

No. 19A-_____

IN THE
SUPREME COURT OF THE UNITED STATES

PATRICK EMANUEL SUTHERLAND,
Applicant,

v.

UNITED STATES OF AMERICA,
Respondent.

**APPLICATION FOR AN EXTENSION OF TIME WITHIN WHICH TO FILE A
PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FOURTH CIRCUIT**

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August 5, 2019

To the Honorable John G. Roberts, Jr., Chief Justice of the Supreme Court and Circuit Justice for the Fourth Circuit:

Pursuant to 28 U.S.C. § 2101(d) and Rules 13.5, 22, and 30 of the Rules of this Court, Applicant Patrick Emanuel Sutherland respectfully requests a 45-day extension of the time, to and including September 30, 2019, in which to file a petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit. The Fourth Circuit entered judgment in Applicant's case on April 19, 2019. A copy of the court's opinion, reported at 921 F.3d 421 (4th Cir. 2019), is attached hereto as Exhibit A. The Fourth Circuit denied Applicant's petition for rehearing en banc on May 17, 2019. A copy of the court's order is attached hereto as Exhibit B. Without an extension, the petition for a writ of certiorari would be due on August 15, 2019. This application is timely because it has been made at least ten days before the petition would be due. This Court's jurisdiction will be invoked under 28 U.S.C. § 1254(1).

This action arises from Applicant's convictions for submitting false tax returns (26 U.S.C. § 7206(1)) and obstructing a grand jury proceeding (18 U.S.C. § 1512(c)(2)). As relevant, businesses owned by Applicant were served with grand jury subpoenas seeking certain financial records. The businesses complied with those subpoenas. Applicant, through his then-counsel, subsequently wrote to the U.S. Attorney's Office in an attempt to persuade the Office to decline prosecution of Applicant. As part of that submission, counsel provided the U.S. Attorney's Office copies of loan agreements that were not responsive to the corporate subpoenas. At trial, the

government argued that the loan documents sent to the U.S. Attorney's Office were fabricated, and the jury found Applicant guilty of obstructing a grand jury proceeding. In its closing argument, the government argued that none of the funds disbursed to Applicant's business was actually loans and that none of the amounts disbursed had been repaid. In fact, the evidence at trial demonstrating that many of the disbursements had contemporaneously been recorded as loans and repayments of a portion of the disbursements had been made prior to Applicant learning of the government's investigation.

Applicant appealed, citing *United States v. Aguilar*, 515 U.S. 593 (1995), and *Marinello v. United States*, 584 U.S. ___, 138 S. Ct. 1101 (2018), in arguing that, as a matter of law, providing fabricated loan documents to a U.S. Attorney's Office was too attenuated from a grand jury proceeding to satisfy the requirement that the government must demonstrate a nexus between the obstructive act and an official proceeding. Although the Fourth Circuit acknowledged that the U.S. Attorney's Office investigation of Applicant was not an official proceeding, the Fourth Circuit concluded that the *Aguilar* nexus requirement was satisfied and affirmed the district court's judgment. Op., Exhibit A at 1.

In holding that the *Aguilar* nexus requirement was satisfied, the Fourth Circuit held that, because the U.S. Attorney's Office was "in charge of presenting evidence to the grand jury," the false statement to the U.S. Attorney's Office "had the foreseeable consequence of reaching and influencing an ongoing court proceeding." *Id.* at 12. The Fourth Circuit reasoned that "there is a strong likelihood that the U.S.

Attorney’s Office would serve as a channel or conduit to the grand jury for the false evidence or testimony presented to it.” *Ibid.* Critically, in finding the *Aguilar* nexus requirement satisfied, the Fourth Circuit did not consider Applicant’s intent or knowledge relative to whether the U.S. Attorney’s Office would act to convey the false statements to the grand jury.

The Circuits are divided on how to apply the *Aguilar* nexus requirement to a defendant’s statements to a third party that has discretion to influence an official proceeding. The First, Fifth, and Seventh Circuits require that the defendant understand that the third party to whom he made false statements was “integrally involved” in the grand jury investigation, such that the third party was acting as an “arm of the grand jury.” See, e.g., *United States v. Dwyer*, 238 Fed. Appx. 631, 650 (1st Cir. 2007); *United States v. Bedoy*, 827 F.3d 495, 506 (5th Cir. 2016); *United States v. Macari*, 453 F.3d 926, 936–937, 939–940 (7th Cir. 2006); *United States v. Fassnacht*, 332 F.3d 440, 449 (7th Cir. 2003). In the Second Circuit, the *Aguilar* nexus is satisfied “in situations where the ‘discretionary actions of a third person are required to obstruct the judicial proceeding’ if it was ‘foreseeable to the defendant that the third party would act on the communication in such a way as to obstruct the judicial proceeding,’” and the defendant “intended and believed” that the third party would act so as to obstruct. *United States v. Desposito*, 704 F.3d 221, 231–232 (2013) (quoting *United States v. Reich*, 479 F.3d 179, 185 (2d Cir. 2007) (Sotomayor, J.)). Although the Fourth Circuit purported to “join” the Second Circuit in the decision below, see Op., Exhibit A at 12 (quoting *Reich*, 479 F.3d at 185), the Fourth Circuit’s

rule is different, as noted above, because it does not require a finding of the defendant's intent relative to the third party's discretionary actions.

This action presents a prime opportunity for this Court to resolve the widespread confusion among the Circuits on how to apply *Aguilar's* nexus requirement when false statements are made not to an official proceeding, but to a third party.

Applicant further argued that misstating the evidence in closing argument constituted prosecutorial misconduct. In the decision below, the Fourth Circuit applied a standard for evaluating prosecutorial misconduct in closing arguments that conflicts with not only the Fourth Circuit's precedent, but also the standard articulated by the D.C. Circuit. The Fourth Circuit held that even if the closing argument was improper, it did not affect Applicant's substantial rights because closing arguments "are prone to exaggeration," and the district court instructed the jury that it should "trust its own recollections of the evidence" and "closing arguments were not evidence themselves." Op., Exhibit A at 14.

The holding of the panel of the Fourth Circuit below is wrong. The Fourth Circuit employs a six-factor test for evaluating whether a prosecutor's improper statements prejudice a defendant's substantial rights. See *United States v. Wilson*, 135 F.3d 291 (1998). In its decision below, instead of applying *Wilson's* six-factor test, the panel concluded that the jury instruction not to treat argument as evidence cured any prosecutorial misconduct. Op., Exhibit A at 14.

The panel's holding not only runs counter to Fourth Circuit precedent, it also runs in sharp conflict with the D.C. Circuit's jurisprudence. In the D.C. Circuit, "[s]tandard jury instructions, such as that 'statements and arguments of counsel are not evidence,' and that it is the jury's 'memory of the evidence that should control during deliberations,' have long been recognized *not* to be a cure-all for such errors." *United States v. Davis*, 863 F.3d 894, 903 (2017) (emphasis added). This Court's review is warranted to clarify the test an appellate court should apply in evaluating whether a prosecutor's improper remarks during closing arguments affected a defendant's substantial rights.

There is good cause for the requested 45-day extension. Barry J. Pollack is counsel of record for Applicant. He is lead counsel in a criminal trial, *United States v. Elbaz*, No. 18-CR-0157-TDC, in the United States District Court for the District of Maryland, that started on July 16, 2019, and is still ongoing. Additional time is necessary and warranted for counsel to confer adequately with Applicant and co-counsel, to analyze the Fourth Circuit's decisions below, to complete research on the authorities supporting this Court's review, and to prepare the petition for certiorari and appendix.

For the foregoing reasons, the application should be granted and the time for filing a petition for certiorari in this case should be extended by 45 days, to and including September 30, 2019.

Respectfully submitted,

Handwritten signature of Barry J. Pollack in blue ink, written over a horizontal line.

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