Nos. 17-1130 and 17-7295

In the Supreme Court of the United States

THEODORE E. OKECHUKU, PETITIONER

v.

UNITED STATES OF AMERICA

EMMANUEL C. IWUOHA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly determined that giving the jury a deliberate-ignorance instruction that was legally correct but lacked an adequate evidentiary basis was harmless error, and thus did not warrant reversal under plain-error review, because the government had presented substantial evidence that petitioners had actual knowledge of the charged conspiracy.

2. Whether the district court violated petitioner Iwuoha's Sixth Amendment rights by considering acquitted conduct in calculating his advisory Sentencing Guidelines range.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-36a[1]) is reported at 872 F.3d 678.

JURISDICTION

The judgments of the court of appeals were entered on October 3, 2017. Petitions for rehearing were denied on November 8, 2017 (Pet. App. 68a-69a). The petition for a writ of certiorari in No. 17-7295 was filed on

[1] "Pet. App." refers to the appendix to the petition for a writ of certiorari filed in No. 17-1130.

January 2, 2018. The petition for a writ of certiorari in No. 17-1130 was filed on February 6, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Texas, petitioners were each convicted on one count of conspiracy to distribute hydrocodone, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(E)(i), and 846. Pet. App. 37a-38a, 65a-66a. Petitioner Okechuku additionally was convicted on one count of using, carrying, and brandishing a firearm during and in relation to a drug-trafficking crime, in violation of 18 U.S.C. 924(c)(1)(A)(ii), and one count of conspiring to use, carry, and brandish a firearm during and in relation to a drug-trafficking crime, in violation of 18 U.S.C. 924(*o*). Pet. App. 38a-39a, 66a-67a. The district court sentenced petitioner Okechuku to 300 months of imprisonment, to be followed by three years of supervised release. Okechuku Am. Judgment 2-3. The court sentenced petitioner Iwuoha to 97 months of imprisonment, to be followed by three years of supervised release. Iwuoha Judgment 2-3. The court of appeals affirmed. Pet. App. 1a-36a.

1. a. Petitioner Okechuku is a medical doctor who worked as a pediatric anesthesiologist at the University of Mississippi. Pet. App. 2a-3a. In 2012 and 2013, he also owned and operated a pain-management clinic, the Medical Rehabilitation Center (MRC), in Dallas, Texas. *Id.* at 2a. Petitioner Okechuku worked at MRC one to two days per week; he operated MRC with the assistance of Ignatius Ezenagu, who worked as the clinic's office manager. *Id.* at 2a-3a.

Through MRC, petitioner Okechuku and his co-conspirators operated a "pill mill," *i.e.*, "a drug business exchanging controlled substances for cash under the guise of a doctor's office." Pet. App. 4a; see *id.* at 2a-4a, 7a-11a. MRC was a cash-only business that did not accept insurance, Medicaid, or Medicare. *Id.* at 3a. It also did not take appointments; when MRC opened in the mornings, 30 to 40 patients typically were waiting to enter. *Ibid.* Two employees—petitioner Iwuoha, who practiced medicine in Nigeria but did not have a medical license in the United States, and Elechi Oti, a physician's assistant (and co-defendant)—saw patients and wrote prescriptions that had been pre-signed by petitioner Okechuku. *Ibid.* Patient visits ordinarily lasted four to eight minutes and involved little to no physical contact, and petitioner Iwuoha's and Oti's notes were "consistently sparse," yet "they wrote almost every patient a prescription for hydrocodone," an opioid painkiller. *Ibid.*; see *id.* at 3a n.2. In an eight-hour day, MRC would see 40 to 50 patients—a number that a medical expert testified would not have been possible for a provider practicing within the normal standard of care. *Id.* at 9a; C.A. ROA 1395-1396. The clinic produced an average of $5000—and as much as $11,000—in revenue each day. Pet. App. 3a.

A large amount of business was brought to MRC by a drug dealer, Jerry Reed, and others working with him. Pet. App. 4a. Reed and others recruited "patients," often from homeless shelters; they drove the patients to MRC, paid for their examinations, and paid the patients themselves up to $50 each. *Ibid.* After the patients received their written prescriptions, Reed and others would fill the prescriptions and keep the medication to be resold later. *Ibid.* Video evidence showed Reed and the other drug dealers signing in patients, handling

patient files, giving cash to patients, and moving freely around the clinic. *Id.* at 8a-9a & n.5. Petitioner Okechuku met several times alone with Reed and Ezenagu, including when the clinic was closed. *Id.* at 8a-9a. Ezenagu testified that petitioner "Okechuku knew from day one" that Reed was bringing patients and money to the clinic. *Id.* at 8a; C.A. ROA 1610.

To protect the large amount of cash generated at the clinic each day and to monitor its intake, petitioner Okechuku took various security measures. Pet. App. 4a. He installed bars around the room where cash was collected and hired armed security guards. *Ibid.* Petitioner Okechuku also installed surveillance cameras that allowed him to monitor the clinic remotely from his cell phone, and both petitioner Okechuku and clinic employees testified that he did in fact monitor the clinic using that video link. *Ibid.*; see *id.* at 8a n.5 (describing clinic employees' testimony that petitioner Okechuku "often called the clinic when he was away to complain that there were too many people congregating in the hallway or that patients needed to be controlled outside," and petitioner Okechuku's testimony that he "spot checked the cameras each day" (brackets omitted)). In addition, petitioner Okechuku required clinic employees to fax him the clinic's cash earnings every day. *Id.* at 4a.

From 2011 to 2013, $1.8 million was deposited into MRC's primary bank account. Gov't C.A. Br. 13. Petitioner Okechuku spent approximately 39% of that amount on personal expenditures. *Id.* at 26. For his part-time work at the clinic, petitioner Iwuoha was paid $180,000, reflecting a salary more than eight times what he otherwise earned as an anesthesiologist technician. *Id.* at 13; see Pet. App. 10a.

b. In April 2013, petitioner Okechuku fired Ezenagu. Pet. App. 4a. Several days later, FBI agents executed a search warrant at MRC, where they seized patient files, business records, pre-written prescriptions, and 77 days of surveillance-camera footage. *Ibid.*

Separately, the Texas Board of Medical Examiners (Board) commenced its own investigation. Gov't C.A. Br. 8. The Board, however, did not consult with law enforcement or visit the clinic, and it reviewed only 20 patient files. C.A. ROA 1785, 1790, 1799. The Board was unaware that payments were all in cash, that groups of homeless people were brought in as patients, that drug dealers were allowed free access to the clinic, and that prescriptions were pre-signed by petitioner Okechuku. *Id.* at 1798-1799. In cases where it is aware that such factors are present, the Board generally does not offer a settlement and instead seeks to revoke the doctor's license. *Id.* at 1801-1802. Here, however, the Board held an informal settlement conference, and it subsequently found that petitioner Okechuku had failed to treat patients according to the professional standard of care but that he was "not engaged in the operation of a pill mill." *Id.* at 1797; see *id.* at 1793-1794.

2. a. A grand jury in the Northern District of Texas returned an indictment charging petitioners and others each with one count of conspiracy to distribute hydrocodone, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(E)(i), and 846; one count of using, carrying, and brandishing a firearm during and in relation to a drug-trafficking crime, in violation of 18 U.S.C. 924(c)(1)(A)(ii); and one count of conspiring to use, carry, and brandish a firearm during and in relation to a drug-trafficking crime, in violation of 18 U.S.C. 924(*o*). Pet. App. 37a-39a. The district court later granted a motion by the government to dismiss the

Section 924(*o*) firearm-conspiracy count against petitioner Iwuoha. *Id.* at 5a.

b. Petitioners and their co-defendants proceeded to trial, at which the government presented "five full days of evidence." Pet. App. 5a. The district court instructed the jury that it had a duty to follow the court's instructions and that the government was required to prove guilt beyond a reasonable doubt. *Id.* at 45a-46a; C.A. ROA 2799-2800. With respect to the charged drug conspiracy, the court instructed the jury that the government was required to prove beyond a reasonable doubt each element of the offense, which included that petitioners "knew of the unlawful purpose of the agreement" and "joined in the agreement willfully, that is, with the intent to further its unlawful purpose." Pet. App. 58a; C.A. ROA 2813-2814.

In its general instructions, the district court explained that "[t]he word 'knowingly' as that term has been used from time to time in these instructions, means that the act was done voluntarily and intentionally and not because of mistake or accident." Pet. App. 56a; C.A. ROA 2811. The court also gave the Fifth Circuit pattern jury instruction on deliberate ignorance. The instruction stated:

> You may find that a defendant had knowledge of a fact if you find that the defendant deliberately closed his eyes to what would otherwise have been obvious to him. While knowledge on the part of the defendant cannot be established merely by demonstrating that the defendant was negligent, careless, or foolish, knowledge can be inferred if the defendant deliberately blinded himself to the existence of a fact.

Pet. App. 56a; C.A. ROA 2811-2812; see 5th Cir. Pattern Jury Instructions (Crim.) § 1.37A, at 69 (2015). The district court overruled petitioners' objection that a deliberate-ignorance instruction should not be given in a conspiracy case. Pet. App. 28a. Petitioners did not challenge the factual basis for such an instruction in this case or object to the particular wording of the instruction. *Ibid.*; see C.A. ROA 2772-2774.

Petitioner Okechuku was convicted on all counts. Pet. App. 2a, 5a, 65a-67a. Petitioner Iwuoha was convicted on the drug-conspiracy count but acquitted on the firearm-brandishing count under Section 924(c). *Id.* at 65a-66a.

c. Before sentencing, the Probation Office prepared presentence investigation reports (PSRs) for petitioners and their co-defendants. Iwuoha's PSR calculated his base offense level as 30. Iwuoha PSR ¶ 41; C.A. ROA 33,649. Pursuant to Sentencing Guidelines § 2D1.1(b)(1), the PSR added two levels for the possession of a dangerous weapon during the commission of the offense, based on the possession of firearms by the security guards at the clinic. Iwuoha PSR ¶¶ 35, 42.

Petitioner Iwuoha objected to the Section 2D1.1(b)(1) enhancement on the ground that the underlying conduct had been the subject of the Section 924(c) firearm-brandishing count on which he had been acquitted. C.A. ROA 33,607-33,608; see *id.* at 33,648-33,649. The district court found no legal merit to that objection, but it concluded that the PSR had overstated the relevant conduct and reduced petitioner Iwuoha's offense level by two. *Id.* at 33,607, 33,613-33,614, 33,680. Because petitioner Iwuoha had a criminal history category of I, the court concluded that his advisory Sentencing Guidelines range was 97 to 121 months of imprisonment. *Id.* at 33,629, 33,680. The court sentenced petitioner Iwuoha

to 97 months of imprisonment, to be followed by three years of supervised release. Pet. App. 6a; Iwuoha Judgment 2-3. It sentenced petitioner Okechuku to 300 months of imprisonment, to be followed by three years of supervised release. Pet. App. 6a; Okechuku Am. Judgment 2-3.

3. The court of appeals affirmed. Pet. App. 1a-36a. The court rejected petitioners' contentions that the evidence was insufficient to support their convictions, as well as their challenges to various evidentiary rulings. *Id.* at 6a-25a. It also determined that petitioners were not entitled to reversal on the ground that the district court erred in giving the deliberate-ignorance instruction. *Id.* at 27a-33a.

On appeal, petitioners challenged that instruction on two grounds: (1) that a deliberate-ignorance instruction is inappropriate in conspiracy cases, and (2) that such an instruction was not supported by the evidence here. Pet. App. 27a-28a. The court of appeals concluded that the first ground was foreclosed by circuit precedent. *Id.* at 28a (citing, *inter alia*, *United States* v. *Investment Enters., Inc.*, 10 F.3d 263, 269 (5th Cir. 1993)). As to the second ground, the court of appeals explained that petitioners had never "argue[d] in the district court that the evidence did not support the [deliberate-ignorance] instruction," and it accordingly reviewed that challenge for plain error. Pet. App. 28a; see Fed. R. Crim. P. 52(b). Applying that standard, the court stated that giving such an instruction was inappropriate in this case because the evidence gave the jury "the choice of deciding whether [petitioners] were actually aware of the pill mill activities or actually not aware of the activities." Pet. App. 29a-30a. The court determined, however, that the instruction was "harmless" here in light of the "'substantial evidence of actual

knowledge.'" *Id.* at 32a (citation omitted). It cited the "ample evidence presented at trial"—including testimony by the office manager, Ezenagu—"that [petitioners] each knew of the illegal purposes for which Jerry Reed and others used the clinic's services." *Ibid.* The court did not expressly address whether the instructional error it identified met Rule 52(b)'s additional requirements, including that the error must also be "plain," *i.e.*, "clear" or "obvious." *United States* v. *Olano*, 507 U.S. 725, 734 (1993) (citation omitted).

Petitioner Iwuoha also argued on appeal that the district court had erred in considering acquitted conduct in calculating his offense level in determining his advisory Sentencing Guidelines range. Pet. App. 36a n.18. The court of appeals explained, and petitioner Iwuoha acknowledged, however, that the claim was foreclosed by binding precedent. *Ibid.* (citing *United States* v. *Watts*, 519 U.S. 148, 157 (1997) (per curiam)); see Iwuoha C.A. Br. 25, 35.

ARGUMENT

Petitioners contend (Okechuku Pet. 15-34; Iwuoha Pet. 7-13) that the court of appeals erred in determining that the district court's error in giving the jury a deliberate-ignorance instruction was harmless and did not warrant reversal. Petitioner Iwuoha separately contends (Pet. 13-16) that the district court erred in considering acquitted conduct in calculating his advisory Sentencing Guidelines range. The court of appeals' decision is correct and does not conflict with any decision of this Court or of another court of appeals. Further review is not warranted. This Court has repeatedly and recently denied review of petitions for writs of certiorari raising both questions. It should follow the same course here.

1. Petitioners argue (Okechuku Pet. 15-34; Iwuoha Pet. 7-13) that the court of appeals applied an incorrect standard for determining whether a deliberate-ignorance instruction that lacks an adequate evidentiary basis constitutes harmless error; they contend that review is warranted to resolve a conflict among the circuits on that issue. This Court has repeatedly denied review of petitions claiming the identical circuit conflict alleged here. See *Lopez* v. *United States*, 136 S. Ct. 1376 (2016) (No. 15-517); *Geisen* v. *United States*, 563 U.S. 917 (2011) (No. 10-720); *Hernandez-Mendoza* v. *United States*, 562 U.S. 1257 (2011) (No. 10-6879); *Kennard* v. *United States*, 551 U.S. 1148 (2007) (No. 06-10149); *Ebert* v. *United States*, 534 U.S. 832 (2001) (No. 00-9596); *Ebert* v. *United States*, 529 U.S. 1005 (2000) (No. 99-6789). No reason exists for a different result in this case. In any event, the court of appeals' decision is correct, and the purported conflict does not require this Court's attention. Moreover, this case is an unsuitable vehicle for addressing the question petitioners present because it arises in a plain-error posture and because petitioners would not prevail even under the harmless-error standard that they advocate.

a. The court of appeals determined that, although the district court erred in giving a factually unsupported deliberate-ignorance instruction, that error was harmless because the government presented substantial evidence to support petitioners' convictions on an actual-knowledge theory. Pet. App. 32a. That determination was correct.

"[T]he crucial assumption underlying the system of trial by jury is that juries will follow the instructions given them by the trial judge." *Marshall* v. *Lonberger*,

459 U.S. 422, 438 n.6 (1983) (citation and internal quotation marks omitted); see *Kansas* v. *Carr*, 136 S. Ct. 633, 645 (2016); *Zafiro* v. *United States*, 506 U.S. 534, 540-541 (1993); *Richardson* v. *Marsh*, 481 U.S. 200, 206 (1987). Under that principle, a reviewing court must presume that the jury followed the district court's instructions and, if no evidence of deliberate ignorance existed, the jury would not have convicted petitioners by finding they were deliberately ignorant. See, *e.g.*, *United States* v. *Stone*, 9 F.3d 934, 938 (11th Cir. 1993), cert. denied, 513 U.S. 833 (1994). Accordingly, if the deliberate-ignorance instruction given in this case was not warranted on the facts, then giving the instruction was harmless because a properly instructed jury would have rejected it and instead relied on an alternative theory supported by the evidence.

That is precisely the logic of this Court's decision in *Griffin* v. *United States*, 502 U.S. 46 (1991). In *Griffin*, the Court rejected the defendant's claim that a general verdict must be set aside where "one of the possible bases of conviction was neither unconstitutional * * * nor even illegal * * * but merely unsupported by sufficient evidence." *Id.* at 56. As the Court explained, it is "settled law * * * that a general jury verdict [i]s valid so long as it [i]s legally supportable on one of the submitted grounds—even though that g[i]ve[s] no assurance that a valid ground, rather than an invalid one, was actually the basis for the jury's action." *Id.* at 49. The Court distinguished between a jury instruction that misstates the law and one that merely presents one theory of conviction (out of several) that is not supported by the evidence. The Court explained:

> When * * * jurors have been left the option of relying upon a legally inadequate theory, there is no reason

> to think that their own intelligence and expertise will save them from that error. Quite the opposite is true, however, when they have been left the option of relying upon a factually inadequate theory, since jurors are well equipped to analyze the evidence.

Id. at 59 (emphasis omitted); see *Sochor* v. *Florida*, 504 U.S. 527, 538 (1992) ("We reasoned [in *Griffin*] that although a jury is unlikely to disregard a theory flawed in law, it is indeed likely to disregard an option simply unsupported by evidence.").

Here, petitioners claimed that the deliberate-ignorance instruction was unsupported by the evidence presented at trial. But under *Griffin*, the submission to the jury of the deliberate-ignorance theory—even if the evidence at trial had been insufficient to support that theory—would not warrant reversal. See *Stone*, 9 F.3d at 937-942; see also *United States* v. *Adeniji*, 31 F.3d 58, 63-64 (2d Cir. 1994). Accordingly, given that petitioners' convictions can be upheld under an actual-knowledge theory, the court of appeals correctly determined that the error in giving the deliberate-ignorance instruction was harmless.[2]

b. Petitioners contend (Okechuku Pet. 17-24; Iwuoha Pet. 7-13) that a three-way division exists among the

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[2] Petitioners also argued below that a deliberate-ignorance instruction should never be given in a conspiracy case; the court of appeals rejected that argument based on circuit precedent, and petitioners do not renew that argument in this Court. Pet. App. 27a-28a. Petitioners did not challenge, either in the district court or on appeal, the language of the instruction given in this case. Although petitioner Okechuku criticizes (Pet. 26-27) the approach of the Fifth Circuit in approving deliberate-ignorance instructions in conspiracy cases, the only instruction-related issue on which petitioners seek review is the standard for determining harmless error. Okechuku Pet. i; see also Iwuoha Pet. ii.

courts of appeals over the appropriate harmless-error standard. Petitioners, however, overstate the degree and significance of any remaining disagreement on this issue. In any event, this case does not squarely implicate the tension petitioners allege among the lower courts because the court of appeals reviewed for plain error and because the alleged error here was harmless under any standard, including the standard petitioners prefer.

i. Most courts of appeals to consider the question have held that instructing the jury on deliberate ignorance without sufficient factual support for the charge is harmless if the instruction is legally correct—*e.g.*, the instruction permits the jury to rely on deliberate ignorance only if the evidence shows such ignorance beyond a reasonable doubt, and it explains that deliberate ignorance requires more than negligence—and the evidence is sufficient to prove guilt on an actual-knowledge theory. See *United States* v. *Fermin*, 771 F.3d 71, 79 (1st Cir. 2014); *United States* v. *Lighty*, 616 F.3d 321, 378-379 (4th Cir.), cert. denied, 562 U.S. 1118 (2010), and 565 U.S. 962 (2011); *United States* v. *Ayon Corrales*, 608 F.3d 654, 657-658 (10th Cir. 2010); *United States* v. *Leahy*, 445 F.3d 634, 654 n.15 (3d Cir.), cert. denied, 549 U.S. 1071 (2006), abrogated on other grounds, *Loughrin* v. *United States*, 134 S. Ct. 2384 (2014); *United States* v. *Alston-Graves*, 435 F.3d 331, 341-342 (D.C. Cir. 2006); *United States* v. *Mari*, 47 F.3d 782, 786-787 (6th Cir.), cert. denied, 515 U.S. 1166 (1995); *Stone*, 9 F.3d at 938-939; see also *United States* v. *Kuhrt*, 788 F.3d 403, 417 (5th Cir. 2015) ("[T]he giving of [a deliberate-ignorance] instruction is harmless where there is substantial evidence of actual knowledge."), cert. denied, 136 S. Ct. 1376 (2016). Those courts have generally reasoned, in accord with *Griffin*, that if the evidence

is insufficient to support a theory of deliberate ignorance but is sufficient to support a finding of actual knowledge, then the jury "must not have convicted the defendant on the basis of deliberate ignorance" but rather "on the basis of [the defendant's] positive knowledge." *Mari*, 47 F.3d at 785 (emphasis omitted).

Petitioners suggest (Okechuku Pet. 17-20; Iwuoha Pet. 9-12) that the courts of appeals that have adopted that reasoning are themselves divided over whether the erroneous instruction is harmless per se or harmless only when the evidence of actual knowledge is "substantial," see Pet. App. 32a, or "sufficient," *Ayon Corrales*, 608 F.3d at 658. But whatever the differences in the verbal formulations used by those courts, the substance of the tests they apply is the same. Indeed, under the standard that petitioners describe as a per se rule, the reviewing court will find the error harmless only when the evidence is sufficient "to convict [the defendant] * * * on the basis of actual knowledge." *United States* v. *Kennard*, 472 F.3d 851, 858 (11th Cir. 2006) (applying *Stone*, 9 F.3d at 937-940), cert. denied, 551 U.S. 1148, and 552 U.S. 981 (2007); see *United States* v. *Ekpo*, 266 Fed. Appx. 830, 833 (11th Cir.) (per curiam) (holding error harmless where "there [wa]s sufficient evidence to support a conviction based on actual knowledge"), cert. denied, 555 U.S. 895 (2008).

Petitioners also contend (Okechuku Pet. 24-28; Iwuoha Pet. 11-12) that division exists among the courts of appeals because the Fifth Circuit's cases do not expressly state that the deliberate-ignorance instruction must require the jury to find deliberate ignorance beyond a reasonable doubt. That distinction has no practical significance. As this case illustrates, juries typically are instructed to find the element of

knowledge beyond a reasonable doubt. See Pet. App. 58a. The Fifth Circuit pattern instruction on deliberate ignorance, which was given here, allows the jury to find knowledge "if" the jury finds that the defendant "deliberately closed his eyes to what would otherwise have been obvious to him" or "deliberately blinded himself to the existence of a fact." *Id.* at 56a. That instruction, given in combination with an overarching reasonable-doubt instruction, does not permit a jury to find guilt on a deliberate-ignorance theory unless it finds beyond a reasonable doubt the facts supporting that theory.[3]

ii. Petitioner Okechuku correctly points out (Pet. 20-23) that four other courts of appeals have applied a slightly different harmless-error standard in some of their decisions. See also Iwuoha Pet. 10-11 (identifying two circuits). The Eighth Circuit in *United States* v. *Barnhart*, 979 F.2d 647 (1992), stated that instructing a jury on deliberate ignorance does not constitute harmless error if the evidence of actual knowledge, although

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[3] Contrary to petitioner Okechuku's suggestion (Pet. 25-26), *United States* v. *Hilliard*, 31 F.3d 1509 (10th Cir. 1994), does not show that varying insistence on express "beyond a reasonable doubt" language in the deliberate-ignorance instruction itself leads to different results in different courts. In that "unusual case," the Tenth Circuit was "troubled by the absence of any limiting instructions concerning evidence of civil regulatory violations" where the issue was whether the defendant closed his eyes to "the *criminal* offenses charged." *Id.* at 1517. Moreover, since *Hilliard*, the Tenth Circuit has found the erroneous inclusion of a deliberate-ignorance instruction to be harmless without examining the specific wording of the instruction. See *United States* v. *Anaya*, 727 F.3d 1043, 1060 (2013) (finding harmless error based solely on "substantial evidence" of defendant's actual knowledge), cert. denied, 135 S. Ct. 419 (2014).

sufficient to support the jury's finding, is not overwhelming. See *id.* at 652-653 & n.1; see also *United States* v. *Covington*, 133 F.3d 639, 644-645 (8th Cir. 1998) (following *Barnhart*, but finding the error in giving deliberate-ignorance instruction to be harmless where evidence of actual knowledge was overwhelming). The Ninth Circuit reached the same conclusion in several decisions. See *United States* v. *Mapelli*, 971 F.2d 284, 287 (1992); *United States* v. *Sanchez-Robles*, 927 F.2d 1070, 1075-1076 (1991), disapproved of on other grounds by *United States* v. *Heredia*, 483 F.3d 913 (9th Cir.) (en banc), cert. denied, 552 U.S. 1077 (2007). And some recent decisions of the Second and Seventh Circuits have also applied an overwhelming-evidence standard. *United States* v. *Quinones*, 635 F.3d 590, 595 (2d Cir.), cert. denied, 565 U.S. 1080 (2011); *United States* v. *Macias*, 786 F.3d 1060, 1063 (7th Cir. 2015). The earliest of these decisions express a concern that, absent evidence to support a deliberate-ignorance instruction, juries may incorrectly employ a negligence or recklessness standard. See, *e.g.*, *Barnhart*, 979 F.2d at 652; *Mapelli*, 971 F.2d at 287.

For the reasons given above, the courts' articulation of the standard in decisions such as *Barnhart*, *Mapelli*, *Macias*, and *Quinones* is incorrect. But review is unwarranted because the extent of any remaining disagreement reflected in these decisions is limited and unlikely to be outcome determinative in most cases (including this case, see pp. 19-20, *infra*).

As an initial matter, two of the circuits that in the past failed to apply *Griffin*—the Eighth and Ninth Circuits—have more recently reevaluated their cases. In *United States* v. *Hernandez-Mendoza*, 611 F.3d 418, cert. denied, 562 U.S. 942 (2010), and 562 U.S. 1257 (2011), the Eighth Circuit retreated from its analysis in *Barnhart*

and effectively overruled *Barnhart* because the court in that case had failed to consider and apply this Court's decision in *Griffin*. *Id.* at 418-419. Similarly, the Ninth Circuit decisions purportedly in conflict with the decision below did not mention *Griffin* and did not reject its application. And, in a more recent unpublished decision, the Ninth Circuit has applied *Griffin* in evaluating the harmlessness of a deliberate-ignorance instruction unsupported by the evidence. See *United States* v. *Daly*, 243 Fed. Appx. 302, 309, cert. denied, 552 U.S. 1070 (2007), and 552 U.S. 1211 (2008). In addition, the en banc Ninth Circuit has rejected the view that giving a deliberate-ignorance instruction "risks lessening the state of mind that a jury must find to something akin to recklessness or negligence." *United States* v. *Heredia*, 483 F.3d 913, 924, cert. denied, 552 U.S. 1077 (2007). It has further held that, where (as here) the jury is instructed that it may not premise a guilty verdict on a finding that the defendant was merely careless, "[r]ecklessness or negligence never comes into play, and there is little reason to suspect that juries will import these concepts, as to which they are not instructed, into their deliberations." *Ibid.* That en banc pronouncement undermines the reasoning of the Ninth Circuit's prior decisions in *Mapelli* and *Sanchez-Robles* to the extent that any nominal division of authority created by those earlier decisions is illusory.

The decisions petitioner Okechuku cites (Pet. 20-21, 23) from the Second and Seventh Circuits also do not establish a conflict that warrants this Court's review. In its earliest post-*Griffin* decision on this issue, the Second Circuit expressed agreement with what is now the majority rule—*i.e.*, that the erroneous instruction will be harm-

less when the evidence is sufficient to prove the defendant's actual knowledge—and identified the "overwhelming" evidence of actual knowledge in that case as an additional reason for its harmlessness determination. *Adeniji*, 31 F.3d at 64. Although in subsequent decisions the Second Circuit has proceeded directly to ask whether the evidence of actual knowledge was overwhelming, see *Quinones*, 635 F.3d at 595; *United States* v. *Ferrarini*, 219 F.3d 145, 154, 158 (2000), cert. denied, 532 U.S. 1037 (2001), petitioners identify no decision in which that court has found that the evidence was sufficient to support guilt under an actual-knowledge theory but nevertheless reversed the conviction solely because such evidence was not "overwhelming."

It is true that, in *Macias*, the Seventh Circuit reversed a conviction after determining that the evidence of the defendant's actual knowledge "was sufficient but not overwhelming." 786 F.3d at 1063. But the court in *Macias* expressed concern that the deliberate-ignorance instruction given there could have been confusing to the jury because two clauses in the instruction were "in tension with one another." *Id.* at 1061. The court also emphasized that the government had raised a harmless-error argument only in a single sentence in its brief, causing the court to dismiss that argument as a "pure, unsubstantiated conclusion, entitled to zero weight." *Id.* at 1063. Moreover, in decisions predating *Macias*, the Seventh Circuit had found erroneous deliberate-ignorance instructions to be harmless under the majority rule—that is, where the government presented "sufficient evidence" of the defendant's actual knowledge. *United States* v. *Salinas*, 763 F.3d 869, 881 (2014); *United States* v. *Malewicka*,

664 F.3d 1099, 1110 (2011).[4] It is thus unclear whether the Seventh Circuit will continue to employ an overwhelming-evidence standard and, even if it does, whether that standard will make a difference in all but exceptional cases.

iii. In any event, this case does not directly implicate the tension petitioners assert in the language that courts of appeals have used to describe the harmlessness inquiry because any error would be harmless even on the standard most favorable to petitioners. Their preferred standard asks whether the evidence at trial of actual knowledge was overwhelming. See, *e.g.*, *Quinones*, 635 F.3d at 595-596 (finding error in giving deliberate-ignorance instruction harmless where evidence of guilt was overwhelming); *Covington*, 133 F.3d at 645 (same). That is the case here, because the evidence overwhelmingly supports petitioners' actual knowledge. See pp. 3-5, *supra*; see also Pet. App. 32a (finding "ample evidence" of petitioners' knowledge of illegal use of clinic's services).

For example, the evidence showed that petitioner Okechuku repeatedly met with Jerry Reed (the drug

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[4] Petitioners cite (Okechuku Pet. 30; Iwuoha Pet. 10 n.2) two other decisions in which the Seventh Circuit has reversed convictions under an overwhelming-evidence standard. But in one of those decisions, the deliberate-ignorance instruction was one of two erroneous instructions on the defendant's mental state. See *United States* v. *L.E. Myers Co.*, 562 F.3d 845, 855 (2009). And in both cases, the Seventh Circuit applied the higher standard under the apparent belief that the instructional error was constitutional in nature, requiring the government to prove harmlessness beyond a reasonable doubt. See *ibid.* (citing *Neder* v. *United States*, 527 U.S. 1, 18 (1999)); see also *United States* v. *Ciesiolka*, 614 F.3d 347, 355 (2010) (same). In any event, any analytical tension among the Seventh Circuit's decisions is for that court to resolve in the first instance. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam).

dealer) and Ezenagu (petitioner Okechuku's office manager) alone, including after hours; closely monitored the clinic's day-to-day operations, including by watching live video on a daily basis; and insisted on being updated each day on the clinic's cash intake. See pp. 3-4, *supra*. Ezenagu testified that petitioner "Okechuku knew from day one" that Reed was bringing straw patients to the clinic to obtain the prescriptions. Pet. App. 8a; C.A. ROA 1610. And petitioner Iwuoha routinely wrote prescriptions—which had been pre-signed by petitioner Okechuku—after cursory, pro forma examinations of patients in which he took only sparse notes and that almost invariably led to the same result: a prescription for hydrocodone. See p. 3, *supra*.

Contrary to petitioner Okechuku's suggestion (Pet. 8), the evidence was not limited to testimony by cooperating witness Ezenagu. The government presented compelling video evidence and testimony from clinic employees, as well as substantial documentary evidence. Pet. App. 8a-10a; Gov't C.A. Br. 10-15. The fact that the Texas Board of Medical Examiners found that petitioner Okechuku was not operating a pill mill (Okechuku Pet. 7) did not undermine that evidence, because the Board had merely reviewed 20 files and was unaware of the many indicators of illegal activity at the clinic. C.A. ROA 1785, 1790, 1798-1799; see p. 5, *supra*.

Petitioners do not identify any court of appeals that would have held the instructional error here to be prejudicial notwithstanding the robust evidence presented that petitioners actually knew of the drug conspiracy. At a minimum, the record here makes this case an unsuitable vehicle to address the question petitioners raise.

c. Even if the question petitioners raise otherwise warranted review, this case would be an unsuitable

vehicle to resolve it for an additional reason. Because the court of appeals determined that petitioners did not preserve their factbound contention that the evidence here did not support a deliberate-ignorance instruction, it reviewed that contention only for plain error. Pet. App. 28a. This Court has emphasized an "important difference" in the prejudice inquiry on plain-error review and the prejudice inquiry when the objection has been preserved, in that on plain-error review "[i]t is the defendant rather than the Government who bears the burden of persuasion with respect to prejudice." *United States* v. *Olano*, 507 U.S. 735, 734 (1993). That distinction alone makes this an inappropriate case for review of the prejudice standard applicable to deliberate-ignorance instructions that are not supported by sufficient evidence.

Furthermore, although the court of appeals determined in the course of its plain-error analysis that the error here was harmless, the court did not address the additional requirement under the plain-error standard that the error must also be "plain," Fed. R. Crim. P. 52(b), which this Court has explained "is synonymous with 'clear' or, equivalently, 'obvious.'" *Olano*, 507 U.S. at 734 (citing *United States* v. *Young*, 470 U.S. 1, 17 n.14 (1985)); see *ibid.* ("[A] court of appeals cannot correct an error pursuant to Rule 52(b) unless the error is clear under current law."); see also *Puckett* v. *United States*, 556 U.S. 129, 135 (2009) (explaining that "the legal error must be clear or obvious, rather than subject to reasonable dispute," and "caution[ing] that 'any unwarranted extension' of the authority granted by Rule 52(b) would disturb the careful balance it strikes between judicial efficiency and the redress of injustice" (brackets omitted)).

As the government explained below, the evidence at trial, viewed in the light most favorable to the government, did support a deliberate-ignorance instruction. Gov't C.A. Br. 76-79. The court of appeals has long recognized that "the same evidence that will raise an inference that the defendant had actual knowledge of the illegal conduct ordinarily will also raise the inference that the defendant was subjectively aware of a high probability of the existence of illegal conduct." *United States* v. *Lara-Velasquez*, 919 F.2d 946, 952 (5th Cir. 1990); see *ibid.* (explaining that "the circumstances of [a] defendant's involvement in the criminal offense may have been *so overwhelmingly suspicious* that the defendant's failure to question the suspicious circumstances establishes the defendant's purposeful contrivance to avoid guilty knowledge," and concluding on that basis that a deliberate-ignorance instruction was appropriate in that case); see also *United States* v. *Faulkner*, 17 F.3d 745, 766 (5th Cir.) (noting that an affirmative act by the defendant to avoid knowledge is not required), cert. denied, 513 U.S. 1056 (1994). As the government argued, the evidence here was sufficient to show that, even if petitioners Okechuku and Iwuoha had somehow managed to avoid acquiring actual knowledge of the critical facts about the pill-mill scheme, they did so only through willful blindness. Gov't C.A. Br. 78-79.

Although the court of appeals disagreed with the government's position, it did not determine—and the record would not support a finding—that the evidence was clearly and obviously insufficient to warrant a deliberate-ignorance instruction. Accordingly, even if the Court were to grant review and were to agree with petitioners on the prejudice issue, they still would not be entitled to relief. At a minimum, the absence of a

ruling below on the plainness of the error and the serious doubt that the rule petitioners propose would affect the outcome makes this case an unsuitable vehicle to consider the question petitioners raise.

2. Petitioner Iwuoha additionally contends (Pet. 13-16) that the district court violated his Sixth Amendment rights by taking into account acquitted conduct at sentencing. Petitioner Iwuoha's argument that the Sixth Amendment bars consideration of acquitted conduct is foreclosed by longstanding precedent of this Court and implicates no conflict among the courts of appeals.

a. In *United States* v. *Watts*, 519 U.S. 148 (1997) (per curiam), this Court held that "a jury's verdict of acquittal does not prevent the sentencing court from considering conduct underlying the acquitted charge, so long as that conduct has been proved by a preponderance of the evidence." *Id.* at 157. The Court noted that, under the pre-Guidelines sentencing regime, it was "'well established that a sentencing judge may take into account facts introduced at trial relating to other charges, even ones of which the defendant has been acquitted,'" and that "[t]he Guidelines did not alter this aspect of the sentencing court's discretion." *Id.* at 152 (citation omitted). And the Court explained that a jury's determination that a litigant failed to prove a fact beyond a reasonable doubt does not have preclusive effect in contexts in which a lower standard of proof applies. See *id.* at 156 ("[A]n acquittal in a criminal case does not preclude the Government from relitigating an issue when it is presented in a subsequent action governed by a lower standard of proof." (citation omitted)).

Petitioner Iwuoha suggests (Pet. 13-14) that this Court's decision in *United States* v. *Booker*, 543 U.S.

220 (2005), undermined or narrowed the Court's holding in *Watts*. To the contrary, however, *Booker* confirms that a judge may constitutionally consider at sentencing conduct that was not found by the jury, so long as the sentence is within the applicable statutory range. In discussing the type of information that a sentencing court could consider under an advisory Guidelines regime, *Booker* made no distinction between acquitted conduct and other relevant conduct. See, *e.g.*, *id.* at 252 (emphasizing the need to consider all relevant conduct to achieve "the sentencing statute's basic aim of ensuring similar sentences for those who have committed similar crimes in similar ways"). Indeed, after emphasizing the judge's "broad discretion in imposing a sentence within a statutory range," *id.* at 233, *Booker* cited *Watts* for the proposition that "a sentencing judge could rely for sentencing purposes upon a fact that a jury had found unproved (beyond a reasonable doubt)," *id.* at 251 (emphasis omitted).

b. Petitioner Iwuoha's Sixth Amendment argument does not warrant further review. Every court of appeals with criminal jurisdiction has held since *Booker* that a district court may consider acquitted conduct for sentencing purposes. See *United States* v. *Gobbi*, 471 F.3d 302, 313-314 (1st Cir. 2006); *United States* v. *Vaughn*, 430 F.3d 518, 526-527 (2d Cir. 2005), cert. denied, 547 U.S. 1060 (2006); *United States* v. *Ciavarella*, 716 F.3d 705, 735-736 (3d Cir. 2013), cert. denied, 134 S. Ct. 1491 (2014); *United States* v. *Jimenez*, 513 F.3d 62, 88 (3d Cir.), cert. denied, 553 U.S. 1034 (2008); *United States* v. *Grubbs*, 585 F.3d 793, 798-799 (4th Cir. 2009), cert. denied, 559 U.S. 1022 (2010); *United States* v. *Farias*, 469 F.3d 393, 399-400 & n.17 (5th Cir. 2006), cert. denied, 549 U.S. 1272 (2007); *United States*

v. *White*, 551 F.3d 381, 386 (6th Cir. 2008) (en banc), cert. denied, 556 U.S. 1215 (2009); *United States* v. *Waltower*, 643 F.3d 572, 575-578 (7th Cir.), cert. denied, 565 U.S. 1019 (2011); *United States* v. *High Elk*, 442 F.3d 622, 626 (8th Cir. 2006); *United States* v. *Mercado*, 474 F.3d 654, 656-658 (9th Cir. 2007), cert. denied, 552 U.S. 1297 (2008); *United States* v. *Magallanez*, 408 F.3d 672, 683-685 (10th Cir.), cert. denied, 546 U.S. 955 (2005); *United States* v. *Siegelman*, 786 F.3d 1322, 1332-1333 & n.12 (11th Cir. 2015), cert. denied, 136 S. Ct. 798 (2016); *United States* v. *Jones*, 744 F.3d 1362, 1365 (D.C. Cir.), cert. denied, 135 S. Ct. 8 (2014); *United States* v. *Dorcely*, 454 F.3d 366, 371-373 (D.C. Cir.), cert. denied, 549 U.S. 1055 (2006).

In addition, this Court has repeatedly and recently denied petitions for writs of certiorari challenging sentencing courts' reliance on acquitted conduct at sentencing. See, *e.g.*, *Soto-Mendoza* v. *United States*, 137 S. Ct. 568 (2016) (No. 16-5390); *Davidson* v. *United States*, 137 S. Ct. 292 (2016) (No. 15-9225); *Krum* v. *United States*, 137 S. Ct. 41 (2016) (No. 15-8875); *Bell* v. *United States*, 137 S. Ct. 37 (2016) (No. 15-8606); *Siegelman* v. *United States*, 136 S. Ct. 798 (2016) (No. 15-353); *Roman-Oliver* v. *United States*, 135 S. Ct. 753 (2014) (No. 14-5431); *Jones* v. *United States*, 135 S. Ct. 8 (2014) (No. 13-10026); *Ciavarella* v. *United States*, 134 S. Ct. 1491 (2014) (No. 13-7103); *Kokenis* v. *United States*, 566 U.S. 1034 (2012) (No. 11-1042). Further review of consideration of acquitted conduct is unwarranted.

CONCLUSION

The petitions for writs of certiorari should be denied.

Respectfully submitted.

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