No.

In the Supreme Court of the United States

PATRICK EMANUEL SUTHERLAND,

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. When a defendant makes false statements to a United States Attorney's Office in an effort to persuade that Office to decline prosecution, does the objective institutional relationship of that Office with the grand jury satisfy the "nexus" required for obstruction or attempted obstruction of a grand jury proceeding under 18 U.S.C. § 1512(c)(2), regardless of whether the defendant subjectively knew, understood, or believed the false documents would be given to the grand jury?

2. When a prosecutor commits misconduct in summation by misstating evidence relevant to an essential element of the offense, but the defendant fails to object, does the fact that the district court provided the jury a standard instruction that "arguments are not evidence" necessarily preclude reversal on appeal for plain error based on the prosecutor's misconduct?

STATEMENT OF RELATED PROCEEDINGS

- *United States of America v. Patrick Emanuel Sutherland*, No. 15-cr-00225, U.S. District Court for the Western District of North Carolina. Ruling on Rule 29 motion entered on October 27, 2016, and ruling on renewed Rule 29 motion entered in part on October 28, 2016 and in part on June 21, 2017. Judgment entered June 27, 2017.
- *United States of America v. Patrick Emanuel Sutherland*, No. 17-4427, U.S. Court of Appeals for the Fourth Circuit. Judgment entered April 19, 2019. Denial of petition for rehearing *en banc* entered May 17, 2019.
- *Patrick Emanuel Sutherland v. United States of America*, Application No. 19A144, Supreme Court of the United States. Grant of application for extension of time to file petition for writ of certiorari entered on August 7, 2019, extending deadline to September 30, 2019.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

Page

TABLE OF CONTENTS—Continued

Page

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

Page(s)

Statutes and Rules

TABLE OF AUTHORITIES—Continued

Page(s)

PETITION FOR A WRIT OF CERTIORARI

Petitioner, Patrick Emanuel Sutherland, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS AND RULINGS BELOW

The opinion of the Fourth Circuit is reported at 921 F.3d 421. App., *infra*, 1a–19a. The district court's rulings on Petitioner's motion and renewed motion under Rule 29 (App. 20a–45a) are not reported.

JURISDICTION

The Fourth Circuit entered judgment on April 19, 2019. Petitioner timely filed a petition for rehearing *en banc*, which was denied on May 17, 2019. App. 46a. On August 7, 2019, Chief Justice Roberts extended the time within which to file a petition for a writ of certiorari to and including September 30, 2019. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 1512(c) provides:

(c) Whoever corruptly—

(1) alters, destroys, mutilates, or conceals a record, document, or other object, or attempts to do so, with the intent to impair the object's integrity or availability for use in an official proceeding; or

> (2) otherwise obstructs, influences, or impedes any official proceeding, or attempts to do so,
>
> shall be fined under this title or imprisoned not more than 20 years, or both.

18 U.S.C. § 1515(a)(1) provides:

> (a) As used in sections 1512 and 1513 of this title and in this section—
>
> (1) the term "official proceeding" means—
>
> (A) 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;
>
> (B) a proceeding before the Congress;
>
> (C) a proceeding before a Federal Government agency which is authorized by law; or
>
> (D) a proceeding involving the business of insurance whose activities affect interstate commerce before any insurance regulatory official or agency or any agent or examiner appointed by such official or agency to examine the affairs of any person engaged in the business of insurance whose activities affect interstate commerce;

Rule 52(b) of the Federal Rules of Criminal Procedure provides:

> (b) Plain Error. A plain error that affects substantial rights may be considered even

though it was not brought to the court's attention.

STATEMENT

This case raises two important questions that warrant this Court's review. First, this case asks whether, when a defendant makes false statements to a prosecutor, the "nexus" required for obstruction or attempted obstruction of an official proceeding under 18 U.S.C. § 1512(c)(2) can be met based on the prosecutor's objective institutional relationship to the grand jury, because the defendant's subjective intent to obstruct the grand jury can necessarily be inferred from that relationship; or, conversely, whether the government must prove that the defendant actually knew, understood, or believed the prosecutor would convey the false statements to the grand jury. Second, this case asks whether a standard instruction that "arguments are not evidence," by itself, precludes a defendant from demonstrating on plain error review that his substantial rights were affected by a prosecutor's misconduct in misstating material evidence during closing argument.

The decision below splits the Circuits on both issues. First, it contravenes *United States* v. *Aguilar*, 515 U.S. 593 (1995), and divides the courts of appeals in applying that precedent in cases involving false statements made to third parties with discretion whether to convey those false statements to the official proceeding. Second, the decision below also divides the courts of appeals over the weight to be given a district court's instruction that "arguments are not evidence" when reviewing for plain error claims of prosecutorial misconduct during closing argument and, by allowing that instruction to be

dispositive, contravenes this Court's admonition in *United States* v. *Young* that, "when addressing plain error, a reviewing court cannot properly evaluate a case except by viewing [a claim of prosecutorial misconduct in summation] against the entire record." 470 U.S. 1, 16 (1985).

A. The *Aguilar* Nexus Requirement

In *United States* v. *Aguilar*, this Court held that 18 U.S.C. § 1503, which criminalizes obstruction of "the due administration of justice," does not reach the act of making false statements to a potential grand jury witness without knowledge that those statements likely would be conveyed to the grand jury. 515 U.S. at 601. To determine whether a defendant acts with requisite "corrupt" intent, this Court explained, the defendant's conduct must have a "nexus" to the judicial proceeding—"the act must have a relationship in time, causation, or logic with the judicial proceedings," or, phrased differently, that "the endeavor must have the natural and probable effect of interfering with the due administration of justice"—because "if the defendant lacks knowledge that his actions are likely to affect the judicial proceeding, he lacks the requisite intent to obstruct." *Id.* at 599 (internal quotation marks omitted). On the facts presented in *Aguilar*, this Court concluded that the nexus requirement was not met, even though the defendant knew he was a target of the grand jury investigation at the time he lied to the FBI, because evidence of his general knowledge about the grand jury "would not enable a rational trier of fact to conclude that [he] knew that his false statement [to the FBI agents] would be provided to the grand

jury[;]" such a conclusion required "speculat[ion]." *Id.* at 601.

This Court has applied the *Aguilar* nexus requirement to other obstruction statutes. See *Marinello* v. *United States*, 138 S. Ct. 1101, 1109–10 (2018) (nexus requirement applies to 26 U.S.C. § 7212(a)); *Arthur Andersen LLP* v. *United States*, 544 U.S. 696, 707–08 (2005) (nexus requirement applies to 18 U.S.C. § 1512(b)(2)).

The courts of appeals agree that the *Aguilar* nexus requirement also applies to Section 1512(c)(2). See, *e.g.*, *United States* v. *Young*, 916 F.3d 368, 386 (4th Cir. 2019); *United States* v. *Petruk*, 781 F.3d 438, 445 (8th Cir. 2015); *United States* v. *Bennett*, 664 F.3d 997, 1013 (5th Cir. 2011), *vacated on other grounds by* 567 U.S. 950 (2012); *United States* v. *Friske*, 640 F.3d 1288, 1292 (11th Cir. 2011); *United States* v. *Phillips*, 583 F.3d 1261, 1264 (10th Cir. 2009); *United States* v. *Reich*, 479 F.3d 179, 186 (2d Cir. 2007); cf. *United States* v. *Burge*, 711 F.3d 803, 810 (7th Cir. 2013) (indicating *Aguilar* nexus applies to Section 1512(c)(2) without affirmatively so holding); *United States* v. *Tyler*, 732 F.3d 241, 249–50 (3d Cir. 2013) (*Aguilar* nexus, as described in *Arthur Andersen*, applies to all Section 1512 offenses); *United States* v. *Carson*, 560 F.3d 566, 584 (6th Cir. 2009) (assuming *Aguilar* nexus applies to Section 1512(c)(2)).

The courts of appeals are divided, however, over how the *Aguilar* nexus requirement operates in situations where false statements were made not to the grand jury, but to someone who has discretion whether to convey those false statements to the official proceeding. The Second, Fifth, and Seventh Circuits have held that the Government must prove

that the defendant subjectively knew, understood, or believed the third party to whom he made the false statements was likely to convey those statements to the official proceeding in order to meet the element of intent to obstruct, impede, or influence the official proceeding. In contrast, the Fourth Circuit has held that the defendant's subjective intent may be inferred from the institutional character of the third party to whom the false statements were made.

B. Plain Error Review Of Prosecutorial Misconduct During Summation

A court of appeals only considers a claim of error not objected to in district court when: (1) the error was forfeited, rather than waived; (2) the error is plain, meaning, it is clear or obvious; and (3) the error "affect[s] substantial rights," meaning, most often, that it "affected the outcome of the district court proceedings." *United States* v. *Olano*, 507 U.S. 725, 732–34 (1993). If those three prongs are met, then the court of appeals may remedy the error if it "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings." *Id.* at 736; *accord Puckett* v. *United States*, 556 U.S. 129, 135 (2009).

A prosecutor's misstatement of the record evidence in summation can violate a defendant's constitutional right to due process under the Fifth Amendment. See *Darden* v. *Wainwright*, 477 U.S. 168, 181 (1986) (comments during summation that "infect[] the trial with unfairness" deny due process (internal quotation marks omitted)); *United States* v. *Brainard*, 690 F.2d 1117, 1123 (4th Cir. 1982).

In evaluating claims that prosecutorial misconduct during closing argument affected a defendant's right to due process, the courts of appeals

have parted ways in determining whether a defendant can demonstrate reversible plain error when the trial court provided the jury a standard instruction to the effect that "arguments are not evidence." The D.C. and Ninth Circuits have expressly stated that such an instruction is just one factor to consider when determining whether prosecutorial misconduct affected the defendant's substantial rights. In contrast, the Fourth Circuit below held that such an instruction is determinative—any misconduct that may have occurred could not have affected Petitioner's substantial rights because the district court gave a variant of that standard instruction.

C. Factual Background And The District Court's Rulings

Petitioner is a businessman who, in addition to operating a number of businesses in the United States, the Government alleged, operated a Bermudan-based company, Stewart Technology Services (STS), which his sister owned. See App. 3a. Between 2007 and 2010, STS disbursed approximately $2.1 million in wire transfers to Petitioner, Petitioner's wife, or companies in the United States that Petitioner owned ("Petitioner's Companies"). *Id.* at 3a–4a. Petitioner's Companies contemporaneously booked substantially all of the funds received from STS in their general ledgers as loans or capital contributions, which are not taxable income. *Ibid.* For the majority of the disbursements (approximately $1.6 million of the $2.1 million), STS provided no contemporaneous description of the purpose of the wire transfers to Petitioner's Companies. App. 48a–49a (describing information summarized in Government Exhibit 12A); App. 54a.

Of the remaining approximately $500,000 in wire transfers, the majority were characterized by STS as "fees." App. 54a. Others were described as loans. *Ibid.* Before any known criminal investigation of Petitioner or Petitioner's Companies began, Petitioner made repayments of some of the amounts received from STS by transferring to STS interests in real property. App. 55a–60a; Corrected Joint App'x, Vols. I–III, *United States* v. *Sutherland*, No. 17-4427 (4th Cir. Nov. 30, 2017), ECF No. 33 (hereinafter, "JA"), at JA1248 (grand jury subpoenas served on Petitioner's Companies in April 2012), JA1315–JA1319 (transfers/assignments of property interests dated 2007, 2008, 2009, and 2010).

Petitioner's Companies were all wholly owned by Petitioner and pass-through entities for tax purposes. JA0118–JA0119. In other words, any taxable income received by Petitioner's Companies would have been required to be reported by Petitioner on his individual tax returns. See JA0197–JA0198. Petitioner did not report the disbursements received from STS on his tax returns in any of the relevant years. See App. 4a. If these funds were, in fact, loans or capital contributions, there was no need for him to do so. Conversely, if the disbursements from STS were gifts, distributions, or compensation, then Petitioner was required to report them on his individual returns, and his willful failure to do so would constitute filing false tax returns in violation of 26 U.S.C. § 7206(1). See App. 3a–4a.

In April 2012, Petitioner's Companies received grand jury subpoenas seeking financial records. JA0143, JA1248. Three months later, Petitioner, through his then-counsel, wrote to the United States

Attorney's Office in an attempt to persuade the Office to decline prosecution of Petitioner. App. 5a. Petitioner's counsel argued that the STS disbursements to Petitioner's Companies were loans, not reportable income, and, in support of this argument, provided copies of what purported to be contemporaneous loan agreements between STS and Petitioner. See *ibid.* These documents were not responsive to the previously issued grand jury subpoenas to Petitioner's Companies and had not been produced pursuant to those subpoenas. See JA1248.

After concluding that the purported loan documents Petitioner voluntarily produced to the United States Attorney's Office through counsel were fraudulent, the United States Attorney's Office charged the Petitioner. The grand jury indicted Petitioner for three counts of filing false tax returns, in violation of 26 U.S.C. § 7206(1), based on the tax returns he filed for 2008, 2009, and 2010, and one count of obstruction or attempted obstruction of a grand jury proceeding, in violation of 18 U.S.C. § 1512(c)(2), based on the false documents he caused his counsel to give to the United States Attorney's Office. App. 5a–6a.

The case proceeded to trial on all four counts in the United States District Court for the Western District of North Carolina, which had jurisdiction under 18 U.S.C. § 3231. At the close of the Government's case, Petitioner made a motion for judgment of acquittal on all counts under Rule 29, specifically arguing that "intent to influence a U.S. attorney not to bring charges is not identical to an intent to influence or obstruct a grand jury

proceeding." App. 28a–30a. The district court denied the motion. *Id.* at 32a–33a. Petitioner renewed his motion at the close of evidence, and the district court again denied the motion. App. 36a–37a.

Prior to closing arguments, the district court instructed the jury that "what the attorneys say is not evidence" and "what the evidence does show is up to [the jury]," but arguments "may be persuasive * * * in one regard or another," so the jurors "should listen to these things." App. 62a–63a.

While there was unrebutted evidence at trial that Petitioner had partially repaid STS prior to instigation of any criminal investigation, App. 55a–60a; JA1248; JA1315–JA1319, during closing arguments the Government told the jury that Petitioner was obligated to report as income the entire $2.1 million that STS had wired to Petitioner and Petitioner's Companies, that Petitioner had never intended to repay any of this amount, and none of this amount had been repaid. As part of the initial closing argument, the prosecutor told the jury:

> We've got to talk about that money from Bermuda. $2.1 million in wires from the Stewart Technology account to the defendant and his companies from 2007 to 2010. * * * The evidence is clear that these were not loans and that the defendant had no intention of paying that money back. * * *
>
> [H]ow do we know these loans were a sham? Well, they were never paid back.

App. 69a–70a.

Similarly, while the evidence at trial was that, for the vast majority of the wire transfers, STS had not indicated the purpose of the disbursements, and Petitioner's Companies had recorded nearly all the disbursements as loans or capital contributions, see App. 54a, the prosecutor told the jury that all of the wire transfers had been recorded as fees. The prosecutor concluded his rebuttal closing argument by telling the jury: "Millions of dollars coming into his account marked as fees but treated as nontaxable. There's a word for it, ladies and gentleman. It's appalling. Find the defendant guilty on all counts." *Id.* at 111a–112a.

The jury found Petitioner guilty on each count. Following the verdict, Petitioner again moved for judgment of acquittal under Rule 29, which the district court denied as to the counts charging the filing of false income tax returns, but reserved judgment as to the obstruction count, sought supplemental briefing, and set the issue for oral argument at sentencing. App. 39a–40a; App. 42a–43a. On June 21, 2017, the district court denied the motion as to that count without hearing further argument. App. 44a–45a.

D. The Court of Appeals' Decision

Petitioner timely appealed, invoking the Fourth Circuit's jurisdiction under 28 U.S.C. § 1291. First, he argued that, even assuming the loan documents he provided the United States Attorney's Office were fraudulent, the record contained insufficient evidence that he intended to obstruct the grand jury's investigation because there was insufficient evidence of a nexus between giving those documents to the United States Attorney's Office and intending to

influence the grand jury proceeding, as required under *United States* v. *Aguilar*, 515 U.S. 593. App. 7a. Second, he argued that the Government's closing argument deprived him of a fair trial because the Government misstated the evidence when it argued that the entire $2.1 million received from STS was taxable income Petitioner willfully failed to report, falsely characterizing the trial evidence as showing that none of the $2.1 million in disbursements had been repaid to STS and that "millions of dollars" of those wire transfers were contemporaneously recorded as fees, which are taxable. See *id.* at 15a.

The Fourth Circuit affirmed Petitioner's convictions on all four counts.

1. Nexus Required For Obstruction Of An Official Proceeding

First, the Court of Appeals reviewed the conviction under Section 1512(c)(2). Looking to the definition of "official proceeding" in Section 1515(a)(1), the Court of Appeals concluded that the United States Attorney's Office's investigation was not an official proceeding, and "[p]roviding materially false documents with an intent only to influence the U.S. Attorney's investigation, therefore, would not amount to a violation of § 1512(c)(2)." App. 9a. Further, the Court of Appeals correctly recognized, the Government must demonstrate that the particular grand jury proceeding at issue was "reasonably foreseeable" to Petitioner and that there existed a nexus between the obstructive act and the grand jury proceeding, as described in *Aguilar*, 515 U.S. 593. App. 9a. The Court of Appeals then determined that the jury instructions properly conveyed these requirements. *Id.* at 12a.

Turning to the facts presented, the Court of Appeals held that a rational jury, following those instructions, could conclude that Petitioner obstructed the grand jury's investigation. The Court of Appeals reasoned that Petitioner's "actions are related to the grand jury in time, causation, *and* logic" because Petitioner "distributed the false loan documents just months after the grand jury subpoena was served upon him, and those documents attempted to explain away transactions reflected in the subpoenaed documents." App. 13a (emphasis added by Court of Appeals).[1]

In reaching this conclusion, the Court of Appeals distinguished the facts in *Aguilar*. The Court of Appeals stated that false statements directed at prosecutors in the United States Attorney's Office are "meaningful[ly] differen[t]" than false statements directed at FBI agents. App. 13a. Emphasizing this Court's statement in *Aguilar* that "'a jury could find [a] defendant guilty' if he lied to an individual who had already been subpoenaed to testify before the grand jury," *id.* at 13a–14a (quoting *Aguilar*, 515 U.S. at 602), the Court of Appeals made a categorical distinction between subpoenaed and non-subpoenaed witnesses and concluded that a federal prosecutor is analogous to a witness subpoenaed to appear before the grand jury. Therefore, the Court of Appeals concluded, "[t]he causal relationship between the U.S. Attorney's office and the grand jury is that envisioned by the *Aguilar* decision." *Id.* at 14a. The panel explained:

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[1] The grand jury subpoenas were actually served on Petitioner's Companies, not Petitioner. See JA0143, JA1248.

> The causal relationship between [Petitioner] and the grand jury rests in part on the meaningful differences between the prosecutor in his case and the FBI agent in *Aguilar*. * * * In the instant case, [Petitioner] gave false documents to the U.S. Attorney's office. A prosecutor tasked with presenting to the grand jury is more akin to a witness who has been subpoenaed than one who has not. As with a subpoenaed witness, 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. "Attorneys for the government," after all, "may be present while the grand jury is in session." Fed. R. Crim. P. 6(d)(1).

Id. at 13a–14a (alteration adopted).

In so holding, the Fourth Circuit stated it was "join[ing] the Second Circuit in recognizing that the 'discretionary actions of a third person,' * * * can form part of the nexus to an official proceeding." App. 14a (quoting *Reich*, 479 F.2d at 185). In *Reich*, 479 F.3d 179, the defendant, as part of earlier civil proceedings, had forged a court order purporting to moot the opposing party's pending mandamus petition, thereby causing the opposing party to withdraw its petition. App. 14a–15a. The Fourth Circuit reasoned:

> As in *Reich*, where forwarding the fake or forged document had the foreseeable consequence of reaching and influencing an ongoing court proceeding, a rational jury could find that [Petitioner's] giving false evidence to the U.S. Attorney's office in charge of presenting evidence to the grand jury in fact

> had one intended and foreseeable consequence: transmission of those documents to the grand jury.

Ibid.

2. The Closing Arguments Pertaining To Filing False Tax Returns

Second, with respect to the propriety of the Government's closing argument, the Court of Appeals below held that the Government's argument was supported by the evidence and, therefore, not improper. The panel stated: "The government proved that the wires had been sent and plainly discredited the fabricated loan documents[.]" App. 16a. In the alternative, the Court of Appeals held that, even if improper, the closing argument did not affect Petitioner's "substantial rights" because arguments "are prone to exaggeration," each side had an opportunity to argue, and the district court had instructed the jury "to trust its own recollections of the evidence, and that closing arguments were not evidence themselves." *Ibid.*

REASONS FOR GRANTING THE PETITION

I. THE DECISION BELOW CONFLICTS WITH DECISIONS OF OTHER CIRCUITS

1. The decision below fundamentally deviates from the approach three Courts of Appeals have taken when applying the *Aguilar* nexus requirement to obstruction cases involving the discretionary acts of third parties.

With this case, the Fourth Circuit has instituted a new categorical rule: where a false statement is directed at a person who the defendant knows or believes is under subpoena to appear before a grand

jury—or to a prosecutor who, based on his objective institutional relationship with the grand jury, is, in the Fourth Circuit's view, analogous to a witness under grand jury subpoena—there is, without more, a sufficient nexus to establish the defendant intended to obstruct the official proceeding.

The Fourth Circuit misread the Second Circuit's decision in *Reich* and split from, rather than joined, its sister court. The Second Circuit has not held that the provision of false information to prosecutors, or to any other category of third parties, is the functional equivalent of providing false information to a subpoenaed grand jury witness and that the nexus requirement can be met based on the institutional role of the third party. Rather, in *Reich*, the Second Circuit applied *Aguilar* straightforwardly and held that the facts demonstrated the defendant subjectively intended for the false information, a fake court order, to influence the judicial proceeding in which the order had been fabricated. The Fourth Circuit's decision in this case contains no similar inquiry into the record evidence of Petitioner's subjective intent.

The Second, Fifth, and Seventh Circuits are united in their requirement that the Government must adduce evidence at trial from which a reasonable jury could find the defendant actually knew, understood, or believed the third party to whom he made false statements was likely to convey those false statements to an official proceeding. In contrast, the Fourth Circuit loosened the nexus requirement by allowing the intent element to be met by inferring it from the institutional relationship between the third party to whom he made the false statements and the

official proceeding, regardless of whether there was evidence presented that the defendant actually knew, understood, or believed the third party would convey those false statements to the official proceeding.

2. Additionally, the decision below parts ways with the D.C. and Ninth Circuits in the dispositive weight it places on a limiting instruction that "arguments are not evidence," and, in so doing, runs afoul of this Court's precedent regarding plain error review of prosecutorial misconduct. In *United States* v. *Young*, this Court clearly directed the lower courts to undertake a searching review of the entire record when considering prosecutorial misconduct in summation on plain error review. 470 U.S. 1, 16 (1985). Consistent with that mandate, the D.C. and Ninth Circuits have stated expressly that a standard jury instruction that "arguments are not evidence" cannot purge the taint of prosecutorial misconduct from a jury verdict and, therefore, is not dispositive of whether a defendant can succeed on plain error review. In the decision below, the Fourth Circuit treated that general instruction as dispositive and concluded, in light of the trial court having given such an instruction, Petitioner could not demonstrate his substantial rights were affected by any misconduct in summation.

A. The Courts Of Appeals Are Divided Over When The *Aguilar* Nexus Requirement Is Met Where False Statements Are Made To A Third Party With Discretion Whether To Convey Those Statements To An Official Proceeding

In contrast to the Fourth Circuit's decision below, three other Courts of Appeals have held that, to find the *Aguilar* nexus requirement satisfied when the discretionary acts of third parties are involved, the record evidence must demonstrate that the defendant actually knew or believed the third party to whom he made the false statements was likely to affect the official proceeding. These courts articulate that showing differently, but each hews closely to *Aguilar*'s mandate that a defendant who "lacks knowledge that his actions are likely to affect the judicial proceeding * * * lacks the requisite intent to obstruct." See *United States* v. *Aguilar*, 515 U.S. 593, 599 (1995).

The Fifth and Seventh Circuits have held that the *Aguilar* nexus requirement is satisfied where the defendant "understood" or "knew" the third party to whom he made false statements was "integrally involved" in the proceeding, such that the third party was acting as an extension of the grand jury itself. See, *e.g.*, *United States* v. *Bedoy*, 827 F.3d 495, 506, 509 (5th Cir. 2016); *United States* v. *Fassnacht*, 332 F.3d 440, 449 (7th Cir. 2003); *United States* v. *Furkin*, 119 F.3d 1276, 1282–83 (7th Cir. 1997). It is not enough that the defendant knew he was the "focus of a grand jury investigation." *Bedoy*, 827 F.3d at 506. Instead, the prosecution must establish that the defendant knew the individuals to whom he lied, or to

whom he directed a third party to lie, "were connected to that grand jury investigation rather than acting pursuant to 'an investigation independent of the grand jury's authority.'" *Ibid.* (alteration adopted) (quoting *Aguilar*, 515 U.S. at 599); *accord Fassnacht*, 332 F.3d at 449; *Furkin*, 119 F.3d at 1283. It is based on that evidence that a reasonable jury can infer that the defendant understood or knew his false statements would reach the grand jury. See *Bedoy*, 827 F.3d at 506, 509; *Fassnacht*, 332 F. 3d at 448–49.[2]

The Second Circuit has held that, where a defendant makes false statements to a third party who has discretion whether to convey that information to an official proceeding and whose discretionary actions are required for obstruction of that proceeding to occur, the Government must demonstrate that 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." See, *e.g.*, *United States* v. *Martinez*, 862 F.3d 223, 238 (2d Cir. 2017) (alterations adopted) (internal quotation marks omitted), *vacated and remanded on other ground sub nom. Rodriguez* v. *United States*, 139 S. Ct. 2772 (2019) (mem.); *United States* v. *Desposito*, 704 F.3d 221, 231–32 (2d Cir. 2013); *United States* v. *Reich*, 479 F.3d 179, 185–86 (2d Cir. 2007).[3]

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[2] The First Circuit has adopted this approach in an unpublished decision. See *United States* v. *Dwyer*, 238 F. App'x 631, 650–51 (1st Cir. 2007) (nexus met where evidence demonstrated FBI agents were "integrally involved" in the grand jury investigation and defendant knew her statements to FBI agents would be submitted to the grand jury).

[3] The Ninth Circuit reached a result consistent with this approach in an unpublished opinion, without expressly adopting

The conflict between the Circuits is clear. In cases where false statements are made to third parties with discretion whether to convey those statements to the grand jury, the Second, Fifth, and Seventh Circuits have held that the *Aguilar* nexus requirement is satisfied only where the record evidence demonstrates the defendant actually knew, understood, or believed that his false statements were likely to reach the grand jury through the third party to whom he made the statements. Under the decisions of these courts, it is plain that establishing that the defendant gave false information to a third party at a time when he knew an official proceeding was pending and that there is a close institutional relationship between the third party and the grand jury is not sufficient to satisfy the *Aguilar* nexus requirement. Instead, the Government must adduce additional evidence that the defendant subjectively knew, understood, or believed that the false information would likely be conveyed to the official proceeding and therefore would influence not merely the third party, but the official proceeding itself. In contrast, the Fourth Circuit has adopted a categorical approach that the other three Courts of Appeals would deem deficient: where the defendant is aware of a pending official proceeding and there is an objective institutional relationship between the third party to whom the defendant provides false information and the official proceeding, such as the objective institutional

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the Second Circuit's interpretation of the *Aguilar* nexus requirement. See *United States* v. *Villalobos*, 567 F. App'x 541, 543 (9th Cir. 2014) (nexus met where defendant instructed witness to lie during interview with U.S. Attorney's Office and defendant believed witness's statements would be conveyed to grand jury).

relationship between a prosecutor and a grand jury, the nexus requirement is satisfied without any other evidence required. Thus, in every case in the Fourth Circuit in which a defendant knows there is a pending grand jury proceeding and provides false information to a prosecutor, the defendant may be found guilty of obstructing a grand jury proceeding, even if the defendant's intent was solely to influence the prosecutor and he had no subjective intent that the false information would be conveyed to the grand jury.

B. The Courts Of Appeals Are Divided Over Whether A Standard Jury Instruction To The Effect That "Arguments Are Not Evidence" Precludes Finding A Defendant's Substantial Rights Were Harmed By Prosecutorial Misconduct In Summation

The decision below splits the courts of appeals over whether, on plain error review of improper argument by the prosecution in summation, a trial court's standard jury instruction that "arguments are not evidence" forecloses a finding of prosecutorial misconduct warranting reversal. In the decision below, the Fourth Circuit concluded that an "arguments are not evidence" standard jury instruction precludes finding a violation of a defendant's substantial rights on plain error review, while two Courts of Appeals have stated that such a general instruction, by itself, is never a sufficient basis to conclude that substantial rights were not affected.

1. In the decision below, the Court of Appeals treated the trial court's provision of a standard jury

instruction that "arguments are not evidence" as determinative. Noting that "[c]losing arguments are just that—arguments," and "[t]hey are prone to exaggeration," App. 16a, the Court of Appeals held that the trial court's general instruction that the jury should "trust its own recollections" and "arguments were not evidence themselves," meant Petitioner could not demonstrate that the prosecution's misstatement of the evidence in closing argument affected his substantial rights, as required on plain error review. *Ibid.*

2. In contrast, the D.C. and Ninth Circuits have determined that a standard jury instruction does not preclude relief from prosecutorial misconduct during summation, even on plain error review. Each of these Courts of Appeals requires the consideration of different factors in assessing whether a defendant's substantial rights were violated. See *United States* v. *Davis*, 863 F.3d 894, 901 (D.C. Cir. 2017) (when reviewing whether prosecutorial misconduct requires reversal on plain error review, a court should consider: "(1) the closeness of the case, (2) the centrality of the issue affected by the error, and (3) the steps taken to mitigate the effects of the error." (alterations adopted) (internal quotations marks omitted)); *United States* v. *Mageno*, 762 F.3d 933, 944–45 (9th Cir. 2014) ("We consider the statements in the context of the entire trial, including curative instructions given to the jury and the weight of the evidence against the defendant, to ascertain the statements' likely effect."), *opinion vacated on other ground*, 786 F.3d 768 (9th Cir. 2015). Each Court, however, has expressly stated that "[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." *Davis*, 863 F.3d at 903 (alterations adopted) (internal quotation marks and citations omitted); *accord Mageno*, 762 F.3d at 945.[4]

3. Thus, the courts of appeals are divided in whether to treat a standard jury instruction that "arguments are not evidence" as dispositive when considering whether a defendant can demonstrate his substantial rights were violated by prosecutorial misconduct in summation. In the Fourth Circuit, the provision of such an instruction precludes relief. In contrast, the D.C. and Ninth Circuits have spoken clearly in stating that a defendant who claims harm arising from prosecutorial misconduct in summation may be able to demonstrate reversible plain error despite the provision of such an instruction.

II. THE DECISION BELOW IS WRONG

A. The Decision Below Contradicts *Aguilar* And Undermines The Purpose Of The Nexus Requirement

1. In finding that the facts of this case "fit comfortably" within this Court's precedents, the Fourth Circuit found sufficient the very facts this Court determined were insufficient in *Aguilar* and relied on a substantive distinction between

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[4] In *Mageno*, upon subsequently learning of substantive typographical errors and omissions in the official transcripts of the trial proceedings, the Ninth Circuit vacated its opinion and affirmed the appellant's conviction. See 786 F.3d at 778, 779. The Ninth Circuit's statement of the governing law on prosecutorial misconduct and its unwillingness to treat standard jury instructions as "cure-alls" for such conduct, however, is unaffected by this subsequent history.

subpoenaed and non-subpoenaed witnesses that *Aguilar* did not endorse.

a. The Fourth Circuit's decision rests on facts that this Court has determined do not support obstruction of justice convictions. The Court of Appeals first noted that the "official proceeding [Petitioner] attempted to influence was not some far-off possibility" because "[t]he grand jury had in fact convened." App. 13a. Then, the Court of Appeals determined his conduct was "related to the grand jury in time, causation, *and* logic [because] * * * * [Petitioner] distributed the false loan documents just months after the grand jury subpoena was served upon him, and those documents attempted to explain away transactions reflected in the subpoenaed documents." *Id.* (emphasis added by Court of Appeals). In *Aguilar*, however, this Court held it was not enough that the defendant knew there was a grand jury proceeding pending and that he was a target of that proceeding when he lied to the FBI about the very conduct the grand jury was investigating. See *United States* v. *Aguilar*, 515 U.S. 593, 600–01 (1995).

b. The Fourth Circuit's decision also erroneously distinguishes between subpoenaed and non-subpoenaed witnesses in a manner that makes provision of false information to the former the functional equivalent to providing the information to the grand jury. The Fourth Circuit then erroneously creates a categorical fiction that prosecutors, unlike the FBI agents in *Aguilar*, are akin to third-party witnesses who have been subpoenaed to appear before the grand jury.

The Court of Appeals stated that prosecutors are "meaningful[ly] differen[t]" than the FBI agents in *Aguilar* because prosecutors are "tasked with presenting to the grand jury" and the Federal Rules of Criminal Procedure provide that they "may be present while the grand jury is in session," which means they are "more akin to a witness who has been subpoenaed than one who has not." App. 14a. *Aguilar*, however, did not endorse categorical treatment of third parties for purposes of determining whether the nexus requirement has been met. See *United States* v. *Macari*, 453 F.3d 926, 939–40 (7th Cir. 2006) ("[T]he *Aguilar* court did not draw a line between subpoenaed or 'actual' and non-subpoenaed or 'potential' witnesses.").

Instead, this Court focused on whether the defendant had the requisite intent to obstruct the official proceeding because the evidence demonstrated he knew his actions were "likely to affect the [official] proceeding." *Aguilar*, 515 U.S. at 599. In determining whether the nexus was met on the facts of *Aguilar*, this Court specifically rejected the argument that there was sufficient evidence of the defendant's intent to obstruct the grand jury based on the defendant having lied to FBI agents after asking them whether he was a target of the grand jury's investigation. *Id.* at 600–01. Lying to FBI agents, knowing that a grand jury proceeding was pending, did not establish the requisite nexus. Presented with no other record evidence that would "enable a rational trier of fact to conclude that [the defendant] knew that his false statement would be provided to the grand jury," this Court refused to allow the defendant's conviction to stand based on speculation about his intent. *Id.* at 601. The institutional relationship between the FBI

and the grand jury had no bearing on this Court's analysis of the nexus requirement.

It is particularly inappropriate to apply the Fourth Circuit's categorial approach to the nexus requirement to statements made to prosecutors. As the Court of Appeals below recognized, a United States Attorney's Office's investigation is not itself an official proceeding, and "[p]roviding materially false documents with an intent only to influence the U.S. Attorney's investigation, therefore, would not amount to a violation of § 1512(c)(2)." App. 9a. Indeed, individuals make proffers to the United States Attorney's Office regularly with intent to persuade prosecutors not to press charges, and prosecutors have discretion whether to take the information they learn as part of those proffers to the grand jury. For this very reason, the Court of Appeals explained, Section 1512(c)(2) should not be read in a manner that would impinge upon the general benefit that comes from the "back and forth between citizens and government," much of which "is a wholly legitimate effort to 'influence' the government" and which an overaggressive reading of Section 1512(c)(2) would chill. *Id.* at 8a. Yet, the Fourth Circuit's analytical treatment of prosecutors as third-party subpoenaed witnesses, giving rise to an obstruction charge if a prosecutor disbelieves a proffer, plainly chills legitimate efforts to influence prosecutorial decisions.

2. For these reasons, among others, when applying the *Aguilar* nexus requirement in the context of false statements made to a third party with discretion whether to convey information to an official proceeding, the Second, Fifth, and Seventh Circuits

more faithfully apply the *Aguilar* nexus requirement than the Fourth Circuit.

a. Consistent with *Aguilar*, the Second, Fifth, and Seventh Circuits make record evidence of the defendant's subjective intent central to their analyses of whether the nexus requirement in met.

In *United States* v. *Bedoy*, for example, the Fifth Circuit upheld a defendant's conviction under Section 1512(c)(2) for obstructing a grand proceeding based on the record evidence of his subjective intent to influence that proceeding. 827 F.3d 495 (5th Cir. 2016). The Fifth Circuit explained that the *Aguilar* nexus requirement was met because the record reflected that the defendant understood the FBI was "integrally involved" in the grand jury's investigation and, upon learning the FBI was looking to speak with a particular witness as part of the grand jury investigation, the defendant told the witness not to talk to the FBI, and, if she did, to lie. *Id.* at 507–09. The Fifth Circuit's conclusion did not rest on the institutional relationship between the FBI and the grand jury, or the potential FBI witness and the grand jury, but rather, on the evidence of the defendant's actual knowledge that the FBI was working as an arm of the grand jury in this particular investigation.

This was also the case in *United States* v. *Reich*, where the defendant was charged with obstructing a judicial proceeding, in violation of 18 U.S.C. § 1512(c)(2), based on his act of faxing a forged order to opposing counsel. 479 F.3d 179 (2d Cir. 2007). The Second Circuit determined the *Aguilar* nexus requirement was satisfied based on the language of the forged order itself: "The forged Order purported to enjoin a party from acting in an arbitration,

directed the parties to contact Chief Judge Korman, and mooted a party's application before the Second Circuit, thereby inducing that party to withdraw it." *Id.* at 186. The content of the forged order evidenced that the defendant foresaw opposing counsel would respond to the order by withdrawing its pending mandamus petition and contacting the Chief Judge, thereby obstructing the judicial proceeding. *Id.* Unlike the Court of Appeals below, *Reich* did not hold, or even suggest, that the nexus finding could be determined categorically, based on an institutional relationship between the third party and the official proceeding.

b. Had the Fourth Circuit properly applied *Aguilar* by focusing on the record evidence of Petitioner's subjective intent, rather than concluding the jury could infer Petitioner's intent from the institutional relationship between the United States Attorney's Office and the grand jury, the conviction would have been reversed. There was no record evidence that Petitioner knew, understood, or believed the United States Attorney's Office would present the false loan documents to the grand jury. A federal prosecutor, like the FBI agent in *Aguilar*, is an independent decisionmaker who exercises her discretion in selecting which materials to present to the grand jury. Cf. *United States* v. *Schwarz*, 283 F.3d 76, 107–09 (2d Cir. 2002) (*Aguilar* nexus requirement not met where defendant lied to federal investigative agents two days after receiving grand jury subpoena; there was no evidence agents indicated they would repeat his statements to grand jury, and it was not enough that it was "possible" the agents would do so). Importantly, prosecutors are under no obligation to present exculpatory materials to the grand jury. See

United States v. *Williams*, 504 U.S. 36, 55 (1992). Accordingly, the Fourth Circuit erred in concluding the nexus requirement was met simply because there was evidence that the Petitioner, knowing a grand jury proceeding was pending, attempted corruptly to influence the prosecutor.[5]

3. The Fourth Circuit's approach also undercuts the purpose of the *Aguilar* nexus requirement. This Court endorsed the nexus requirement in order to place "metes and bounds" on exceptionally broad statutory language and ensure that a defendant who "lacks knowledge that his actions are likely to affect

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[5] Indeed, the evidence presented at trial cut the other direction. By seeking declination of prosecution—as his attorney's letter plainly stated was Petitioner's intent in providing the documents, JA1306–JA1311—Petitioner wanted prosecutors to review the documents and decline prosecution. The only scenario under which it would be likely the prosecutor would provide the documents to the grand jury is the one that actually occurred—where the prosecutor believed the documents to be fabricated and, therefore, gave them to the grand jury as evidence of obstruction. Plainly, this was not what Petitioner intended to have happen. The Court of Appeals' conclusion that "a rational jury could find that [Petitioner's] giving false evidence to the U.S. Attorney's office in charge of presenting evidence to the grand jury in fact had one intended and foreseeable consequence: transmission of those documents to the grand jury[,]" App. 14a–15a, ignores that prosecutors conduct their own investigations in making charging decisions, which are not official proceedings, and possess discretion in choosing what information, if any, to present to the grand jury. Just because a potential defendant knows the United States Attorney's Office may present materials in its possession to the grand jury does not transform a false statement in a defense proffer into an obstruction charge. Cf. *Marinello* v. *United States*, 138 S. Ct. 1101, 1110 (2018) ("Just because a taxpayer knows that the IRS will review her tax return every year does not transform every violation of the Tax Code into an obstruction charge.").

the judicial proceeding" is not held guilty of obstruction. *Aguilar*, 515 U.S. at 599 (citing *Pettibone* v. *United States*, 148 U.S. 197 (1893)). By focusing on the institutional character of the third party, the Fourth Circuit's decision below does not exhibit this restraint. The Fourth Circuit's approach fails to ensure that the jury finds the defendant actually knew, understood, or believed his actions were likely to affect the grand jury and, instead, permits conviction where a reasonable trier of fact can conclude that a third party to whom a false statement was made is objectively a likely "channel or conduit to the grand jury." See App. 14a.

Accordingly, this Court should accept review of this issue and resolve the split in the Circuits by clarifying that the nexus requirement under *Aguilar* cannot be satisfied based on the objective relationship between an official proceeding and a third party to whom a defendant, aware of the proceeding, makes a false statement, but rather, requires sufficient evidence that the defendant subjectively knew, understood, or believed that the false information was likely to be conveyed by the third party to the official proceeding.

B. The Decision Below Contradicts This Court's Instruction For How To Review Prosecutorial Misconduct For Plain Error And Allows Tainted Jury Verdicts To Stand

Although prosecutorial misconduct arising from misstatements in summation of material evidence seriously affects the fairness, integrity, and public reputation of judicial proceedings—precisely when this Court has said appellate courts may exercise

their discretion to correct plain error, see *United States* v. *Olano*, 507 U.S. 725, 732 (1993)—the decision below requires a tainted verdict to stand any time a trial court has given the standard jury instruction that "arguments are not evidence."

1. The Court of Appeals erroneously held that the prosecutors' comments during closing argument were supported by the evidence and, therefore, not misconduct.

The Fourth Circuit below mistakenly focused on whether the Government had proven that the wire transfers occurred and the loan documents Petitioner gave the United States Attorney's Office were false. App. 16a ("The government proved that the wires had been sent and plainly discredited the fabricated loan documents."). This conclusion misses the mark because it fails altogether to address the falsity of the prosecutor's claims that Petitioner never intended to make any repayments, Petitioner had not made repayments, and that STS contemporaneously described all of the wire transfers as being for the payment of fees.

Comparing the prosecutor's statements against the trial record, the prosecutor demonstrably misstated the evidence on these points. That misconduct was plain error. The evidence at trial was that Petitioner had repaid a portion of the loans prior to initiation of any investigation, App. 55a–60a; JA0143, JA1248, JA1315–JA1319, and STS had not contemporaneously described "millions of dollars" of fees, but, in fact, had given no description at all for $1.6 million of the $2.1 million in wire transfers at issue, App. 54a. It has long been the rule that misstating the evidence in summation is improper

conduct. See, *e.g.*, *United States* v. *Wilson*, 135 F.3d 291, 297–98 (4th Cir. 1998) (prosecutor's argument that defendant "shot a man dead"—when evidence reflected only that defendant fired a gun at a car as it drove away, the car slowed, and the car was later found off the road—was improper (alteration adopted)); *United States* v. *Brainard*, 690 F.2d 1117, 1122 (4th Cir. 1982) (prosecutor's mischaracterization of co-defendant's statements was improper); cf. *Darden* v. *Wainwright*, 477 U.S. 168, 181–82 (1986) (plain error affecting due process did not occur because, *inter alia*, "prosecutors' argument did not manipulate or misstate the evidence"). It was clear under existing law that the prosecutor's misstatement of the evidence was plain error. See *United States* v. *Olano*, 507 U.S. 725, 734 (1993) (an error is "plain" when "the error is clear under current law").

2. By treating a trial court's standard jury instruction that "arguments are not evidence" as dispositive of whether Petitioner's substantial rights were affected by prosecutorial misconduct in summation, the Court of Appeals has chartered a path for plain error analysis of prosecutorial misconduct that runs afoul of this Court's precedent.

In *United States* v. *Young*, this Court explained that "a reviewing court cannot properly evaluate a case except by viewing [a claim of prosecutorial misconduct during closing argument] * * * against the entire record." 470 U.S. at 16. This Court emphasized that "it is particularly important for appellate courts to relive the whole trial imaginatively" when considering claimed errors in a criminal case under plain error review, as "[i]t is simply not possible for an appellate court to assess the seriousness of the

claimed error by any other means." *Ibid.* On the facts presented in *Young*, this Court held that the prosecutor's expression of his personal opinion about the evidence and exhortation to the jury to "do its job," while error, did not amount to plain error—not because of the provision or absence of standard jury instructions that a lawyer's statements are not evidence, but because the remarks were invited by defense counsel's own improper statements and there was substantial evidence of the defendant's guilt, which allowed this Court to conclude that the jury's verdict was not compromised. *Id.* at 14–20.

3. By determining that misstatements of evidence that bear directly on the jury's consideration of an essential element of the offense could not have affected the verdict because standard jury instructions were given, the Court of Appeals effectively insulates prosecutorial misconduct in closing argument from plain error review.

Had the Fourth Circuit properly viewed Petitioner's claim of prosecutorial misconduct in summation against the entire record, then the Court would have determined that the prosecutor's misconduct affected Petitioner's substantial rights. The evidence that was mischaracterized by the prosecution went to the key contested issue at trial: whether, when the disbursements were made, Petitioner intended to repay them. To find Petitioner guilty of violating 26 U.S.C. § 7206(1), the Government had to prove beyond reasonable doubt that Petitioner "willfully" submitted false tax returns. Repayment is critical evidence of intent to repay, the *sine qua non* of a loan. See *United States* v. *Pomponio*, 563 F.2d 659, 662 (4th Cir. 1977). Consequently, the

prosecutor's mischaracterization of the evidence went directly to the jury's consideration of Petitioner's *mens rea*, an element of each of the three false income tax return counts. See *Davis*, 863 F.3d at 902 (reversal for prosecutorial misconduct warranted on plain error review where, "critically, the prosecutor blatantly misrepresented the evidence regarding [the defendant's] *mens rea*"); *Brainard*, 690 F.2d at 1122 (finding prejudice based, in part, on fact that prosecutor's "misstatements [of what co-defendant said] pertained to the central issue—indeed the only issue—in the case"). Accordingly, false claims in summation that there was evidence that Petitioner had made no repayments and that the disbursements were contemporaneously recorded as fees, not loans or capital contributions, was devastating to Petitioner. These claims violated Petitioner's substantial right under the Fifth Amendment "not to be convicted except on the basis of evidence adduced at trial." See *United States* v. *Mageno*, 762 F.3d 933, 943 (9th Cir. 2014); see also *Brainard*, 690 F.2d at 1123 ("It is difficult to imagine comments which would more seriously affect the fairness of a trial than repeated * * * [misstatements of evidence] with respect to the only disputed issue.").

This Court should accept review of this issue and resolve the existing Circuit split by reversing the conviction below and holding that an improper summation can rise to the level of plain error despite a standard jury instruction that the closing argument is not evidence. See *Davis*, 863 F.3d at 903; *Mageno*, 762 F.3d at 945.

III. THE QUESTIONS PRESENTED ARE IMPORTANT AND RECURRING

1. The first question presented has broad implications if left unanswered. The criminal law is not being uniformly applied. If Petitioner had been prosecuted in Chicago rather than North Carolina, he could not have been convicted absent the Government presenting evidence that he actually knew, understood, or believed the United States Attorney's Office would present the documents his counsel provided that Office to the grand jury. Leaving the question presented in this case unanswered will allow prosecutors in the Fourth Circuit greater discretion to pursue obstruction charges and therefore "result in the nonuniform execution of [prosecutorial discretion] across time and geographic location." See *Marinello* v. *United States*, 138 S. Ct. 1101, 1109 (2018); see also *United States* v. *Pugh*, No. 17-1889, 2019 WL 4062635, at *11 (2d Cir. Aug. 29, 2019) (Calabresi, J., concurring) (prosecutors rely on obstruction of justice charges to obtain sentences disproportionate to the underlying crime).

Further, the risk of uneven application extends beyond disparate prosecutions under Section 1512(c)(2). Because the *Aguilar* nexus requirement sets the "metes and bounds," *Aguilar*, 515 U.S. at 599, of not one but several obstruction statutes, see *Marinello*, 138 S. Ct. 1101; *Arthur Andersen LLP* v. *United States*, 544 U.S. 696 (2005), the split the decision below engenders extends not merely to a single statute, but to the entire body of obstruction law. Decisions in the Fourth Circuit involving any statute to which the *Aguilar* nexus requirement applies will deviate from decisions in the Second,

Fifth, and Seventh Circuits under those same statutes. This Court should accept review to prevent non-uniform application of the *Aguilar* nexus requirement across multiple statutes, clarifying whether the nexus requirement can be met through an objective categorical approach or whether it is dependent on proof of the defendant's subjective intent.

2. The second issue presented is one that will arise frequently, and this Court's review is needed to provide guidance to courts of appeals as they review such claims and to create uniform treatment of those claims, nationwide.

If this question remains unanswered, similarly situated defendants will receive disparate levels of appellate consideration of claims of prosecutorial misstatements of evidence in summation depending on where they are prosecuted. Those in the Fourth Circuit automatically will be precluded from obtaining relief, even where a prosecutor's misstatements go to an essential element of the charge against them, as long as the trial court issued standard jury instructions. Meanwhile, those prosecuted in the D.C. and Ninth Circuits will be afforded more searching appellate review that considers the prosecutor's misstatements against the record as a whole. If standard jury instructions should be treated as dispositive on plain error review, then this Court's holding to that effect would enhance judicial efficiency by allowing a reviewing court to focus first on whether the standard jury instruction was given and, if so, bypass the remainder of the *Olano* analysis. If, on the other hand, such instructions should not be treated as dispositive, as

this Court's precedents indicate, then so stating would ensure consistency in the provision of relief to defendants whose substantial rights have been affected by an improper summation. Either ruling would create uniformity across all Circuits and ensure defendants everywhere are afforded the same level of judicial review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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