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United States Court of Appeals
Tenth Circuit

April 5, 2022

Christopher M. Wolpert
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PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

KLAWAUN LYNELL SUTTON,
a/k/a O.G.G.,

Defendant - Appellant.

No. 20-7028

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

DERRICK CHRISTOPHER SEGUE,

Defendant - Appellant.

No. 20-7034

Appeals from the United States District Court
for the Eastern District of Oklahoma
(D.C. Nos. 6:19-CR-00034-RAW-8 &
6:19-CR-00034-RAW-9)

Lynn C. Hartfield, Lynn C. Hartfield Law Offices, Denver, Colorado, and John C. Arceci, Assistant Federal Public Defender, Office of the Federal Public Defender, Districts of Colorado and Wyoming (Virginia L. Grady, Federal Public Defender, with him on the briefs), Denver, Colorado, for Defendants-Appellants.

E. Addison Gantt, Special Assistant United States Attorney, U.S. Department of Justice, Executive Office for United States Attorneys, National Advocacy Center, Columbia, South Carolina (Christopher J. Wilson, Acting United States Attorney, Muskogee, Oklahoma, with him on the briefs), for Plaintiff-Appellee.

Before **BACHARACH**, **MORITZ**, and **EID**, Circuit Judges.

BACHARACH, Circuit Judge.

This case arises from a jail fight that started when an inmate learned that another inmate had “snitched.” Based on the fight, the federal government charged two inmates (Mr. Derrick Segue and Mr. Klawaun Sutton) with conspiring to tamper with a witness in a federal proceeding. 18 U.S.C. §§ 1512(b)(1), 1512(k).

At trial, Mr. Sutton and Mr. Segue moved for acquittal, arguing that insufficient evidence existed on their contemplation of a legal proceeding that was likely to be federal. The motion was denied, and they were convicted. In our view, the district court should have granted the motion for acquittal. The evidence showed that Mr. Sutton and Mr. Segue had intended to interfere with a state proceeding. But there was nothing to suggest that Mr. Sutton or Mr. Segue had contemplated the witness’s participation in

- a possible federal proceeding or
- a proceeding that was reasonably likely to become federal.

1. The defendants instigate a fight with Mr. Bridges.

In January 2019, Mr. Brandon Bridges was arrested. Hoping to soften any eventual sentence, he spoke to a police officer. Mr. Bridges said that he had seen Mr. Cornelious Jones with firearms, a lot of cash, and methamphetamine. This information led a state judge to issue a search warrant for Mr. Jones's house. With the warrant in hand, state law–enforcement officers searched the house and found firearms and methamphetamine. Mr. Jones was arrested on state charges and put in a county jail.

Mr. Jones then learned that the police had obtained incriminating information from Mr. Bridges, who was incarcerated at the same jail and housed in an adjoining pod. Between the two pods, inmates could talk through a "slider" door. Mr. Jones realized that he could get someone in the adjoining pod to fight Mr. Bridges.

Mr. Jones spotted an inmate (Mr. Nikkie Fields) in Mr. Bridges's pod. Mr. Fields then left and reappeared with Mr. Bridges, Mr. Segue, and Mr. Sutton. The four inmates approached the slider door, where Mr. Jones remained on the other side. Mr. Jones then spoke, Mr. Sutton signaled, and Mr. Segue and Mr. Bridges began fighting. Mr. Sutton quickly pulled the two men apart and told Mr. Bridges that he was lucky to be pulled away. Mr. Segue explained the fight this way:

- Mr. Jones had said that Mr. Bridges was a snitch and needed to be smacked,
- Mr. Segue had hit Mr. Bridges because he was a snitch and stole food, and
- Mr. Segue thought that his jail time would go easier because he had hit Mr. Bridges.

2. A jury finds Mr. Sutton and Mr. Segue guilty of conspiring to tamper with a federal witness.

The federal government invoked 18 U.S.C. §§ 1512(b)(1), (j), and (k), charging Mr. Sutton and Mr. Segue with conspiring to tamper with a witness through threats or intimidation. This statute provides:

> (b) Whoever knowingly uses intimidation, threatens, or corruptly persuades another person, or attempts to do so, or engages in misleading conduct toward another person, with intent to—
>
> (1) influence, delay, or prevent the testimony of any person in an official proceeding;
>
> . . . .
>
> shall be fined under this title or imprisoned not more than 20 years, or both.

18 U.S.C. § 1512(b)(1). The jury found Mr. Sutton and Mr. Segue guilty.

3. Our review is de novo.

Mr. Sutton and Mr. Segue argue that the government lacked sufficient evidence of conspiracy to tamper with a witness in an official proceeding. In addressing this argument, we conduct de novo review.

United States v. LaVallee, 439 F.3d 670, 697 (10th Cir. 2006). Conducting this review, we

- consider the evidence in the light most favorable to the government and

- determine whether a reasonable jury could have found guilt beyond a reasonable doubt.

Id.

4. The government needed to prove that Mr. Sutton and Mr. Segue had contemplated that Mr. Bridges would testify at a particular proceeding that was reasonably likely to be federal.

To obtain a conviction, the government needed to prove a conspiracy to commit witness-tampering under 18 U.S.C. § 1512(b)(1). *See United States v. Hill*, 786 F.3d 1254, 1269 (10th Cir. 2015). For each defendant, the outcome turned on whether he

- had agreed with another person to commit witness-tampering under § 1512(b)(1),

- had known the essential objectives of the conspiracy,

- had knowingly and voluntarily involved himself in the conspiracy, and

- had been interdependent with another conspirator.

Id. at 1270. On the element of intent, the government needed to show that the defendants had "knowingly" conspired to use intimidation, threats, or corrupt persuasion "with intent to . . . influence, delay, or prevent the testimony of [another] person in an official proceeding." 18 U.S.C.

§ 1512(b)(1); *see United States v. Wardell*, 591 F.3d 1279, 1287 (10th Cir. 2009).

A. The government needed to prove that Mr. Sutton and Mr. Segue had contemplated a particular proceeding.

The term "official proceeding" refers to federal proceedings and proceedings before an insurance regulator. 18 U.S.C. § 1515(a)(1)(A).[1] So an official proceeding couldn't consist of a state judicial proceeding or criminal investigation. *See United States v. Petruk*, 781 F.3d 438, 445 (8th Cir. 2015) ("An 'official proceeding' includes a proceeding before a federal judge, court, or grand jury, but not a state proceeding."); *Deck v. Engineered Laminates*, 349 F.3d 1253, 1257 (10th Cir. 2003) (state judicial proceedings not included); *United States v. Young*, 916 F.3d 368, 384 (4th Cir. 2019) (FBI investigation not included); *United States v. Ermoian*, 752 F.3d 1165, 1171–72 (9th Cir. 2013) (FBI investigation not included).

An official proceeding need not be pending or imminent in order to trigger the witness-tampering statute. 18 U.S.C. § 1512(f)(1). But the

[1] The relevant portion of the statutory definition of an "official proceeding" is

> [a] proceeding before a judge or court of the United States, a United States magistrate judge, a bankruptcy judge, a judge of the United States Tax Court, a special trial judge of the Tax Court, a judge of the United States Court of Federal Claims, or a Federal grand jury . . . .

18 U.S.C. § 1515(a)(1)(A).

government must prove that an official proceeding was reasonably foreseeable to the defendant. *United States v. Tyler*, 732 F.3d 241, 248–49 (3d Cir. 2013).

This burden was crystallized in *Arthur Andersen LLP v. United States*, 544 U.S. 696 (2005), which involved witness-tampering charges against an accounting firm that had audited a corporation. There the federal government invoked 18 U.S.C. §§ 1512(b)(2)(A) and (B), alleging that the auditing firm had encouraged employees to destroy documents relating to its representation of the corporation. 544 U.S. at 698. The Supreme Court recognized that the government had needed to show the auditing firm's contemplation of a "particular official proceeding in which those documents might be material." *Id.* at 708. Given this burden, the Court held that the intent element would be satisfied only if the auditing firm had recognized a likely effect on the proceeding. *Id.*[2]

[2] The dissent argues that *Arthur Andersen* established a foreseeability standard without incorporating the likely–effect standard from *United States v. Aguilar*, 515 U.S. 593 (1995). But the Supreme Court in *Arthur Andersen* relied on *Aguilar*'s likely–effect standard when fleshing out the test for criminal intent. *Arthur Andersen*, 544 U.S. at 708. And we have treated *Arthur Andersen*'s foreseeability requirement and *Aguilar*'s likely–effect standard as interchangeable. *See United States v. Phillips*, 583 F.3d 1261, 1264 (10th Cir. 2009) ("In *Arthur Andersen* . . . , the Court extended the *Aguilar* nexus requirement to prosecutions under § 1512(b) . . . ."); *United States v. Smalls*, 752 F.3d 1227, 1249 n.10 (10th Cir. 2014) (noting that in *Arthur Andersen*, the Supreme Court applied *Aguilar*'s likely–effect standard to the intent element under 18 U.S.C. § 1512(b)).

Arthur Andersen addressed a different subsection of § 1512—subsection (b)(2). In contrast, our case involves subsection (b)(1). But (b)(1) and (b)(2) contain the same *mens rea* requirement: the "knowing[]" use of intimidation, threats, or corrupt persuasion of another "with intent to [affect] an official proceeding." 18 U.S.C. §§ 1512(b)(1)–(2). Given the existence of the same *mens rea* requirement, every circuit to consider the issue has applied *Arthur Andersen* to cases involving (b)(1). *United States v. Tyler*, 732 F.3d 241, 249–50 (3d Cir. 2013); *United States v. Kaplan*, 490 F.3d 110, 125–27 (2d Cir. 2007); *United States v. Darif*, 446 F.3d 701, 711–12 (7th Cir. 2006). We join these circuits and conclude that the government needed to prove contemplation of a particular "official proceeding."

The dissent states that *Arthur Andersen* doesn't require contemplation of a particular "official proceeding" because the Court sometimes referred to an "official proceeding" and other times referred more broadly to a "proceeding." But the Court's decision to sometimes use the shorthand *proceeding* does not detract from the unambiguous statement requiring a nexus to a "particular official proceeding": "A 'knowingly . . . corrupt[] persuade[r]' cannot be someone who persuades others to shred documents under a document retention policy *when he does not have in contemplation any particular official proceeding* in which these documents might be material." *Arthur Andersen*, 544 U.S. at 708 (emphasis added).

We don't lightly disregard the Supreme Court's articulation of the test, for "a good rule of thumb for reading [the Supreme Court's] decisions is that what they say and what they mean are one and the same." *Mathis v. United States*, 579 U.S. 500, 136 S. Ct. 2243, 2256 (2016).

Though *Arthur Andersen* clarified the need to prove contemplation of a particular proceeding, the Supreme Court did not say whether the defendants had to know that the official proceeding was federal. But *Arthur Andersen* requires proof of an intent to influence an "official proceeding." *See* pp. 7–8, above. And the statute defines an "official proceeding" as a proceeding that's federal. 18 U.S.C.§ 1515(a)(1); *see* p. 6, above. So *Arthur Andersen* could be interpreted to require actual knowledge that the proceeding was federal.

But that interpretation of *Arthur Andersen* is foreclosed by another provision of the witness-tampering statute: § 1512(g). This provision relieves the government of a need to prove actual knowledge that the proceeding is federal. 18 U.S.C. § 1512(g)(1). So a conviction may be appropriate if the defendant had

- targeted a specific proceeding but didn't know whether it was state or federal or
- mistakenly believed that a federal proceeding had been a state proceeding.

Our case doesn't involve either scenario. We have ongoing, parallel proceedings by the state and the federal governments. Mr. Sutton and Mr. Segue knew of the state proceedings, but had no way of knowing that their actions could also disrupt a potential federal proceeding. What happens then?

B. The government also needed to prove that the proceeding contemplated by Mr. Sutton and Mr. Segue had been reasonably likely to be federal.

The Supreme Court addressed an analogous situation in *Fowler v. United States*, 563 U.S. 668 (2011). There the Court again addressed the intent requirement for the witness-tampering statute. *Id.* at 672. In *Fowler*, the Court was considering a conviction under a provision that criminalizes the killing or attempted killing of another person to prevent communication with a federal law–enforcement officer. 18 U.S.C. § 1512(a)(1)(C). But a separate provision relieved the government of a need to prove the defendant's knowledge that the law–enforcement officer was federal (rather than state). 18 U.S.C. § 1512(g)(2).

The *Fowler* Court addressed the combination of these provisions, concluding that when the defendant had no particular federal law–enforcement officer in mind, the intent requirement is satisfied if

- the defendant generally contemplated the involvement of law enforcement and
- it was reasonably likely that if the person had communicated with law–enforcement officers, "at least one relevant

communication would have been made to a federal" (rather than state) officer.

563 U.S. at 677–78; *see id.* at 672. Any looser requirement, the Court reasoned, "would bring within the scope of th[e] statute many instances of witness-tampering in purely state investigations and proceedings, thus extending the scope of this federal statute well beyond the primarily federal area that Congress had in mind." *Id.* at 675.

Fowler addressed a provision of the witness-tampering statute that covered communications with federal officers rather than testimony in official proceedings. But *Fowler*'s reasoning applies equally here.[3] In requiring a reasonable likelihood that the tampering prevented communication with a federal officer, the *Fowler* Court relied on

- the dictionary definition of "prevent" and
- a concern that broadly interpreting the statute to cover tampering with all witnesses would "extend[] the scope of" the statute to cover all witnesses when federal and state jurisdictions overlap.

Id. at 674–78.

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[3] The Third Circuit applies *Fowler* only to the statutory provisions governing "federal officials" and applies *Arthur Andersen* to the provisions governing "official proceedings." *United States v. Shavers*, 693 F.3d 363, 378–79 (3d Cir. 2012), *vacated on other grounds*, 570 U.S. 913 (2013). But the Third Circuit already applies a stricter intent requirement under *Arthur Andersen*, requiring the government to prove that (1) the defendant had in mind a particular proceeding and (2) this proceeding was federal. *Id.* We do not read *Arthur Andersen* this way.

On the first consideration, the Court observed that the dictionary definition of "prevent" could suggest either that the aborted communication

- *would possibly have been* with a federal law–enforcement officer or
- *would likely have been* with a federal law–enforcement officer.

Id. at 676–77. The Court embraced the second interpretation in light of the statute's federal scope and the overlap between state and federal jurisdictions. *Id.* at 675–78. Given that overlap, the government needed to prove a reasonable likelihood of federal involvement; the first interpretation would "transform a federally oriented statute into a statute that would deal with crimes, investigations, and witness-tampering that, as a practical matter are purely state in nature." *Id.* at 677. Before upending the federal-state balance in prosecutions, the Court required a clear statement of congressional intent. *Id.*; *see Jones v. United States*, 529 U.S. 848, 858 (2000) ("'[U]nless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance' in the prosecution of crimes." (quoting *United States v. Bass*, 404 U.S. 336, 349 (1971))).

Fowler's reasoning applies here. In § 1512(b), Congress didn't clearly express its intent to federalize state witness tampering that incidentally interfered with federal proceedings. Like the subsection at

issue in *Fowler*, § 1512(b) criminalizes action intended to "prevent" potential witnesses from communicating. *Compare* 18 U.S.C. § 1512(a)(1)(C) (requiring an "intent to . . . *prevent* the communication by any person to a [federal officer] of information relating to the commission or possible commission of a Federal offense") (emphasis added), *with* 18 U.S.C. § 1512(b)(1) (requiring an "intent to . . . influence, delay, or *prevent* the testimony of any person in an official proceeding") (emphasis added). Given Congress's use of the statutory term "prevent" in both subsections, the dictionary definition is equally applicable here. And our case implicates *Fowler*'s concerns about the breadth of the criminal statute when the state and federal government are simultaneously conducting proceedings.

The dissent would not rely on *Fowler* because it addressed communications to law enforcement and our case addresses official proceedings. But *Fowler*'s reasoning doesn't support a distinction between

- witness-tampering aimed at official proceedings and
- witness-tampering aimed at communications with law enforcement.

Regardless of whether the witness would testify in court or communicate with a law–enforcement officer, § 1512 is a federal witness-tampering

statute and governs only if there is a reasonable likelihood of federal involvement.[4]

Even if *Fowler*'s holding hadn't dictated the outcome here, "we [would be] bound to follow both the holding and the *reasoning*, even if dicta, of the Supreme Court." *Navajo Nation v. Dalley*, 896 F.3d 1196, 1208 n.6 (10th Cir. 2018) (emphasis in original). The reasoning of *Fowler* applies equally here.

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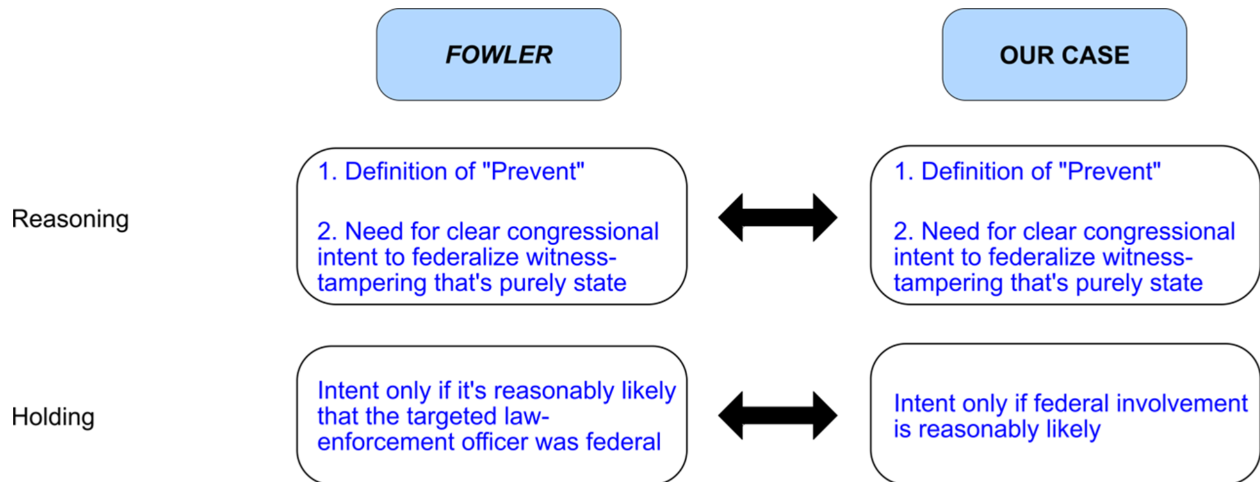
[4] The dissent cites *United States v. Byrne*, 435 F.3d 16 (1st Cir. 2006), to distinguish between provisions involving communications with law enforcement and official proceedings. In *Byrne*, the First Circuit expressed doubt about applying *Arthur Anderson*'s nexus requirement to 18 U.S.C. § 1512(b)(3) because

- this provision addresses communications with law–enforcement and

- *Arthur Andersen* addressed a provision involving official proceedings.

Byrne, 435 F.3d 1 at 25. But the court didn't decide the applicability of *Arthur Andersen*. In dicta, the court just observed that a defendant would not be "beyond the purview of subsection (b)(3) merely because he expected the witness he tampered with to be interviewed by State Officer X in particular, but the witness actually was contacted by Federal Agent Y." *Id*.

This observation doesn't apply here, for the government presented no evidence of any contact between a federal agent and the potential witness (Mr. Bridges). So we can draw no guidance from the *Byrne* court's dicta.



So we apply both *Fowler* and *Arthur Andersen*, requiring the government to prove that the defendant contemplated a proceeding that was reasonably likely to be federal.

The government argues that the Tenth Circuit requires only a possibility (not a reasonable likelihood) that the defendant's actions would influence an official (federal) proceeding. But the Supreme Court rejected this argument in *Fowler*, requiring instead a general intent to prevent communications with law enforcement, combined with a reasonable likelihood that one of the law–enforcement officers would have been federal. 563 U.S. at 672, 677; *see* pp. 10–11, above. Under *Fowler*, a mere possibility is not enough. The government needed to go further, proving that Mr. Sutton and Mr. Segue had contemplated a proceeding that was reasonably likely to be federal. *See* pp. 10–11, above.

At oral argument, the government took a different approach, arguing that *Fowler* had dispensed with the need for contemplation of a proceeding

that was reasonably likely to become federal. We disagree with this approach. In addressing a separate provision of the witness-tampering statute (§ 1512(a)(1)(C)), *Fowler* didn't diminish the burden that *Arthur Andersen* had established for cases involving § 1512(b): proof of the defendant's contemplation of a particular "official proceeding." 544 U.S. at 708; *see* p. 7, above. And *Fowler* did not mention *Arthur Andersen*—much less overturn it. *See Shalala v. Ill. Council on Long Term Care, Inc.*, 529 U.S. 1, 18 (2000) ("Th[e Supreme] Court does not normally overturn, or so dramatically limit, earlier authority *sub silentio* . . . ."). So *Fowler* does not abrogate *Arthur Andersen*'s requirement that the defendant contemplate a particular proceeding. *See United States v. Shavers*, 693 F.3d 363, 379 (3d Cir. 2012), *vacated on other grounds*, 570 U.S. 913 (2013).[5]

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[5] In *Shavers*, the Third Circuit explained:

> The *Fowler* decision addressed a situation in which the defendant *did not* have in contemplation a particular group of law enforcement officers. Thus, if applied to § 1512(b)(1), the rule set forth in *Fowler* would directly contradict the *Arthur Andersen* pronouncement . . . . It is telling that the *Fowler* opinion does not mention *Arthur Andersen*. If the Supreme Court intended to overrule *Arthur Andersen* and for all of the [Victim and Witness Protection Act of 1982] to be governed by *Fowler*, it presumably would have mentioned *Arthur Andersen* and explained why.

693 F.3d at 379 (citation omitted; emphasis in original).

We thus conclude that under *Arthur Andersen* and *Fowler*, the government bore the burden to prove two elements at the time of the conduct:

1. A defendant contemplated a particular official proceeding.

2. A reasonable likelihood existed that the proceeding would be federal.[6]

5. The government did not present sufficient evidence of the defendants' contemplation of a particular proceeding that was reasonably likely to be federal.

The government did not satisfy its burden. Interference with a *state* proceeding was foreseeable because Mr. Jones had been

- arrested by state law–enforcement officers executing a state court's search warrant and

- housed in a state jail on state charges.

But even if Mr. Jones had shared everything that he knew about Mr. Bridges' role—that Mr. Bridges had spoken to a state police officer, who used the information to obtain a state search warrant from a state judge—there was nothing "federal" about Mr. Bridges' role. So all of the evidence

[6] The Third Circuit uses a stricter standard, requiring the government to prove "that the defendant contemplated a particular, foreseeable proceeding, *and* that the contemplated proceeding constituted an 'official proceeding,' as defined by [18 U.S.C.] § 1515(a)(1)(A)." *United States v. Shavers*, 693 F.3d 363, 379 (3d Cir. 2012) (emphasis added), *vacated on other grounds*, 570 U.S. 913 (2013); *see United States v. Tyler*, 732 F.3d 241, 249 (3d Cir. 2013) (applying the *Shavers* test after the Supreme Court's vacatur).

shows that if the defendants had intended to interfere with a specific judicial proceeding, that proceeding would have been state—not federal.

If the defendants had been mistaken about the nature of that proceeding and it had turned out to be federal, § 1512(g)(1) would still permit a conviction. But the relevant proceeding here involved state criminal charges against Mr. Jones, and the government presented no evidence that Mr. Sutton and Mr. Segue had contemplated any other proceeding that was federal or reasonably likely to evolve into a federal proceeding.

In oral argument, the government pointed to its evidence that federal agents had been investigating a conspiracy to distribute drugs. But how could Mr. Sutton or Mr. Segue have contemplated that parallel federal investigation? After all, the government did not present evidence that

- any of the federal agents had been aware of Mr. Bridges or
- anyone in the jail had known of a federal investigation.

Mr. Bridges had given information about Mr. Jones to a state officer, who obtained a state search warrant and arrested Mr. Jones on state charges. That information contained nothing to suggest the possibility of proceedings that were likely to be federal. *See United States v. Petruk*, 781 F.3d 438, 445–46 (8th Cir. 2015) (vacating a § 1512(c)(2) conviction when the evidence showed only that the defendant had intended to obstruct state proceedings and there was no evidence that the defendant had been “aware

of [a federal] investigation"); *United States v. Shavers*, 693 F.3d 363, 379–80 (3d Cir. 2012) (vacating convictions based on § 1512(b)(1) when the defendants had contemplated obstruction with state trial testimony despite knowledge of a federal investigation), *vacated on other grounds*, 570 U.S. 913 (2013); *see also Lobbins v. United States*, 900 F.3d 799, 802–05 (6th Cir. 2018) (vacating a conviction based on § 1512(a)(2) because the person that the victim might have testified against was in jail on state charges). So the mere existence of a parallel federal investigation is not enough for a conviction under § 1512(b)(1) when the defendant intended to obstruct a state proceeding.

In oral argument, the government argued for the first time that the federal proceeding was foreseeable to Mr. Sutton and Mr. Segue because of the magnitude of the drug conspiracy. But the government didn't make this argument in its response brief, and oral argument was too late. S*ee United States v. Gaines*, 918 F.3d 793, 800–01 (10th Cir. 2019) ("We typically decline to consider an appellee's contentions raised for the first time in oral argument.").

Even if we were to consider the merits of the government's new argument, we would reject it. The government failed to cite any supporting authority, and any relationship between the size of a drug conspiracy and the likelihood of a federal prosecution is simply speculative. We would

thus reject the government's argument even if it had preceded the oral argument.

6. Conclusion

The government needed to show that Mr. Sutton and Mr. Segue had contemplated Mr. Bridges' testimony in a particular federal proceeding or a proceeding that was reasonably likely to evolve into a federal proceeding. But the evidence showed only that

- Mr. Bridges had given information to a state police officer, who obtained a search warrant in state court, and
- Mr. Jones had been arrested on state charges.

Even if we assume that Mr. Sutton and Mr. Segue were aware of these facts, the government presented no evidence that

- they had contemplated a federal proceeding or
- it was reasonably likely that the contemplated proceeding would have been federal.

We thus conclude that no rational trier of fact could find that Mr. Sutton or Mr. Segue had contemplated a proceeding that was reasonably likely to be federal. So we vacate the convictions of Mr. Sutton and Mr. Segue for conspiring to violate 18 U.S.C. § 1512(b)(1).[7]

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[7] Because we vacate the convictions on this ground, we do not address the defendants' other arguments involving the sufficiency of the evidence, existence of instructional error, and admissibility of testimony about prison culture. For the same reason, we do not address Mr. Segue's challenge to the denial of his motion to discharge his attorney.

The mandate shall issue forthwith.

No. 20-7028, *United States v. Sutton, et al.*

EID, J., dissenting.

The majority interprets § 1512(b)(1) to require proof that (1) "[a] defendant contemplated a particular official proceeding," and (2) "[a] reasonable likelihood existed that the proceeding would be federal." Maj. op. at 17. While I agree that the statute requires a nexus between the defendant's mental state and *a* proceeding, I do not find the existence of a nexus between the mental state and a *federal* proceeding. Instead, § 1512(b)(1) still requires a connection to a federal element, but not one connected to a mens rea element; it simply requires that the testimony would have been, or simply was, used in a federal proceeding. This leads to my conclusion that a rational jury could have found Sutton and Segue guilty of witness tampering under 18 U.S.C. § 1512(b)(1). Accordingly, I dissent.

I.

18 U.S.C. § 1512(b)(1) requires the government to prove knowledge and intent to "influence, delay, or prevent the testimony of [another] person in an *official proceeding*." *Id.* (emphasis added). In part, "official proceeding" is defined as "a proceeding before a judge or court of the United States." *Id.* § 1515(a)(1)(A). Despite these two sections suggesting the existence of a specific intent requirement—that a defendant knowingly impacted an official or *federal* proceeding—§ 1512(g)(1) specifies that "no mental state need be proved with respect to the circumstance . . . that the official proceeding . . . is before a judge or court of the United States." *Id.* This provision is the crux of my dissent.

Interpreting these provisions together, it is initially unclear what the government is required to prove as to the defendant's mental state and its connection to the federal nature of the proceeding. While the definition of "official proceeding" seemingly injects a federal nature requirement into the mens rea of the general statutory provision, that requirement is explicitly removed by a subsequent, more specific provision. *See* 18 U.S.C. § 1512(g)(1). Since requiring any mental state as to the federal nature of the proceeding runs contrary to this specific provision, requiring such would directly nullify that provision. *See Duncan v. Walker*, 533 U.S. 167, 174 (2001) (normally we must give effect "to every clause and word of a statute" (internal quotation marks omitted)).

On the other hand, requiring a more general mental state—that a defendant contemplated or reasonably foresaw *a* proceeding—still gives force to the "official proceeding" phrase under § 1512(b)(1). In isolation, before the (g)(1) exception, § 1512(b)(1) seemingly requires both actus reus and mens rea elements of the federal nature requirement: (1) that the defendant had knowledge and intent to influence a federal proceeding, and (2) that the testimony was or would have been used in a federal proceeding. The (g)(1) exception does not remove both elements; it only removes the mens rea from the federal nature requirement. So, despite this removal of the mens rea element, we are still left with the actus reus—the government must still prove that the testimony was or would have been used in a federal proceeding. Thus, in order to give force to both § 1512(b)(1) and (g)(1), I do not read the statute to require a mental state as to the federal nature of the proceeding; I read it to require an actus reus relating to the existence of that proceeding.

In other words, while I agree with the majority that the statute requires a nexus between the defendant's mental state and *a* proceeding, I do not find the existence of a nexus between the mental state and a *federal* proceeding. Of course, I still find a federal element in the actus reus of the statute—requiring proof that the testimony would have been, or was, used in a federal proceeding. But, inasmuch as the majority's opinion requires knowledge, or any other mental state, of the proceeding's federal nature, I do not agree because this would run contrary to the text of the statute. *See* maj. op. at 17 (interpreting § 1512(b)(1) to require that a "defendant contemplated a particular official proceeding," and that a "reasonable likelihood existed that the proceeding would be federal"); *but see* 18 U.S.C. § 1512(g)(1) (providing that "no mental state need be proved with respect to the circumstance . . . that the official proceeding . . . is before a judge or court of the United States").

In support of its standard, the majority turns to two cases: *Arthur Andersen* and *Fowler*. The majority finds that *Arthur Andersen* "could be interpreted to require knowledge that the proceeding was federal."[1] Maj. op. at 9 (citing *Arthur Andersen LLP*

[1] The majority also finds that *Arthur Andersen* "held that the intent element was satisfied only if the [defendant] had recognized a *likely effect* on the proceeding." Maj. op. at 7 (citing *Arthur Andersen*, 544 U.S. at 708) (emphasis added). This seems to conflate two different standards: the foreseeability standard provided by *Arthur Andersen*, and a "likely effect" standard provided inside of the Court's case analogy. But likelihood is not the same as the foreseeability standard provided by *Arthur Andersen*. Considering the context, "likely effect" was not an extension or a restatement of the *Arthur Andersen* legal standard; the phrase merely arose in the Court's use of a case analogy illustrating the necessity of requiring something more than mere possibility. The Court called the analogized case "a similar situation"; it did not reference it as the same. *See Arthur Andersen*, 544 U.S. at 708 ("We faced a similar situation in *Aguilar*, *supra*.

v. United States, 544 U.S. 696 (2005)). However, *Arthur Andersen* merely stands for the proposition that there must be some connection between the mental state and *a* proceeding.

In *Arthur Andersen*, the defendant was charged under § 1512(b)(2), which makes it a crime to "knowingly . . . corruptly persuade[] . . . with intent to . . . cause or induce any person to . . . withhold testimony, or withhold a record, document, or other object, from an official proceeding."[2] 544 U.S. at 707. Interpreting this statute, the government "resist[ed] any type of nexus element" between the persuasion to destroy documents and a proceeding, "rel[ying] heavily on § 1512(e)(1), which states that an official proceeding 'need not be pending.'" *Id.* In turn, the Court considered whether the statute required "*any* nexus between the 'persua[sion]' to destroy documents and any particular proceeding." *Id.*(emphasis in original).

The Court held that the statute did, in fact, require a nexus between the defendant's mens rea and *a* proceeding—a defendant must "contemplate" or reasonably "foresee" a particular proceeding. *Id.* at 707–08 ("It is . . . one thing to say that a proceeding 'need not be pending,'" "and quite another to say a proceeding need not even be foreseen."). *Arthur Andersen* did not, however, require that the mens rea be connected to the *federal* nature of a proceeding. In fact, the Court used "proceeding" and "official

. . . We held that § 1503 required something more—specifically, a 'nexus' between the obstructive act and the proceeding.").

[2] I agree with the majority that the statute addressed in *Arthur Andersen*, § 1512(b)(2), is sufficiently similar to the relevant statute here. *See* maj. op. at 8.

proceeding" interchangeably throughout the relevant portion of its opinion.[3] While the majority contends that the use of "proceeding" was simply shorthand for "official proceeding," maj. op. at 8, I do not read *Arthur Andersen* to require intent to influence a *federal* proceeding. This is because, in addition to the Court's seemingly interchangeable use of these terms, the Court did not actually address the issue of whether a mental state could be equally attached to state proceedings. It also failed to mention § 1512(g), which removes the mens rea element from the official proceeding, and it failed to mention § 1512(a)(1)(A), which would have specifically defined the term "official." *See Arthur Andersen*, 544 U.S. at 707–08.

The majority leans on *Fowler* to clear up the ambiguity under § 1512(b)(1), finding that *Fowler*'s interpretation of § 1512(a)(1)(C) equally applies to § 1512(b)(1). *See* maj. op. at 10–17 (citing *Fowler v. United States*, 563 U.S. 668 (2011)). The relevant provision in *Fowler* makes it a crime "to kill another person, with intent to . . . prevent the communication by any person to a law enforcement officer . . . of the United States" of "information relating to the . . . possible commission of a Federal offense." 18 U.S.C.

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[3] In its discussion on whether the statute required *any* nexus, the Court used the term "proceeding" nine times. Of those nine instances, the Court failed to include the "official" modifier six times. *See Arthur Andersen*, 544 U.S. at 707 ("They led the jury to believe that it did not have to find any nexus between the 'persua[sion]' to destroy documents and any particular proceeding."); *id.* at 707 n.10 (finding that the court of appeals "recognized that petitioner was challenging 'the concreteness of the defendant's expectation[s] of a proceeding'"); *id.* at 707–08 ("It is, however, one thing to say that a proceeding 'need not be pending . . . ,' and quite another to say a proceeding need not be foreseen."); *id.* at 708 ("a 'nexus' between the obstructive act and the proceeding"); *id.* ("defendant lacks knowledge that his actions are likely to affect the judicial proceeding").

§ 1512(a)(1)(C). The question in *Fowler* was "what, if anything, the Government must show beyond this broad in-definite intent in order to show that the defendant more particularly intended to prevent communication with *federal* officers as well." 563 U.S. at 670. The Court held that § 1512(a)(1)(C) required proof of "a reasonable likelihood that, had, *e.g.*, the victim communicated with [police] officers, at least one relevant communication would have been made to a federal [police] officer." *Id.* at 677.

While there are some considerations in *Fowler* that compare to our case, I would not apply *Fowler* here for a few reasons. First, *Fowler* applied an investigation-related provision that makes it a crime to "knowingly . . . kill another, with intent to . . . prevent the communication by any person to a law enforcement officer or judge of the United States." 18 U.S.C. § 1512(a)(1)(C). Aside from the fact that this provision is aimed at protecting the communication of information to law enforcement, it makes no mention of an "official proceeding," and its elements do not require that conduct relate in any way to a proceeding. *See id.* § 1512(b)(3); *see also United States v. Byrne*, 435 F.3d 16, 24 (1st Cir. 2006).

On the other hand, § 1512(b)(1) is a proceeding-related provision aimed at protecting anticipated testimony in a proceeding, making it a crime "to knowingly use [] intimidation, threat[s], or corrupt[] persua[sion] [of] another . . . , with intent to . . . influence, delay, or prevent the testimony of any person in an official proceeding[.]" By its very nature, *Fowler*'s "reasonable likelihood" standard is fashioned for the analysis of a materially different offense than § 1512(b)(1). *See Byrne*, 435 F.3d at 24 ("Unlike [§ 1512](b)(2) . . . which protect[s] particular 'official proceedings,' [§ 1512](b)(3)

protects the general ability of law enforcement agents to gather information relating to federal crimes. . . ." (citation omitted)); *see also United States v. Shavers*, 693 F.3d 363, 379 (3d Cir. 2012), *judgment vacated on other grounds*, 570 U.S. 913 (2013).

Second, the *Fowler* standard does not seamlessly mesh with the standard in *Arthur Andersen*. While *Fowler*'s "likelihood" standard puts the inquiry in terms of the probability of a fact occurring, *Arthur Andersen*'s "foreseeability" test seemingly zooms in on the defendant's mental state. In this sense, it is entirely possible that a proceeding is foreseeable to a defendant, but still not reasonably likely to happen. Conversely, it is also possible that a proceeding is reasonably likely to happen but not foreseeable to a given defendant. Thus, inserting "likelihood" into the standard could require more or even less proof than is currently required under the statute. *See United States v. Ronda*, 455 F.3d 1273, 1288 (11th Cir. 2006) (observing that the link to a federal proceeding in the investigation-related provisions is less strict than the "official proceeding" requirement in § 1512(b)(1) and (2)).

The majority applies *Fowler*'s likelihood standard under the assumption that two of its recited rationales equally apply here. *See* maj. op. at 12–15. But, although I do not find this reasoning wholly unpersuasive, those rationales do not change the fact that *Fowler* simply did not address the proceeding-related provisions relevant to our case here, nor does it change the fact that its standard fails to fit within the holding of *Arthur Andersen*. Additionally, even though *Fowler* was decided just six years after *Arthur Andersen*, *Fowler* entirely failed to reference it. If the *Fowler* Court actually intended to alter the standard in *Arthur Andersen*, I believe it would have done so. *See Shalala v. Ill.*

Council on Long Term Care, Inc., 529 U.S. 1, 18 (2000) ("The Court does not normally overturn, or so dramatically limit, earlier authority sub silentio.").

To be clear, I do not suggest that § 1512(b)(1) merely requires a *possibility* of a federal proceeding, nor do I suggest that the statute removes the mens rea element entirely from its nexus to a proceeding. But § 1512(g)(1) specifically removes any requirement to prove a mental state as to the federal nature of the proceeding. What remains after that exception is the actus reus of the federal nature requirement—that the testimony would have been, or was, made in a federal proceeding—and the mens rea nexus to *a* proceeding (*i.e.*, *Arthur Andersen*'s foreseeability standard).

II.

Turning to the sufficiency of the evidence, the majority holds that a rational jury could not have found that defendants "had no way of knowing that their actions could also disrupt a potential federal proceeding," and thus, the government did not satisfy its burden under § 1512(b)(1). Maj. op. at 10. Of course, this analysis almost entirely depends on the legal standard. As explained above, I read § 1512(b)(1) to require: (1) a nexus between the defendant's mental state and a particular proceeding, and that (2) the testimony would have been, or was, used in a federal proceeding. In this case, there was sufficient evidence to show that a rational jury could have found that these two requirements were met. Accordingly, I would affirm the district court's order denying judgment of acquittal for insufficiency of the evidence.