No. 19-433

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

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

I. This Court Should Review Whether The Institutional Relationship Of A Third Party To An Official Proceeding Establishes The Defendant's Subjective Belief His Interaction With The Third Party Would Likely Affect The Official Proceeding.

The Fourth Circuit upheld Petitioner's conviction under 18 U.S.C. § 1512(c)(2) for obstructing the grand jury based on his provision of false documents to the United States Attorney's Office ("USAO"). That holding created a Circuit split that warrants this Court's review.

1. A defendant who "lacks knowledge that his actions are likely to affect the judicial proceeding * * * lacks the requisite intent to obstruct." *United States* v. *Aguilar*, 515 U.S. 593, 599 (1995). The Fourth Circuit relied solely on the institutional relationship of the USAO to the grand jury to infer that Petitioner, by providing false documents to the USAO, acted with knowledge that his actions were likely to affect the grand jury. Under the law of other Circuits, however, the fact that there is an institutional relationship between the third party with whom the defendant interacted and an official proceeding does not suffice to prove the defendant had the intent not just to influence the third party, but, as *Aguilar* requires, to affect the official proceeding.

a. Respondent concedes that the Fourth Circuit found subjective intent based on the fact the proffer was made to "the very office 'tasked with presenting to the grand jury.'" See Br. in Opp. ("Opp.") at 10 (quoting Pet. App. 14a). Indeed, the Fourth Circuit

did not purport to find subjective knowledge other than inferring it from the institutional relationship of the USAO to the grand jury. See Pet. App. 14a. In so doing, the Fourth Circuit effectively transformed *Aguilar*'s subjective standard for intent into an objective one.[1]

While Respondent cites to the cover letter that accompanied the false documents, see Opp. 10–11, the cover letter simply asked prosecutors to review the documents; it did not ask that the documents, which were produced voluntarily, not in response to a grand jury subpoena, be presented to the grand jury. See C.A. App. JA1306–1311. Thus, the cover letter adds nothing to the analysis. It simply demonstrates that Petitioner provided the false documents to the USAO. The Fourth Circuit found intent to influence the grand jury based solely on the institutional relationship between the USAO and the grand jury.

Regardless of whether an objectively reasonable person should know that, based on the institutional relationship between the USAO and the grand jury, documents presented to a USAO will likely be presented to a grand jury (a debatable proposition), the Fourth Circuit plainly used the supposed objective reasonableness of this proposition to establish

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[1] Respondent also notes the timing of the communication of the false documents to the USAO, a few months after Petitioner became aware of the existence of a grand jury proceeding. Opp. 9–10. But *Aguilar* requires that, in addition to having knowledge of an official proceeding, the defendant must have subjectively intended to affect that proceeding. Here, Petitioner concedes that he had knowledge of a pending official proceeding. What is at issue is what evidence can be used to establish his subjective intent to affect that proceeding.

Petitioner's subjective intent. The Fourth Circuit cited no evidence in the record, and there was none, of Petitioner's understanding of the role of the USAO vis-à-vis the grand jury or his belief the documents would likely be presented to the grand jury.[2]

Under the Fourth Circuit's holding below, the provision of false documents or information to a USAO by someone aware of a grand jury proceeding necessarily satisfies the nexus requirement. Whether the defendant was a criminal procedure scholar or had a third grade education is irrelevant to the analysis; as is whether the defendant did anything that evidenced a belief his interaction with the USAO would affect the grand jury. As set forth below, see p. 5 infra, this stands in stark contrast to the law in other Circuits, where courts require an analysis of the defendant's subjective state of mind regarding whether his or her interaction with a third party would likely affect an official proceeding.

b. Acknowledging that the USAO might not present the false documents to the grand jury, Opp. 10, and implicitly therefore that Petitioner may not have intended for the false documents to be provided to the grand jury, Respondent submits an alternative rationale from the one on which the Fourth Circuit relied in affirming the conviction. Respondent argues that by intending to persuade the USAO to decline prosecution—*i.e.*, "to discontinue its efforts before the

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[2] In fact, Petitioner was plainly intending the USAO would credit the documents and decline prosecution without presenting to the grand jury, rather than discredit them and present them to the grand jury as evidence of obstruction. See Pet. 29 n.5.

grand jury"—Petitioner intended indirectly to influence the grand jury. See *id.* at 10–11.

Respondent's argument runs headlong into the basic premise on which the *Aguilar* nexus rests: "The action taken by the accused must be with an intent to influence judicial or grand jury proceedings; it is not enough that there be an intent to influence some ancillary proceeding, such as an investigation independent of the court's or grand jury's authority." 515 U.S. at 599. Prosecutors' investigations are ancillary to and independent from the grand jury's authority. See Fed. R. Crim. P. 6(a)(1), (d)(2) (grand jury proceedings are convened by the court and prosecutors may not be present during grand jury deliberations or votes whether to indict); Pet. App. 7a–9a (USAO's investigation is not an "official proceeding" and "[p]roviding materially false documents with an intent only to influence the [USAO]'s investigation * * * would not amount to a violation of § 1512(c)(2)"). Thus, even if Petitioner intended to persuade the USAO to drop its investigation, with the collateral effect of causing prosecutors not to marshal evidence before the grand jury, this Court already determined that such conduct cannot act as a proxy to demonstrate Petitioner acted with "corrupt" intent towards the grand jury. See *Aguilar*, 515 U.S. at 601 ("[W]hat use will be made of false testimony given to an investigating agent who has not been subpoenaed or otherwise directed to appear before the grand jury is far more speculative. * * * [I]t cannot be said to have the 'natural and probable effect' of interfering with the due administration of justice.").

Despite Respondent's efforts to recast the decision below, the Fourth Circuit's opinion can only be read to hold that subjective intent is established based solely on an institutional relationship between a third party and an official proceeding that might lead an objectively reasonable person to believe interacting with the third party would likely affect the official proceeding.

2. Respondent also errs in asserting that there is no Circuit split over how the *Aguilar* nexus requirement is being applied in cases involving the discretionary acts of third parties. Opp. 12. Respondent neither responds to, nor reconciles, the different tests the Circuits employ to find subjective intent. Instead, Respondent states there is no split because: (i) the Fourth Circuit "did not disregard petitioner's subjective intent," and (ii) several of the cases Petitioner cited upheld convictions against sufficiency-of-the-evidence challenges, so there is "no basis to conclude that another court of appeals would have found the evidence [here] insufficient." See *id.* at 12–13. As set forth above, the Fourth Circuit did disregard Petitioner's subjective intent by holding that it can be established based solely on the objective relationship between the USAO and the grand jury. Thus, Respondent's first assertion is incorrect. While the second assertion is correct in that other cases have involved sufficiency challenges, Respondent is incorrect in asserting that these cases have therefore not established law inconsistent with the holding of the Fourth Circuit below. Indeed, Respondent reaches that conclusion only because of its mischaracterization of the Fourth Circuit's decision.

The Fourth Circuit has created a split with the Second, Fifth, and Seventh Circuits by holding that evidence of a defendant's subjective belief that false statements he made to a third party were likely to reach the official proceeding is not required, because subjective intent to affect that proceeding can simply be inferred from the objective, institutional relationship of the third party to the proceeding. See Pet. i, 5–6, 16–21, 27–28. That approach is materially different than the one taken by three other courts of appeals, which consistently look not merely to the nature of the relationship between the third party and the official proceeding, but also to whether the defendant knew, understood, or believed the third party to whom he provided false information would convey those statements to the grand jury. Thus, courts look, for example, for evidence the defendant knew or understood the third party was "'integrally involved' in the proceedings, such that the third party was acting as an extension of the grand jury," see Pet. 18–19 (collecting cases from Fifth and Seventh Circuits), or for evidence "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,'" *id.* at 19 (collecting cases from Second Circuit). Because each of these Circuits requires something more than an objective analysis of the institutional relationship of a third party with whom the defendant interacted and the official proceeding to establish the defendant intended to influence the official proceeding, none of these Circuits would have affirmed the conviction below, as the Fourth Circuit did.

Three Circuits will continue to review obstruction convictions with a fact-bound assessment of evidence

of subjective intent. In the Fourth Circuit, on the other hand, the *Aguilar* nexus will be met in every case where a defendant, aware of a grand jury proceeding, gives false information to a prosecutor, regardless of whether the defendant actually believed it likely the information would be presented to the grand jury. Thus, in the Fourth Circuit, any false statement made in a proffer session by someone aware of the existence of a grand jury will be deemed to be obstruction of the grand jury; whereas in three other Circuits, obstruction will occur only if there is sufficient evidence the defendant believed it was likely the prosecutor would present the false proffered information to a grand jury.

II. This Court Should Review Whether Provision Of A Standard Curative Instruction Precludes Reversal On Appeal For Plain Error Based On Prosecutorial Misconduct In Summation.

Petitioner's second question presented also involves a Circuit split that warrants this Court's review.

1. This case is a suitable vehicle for review of whether the Fourth Circuit erred in finding a standard "arguments are not evidence" jury instruction precluded Petitioner's claim that his substantial rights were affected by prosecutorial misconduct in summation. Contra Opp. 17. "The statement of any question presented is deemed to comprise every subsidiary question fairly included therein." S. Ct. R. 14.1(a). Whether the prosecutor's statements were erroneous is a subsidiary question to whether Petitioner's substantial rights were violated by those erroneous statements. See Pet. i; *Lebron* v.

National R.R. Passenger Corp., 513 U.S. 374, 379–380 (1995) (whether Amtrak was a Government entity was a question fairly encompassed within whether Amtrak's actions were subject to constitutional constraint).

The question presented expressly asserts as its premise that the prosecutor "commit[ted] misconduct in summation by misstating evidence relevant to an essential element of the offense," Pet. i, and the petition argues both that the Fourth Circuit erred in holding the prosecutor's closing argument was supported by the evidence, *id.* at 31–32, and that the Fourth Circuit erred in allowing a standard jury instruction that "arguments are not evidence" to preclude a finding that Petitioner's substantial rights were affected by that misconduct, *id.* at 32–34. Further, Petitioner has consistently argued on appeal that the prosecutor's statements on summation were erroneous and that that error affected his substantial rights, despite provision of a limiting instruction. See Br. of Appellant 28–36 (4th Cir. Nov. 22, 2017), ECF No. 26; Pet. for Reh'g En Banc 15–16 (4th Cir. May 2, 2019), ECF No. 89. Accordingly, there is no prudential bar to accepting review of this question.

2. The Fourth Circuit's reliance on a standard limiting instruction as its sole reason for finding Petitioner's substantial rights were not affected is at odds with the approach taken in two other courts of appeals.

a. Respondent disagrees with Petitioner's characterization of the Fourth Circuit's opinion "as announcing a categorical rule" that the provision of a curative instruction is dispositive in the determination that prosecutorial misconduct in

summation did not affect a defendant's substantial rights and therefore precludes finding plain error. Opp. 16. The Fourth Circuit, however, advanced just one rationale for finding Petitioner's substantial rights were not affected: "The district court instructed the jury to trust its own recollections of the evidence, and that closing arguments were not evidence themselves." See Pet. App. 16a. Consequently, the Fourth Circuit gave the instruction not just weight, see Opp. 16, but dispositive weight.[3]

b. This Court has made clear that an appellate court considering whether an error affects a defendant's substantial rights must analyze the effects of the error in the context of the entire proceeding. See *United States* v. *Young*, 470 U.S. 1, 16 (1985) ("a reviewing court cannot properly evaluate a case except by viewing [a claim of prosecutorial misconduct during closing argument] against the entire record"); see also, *e.g.*, *Molina-Martinez* v. *United States*, 136 S. Ct. 1338, 1346 (2016) (on plain error review of whether erroneously calculated Guidelines range affected defendant's substantial

[3] The Fourth Circuit's opinion also states: "And Sutherland had the opportunity to respond to arguments he felt were unsupported by the evidence with objections or better arguments of his own." Pet. App. 16a. The observation that Petitioner could have argued the prosecutor's summation was not supported by the evidence and made better arguments of his own, however, is merely illustrative of the Fourth Circuit's basis for its holding that Petitioner's substantial rights were not affected by the prosecutor's improper summation: the jury was instructed that "[c]losing arguments are just that—arguments." See *ibid.* The fact that Petitioner could have objected, on the other hand, was not a basis for the Fourth Circuit's holding on the merits. Rather, it was the reason that appellate review was, appropriately, for plain error.

rights, "a reviewing court must consider the facts and circumstances of the case before it"; rejecting Court of Appeal's categorical requirement that defendant demonstrate "additional evidence"); *United States* v. *Davila*, 569 U.S. 597, 612 (2013) (on plain error review of whether Rule 11(c)(1) violation affected defendant's substantial rights, "the Court of Appeals should have considered whether it was reasonably probable that, but for the Magistrate Judge's exhortations, [defendant] would have exercised his right to go to trial" by assessing the error "in light of the full record" rather than "in isolation"). The Fourth Circuit engaged in no review of the improper summation in light of the entire record. Instead, it simply rejected the argument because the jury was instructed generally that arguments are not evidence.[4]

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[4] There is a reasonable likelihood that, but for the prosecutor's misstatements in summation, the jury would not have found Petitioner acted with the requisite intent to violate 26 U.S.C. § 7206(1). Section 7206(1) requires proof the defendant acted "willfully" in submitting inaccurate returns. Evidence of underreporting alone is not sufficient to infer Petitioner acted "willfully." See *Holland* v. *United States*, 348 U.S. 121, 139 (1954). The Government contended Petitioner knew the unreported receipts were not loans, but, rather, reportable income. Respondent does not dispute that the uncontroverted evidence demonstrated Petitioner made multiple repayments, across multiple years, prior to the criminal investigation of his companies, see Pet. 10–11, 31, yet the prosecutor asserted in summation Petitioner had made no repayments, see *id.* at 10–11. There is a reasonable probability that, but for the prosecutor's misstatements, the jury would have had reasonable doubt whether Petitioner acted "willfully" by underreporting income, knowing the monies received were not loans. Indeed, an intent to repay is "the *sine qua non* of a bona fide non-reportable loan," and there is no stronger evidence of an intent to repay than actual repayments. See *United States* v. *Pomponio*, 563 F.2d

c. The Fourth Circuit's holding is at odds with rulings in the Ninth and D.C. Circuits. Contra Opp. 16. Respondent seeks to distinguish *United States* v. *Davis*, 863 F.3d 894 (D.C. Cir. 2017), and *United States* v. *Mageno*, 762 F.3d 933 (9th Cir. 2014), vacated on other ground, 786 F.3d 768 (9th Cir. 2015), on the particular facts presented in those cases, see Opp. 16–17, but does not dispute that those courts of appeals unequivocally stated that an "arguments are not evidence" instruction is not a "cure-all" for prosecutorial misconduct on summation. See *Davis*, 863 F.3d at 903; *Mageno*, 762 F.3d at 945. Because the Fourth Circuit below held that such an instruction insulated prosecutorial misconduct in summation from constituting plain error, its holding cannot be squared with those of the Ninth and D.C. Circuits.[5]

This Court should grant certiorari to resolve the Circuit split that has resulted from the decision below.

CONCLUSION

The petition should be granted.

659, 662 (4th Cir. 1977); see also *United States* v. *Davis*, 863 F.3d 894, 902–903 (D.C. Cir. 2017) (reversal on plain error review where "prosecutor blatantly misrepresented the evidence regarding [the defendant]'s *mens rea*").

[5] The Ninth Circuit vacated its opinion in *Mageno* due to subsequent *factual* developments, leaving the law set forth in that decision unchanged. See *Mageno*, 786 F.3d at 778 (vacating opinion "[b]ecause the corrected transcript shows that the prosecutorial misstatements did not occur"); see also *United States* v. *Alcantara-Castillo*, 788 F.3d 1186, 1196 (9th Cir. 2015); *United States* v. *Flores*, 802 F.3d 1028, 1034 (9th Cir. 2015); contra Opp. 16.

Respectfully submitted.

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