstructed would have been with a federal officer." The government, however, contends that a "reasonable possibility" of this communication suffices—more proof than a "theoretical or remote possibility," but short of proof that the communication likely or certainly would have occurred.

The government rests its position on the conclusion that the federal officer language in § 1512(a)(1)(C) constitutes a jurisdictional element authorizing federal prosecution, not a factual element to which the statute's mens rea requirement of intent applies. Jurisdictional elements, the government notes, typically do not require the same proof of mens rea as other elements because jurisdictional elements do not criminalize otherwise innocent conduct.

The government cites legislative history suggesting that the federal officer language merely confers federal jurisdiction over murders intended to prevent communications about a federal offense. As further support, the government emphasizes § 1512(g)(2), which provides that in a prosecution under § 1512: "[N]o 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." Therefore, the "element describes a possible outcome from the obstructive killing, not its purpose."

The government challenges Fowler's position, however, that this outcome must be proved to a "realistic likelihood," or even a certainty. Fowler's approach, the government asserts, conflicts with the statute's objective of protecting the integrity of the federal criminal justice system. The government opines: "If conviction turns on the victim's subjective intent to communicate with a federal official, a broad swath of killings plainly covered by the text of the statute would be excluded." Indeed, the government continues, "[g]iven that the defendant need not have had communication to federal officials in mind, it would make no sense to require that a victim have had a subjective intent to communicate with federal officials." The proof instead should suffice if "one of the communications actually prevented or intended to be prevented by the murder might have been with a federal official."

Fowler counters with decisions from the Second and Fifth Circuits where, Fowler contends, these courts reversed § 1512(a)(1)(C) convictions because "the Government presented insufficient evidence to establish that the victims in those cases would have transferred information to federal officials." See *United States v. Lopez*, 372 F.3d 86 (2nd Cir. 2004); *United States v. Causey*, 185 F.3d 407 (5th Cir. 1999). These decisions focused on the victims' state of mind, Fowler observes, and "the fact that [the victim] had not communicated with federal authorities." Each decision concluded that the government must prove "that the victim plausibly might have turned to federal officials."

Under this standard, Fowler argues, his conviction cannot stand. The evidence did not establish that Fowler himself "intended to prevent Officer Horner from reporting any crime to any law enforcement agency outside Polk County, Florida." Moreover, "there is nothing in the record to support jury findings that any of the persons to whom Officer Horner normally reported were Federal officials, or that Officer Horner intended to communicate with any Federal law enforcement officers prior to his death."

Fowler adds that the Supreme Court’s own “federal nexus” decisions support this conclusion. These decisions, such as *Arthur Anderson, LLP v. United States*, 544 U.S. 696 (2005), and *United States v. Aguilar*, 515 U.S. 593 (1995), require “a connection between the wrongful conduct attributed to the defendant and a specific Federal interest that the particular criminal statute is designed to protect.” The Eleventh Circuit and the government, Fowler asserts, undermine this connection by leaving to “chance” the “nexus between the obstructive conduct and the proceeding—a communication with Federal officers.”

The government claims that Fowler takes too much from these decisions. The *Lopez* and *Causey* decisions, the government argues, do not limit this murder statute exclusively to cases where the victim already communicated or subjectively intended to communicate with a federal officer. To the extent these decisions suggest this conclusion, they misconstrue the statute, maintains the government. The government cites other circuit court decisions that inquire more contextually whether the victim might have communicated with a federal officer if the victim had not been murdered.

The government also distinguishes the Supreme Court cases cited by Fowler. In these cases, the government argues, the Supreme Court required mens rea for the nexus element to ensure a culpable basis for a federal prosecution. By contrast, a § 1512(a)(1)(C) prosecution already involves the intentional murder of a witness to a federal offense. Moreover, § 1512(g)(2) provides that no state of mind need be proved regarding “the circumstance . . . that the law enforcement officer is an officer or employee of the United States.”

Fowler concludes by invoking federalism concerns. Fowler does not contend that this statute exceeds Congress’s enumerated powers. But, Fowler emphasizes, “[m]urder . . . is a paradigmatic common law state crime,” and “Congress ‘has no general right to punish murder committed within any of the States.’” Fowler argues that his proposed “realistic likelihood” standard more clearly links this federal murder statute to an identifiable federal interest. The Eleventh Circuit’s approach instead “upsets the federal-state balance by affirming a conviction under § 1512(a)(1)(C) even though communications to Federal officers never occurred.”

The government characterizes Fowler’s federalism argument as “not altogether clear” but takes it as invoking the constitutional avoidance doctrine—that statutes should be construed to avoid constitutional problems. The government identifies no such problem. Citing recent Supreme Court decisions such as *United States v. Comstock*, 130 S. Ct. 1949 (2010), the government argues that Congress may regulate activity that threatens the integrity of the federal criminal justice system, such as murders to eliminate witnesses to federal offenses. Under the Necessary and Proper Clause, the government adds, Congress properly may regulate this threat even if not every case would have resulted in a communication to a federal official. Rather, Congress may “proscribe such murders when there is a reasonable possibility that they prevented a communication with a federal law enforcement official about a federal crime.”

The government closes by arguing that even under Fowler’s “reasonable likelihood” standard, the government proved Fowler’s guilt. Noting that Officer Horner planned to communicate with law enforcement about his investigation before Fowler killed him, the government argues that “[t]he jury was entitled to conclude . . . that

it was plausible or realistically likely that, when [Fowler] killed Officer Horner in order to prevent him from communicating with law enforcement about the federal crimes at issue, one of the communications he prevented or intended to prevent would have been with a federal officer.”

SIGNIFICANCE

This case presents the Supreme Court with a choice between two fairly nuanced constructions of the “communication to a federal officer” element in § 1512(a)(1)(C): Fowler’s “realistic likelihood” standard or the government’s “reasonable possibility” standard. The parties’ advocacy avoids other potential constructions of the statute.

For instance, both parties appear to agree that a defendant’s intent to prevent a communication to a federal officer *can* satisfy this element. Neither party, however, argues that the communication to a federal officer element relates *solely* to the intent element in this statute—that the statute punishes defendants who kill with the intent to prevent communication (1) of information relating a federal offense (2) to a law enforcement officer or judge of the United States.

The government could benefit from this construction because it would not require the government to prove *any* likelihood that the murder prevented an actual communication to federal officers, only that the defendant meant for the murder to prevent it. The defendant’s intent in killing would establish the culpable connection to a federal interest, not any particular outcome beyond the killing itself. Under § 1512(g)(2), moreover, the government would not need to prove that the defendant anticipated the communication would be to an officer of the United States, just to law enforcement.

Defendants could benefit too, however, because the government would need to prove that the defendant intended more from the killing than just to suppress information about a federal offense generally. The defendant would need to intend for the killing to prevent the victim from communicating this information to law enforcement officers. Therefore, proof that the information *would have* reached federal officers would not suffice if the defendant personally did not intend this outcome from the killing.

Both parties instead appear to treat the communication element as what the law might characterize as an “attendant circumstance” element: a fact connected to the defendant’s conduct whose existence the government must prove. But because the murder in many of these cases will have prevented this communication from occurring at all, the Supreme Court must determine how likely its occurrence must have been.

The government’s position treats this circumstance element as solely jurisdictional in nature—it does not define the offender’s culpability, but rather the circumstances under which federal authority to prosecute murder may be exercised. If the Supreme Court adopts this view of the communication element, the Court may embrace the less stringent “reasonable possibility” threshold advocated by the government.

Fowler, by contrast, connects this circumstance element to the statute’s proscribed culpability, and to proper limitations on Congress’s power to punish murder. If this understanding of § 1512(a)(1)(C)

persuades the Supreme Court, it may adopt one of the more demanding standards of proof asserted by Fowler: that a communication would have occurred, was certain to occur, or at least was realistically likely to occur. Fowler's upcoming reply brief may clarify whether Fowler limits himself to a "realistic likelihood" standard or also will press for true certainty, as his opening brief suggests at times.

The Supreme Court also could resolve this case by holding simply that under any construction of this statute, the trial proof established Fowler's guilt. This kind of narrow, case-specific disposition, however, more typically is the business of the circuit courts than a cert-worthy Supreme Court question.

In the end, Fowler is challenging his conviction for murdering a police officer, always a tough sell. Fowler, however, challenges the evidence making this murder federal in nature. Whether the Supreme Court sees this problem as a narrow statutory interpretation problem or a larger problem about the scope of federal criminal law authority over murder offenses may be revealed by the Court's questions at oral argument.

(Editor's note: This issue went to print before the petitioner's reply brief was available.)

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PREVIEW of United States Supreme Court Cases, pages 261–264.
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