No. 20-7410

IN THE
Supreme Court of the United States

EDWARD MCCAIN,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fourth Circuit

REPLY BRIEF FOR PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

RULES

INTRODUCTION

The United States agrees that the Fourth Circuit's "analysis of the [third prong of plain error review] was incorrect". BIO at 13. Nor does it dispute that the 4th Circuit's incorrect conclusion creates a split with the ten other federal circuits to conduct that analysis. *See* Pet. at 19-21 (citing cases).

Faced with this compelling justification for this Court's review, the United States argues that this Court should nonetheless deny Mr. McCain's petition because (1) he does not meet the first two prongs of plain error (a question the 4th Circuit did not reach); and (2) he did not address the third prong of plain error review in the Fourth Circuit. Both of these arguments are incorrect, and neither of them justify denying Mr. McCain's petition and allowing an improper conviction resulting in a life sentence to stand.

First, petitioner meets the first two prongs of plain error review because the district court erred, and that error was plain. Second, petitioner raised the issue regarding the third prong of plain error review in the Fourth Circuit, and—even assuming that he did not—this Court has consistently held that a petitioner may raise new arguments in this Court in support of a properly preserved claim.

This Court should grant review or, in the alternative, summarily reverse the Fourth Circuit's opinion and remand for reconsideration in light of *Rutledge v. United States,* 517 U.S. 292 (1996); *Ball v. United States,* 470 U.S. 856 (1985); *Benton v. Maryland*, 395 U.S. 784 (1969); and *Sibron v. United States*, 392 U.S. 40 (1968).

ARGUMENT

A. The Fourth Circuit's published opinion is incompatible with this Court's precedent, is undisputedly wrong, and creates a conflict with the other ten circuits that have addressed the issue.

Petitioner argued that the district court plainly erred in not vacating his Section 1512 conviction because he was unconstitutionally transferred to adult court for that charge. The Fourth Circuit assumed that the district court plainly erred in not vacating his conviction, but it nonetheless refused to grant relief, holding that the error did not affect petitioner's substantial rights because he was serving a concurrent life sentence on another count. Pet. App. 12-a-13a.

The Fourth Circuit's opinion contradicts this Court's long standing plain error jurisprudence, which holds that a plainly erroneous *conviction* affects a defendant's substantial rights, even if another count of conviction carries a concurrent *sentence*. *See Ball,* 470 U.S. at 865; *see also Rutledge,* 517 U.S. at 301; *Benton*, 395 U.S. at 790-791; *Sibron*, 392 U.S. at 54-56. The Fourth Circuit "was incorrect." BIO at 13.

The Fourth Circuit also creates a conflict with the other ten circuits to consider this issue—all of whom have followed this Court's guidance regarding the third prong of plain error review. *See* Petition at 19-21 (citing cases). The United States does not dispute that the Fourth Circuit's opinion is an outlier or that it creates a circuit split. Nor does the United States dispute that the Fourth Circuit is wrong. For these reasons alone, this Court's review is warranted. This Court should grant the petition to resolve the split created by the Fourth Circuit's erroneous published opinion.

B. Mr. McCain's argument is not new, and even if it is, this Court can and should address it.

The United States claims that "petitioner forfeited any argument that he could satisfy the third requirement of the plain-error standard by failing to raise such an argument in the court of appeals." BIO at 12-13. The United States is wrong.

Petitioner argued in his Fourth Circuit brief that the district court plainly erred by not vacating his Section 1512 conviction. Op. Br. at 15-18. The Fourth Circuit correctly understood that petitioner's invocation of the plain error standard incorporated the entirety of that standard. So the Fourth Circuit directly addressed the claim at the heart of this petition—whether a plainly erroneous conviction affects a defendant's substantial rights if the defendant has another conviction with a concurrent sentence. Pet. App. at 12a-13a. The claim is preserved for this Court's review.

Even if this Court believes that petitioner's argument regarding the third prong of the plain error standard is new, petitioner did not forfeit his right to raise that argument in his position because it is simply an argument supporting his preserved claim. "Once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." *Citizens United v. FEC*, 558 U.S. 310, 330-31 (2010) (internal quotation omitted).

Petitioner did not forfeit his argument, and this Court should grant review and reach it.

C. There was error, and it was plain.

The government also contends that this Court should deny review because the district court did not err, and—if it did—that error was not plain. The government is wrong because the clearly established law of this Court and the Fourth Circuit holds that the petitioner could not lawfully be convicted under Section 1512.

An error is "plain" for plain error purposes if it is "clear" or "obvious" at the time of appellate review. *United States v. Olano*, 507 U.S. 725, 734 (1993) (establishing standard); *Henderson v. United States*, 568 U.S. 266, 279 (2013) (clarifying time frame). Here, the government incorrectly asserts that "[t]he only support for petitioner's contention that his conviction should have been vacated is the court of appeals' decision in *Under Seal*." BIO at 16.

Contrary to the government's assertion, it is clear and obvious that the Eighth Amendment prohibits a district court from convicting a juvenile of a crime for which the statutory minimum punishment is a mandatory life sentence. First, of course, is the Fourth Circuit's decision in *United States v. Under Seal*, 819 F.3d 715 (4th Cir. 2016). Unlike the government's assertion that petitioner's case presents only "a sentencing issue that can be remedied in a different way," BIO at 15, *Under Seal* makes clear that the Eighth Amendment prohibits the government from "initiating *prosecution* of a juvenile" for a crime for which a mandatory life sentence is the statutory minimum punishment. *Under Seal*, 819 F.3d at 728 (emphasis added). Petitioner's conviction—as well as his sentence—is unconstitutional under clear and obvious Fourth Circuit precedent.

While it is true that *Under Seal* involved a post-*Miller* juvenile defendant, this Court has held that *Miller* announced a substantive rule that applies to cases on collateral review. *Montgomery v. Louisiana*, 136 S. Ct. 718, 736 (2016). And no one disputes or can dispute that petitioner currently stands convicted of a crime for which he could not be convicted today under clear and obvious 4th Circuit precedent. The district court plainly erred.

Most fundamentally for purposes of whether this Court should grant review, the question of whether the district court plainly erred is best resolved in the Fourth Circuit, not this Court. The Fourth Circuit did not reach the issue of whether the district court erred and whether the error was clear and obvious. It assumed that it was without deciding it. But the Fourth Circuit did, as the government does not dispute, issue a published opinion that erroneously applies the third prong of plain error review, creating a split with every other circuit to reach the issue. The proper remedy for that error is for this Court to grant review and resolve the split on the third prong of plain error and remand to the Fourth Circuit to address the first two prongs in the first instance. *See, e.g., McFadden v. United States*, 576 U.S. 186, 197 (2015).

D. Petitioner's conviction on Count Five must be vacated, so it cannot support the Fourth Circuit's erroneous holding regarding his conviction on Count One.

As noted above and in Mr. McCain's petition, the Fourth Circuit's conclusion that his unconstitutional conviction on Count One did not affect his substantial rights is erroneous as a matter of law. It also relies on a factually incorrect

premise—that his conviction on Count Five is proper. It is not. Thus, the Count Five conviction cannot support any holding that the erroneous Count One conviction did not affect his substantial rights.

Petitioner pleaded guilty, in Count Five, to using and carrying a firearm in furtherance of "a drug trafficking crime and a crime of violence, both of which are prosecutable in a court of the United States." Pet. App. 238a. However, the "crime of violence" that supported that conviction—witness tampering by murder—is not a crime that could have been constitutionally be prosecuted against petitioner in a court of the United States. *See Under Seal,* 819 F.3d at 728 (holding that a prosecution against a juvenile for a crime with a mandatory minimum life sentence "cannot constitutionally proceed."). Thus, the Count Five conviction is improper and cannot remedy any errors regarding the Count One conviction.

The United States' Brief in Opposition disputes the illegality of the Count Five conviction, arguing that petitioner's guilty plea supports the conviction because the government charged him in the conjunctive with carrying a firearm in furtherance of a crime of violence *and* a drug trafficking crime. Because, the government contends, the drug trafficking crime alone could support the Count Five conviction, the invalidity of the crime of violence is not relevant. BIO at 17-18.

The government misunderstands the role of charging documents written in the conjunctive. As explained in Mr. McCain's petition, a plea to a document that charges alternative elements in the conjunctive admits only to the minimum

conduct necessary for a conviction—not to all of the alternative elements. *See* Pet. at 22-23 (citing cases).

Thus, the Count Five conviction was improper and cannot support the Fourth Circuit's erroneous holding that the erroneous Count One conviction did not affect petitioner's substantial rights.

E. Summary disposition may be appropriate.

Petitioner could not lawfully be convicted under either of the two counts—Count One and Count Five—for which he is serving a life sentence. The United States agrees that the Fourth Circuit's analysis of the third plain error prong is wrong and does not dispute that it creates a conflict with the ten other Circuit courts to address this question. Nor can the United States dispute that the core question at issue—the propriety of imposing a life sentence on a juvenile—is important and worthy of this Court's review. Finally, the United States' Brief in Opposition notes unresolved questions regarding the first two prongs of the plain error inquiry that the Fourth Circuit did not address and that would benefit from the Fourth Circuit's initial review. Vacating the Fourth Circuit's opinion and remanding for reconsideration in light of *Rutledge, Ball, Benton,* and *Sibron* may be an appropriate response to the Fourth Circuit's error.

***F. Jones v. Mississippi* does not resolve the question of what level of sentencing court fact finding is required to support a juvenile life sentence in a federal case.**

The United States claims that *Jones v. Mississippi,* 141 S. Ct. 1307 (2021), resolves any questions in petitioner's case about whether the district court at

resentencing made sufficient factual findings to support petitioner's life sentence. BIO at 18-19. The United States is wrong.

In *Jones,* this Court held that Mississippi's discretionary sentencing scheme was "both constitutionally necessary and constitutionally sufficient" to insulate a juvenile life sentence from Eighth Amendment scrutiny, even without a separate finding of permanent incorrigibility. 141 S. Ct. at 1313. But this holding relied in large part on federalism concerns. This Court sought to "'avoid intruding more than necessary upon the States' sovereign administration of their criminal justice systems.'" *Id.* at 1321 (quoting *Montgomery,* 577 U.S. at 211).

No such concerns apply to this federal prosecution. This Court and the federal circuit courts have inherent supervisory power over the federal trial courts. *See Castro v. United States,* 540 U.S. 375, 382-83 (2003); *Donnelly v. DeChristoforo,* 416 U.S. 637 n.23 (1974). As the Fourth Circuit has recognized, appellate courts have powers—derived both from the federal rules and their inherent powers—to correct the mistakes of federal district courts, even outside of the normal rules regarding error preservation. *Brickwood Contractors, Inc. v. Datanet Eng'g, Inc.*, 369 F.3d 385, 396 (4th Cir. 2004) (citing Fed. R. Crim. P 52(b)).

This petition, in other words, raises issues that are informed by the discussion and analysis in *Jones.* But *Jones* does not directly control this case. This Court should grant the petition and, if it does agree with summary reversal, remand for reconsideration in light of *Jones* as well as the plain error cases noted above.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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