IN THE
SUPREME COURT OF THE UNITED STATES

AARON NEW, PETITIONER

vs.

UNITED STATES OF AMERICA, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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Questions Presented

1. Did the Ninth Circuit's opinion contradict this Court's holding in Universal Health Services, Inc. v. United States ex rel. Escobar 136 S. Ct. 1989 (2016) that a decision-maker's behavior is relevant to determine whether a false statement is material?

2. Are the Circuits split on whether to apply a subjective standard, as described in United States v Gaudin, 515 U.S. 506 (1995) and Escobar, supra. or an objective standard used by the Ninth Circuit to make materiality determinations?

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No. _____

AARON NEW petitions this Court for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit in this case.

Opinion Below

On May 28, 2019, the Ninth Circuit Court of Appeals issued a Memorandum Opinion in which it affirmed Petitioner's Conviction and Sentence. (Appendix A.)

* * *

Jurisdiction of the Supreme Court

The judgment of the Ninth Circuit Court of Appeals is dated May 28, 2019. (Appendix A.) Petitioner timely filed a Petition for Rehearing and Suggestion for Rehearing En Banc that was denied on October 24, 2019. (Appendix B.) Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

Constitutional and Statutory Provisions Involved

United States Constitution, Amendment V

> No person shall . . . be deprived of life, liberty, or property, without due process of law. . .

United States Constitution, Amendment V

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

List of Parties

Aaron New, Petitioner

United States of America, Respondent

STATEMENT OF THE CASE

Jurisdiction of the Court Below

The district court had jurisdiction pursuant to 18 U.S.C. § 3231. The Court of Appeals had jurisdiction pursuant to 28 U.S.C. § 1291.

Background and District Court Proceedings

This case involves mail and wire fraud in the procurement of residential loans during the national lending frenzy of the mid-2000s. This case is related to several identically charged cases in the Eastern District of California. Petitioner and others were indicted for acquiring properties in which some of the participants made misrepresentations on loan applications.

The lenders participated in and encouraged the scheme knowing most of the representations on residential loan applications were false. Nationwide, over 3,000,000 borrowers participated in similar loan schemes where they provided false information on loan applications. The lending industry referred to these as "liar loans" and fully expected the borrowers to lie in order to get the loans which the lenders then securitized and passed on to investors. The lenders made hundreds of millions of dollars off these loans and were not indicted for their participation in the fraud. Remarkably, despite the fact that the lenders were involved up to their eyeballs in this fraudulent scheme, the government chose to cast them as "victims."

The issue in these cases was whether defendants' false representations in the loan applications were material to these "victim" lenders. Because of their knowing involvement in the

fraudulent, Petitioner and the defendants in each of the related cases proffered expert testimony demonstrating that the misrepresentations were immaterial to the lending decision. In the offer of proof, petitioner asserted that the lenders did not care if the answers on loan application questions were false. All they wanted to do was to make the loans and then sell the loan as quickly as possible. Not only did none of the lenders involved in this case lose so much as a penny, they all made money.

The notice of expert testimony filed by the defendants alleged that:

> ... Professor Partnoy will testify why the falsified documents alleged to have been used in this case are not material. Professor Partnoy will explain the conduct of the lending institutions as well as the securitization process and what happened in the financial market during the time frame outlined in the indictment. Further, he will explain why the lending institutions would accept loans that were clearly falsified. He will opine that the alleged victims in this indictment (the lending intuitions) were not defrauded. He will opine that, in fact, the lending institutions encouraged this conduct and allowed it to occur. He will opine that without the complicity of the lending institutions this type of conduct would not have been able to occur. He will further discuss the profit incentive that the top executives had at this time and how they reaped huge profits from accepting loans that were clearly falsified. He will discuss the fact that the lending institutions charged premium rates for poor credit loans

> which increased the institutions profits and the executives' income.

(ER 3492.)

The government filed several in limine motions to prevent Petitioner from presenting this evidence because it claimed the evidence was irrelevant. (ER 3478-3491, 3492-3505.)

The district court agreed and held that the testimony was "not relevant to the objective standard of materiality developed by higher courts." ER 694, see also, ER 691-692.

The case went to trial. The jury found Petitioner, and the other defendants in the related wire and mail fraud cases, guilty. ER 610. In a Judgment entered on October 27, 2015, Petitioner was sentenced to 96 months in prison. (Appendix C.)

Decision Below

Petitioner appealed. He argued that materiality is one of the essential elements of mail and wire fraud. *Neder v. United States*, 527 U.S. 1, 25 (1999). A false statement is "material" if it has "a natural tendency to influence, or [is] capable of influencing, the decision of the decision-making body to which it was addressed." *United States v. Gaudin*, 515 U.S. 506, 509 (1995); *Neder*, 527 U.S. at 16.

Materiality "looks to the effect on the likely or actual behavior of the recipient of the alleged misrepresentation." *Universal Health Services, Inc. v. United States ex rel. Escobar*, 136 S. Ct. 1989, 2003 (2016) ("*Escobar*"). He argued that not allowing expert testimony on the materiality element deprived him of his right to present a defense under the Due Process and Confrontation clauses of the Constitution.

The case was argued before the same panel with two other cases arising out of the same series of transactions and raising the identical the materiality expert witness issue. In this case, the panel affirmed the district court's ruling and held that "complicity and motives of the particular victim lenders "were irrelevant. (Appendix A at 3-4.) In *United States v. Markevich*, 2:11-CR-490 JAM, Ninth Circuit Case No. 15-10457, the panel held "Under *Lindsey* a defendant cannot offer expert testimony on a specific lender's behavior to disprove the materiality of a defendant's false statements." (Appendix D at 3.) In *United States v. Vera Kuzmenko*, et al., 2:11-CR-210-JAM, Ninth Circuit Case No. 16-10129 the panel held "evidence of individual lender behavior, including evidence of lender negligence and

intentional disregard of relevant information, is not admissible as a defense to mortgage fraud." *Id.* at 1019." (Appendix E at 2-3.)

In all of the decisions, the panel relied on *United States v. Lindsey*, 850 F.3d 1009 (9th Cir. 2017) (*Lindsey II*) which held "individual lender behavior is not admissible [to disprove materiality]." *Id.* at 2012. *Lindsey II* directly contravenes this Court's holding in *Escobar* that materiality "looks to the effect on the likely or actual behavior of the recipient of the alleged misrepresentation." *Escobar*, 136 S. Ct. at 2003.

Issues Presented

I.

The Ninth Circuit Directly Contradicted this Court's Holding in *Escobar* that a Decisionmaker's Behavior Is Relevant to Determine Whether a False Statements Is Material.

The defendants were indicted for making misrepresentations about the income and property ownership in the loan applicants. These loans were known by the lenders that promoted them as "income stated" loans or "liar loans." *See e.g.*, ER 193-197. The defendants' principle defense was their misrepresentations were not material to the lenders making these loans.

As mentioned above, the Ninth Circuit relied on *Lindsey II* to hold that, contrary to the statement in *Escobar*, lender behavior was inadmissible in determining whether a statement was material. To understand *Lindsey II*, it is important to understand that the Ninth Circuit uses an "objective test" to evaluate materiality. The notion that materiality is based on an objective standard started with an incomplete and sloppy reading of *United States v. Peterson*, 538 F.3d 1064, 1072 (9th Cir. 2008). Not only does *Peterson* not call for materiality to be based on an objective standard, it specifically reaffirms the subjective test from *Gaudin*. *Id.* at 1072-1073. *Peterson* made it clear a jury is required to determine if a "false statement could have actually resulted in a change in position of the agency." *Id.* at 1072-1073.

The issue in *Peterson* was whether a materiality instruction complied with the *Gaudin* materiality definition. At the time, the Ninth Circuit Manual of Model Criminal Jury Instructions, No. 8.66 (2003), provided that that "[a] a statement is material if it could have influenced an agent's decision or activities." *Peterson*, 538 F.3d at 1070.

The defendant complained the instruction should have used the exact language from *Gaudin* that "[t]he statement must [be] capable of influencing the decision of the decision-making body to which was addressed." *Id.* at 1071. The defendant said the instruction was erroneous for two reasons. First, it argued "could have" in the model instruction was not the same as "capable" in *Gaudin*. *Id.* at 1072. Second, it argued the inclusion of the word "activities" meant a statement could be deemed material even if it was completely incapable of influencing the decision the agency was trying to make. *Id.* at 1072-73. Because the two objections were not raised at trial, the court employed a plain error analysis. *Id.* at 1071-1072.

The *Peterson* court prefaced its plain error analysis by stating, "We hold that *although it would be preferable for district courts to use the definition of materiality approved by the Supreme Court in Gaudin*, in this case, the use of the Ninth Circuit Model Jury Instruction was not plain error." *Id.* at 1071. (emphasis added) This is the actual holding of *Peterson*, but it is never quoted in opinions discussing *Peterson* and materiality. Instead, the Ninth Circuit decisions rely on only the first half of the two-part plain error analysis.

First, *Peterson's* plain error analysis discussed whether the substitution of "could have" for "capable" changed the *Gaudin* materiality standard. As to this issue, the court reasoned:

> The difference between "could have influenced" and "capable of influencing," is sufficiently nebulous that our sister circuits have sometimes used the "could have" language in post-*Gaudin* opinions. Furthermore, "capable of influencing" is an *objective test,* which looks at "the intrinsic capabilities of the false statement itself, rather than the possibility of the actual attainment of its end." *United States v. Facchini*, 832 F.2d 1159, 1162 (9th Cir.1987); *see also Kungys*, 485 U.S. at 771, 108 S. Ct. 1537 (equating "predictably capable of affecting" with "ha[ving] a natural tendency to affect").

Id. at 1071. *Lindsey II* relied on the italicized language three separate times in emphasizing its assertion that materiality is based on an objective standard. *Lindsey II*, 850 F.3d at 1014, 1015, 1016.

Apparently, the *Lindsey II* court saw the words "objective test" and stopped reading. It clearly did not read the next section of *Peterson* dealing with the second issue regarding the addition of the word "activities." The court analyzed the defendant's second objection as follows:

> Defendants' second argument regarding the given jury instruction turns on the inclusion of the word "activities." Here, they argue that a statement could be deemed material even if it was completely incapable of influencing a decision the agency was trying to make. *This argument*

> *fails because the plain language of the given instruction does not permit a finding of materiality based solely on the utterance of a false statement. Rather, under the given instruction, the jury was required to find that the false statement could have actually resulted in a change in position by the agency. Again, this is "substantially similar" to the Gaudin instruction.*

Id. at 1072-1073. When it upheld the model instruction, *Peterson* confirmed, the behavior of the decision-maker is relevant to a materiality determination because under the model instruction "a jury was required to find that the false statement could have actually resulted in a change of position by the agency." *Ibid.* Without using the precise phrase "subjective test," *Peterson* confirmed materiality is indeed based on subjective factors.

A few years after *Peterson*, the Ninth Circuit Model Jury Instructions were amended. Model Jury Instruction 8.121 and 8.122 (2010) now states that "statements made, or facts omitted as part of the scheme were material; that is they had a natural tendency to influence or were capable of influencing *a person* to part with money or property." The comment states the new instruction is based on *Peterson*, but it relied upon the same erroneous and incomplete reading of *Peterson*.

As discussed above, the clear directive from *Peterson* was that the preferred model jury instruction would repeat the *Gaudin* standard of "influencing the decision-making body to which it was addressed." *Id.* at 1071. The Ninth Circuit's objective standard of materiality evolved out of a misreading of its own precedent and turned this Court's materiality analysis on its head.

It is also important to the understanding of *Lindsey II* is to know this was not the panel's first attempt to rule on the materiality of answers to questions on loan applications. Its first opinion, issued shortly before *Escobar*, at 827 F.3d 865 was later *withdrawn* after consideration of a petition for rehearing. (*Lindsey* 854 F.3d 1047 (2017) ("*Lindsey II*"). As in its later decision, *Lindsey I* cut and pasted the language from the first part of the *Peterson* plain error analysis referring to the "objective test." *Lindsey I*, 827 F.3d at 869, 870-871 Therefore because it believed materiality was based on an objective test, and ignoring this Court's decision in *United States v. Gaudin, supra,* 515 U.S. at, 511 (19, *Lindsey I* held that "*as a matter of law,* that when a lender requests specific information in its loan applications, false responses to those specific requests are objectively

material for the purposes of proving fraud[1]." *Lindsey I*, 827 F.3d. at 871 (emphasis added).

It is apparent, the *Lindsey* panel did not read the second part of the *Peterson* plain error analysis where the court upheld the given instruction because it did not "permit a finding of materiality based solely on the utterance of a false statement." *Peterson*, 538 F.3d at 1072-1073. If the court read that part of the opinion it would have known that it could not hold that a false statement whether on a loan or otherwise is never material as a matter of law. Instead, *Peterson* reaffirmed that a jury is "required to find that the false statement could have actually resulted in a change of position by the agency." *Id.* at 1073.

Before *Lindsey I* was final, this Court issued its opinion in *Escobar*. In *Escobar*, this Court confirmed materiality "looks to the effect on the likely or actual behavior of the recipient of the alleged

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[1] *Lindsey I* based its holding on First Circuit authorities holding that because loan applications "specifically sought information regarding the purchaser's income, assets, and intent to reside in the property, all of which were designed to assess the borrower's creditworthiness" the answers were "capable of influencing its decisions" and therefore they were material. *United States. v. Appolon*, 715 F.3d 362, 368 (1st Cir. 2013), *see also United States v. Prieto*, 812 F.3d 6, 14 (1st Cir. 2016).

misrepresentation." *Escobar,* 136 S. Ct. at 2003. In evaluating the materiality of conditions for payment under the False Claims Act, this Court explained, "if the Government pays a particular claim in full despite its actual knowledge that certain requirements were violated, that is very strong evidence that those requirements are not material." *Id.* 2003-04. By analogy, if a lender regularly lends money despite actual knowledge that the information in the loan application is false, that is strong evidence the false representation was not material. After *Escobar,* this Court withdrew *Lindsey I* and abandoned its bright line holding that that false statements in loan applications are material as a matter of law.

Lindsey II could have easily reiterated this Court's holding and allowed evidence of "the likely or actual behavior of the recipient of the alleged misrepresentation" if the recipient knew the answer was false. *Escobar,* 136 S. Ct. at 2003. Instead, *Lindsey II* replaced its original opinion by attempting to reconcile what it called two "competing lines of precedent." *Lindsey II,* 850 F.3d at 1016. The alleged "competing lines" of precedent are the incomplete and erroneous reading of *Peterson* that materiality is tested by an "objective test" making a victim's behavior irrelevant, *Id.* at 1015, and

what it characterizes as this Court's "suggestion" in *Escobar* that behavior is relevant. *Id.* at 1017.[2]

To reconcile these "competing precedents," the Ninth Circuit distinguished *Escobar* because it was deciding an issue under the Fair Claims Act. *Id* at 1017. *Lindsey II* reasoned the standards would be different if applied to an individual or an entity rather than the government as in the Fair Claims Act. Therefore, the Ninth Circuit came up with a solution that "evidence of individual lender behavior is not admissible to disprove materiality, but the evidence of general lending standards in the mortgage industry is admissible to disprove materiality." *Id.* at 1019. The problem with this analysis there is nothing in *Escobar* that limits its holding to government entities or the Fair Claims Act.

On the contrary, *Escobar* specifically recognized that the False Claims Act, 31 U.S.C. § 1329 "defines materiality using language that we have employed to define materiality in other federal fraud

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[2] This court's holding was hardly a mere "suggestion," to wit: "if the Government pays a particular claim in full despite its actual knowledge that certain requirements were violated, that is very strong evidence that those requirements are not material." (*Id.* 195 L.Ed 2d at 366.)

statutes," *Escobar*, 136 S. Ct. at 2002. It referred to *Neder*, 527 U.S., at 16, 119 S. Ct. 1827 (using this definition to interpret the mail, bank, and wire fraud statutes) and *Kungys v. United States*, 485 U.S. 759, 770, 108 S. Ct. 1537, 99 L. Ed. 2d 839 (1988) (for fraudulent statements to immigration officials). *Id.* In a footnote, *Lindsey* conceded that this Court uses "materiality in one context as precedent for materiality in another." *Lindsey*, 850 F.3d at 1017 n. 4.

Lindsey II, upon which the Ninth Circuit relied to affirm the denial of Petitioner's right to present a defense, is not only contrary to the Ninth Circuit authority in *Peterson*, it is contrary to this Court's holdings in *Gaudin*, *Neder*, and *Escobar*. Under this Court's precedents, Petitioner should have been allowed to present evidence that when the subprime lenders issued loans they called "liar loans," any lies on the loan applications were not material, but expected as part of the "lair loan" process. Because the Ninth Circuit chose to go down its own path by ignoring the import of *Escobar,* this court is requested to clearly state that the subjective standard of materiality, not the objective standard, applies to wire and mail fraud cases.

II.

The Circuits Are Split on Whether to Apply a Subjective Standard, as Described in *Gaudin* and *Escobar* or an Objective Standard used by the Ninth Circuit to Materiality Determinations.

The circuits are split on how to apply materiality in the context of mail and wire fraud. A starting point to determine whether the circuits are applying *Gaudin* or something else is to look at the circuits' model jury instructions[3].

The First, Fifth, and Tenth Circuits' model instructions follow the *Gaudin* definition. The First Circuit Model Criminal Jury Instruction 4.18.152(2), (3) provides: A "material" fact is one that has a natural tendency to influence or be capable of influencing the decision of the decisionmaker to whom it was addressed." In practice, however, the First Circuit does not always follow *Gaudin*. Thus its holdings and analysis in *Appolon, supra,* and *Prieto, supra,* were used by *Lindsey I* to hold that answers on loan applications are material as a matter of law.

The Fifth Circuit Model Instruction 2.59 [18 USC §§ 1341, 1346] provides that "[a] representation is material if it has a natural tendency to influence, or is capable of influencing, the decision of the

[3] The Second and Fourth Districts do not have model Instructions.

person or entity to which it is addressed." The Fifth Circuit's case law relies on subjective factors by focusing on the decision-maker in lending situations. *United States v. Holmes*, 406 F.3d 337, 355 n. 27 (5th Cir. 2005) (citing *United States v. Heath*, 970 F.2d 1397, 1403 (5th Cir. 1992); *United States v. Curtis*, 635 F.3d 704 (5th Cir. 2011).

The Tenth Circuit Model Jury Instruction 2.56 Mail Fraud 18 U.S.C. § 1341 instructs a jury that "[a] false statement is 'material' if it has a natural tendency to influence, or is capable of influencing, the decision of the person or entity to which it is addressed." The Circuit's model instruction complies with *Gaudin*, but its case law describes a reasonable lender standard. *United States v. Williams*, 865 F. 3d 1302, 1312 (10th Cir. 2017).

The Seventh Circuits uses the *Gaudin* definition but inserts the identity of the decision-maker. The Seventh Circuit's Model Jury Instructions 18 U.S.C. § 1001 (Materiality – definition) is as follows: "a statement is material if it had the effect of influencing the action of the [body or agency] or was capable of or had the potential to do so. [It is not necessary that the statement actually have that influence or be relied on by the [body or agency] so long as it had the potential or capability to do so." However, the Seventh Circuit actually applies

a reasonable person or reasonable lender standard. *United States v. Betts-Gaston*, 860 F.3d 525, 532 (7th Cir. 2017).

The Sixth, Eighth, and Eleventh Circuits acknowledge the *Gaudin* definition but add a "reasonableness" component to describe the decision-maker and refer to a general group of decision-makers rather than the specific decision-maker or class of specific decision-makers to whom the statement was made, thus transforming the test into an objective standard.

The Sixth Circuit Model Criminal Jury Instruction 10.01 Mail Fraud instructs that "a misrepresentation of concealment is 'material' if it has a natural tendency to influence or is capable of influencing the decision of *a person of ordinary prudence and comprehension.*"

Eighth Circuit Model Jury Instruction 6.18.1343 Wire Fraud (18 U.S.C. § 1343) instructs that "[a][fact] [falsehood] [representation] [promise] is 'material' if it has a natural tendency to influence, or is capable of influencing, the decision of *a reasonable person* in deciding whether to engage or not to engage in a particular transaction. [However, whether a [fact] [falsehood] [representation] [promise] is

'material' does not depend on whether the person was actually deceived."

Finally, the Eleventh Circuit Pattern Jury instruction for 50.1 Mail Fraud 18 U.S.C. §1341 states that "a 'material fact' is an important fact that *a reasonable person* would use to decide whether to do or not do something. A fact is 'material' if it has the capacity or natural tendency to influence *a person's* decision. It doesn't matter whether the decision-maker actually relied on the statement or knew or should have known that the statement was false." Its case law goes both ways. It followed the *Gaudin* decision-maker standard in *United States v. McAuliffe*, 490 F.3d 526, 531 (6th Cir. 2007) (quoting *Neder*, 527 U.S. at 16). However, in *United States v. Daniel*, 329 F.3d 480, 487 (6th Cir. 2003), it applied the objective reasonable person standard.

On the outer limit of the circuits' compliance with *Gaudin* is the Third Circuit's model instruction that seems to be oblivious to *Gaudin* or *Neder*. Its Model Criminal Jury Instruction 6.18 1341-1 provides that: "[t]he false or fraudulent representation must relate to a material fact or matter. A material fact is one which would reasonably be expected to be of concern to a reasonable and prudent person in

relying upon the representation or statement in making a decision." However, unlike the Sixth, Eighth, and Eleventh Circuits, the Third Circuit case law follows *Gaudin* and focuses on the decision-maker recipient of the misrepresentations. *See, United States v. Wright*, 665 F.3d 560, 575 (3d Cir 2012) *accord id.* at 574-75; *United States v. Fallon*, 470 F.3d 542 (3d Cir. 2006).

The Second and Fourth Circuits do not have model instructions. The Second Circuit is more or less consistent with *Gaudin* by holding material statements "had to be capable of influencing a decision that the bank was able to make." *United States v. Rigas*, 490 F.3d 208, 235 (2nd Cir. 2007). The Circuit was focused on the decisionmaker even before *Gaudin*. *See United States v. Rodriguez*, 140 F.3d 163, 168 (2nd Cir. 1998).

The Fourth Circuit did its own version of *Lindsey II*-type baby splitting. It held as to fraud schemes targeting the government, materiality "verges on the subjective [while] a fraud scheme targeting a private lender, on the other hand, is measured by an objective standard." *United States v. Raza*, 876 F.3d 604, 616 (4th Cir. 2017).

If Petitioner took out a liar loan in the Second, Third, and Fifth Circuits she would have been able to put on expert testimony that

the subprime lenders in her case did not care whether the answers to the loan application questions were true or false. Petitioner would probably have been acquitted. That's what happened in a nearly identical case tried in the same Eastern District of California courthouse where such testimony was allowed.

United States v. Charikov, No. 12-003-LLK (E.D. Cal. 2014)

Instead, Petitioner processed loans in the Ninth Circuit and is facing 96 months in prison.

The split among the circuits and even within the circuits is a continuing problem. Unlike the Ninth Circuit, this Court knows what it meant in *Gaudin*, *Neder*, and *Escobar* and could issue a *per curiam* decision clarifying that materiality in mail and wire fraud cases is governed under a subjective standard.

* * *

CONCLUSION

For the reasons set forth, the writ of certiorari should be granted.

Dated: January 21, 2020

Respectfully submitted,

Barry L. Morris

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AARON NEW