NO. _____

IN THE SUPREME COURT OF THE UNITED STATES OF AMERICA
OCTOBER TERM 2019

GIAM NGUYEN,	§	
ANNA BAGOUMIAN, and	§	**PETITIONERS**
DONOVAN SIMMONS	§	
	§	
VS.	§	
	§	
UNITED STATES OF AMERICA	§	**RESPONDENT**
	§	

JOINT PETITION FOR WRIT OF CERTIORARI

CAUSE NO. 17-2063
IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

CAUSE NO. 4:13cr-578
IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

STANLEY G. SCHNEIDER	**DAVID ADLER**	**SHAUN KHOJAYAN**
SCHNEIDER & McKINNEY, PC	**DAVID ADLER, PC**	**Law Offices of Shaun Khojayan & Associates P.L.C.**
440 LOUISIANA, SUITE 800	**6750 West Loop S., Suite 120**	**515 S. Flower St.**
HOUSTON, TEXAS 77002	**BELLAIRE, TX 77401**	**LOS ANGELES, CA 90071**
(713) 951-9994	**(713) 666-7576**	**(310) 274-6111**
ATTORNEY FOR	**ATTORNEY FOR**	**ATTORNEY FOR**
GIAM NGUYEN	**DONOVAN SIMMONS**	**ANNA BAGOUMIAN**

ISSUES PRESENTED FOR REVIEW

Petitioners, Nguyen and Simmons were doctors while Ms. Bagoumian worked as a nurse in medical clinics. They were convicted in a series of Medicare fraud related offenses. The medical clinics were created by two co-defendants who pled guilty before trial. The defense was that they did not know the fraudulent nature of the scheme and they had nothing to do with finding patients or billing.

The two co-defendants had been charged with a similar Medicare fraud scheme in Arizona. In that scheme, the investigators concluded the medical professionals employed in the clinics were dupes. One of the organizers of the scheme at issue who pled guilty, Zayan "Mike" Pogosyan, at his guilty plea told the District Court that Petitioner Simmons and co-defendant Benjamin Martinez (not a party to this petition) knew nothing about the scheme. Petitioners attempted to introduce Pogosyan's statement and testimony from a physician and investigator in the Arizona case as "reverse 404(b)" evidence. The District Court excluded the evidence and the Court of Appeals affirmed.

The first two issues presented are:

1. Whether the Petitioners were deprived of their Fifth Amendment right of Due Process to present a defense by the District Court's exclusion of the reverse 404(b) evidence.

2. Whether the Petitioners were deprived of their Sixth Amendment right of compulsory process by the District Court's exclusion of the reverse 404(b) evidence.

The District Court gave what the Court of Appeals called a muddled standard for determining deliberate ignorance. In determining of the error was harmless, the Court of Appeals simply held there was sufficient evidence for a properly intructed jury to reach the same verdict.

The third issue presented is:

3. Did the Court of Appeals use the correct standard to determine harmless error or should it have used the standard set out in FED. R. CRIM. P. 52(a) after it deems a jury instruction confusing.

LIST OF PARTIES

The Defendants-Appellants and their Counsel:

Giam Nguyen: Stanley G. Schneider (trial and appeal) and Casie Gotro (trial)

Anna Bagoumian: Thomas S. Berg (trial);Shaun Khojayan and David P. Cunningham (appeal)

Donovan Simmons: David Adler (trial and appeal)

UNITED STATES OF AMERICA AND ITS COUNSEL:

Ryan K. Patrick, United States Attorney
Kenneth Magidson, former United States Attorney

Appeal

Elizabeth H. Danello, Attorney, U.S. Department of Justice, Criminal Division, Appellate Section James Pearce U.S.Department of Justice, Criminal Division, Appellate Section, Carmen Castillo Mitchell, Assistant United States Attorney

Trial and Forfeiture

Adrienne Ellen Frazior, Assistant United States Attorney (forfeiture) Kristine Rollinson, Assistant United States Attorney (forfeiture), Albert A. Balboni, Assistant United States Attorney (trial) Rodolfo Ramirez, Assistant United States Attorney (trial)

TABLE OF CONTENTS

INDEX OF AUTHORITIES

Cases

Statutes and Rules

Other Authorities

TO THE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

COME NOW GIAM NGUYEN, ANNA BAGOUMIAN AND DONOVAN SIMMONS, through their counsel, **STANLEY G. SCHNEIDER, SHAUN KHOJAYAN AND DAVID ADLER,** and pursuant to SUP CT. R. 14, file this petition for writ of certiorari and would show the Court as follows:

I. CITATION TO OPINION OF THE COURT BELOW

The United States Court of Appeals affirmed the convictions and sentences of all three petitioners in a published opinion, *United States v. Martinez,* 921 F.3d 452 (5th Cir. 2019). A copy of the opinion is attached as Appendix A.

II. BASIS OF THIS COURT'S JURISDICTION

The opinion of the Court of Appeals was released on April 16, 2019. Petitioners filed a timely motion for rehearing and petition for rehearing *en banc.* That motion was overruled on July 23, 2019. A copy of the order denying rehearing and rehearing *en banc* is attached as Appendix B. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1) to review a final judgment of a United States Court of Appeals.

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.

III. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Sixth Amendment

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 defence.

FED. R. EVID. 404(b)

(b) Crimes, Wrongs, or Other Acts.

(1) Prohibited Uses. Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.

(2) Permitted Uses; Notice in a Criminal Case. This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. On request by a defendant in a criminal case, the prosecutor must:

(A) provide reasonable notice of the general nature of any such evidence

that the prosecutor intends to offer at trial; and

(B) do so before trial — or during trial if the court, for good cause, excuses lack of pretrial notice.

Federal Rule of Criminal Procedure 52

a) Harmless Error. Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded.

(b) Plain Error. A plain error that affects substantial rights may be considered even though it was not brought to the court's attention.

IV. REASONS FOR REVIEW

A. Issues 1 and 2 (Restated)

1. Whether the Petitioners were deprived of their Fifth Amendment right of Due Process to present a defense by the District Court's exclusion of the reverse 404(b) evidence.

2. Whether the Petitioners were deprived of their Sixth Amendment right of compulsory process by the District Court's exclusion of the reverse 404(b) evidence.

As to Issues 1 and 2, review is proper pursuant to SUP. CT. R. 10(a) in that the decision of the Court of Appeals conflicts with *United States v. Aboumoussallem*, 726 F.2d 906, 911-912 (2d Cir.1984); *United States v. Stevens,* 935 F.2d 1380 (3d Cir. 1991); and *United States v. Montelongo*, 420 F.3d 1169, 1173-75 (10th Cir. 2005). Review also is proper pursuant to SUP. CT. R. 10(a) in that the decision of the Court

of Appeals conflicts with the holding of the Texas Court of Criminal Appeals in *Torres v. State,* 71 S.W.3d 758 (Tex. Crim. App. 2002).

1. Relevant Facts as to Issues 1 and 2

The facts set out herein are taken from the opinion of the Court of Appeals.

> This case involves a scheme to defraud Medicare orchestrated by two men: Zaven"Mike" Pogosyan and Edvard Shakhbazyan. From 2008 to 2010, Pogosyan opened three purported medical clinics in the Houston, Texas area: the Jefferson Clinic, the Pease Clinic, and the Silver Star Clinic. Pogosyan hired defendants Dr. Nguyen, Dr. Martinez, and Dr. Simmons to serve as "Medical Directors" for these clinics. The hiring of a physician for each clinic was essential to the scheme because a clinic cannot become a Medicare provider without an application submitted by a physician or a non-physician practitioner. Medicare will only issue the requisite provider number and remit funds to a bank account in the same name as that physician.

921 F.3d at 462-63 (internal citations omitted).

Dr. Nguyen was hired to be medical director of the first clinic, the Jefferson Clinic, at a salary of $10,000 per month. At Pogosyan's direction, he applied for a Medicare application, opened a bank account in his own name and gave signed checks to Pogosyan, giving him control over the account. *Id.* at 463. After Pogosyan hired staff, they performed administrative tasks such as billing he had previously done. Marketeers were hired by the staff who gave kickbacks to patients and instructed the patients not to inform the physicians of the kickbacks. *Id.*

Dr. Nguyen at the Jefferson Clinic often ordered a series of intrusive tests

referred to by the Court of Appeals as "rectal tests." While the clinic had the equipment to perform the tests and billed Medicare for them, there is no evidence that any of the tests were in fact conducted. *Id.* at 463-64.

After claims were paid by Medicare, they were remitted to the bank account opened by Dr. Nguyen. Pogosyan and Shakhbazyan twice per week withdrew $5,00-$9,000. The cash was used for the kickback scheme and their regular trips to Las Vegas. *Id.* at 464.

The Jefferson Clinic abruptly closed. Pogosyan, Shakhbazyan, Petitioner Bagoumian and another person shredded all of the clinics records in a single afternoon. Pogosyan and Shakhbazyan opened a new clinic, the Pease Clinic, where Bagoumian and Nguyen moved. Although Dr. Nguyen saw patients at that clinic, he did not enroll with Medicare as a provider. Instead, co-defendant Dr. Martinez, a resident physician in Dallas, was hired for $7,000 per month to come to Houston one day per week to review records. *Id.* Later, Petitioner Simmons was hired to review records. Both Martinez and Simmons applied to be Medicare providers, opened bank accounts and signed blank checks for Pogosyan's use. Otherwise, the clinic operated like the Jefferson Clinic, including the use of marketeers and billing for rectal tests. *Id.* at 464-65.

The Pease Clinic also closed. Pogosyan and Dr. Nguyen opened a third clinic

and applied for provider enrollment under the name Silver Star, a professional association formed by Pogosyan and Dr. Nguyen. Again, Pogosyan controlled the bank accounts. At Silver Star, Dr. Nguyen saw patients, patients were paid to come and claims were submitted to Medicare, including for rectal tests.[1] *Id.* at 465.

Essentially, all three clinics operated the same way. Pogosyan and Shakhbazyan hired a front man physician to enroll as a Medicare provider and they controlled the billing and money paid to the clinics.

At trial, Petitioners sought to introduce evidence that Pogosyan and Shakbazyan, conspirators who pled guilty before trial, were previously indicted in Arizona for a similar Medicare fraud scheme, and that the investigators there had viewed those doctors as unwitting dupes rather than co-conspirators. The Arizona charges were dismissed. The doctors sought testimony from the associated doctor and an investigator in the case. The district court concluded that even if the Arizona doctor was tricked, "[p]roving there are other people who didn't know the speed limit sign was there doesn't prove you didn't know." 921 F.3d at 481. At his own guilty plea, there was the following exchange between Pogosyan and the District Court:

DEFENDANT POGOSYAN: Doctor — excuse me. Dr. Benjamin

[1]Dr. Nguyen testified at trial that all rectal test claims were fraudulent. He said he never ordered rectal tests, he did not know the clinics had the equipment to perform them and they were not normally conducted in a primary physician's office. 921 F.3d at 475.

> Martinez and Donovan Simmons, they didn't actually know anything about the whole — what do you call it, conspiracy. They were —
>
> THE COURT: You didn't tell them, is that what you're telling me?
>
> DEFENDANT POGOSYAN: Yes. Yes, Your Honor.
>
> THE COURT: So you don't know what they knew. You just know what you — you didn't have any contact with them in which you disclosed —
>
> DEFENDANT POGOSYAN: Yes, Your Honor.
>
> THE COURT: — what was going on? Did you have any contact with them?
>
> DEFENDANT POGOSYAN: No, Your Honor.
>
> THE COURT: Okay. And so all you can testify to, technically, is that you are not aware of whether they knew anything about it. Is that what you're telling me?
>
> DEFENDANT POGOSYAN: Yes, Your Honor.

Id. at 482.

The Court of Appeals affirmed the exclusion of the Arizona witness. It wrote:

> Whatever the probative value, the sought-after evidence here was convoluted. The defendants sought to call non-party witnesses to testify to a lack of knowledge, of a different scheme, in a different state, that was operated by two of the same individuals as this scheme, to support an inference that the more recent defendants had a lack of knowledge of this scheme.

Id. at 481.

It further held: "The district court did not abuse its discretion by excluding

attenuated and collateral evidence of the Arizona scheme." *Id.* at 482.[2]

2. Discussion

a. The Due Process Right to Present a Complete Defense

In *Chambers v. Mississippi,* 410 U.S. 284 (1973), this Court found a due process right[3] to present a full defense. While the application of *Chambers* has been convoluted at best, in *Kubsch v. Neal,* 838 F.3d 845, 855-56 (7th Cir. 2016), *cert.* 137 S. Ct. 2161 (2017), the court examined the holding in *Chambers* and determined it was not a "one and done" decision. Exclusion of the reverse 404(b) evidence in the instant case deprived Petitioners of their right to present a full defense.

Knowledge and intent were hotly contested matters in this case. The Doctor-Petitioners, Nguyen and Simmons, asserted that fraudulent Medicare claims were filed without their knowledge. They have maintained that vast amounts of money were transferred to Shakhbazyan and Pogosyan without their knowledge or consent. The Doctor- Petitioners alleged that rather than co-conspirators, they were victims of

---

[2]Petitioner Simmons and Dr. Martinez asked the Court of Appeals to take judicial notice of Pogosyan's statements at his guilty plea. The Court did not do so and held that there was nothing preventing the defendants from calling him as a witness at trial although the Court quoted the defendants' brief that he would invoke his Fifth Amendment right against self incrimination. 921 F.3d at 482.

[3]In *Chambers,* the due process right was based on the Fourteenth Amendment. Because the federal government, not a state, is involved in the instant case, Petitioners rely on the Due Process Clause of the Fifth Amendment.

fraud perpetrated by Shakhbazyan and Pogosyan – the same fraudulent scheme that these clinic owners perpetrated in Arizona.

The admissibility of extrinsic evidence of other crimes, bad acts, or wrongs is governed by Federal Rule of Evidence 404(b). *United States v. Krezdorn*, 639 F.2d 1327, 1331 (5th Cir. 1981). However, if the defendant offers the evidence against a third party, this category of evidence is referred to as "reverse 404(b)," and while rarely used, the objective of such evidence is to exonerate the defendant. *Stevens*, 935 F.2d at 1401-02. In this case, the third parties are named co-defendants who just months before the onset of the instant alleged conspiracy duped doctors into committing health care fraud in Arizona.

In the instant case, if Pogosyan and Shakhbazyan had gone to trial, the Government could have presented proof of the Arizona case under Rule 404(b) to show their motive, scheme, plan, knowledge or preparation. The fact that a person immediately before the fraud at issue used an almost identical scheme to perpetrate another, almost identical fraud, is proof that he used the same scheme. *See e.g. United States v. Singleton,* 458 Fed. Appx. 169 (3rd Cir. 2012) (proof of similar fraud scheme properly offered to show intent to defraud and knowingly participating in the fraud scheme at issue); *United States v. Barrington,* 648 F.3d 1178, 1186-87 (11th Cir. 2011) (evidence of earlier scheme to change grades in university records

admissible to show intent in similar scheme on trial); *United States v. Harrod,* 856 F.2d 996, 1000-01 (7th Cir. 1988) (Evidence of two earlier bank fraud schemes properly admitted to show intent to engage in the bank fraud scheme on trial).

Evidence of the earlier scheme in Arizona was admissible as reverse 404(b) in the instant case to show the scheme Pogosyan and Shakhbazyan utilized. The Arizona evidence showed the scope and means that they would use to con or dupe unsuspecting doctors to become involved with their scheme. It was similar to the scheme in the instant case in all important respects. It was relevant under FED. R. EVID. 401 in that it tended to show the Doctor-Petitioners were duped just like the Arizona doctors and therefore lacked knowledge or intent to defraud medicare. As discussed in the classic Wigmore treatise on evidence,

> It should be noted that ["other crimes"] evidence may be also available to negative the accused's guilt. *E.g.*, if A is charged with forgery and denies it, and if B can be shown to have do series of similar forgeries connected by a plan, this plan of B is some evidence that B and not A committed the forgery charged. This mode of reasoning may become the most important when A alleges that he is a victim of mistaken identification.

2 Wigmore, *Wigmore on Evidence* § 304, at 252 (J. Chadbourn rev. ed. 1979).

In *Stevens,* the Third Circuit recognized the importance of reverse 404(b) evidence and the low bar to its admissibility. The court said:

> [T]he defendant, in order to introduce other crimes evidence, *need not*

> *show* that there has been more than one similar crime, that he has been misidentified as the assailant in a similar crime, or *that the other crime was sufficiently similar to be called a "signature" crime.* These criteria, although relevant to measuring the probative value of the defendant's proffer, should not be erected as absolute barriers to its admission. Rather, a defendant must demonstrate that the "reverse 404(b)" evidence has a tendency to negate his guilt, and that it passes the Rule 403 balancing test.

Stevens, 935 F.2d at 1406 (emphasis added). The *Stevens* test for admissibility of reverse 404(b) is the "relatively low relevance hurdle." *Id.* at 1384.

"District courts should be less discriminating in admitting reverse 404(b) evidence than in admitting evidence proffered by the prosecution." *United States v. Alayeto*, 628 F.3d 917, 921 (7th Cir. 2010). Put another way, "the defense is not held to as rigorous a standard as the government in introducing reverse 404(b) evidence." *United States v. Seals*, 419 F.3d 600, 607 (7th Cir. 2005) (finding the trial court abused its discretion in excluding evidence, but harmless error). In an elucidating concurring opinion, Judge Posner set out the theory behind the differing standards, concluding that, "what is sauce for the goose should be sauce for the gander." *Id.* at 613.[4]

The evidence the defense proffered in this case was relevant because it would

[4]Using Judge Posner's sauce for the goose is sauce for the gander analysis, under the Court of Appeals' holding, evidence offered by the Government of a similar scheme under Rule 404(b) would be collateral and attenuated and inadmissible.

have made the existence of a material fact of consequence in the case at bar, the Doctor-Petitioners' culpability, knowledge, or intent, less probable. *Montelongo*, 420 F.3d at 1174-75 (holding evidence of prior similar acts by alleged co-conspirators relevant "to their defense that [the defendants] had no knowledge of the [charged crime]."); *Aboumoussallem,* 726 F.2d at 912 (holding testimony of prior similar acts by alleged co-conspirator relevant as, "It tends to make the existence of a consequential fact, [the appellants'] knowledge, less probable").

The Court of Appeals' holding on the admissibility of the reverse 404(b) evidence also conflicts with the holding of the Texas Court of Criminal Appeals in *Torres*. In that case, the court held that violent acts by a deceased in a murder case were admissible to show the deceased's frame of mind – even if the acts were unknown to the defendant – to support a claim of self defense. The court wrote:

> Here, the proffered testimony revealed that, two days before he was killed, Valdez entered the apartment by climbing through a window. He threatened Diane and her children that "he would do something to [them]" if she did not tell him where Roxanne was. This shows a mind set of violence against those who might stand between him and Roxanne. It could also explain Valdez's unorthodox entry by demonstrating the intent or motive of getting back with Roxanne one way or another, or keeping others away from Roxanne by violence if necessary. Because the proffered testimony was probative of the deceased's state of mind, intent, and motive, we hold that the Court of Appeals erred in concluding that the evidence was relevant only to character conformity.

71 S.W.3d at 762.

Given the erroneous jury charge on deliberate ignorance submitted by the District Court, over objection, the Arizona evidence would negate any inference that might be drawn by the evidence and the Government's argument that the Doctor-Petitioners acted with willful blindness. The Arizona evidence tended to show that Shakhbazyan and Pogosyan had the unique ability to gain the trust of physicians and use them to their own ends.

b. Compulsory Process: The Right to Present Evidence

The right to compulsory process is more than the right to force witnesses to appear in court. It also includes the right to offer their testimony to present the defendant's version of events as well as the prosecution's so that the jury may decide where the truth lies. The right to compulsory process includes the right to present a defense. *Washington v. Texas,* 388 U.S. 14, 19 (1967).

For the reasons set out, *supra,* the Doctor-Petitioners had the Sixth Amendment compulsory process right to present evidence from the Arizona investigator and duped physician to show their lack of knowledge of the fraud scheme.[5]

[5]The Court of Appeals statement that they could have called Pogosyan for that purpose, 921 F.3d at 482, is irrelevant to their right to call other witnesses to prove the same facts. The court's inference that they should have called a co-defendant and therefore it is permissible to exclude other relevant evidence in effect deprives Petitioners of their Sixth Amendment right to counsel. It is counsel who makes the decisions on trial strategy, not the trial court or court of appeals.

The District Court's holding that proving the Arizona doctors were duped, "proving that other people who didn't know speed limit sign doesn't prove you didn't know," or the Court of Appeals analysis that the sought to be introduced evidence was "convoluted" and amounted to calling non-party witnesses to a scheme in a different state to support an inference that the Doctor-Petitioners lacked knowledge, 921 F.3d at 481, miss the point. The evidence was offered to show the organizers' scheme to dupe doctors into participating in their scheme to defraud Medicare. That leads to the inference the plan and scheme was to dupe the Doctor-Petitioners in the instant case the same way.

c. Conclusion as to Issues 1 and 2

The reverse 404(b) evidence sought to be admitted by the Doctor-Petitioners to show lack of knowledge was admissible to show the scheme and plan for the Medicare fraud perpetrated by Pogosyan and Shakhbazyan. The defendants in the instant case claimed they did not know of the fraud. Evidence of the Arizona fraud was relevant to their defense in that it would have shown that Pogosyan and Shakhbazyan kept doctors in the dark to further their scheme. The defendants had the due process and compulsory process rights to present that evidence to the jury.

This is especially important in light of the confusing deliberate ignorance instruction given by the District Court. Stated simply, if a jury can infer from the

facts that the defendants had knowledge of the scheme, the same jury can infer from the Arizona scheme that Pogosyan and Shakhbazyan deliberately kept them in the dark.

This Court should grant certiorari to resolve the conflicts between the Court of Appeals in the instant case with holdings of the Second, Third and Tenth Circuits and the Texas Court of Criminal Appeals as to the admissibility of reverse 404(b) evidence to negate knowledge.

B. Issue 3 (Restated)

3. Did the Court of Appeals use the correct standard to determine harmless error or should it have used the standard set out in FED. R. CRIM. P. 52(a)after the Court of Appeals deemed the jury instruction confusing.

1. Relevant Facts as to Issue 3

Again, all facts herein are taken from the Court of Appeals' opinion.

> All the defendants take issue with the district court's specially-crafted instruction on deliberate ignorance. At the charging conference, the government requested this pattern instruction on that subject:
>
> > 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.

Fifth Circuit Pattern Jury Instructions (Criminal Cases) § 1.37A (2015).

****

The district court would not have abused its discretion by giving our pattern instruction on deliberate ignorance. The district court charted a different course. Instead of granting the government's request, the district court gave this instruction that is written in terms of circumstantial evidence:

> The defendants must be found to have acted knowingly and willfully. "Knowingly" means that an act was done intentionally and not because of mistake, accident, or another innocent reason. "Willfully" means an act was done with a conscious purpose to violate the law.
>
> ****
>
> Circumstantial facts tend to be the only kind available for subjective facts, something about which the jury lacks direct access to the defendant's mind. For instance, the jury may infer knowledge and intent from conduct or context.
>
> Attempts to eliminate or minimize evidence of knowledge may justify an inference of it. Knowledge does not require certainty. The law permits inferred, expected judgments to count as knowledge. These inferences must be beyond a reasonable doubt.

The doctors treat this as a flawed deliberate ignorance instruction that allowed the jury to infer knowledge based on a defendant's negligence. Bagoumian makes a similar argument and characterizes the instruction as a legally incorrect statement of the knowledge element that "essentially directed guilty verdicts" against the defendants or "cause[d] the jury to use a lower negligence standard."21Link to the text

of the note Bagoumian also argues that if it was a deliberate ignorance instruction, it was improperly given as to her because there was no evidence of her "purposeful avoidance." The defendants preserved their objections to this instruction.

921 F.3d at 477-78.

The Court of Appeals analyzed the District Court's instruction in this way:

> We must start with the observation that this is a difficult instruction to understand. It would have been better left as a conceptual and unsubmitted disagreement with the pattern deliberate ignorance instruction. The concern is whether the instruction lowered the standard of proof as to knowledge. Error will exist if the instruction can reasonably be read to mean that if people would be expected to infer something, the defendant is guilty even if he or she negligently failed to make the inference.
>
> We do not see such a reading by jurors as a likely one. We say that because, in summary, the instruction informed jurors they would be justified in finding a defendant knew of the fraud if he or she took steps "to eliminate or minimize evidence of knowledge." The "knowledge" that needed to exist did "not require certainty," which reasonably would mean that a defendant who attempted to avoid creating evidence of knowledge did not need to be absolutely certain of the fraud to be criminally knowledgeable. Jurors were also told in this context that they could not rely on "mistake, accident, or another innocent reason" to support guilt. The challenged language about expectations and inferences was followed immediately by requiring the inferences to "be beyond a reasonable doubt."
>
> *Less than sparkling clarity or a problematic phrase does not invalidate an instruction and certainly does not necessarily create reversible error.* An instruction is examined in the context of the universe of guidance. *Dupuy v. Cain,* 201 F.3d 582, 587 (5th Cir. 2000). Though we see no clear lowering of the standard of proof as to knowledge, we do see the possibility of confusion. Potentially creating

> more uncertainty for jurors, the district court recited the reasonable doubt standard in its preliminary instructions and general instructions, but in the special instructions it recited the reasonable doubt standard for every count except the health care fraud conspiracy.
>
> For these reasons, uncertainty persists about whether jurors would have understood from this instruction in isolation that they must find beyond a reasonable doubt that each defendant actually knew about the fraud based on evidence of a defendant's attempts to avoid learning of it. They were not instructed on deliberate ignorance of the fraud. *We conclude that it was error to give this instruction, not because it gave a lower standard of proof to jurors but because it gave such a muddled standard.*

Id. at 480. (Emphasis added)

The Court of Appeals concluded: "We conclude that a more clearly instructed jury would have reached the same verdict as did this one. The error was harmless." *Id.* at 481. It did not cite or mention Rule 52.

2. Discussion

Rule 52(a) is the harmless error rule for non-constitutional error. This Court held that in making a harmless error determination under Rule 52(a), the appellate court should examine the entire record and find error harmless if it did not effect the substantial rights of the parties. *United States v. Lane,* 474 U.S. 438, 445 (1986). *Accord, United States v. Heidebur,* 122 F.3d 577, 581 (8th Cir. 1997), *United States v. Doherty,* 867 F.2d 47, 58 (1st Cir. 1989).

The Court of Appeals erred in considering only the erroneous instruction in

determining whether the error was harmful and it erred in not examining the entire record under Rule 52(a) to determine if the substantial rights of the defendants were effected. It failed to consider the effect of the muddled and confusing instruction on the jury in the absence of the exclusion of the Arizona fraud evidence.

Instead of considering the excluded evidence in light of the erroneous deliberate ignorance, the Court of Appeals simply held that a properly instructed jury – without the Arizona fraud evidence – would have reached the same verdict.

Issues 1 and 2 on the exclusion of the reverse 404(b) evidence are intertwined with this issue. While a properly instructed jury *could* have reached the same verdict based on the evidence before it, evidence of a plan and scheme to dupe doctors and keep them in the dark about the Medicare fraud is relevant to the jury's determination of deliberate ignorance. The two go hand in glove.

The reverse 404(b) evidence is strong evidence that the defendants were affirmatively kept from knowing of the fraud scheme rather than being deliberately ignorant.

This Court should grant certiorari to determine if improperly excluded evidence should be considered in a court of appeals' analysis of harmless error under Rule 52(a) and whether Rule 52(a) is the sole harmless error rule for properly preserved non-constitutional error.

Failure to the improper exclusion of the reverse 404(b) in the harmless error analysis is contrary to the cumulative error doctrine recognized *United States v. Marchan,* 935 F.3d 540 (7th Cir. 2019).

C. Conclusion

The issues presented are closely intertwined. At trial, petitioners did not contest the fact of a Medicare fraud scheme. Their defense was they did not know anything about it and that they were simply medical professionals doing their jobs as employees of a clinic. They were not the ones who billed Medicare and they had no control over the clinics' bank accounts.

In order to show the scheme orchestrated by Zaven "Mike" Pogosyan and Edvard Shakhbazyan, they sought to introduce as reverse 404(b) evidence a similar scheme in Arizona run by the same two men and that the medical professionals in that scheme were kept in the dark about the fraud. The evidence of the Arizona scheme would have been admissible under Rule 404(b) to show scheme if Pogosyan and Shakhbazyan had gone to trial.

The district court's analysis that the reverse 404(b) evidence about another scheme didn't show lack of knowledge and the Court of Appeals' analysis the district court didn't abuse its discretion in excluding the evidence because it was convoluted would in effect gut Rule 404(b) for both the prosecution and the defense. The same

reasoning would apply to any other crime where the scheme or plan was identical to another crime. Be it a series bank robberies with signature *modus operandi,* drug deals in multiple locations or any other type of similar crimes, the reasoning would be the same.

The testimony of the innocent physician in the Arizona case as well as the investigators was relevant under FED. R. EVID. 401.

The exclusion of this crucial evidence is directly related to the harm caused by the confusing deliberate ignorance instruction given by the district court. The deliberate ignorance instruction coupled with the exclusion of the reverse 404(b) evidence resulted in the jury considering Petitioners' claim of lack of knowledge based on a flawed and confusing instruction and in the absence of admissible evidence showing the perpetrators had a scheme in which the medical professionals were kept in the dark about the fraud.

PRAYER

WHEREFORE, PREMISES CONSIDERED, Petitioners pray that this Court grant their petition for writ of certiorari, order full briefs and oral arguments, vacate the decision of the court of appeals and remand to that court for further proceedings.

Respectfully submitted,

Stanley G. Schneider
Schneider & Mckinney, PC
Texas Bar No. 17790500
440 Louisiana, Suite 800
Houston, TX 77002
Attorney for Giam Nguyen

David Adler
Texas Bar No. 00923150
David Adler, PC
6750 West Loop S., Suite 120
Bellaire, TX 77401 Attorney for
Donovan Simmons

Shaun Khojayan
Law Offices of Shaun Khojayan
& Associates P.L.C.
515 S. Flower St., 19th Floor
Los Angeles, CA 90071
Attorney for Anna Bagoumian