

No. --

IN THE
SUPREME COURT OF THE UNITED STATES

EMMANUEL C. IWUOHA,

Petitioner

v.

UNITED STATES OF AMERICA

Respondent

On Petition for Writ of Certiorari
To The United States Court of Appeals for the Fifth Circuit

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a district court's error in instructing the jury that a defendant may be convicted on the basis of deliberate ignorance is necessarily harmless "where there is substantial evidence of actual knowledge"?
2. Whether the United States Constitution permits a sentencing court to increase a defendant's sentence on the basis of conduct for which a jury has acquitted him?

PARTIES

Emmanuel C. Iwuoha is the Petitioner, who was the defendant-appellant below. The United States of America is the Respondent, who was the plaintiff-appellee below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Emmanuel C. Iwuoha, respectfully petitions for a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The published opinion of the United States Court of Appeals for the Fifth Circuit is captioned as *United States v. Oti*, 872 F.3d 678 (5th Cir. October 3, 2017)(unpublished), and is provided in the Appendix to the Petition. [Appendix A]. The judgment of conviction and sentence was entered June 24, 2016, and is also provided in the Appendix to the Petition. [Appendix B].

JURISDICTIONAL STATEMENT

The judgment and opinion of the United States Court of Appeals for the Fifth Circuit were filed on October 3, 2017. [Appx. A]. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, SENTENCING GUIDELINES AND RULES INVOLVED

The Fifth Amendment to the United States Constitution provides:

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 to the United States Constitution provides:

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

Section 841 of Title 21 provides in part:

- (a) Unlawful acts.** Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—
- (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or
 - (2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

Section 846 of Title 21 provides in part:

Any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

Section 924 of Title 18 provides in part:

- (c)(1)(A) Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime—
- (i) be sentenced to a term of imprisonment of not less than 5 years...

- (o) A person who conspires to commit an offense under subsection (c) shall be imprisoned for not more than 20 years, fined under this title, or both; and if the firearm is a machinegun or destructive device, or is equipped with a firearm silencer or muffler, shall be imprisoned for any term of years or life.

Federal Sentencing Guideline 2D1.1 provides in part:

- (b)(1) If a dangerous weapon (including a firearm) was possessed, increase by 2 levels.

Federal Rule of Criminal Procedure 52 provides:

- (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.

STATEMENT OF THE CASE

A. District Court Proceedings

Petitioner Emmanuel Iwuoha is a doctor in Nigeria, but he has yet to receive his license in the United States.¹ He worked as a “telepresenter” for Dr. Theodore Okechuku at the Medical Rehabilitation Clinic (MRC) in East Dallas, Texas.² Telepresenters perform examination of patients and report the exams to a doctor, who then make decisions about the course of treatment.

The government obtained an indictment against Petitioner, alleging that he illegally conspired to distribute pain medicine at MRC, and that he aided and abetted the possession of firearms (by the clinic’s security guards) in connection with the drug distribution.³ He was convicted by a jury of the drug conspiracy counts, but acquitted of the firearm charge.

At trial, the government introduced evidence that a man named Jerry Reed brought homeless people to the clinic, and then resold the pain medicines prescribed to these patients.⁴ It showed that Mr. Iwuoha saw patients rapidly (averaging every seven minutes),⁵ and that patients received prescriptions from Mr. Iwuoha with Dr. Okechuku’s name pre-filled.⁶

But there was also testimony that Mr. Iwuoha’s acted in accordance with appropriate medical practices. A defense expert explained that new patient visits might legitimately take only two minutes in some cases.⁷ A government witness admitted that Mr. Iwuoha did not hand prescriptions

¹(ROA.1098, 2584). Record citations are included in hopes they are of use to the government in answering the Petition or the Court in evaluating it.

²(ROA.1098, 2584).

³A third, dismissed, charge, alleged that he conspired to possess a firearm in connection with a drug trafficking offense.

⁴(ROA.1133-1135).

⁵(ROA.997).

⁶(ROA.1186-1187, 1830, 1959).

⁷(ROA.2329).

directly to patients and that he played no role in faxing the prescriptions to the pharmacies.⁸ And Dr. Okechuku denied that Mr. Iwuoha made medical decisions without his knowledge and authorization.⁹ Dr. Okechuku was supported in this claim by extensive phone records showing the two men in constant phone contact.¹⁰ Finally, there was evidence that Dr. Okechuku implemented a series of protocols designed to prevent the illegal resale of pain medicines prescribed by the clinic. These included: global caps on the amount of pain medicines provided in a given period, dismissal of patients suspected of reselling the prescriptions, surprise drug tests of patients to see whether they were actually taking the medicines prescribed, notifying a pharmacy that a patient suspected of resale should not be served, and banning Mr. Reed from the MRC.¹¹

At the charge conference, the government succeeded in obtaining a jury instruction on the question of “deliberate ignorance.” This instruction allowed the jury to find knowledge on the basis of a defendant’s willingness to close his eyes to such knowledge. It did not require the jury to find it beyond a reasonable doubt in order to consider that theory of conviction:

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.¹²

A codefendant (joined by petitioner) objected, but the district court overruled the objection:

MR. VITAL: Object, Your Honor, under general definitions to the second paragraph starting with the word "you" --

THE COURT: Yes

⁸(ROA.1524, 1603, 1624).

⁹ (ROA.2590-2591).

¹⁰(ROA.1635, 1798).

¹¹ (ROA.1863-1867, 1995, 22-07, 2216-2219, 2393, 2408, 2526, 2530, 2543-2545, 2552-2571, 2607, 3231-3234).

¹²(ROA.597).

MR. VITAL: -- and ending with the word "fact," which represents in the Fifth Circuit, as Your Honor knows, a deliberate ignorance instruction. I believe it is inconsistent with the mens rea that is required for a conspiracy offense instruction. Perhaps it is applicable and okay for the substantive offense of count 2, but with respect to count -- counts 1 and 3 my objection is that it improperly lowers the burden of proof.

The law is that a conspiracy is a specific intent crime and by allowing the government to -- or allowing the instruction for deliberate ignorance we are lowering the mens rea necessary for the offense to be found by the jury.

And I would note that I've looked for authority for the proposition I'm talking about. I don't know if anybody has ever articulated the objection as specifically as I'm articulating it, but I think that deliberate ignorance is and/or should be inappropriate and not given in a conspiracy case.¹³

At sentencing, the court imposed a two level adjustment to Petitioner's Federal Sentencing Guidelines range for the security guards' possession of firearms at MRC.¹⁴ The defense objected unsuccessfully to the adjustment on the ground that the constitution did not permit an increased sentence on the basis of acquitted conduct.¹⁵ Petitioner received a sentence of 97 months.

B. Appeal

On appeal, Petitioner argued, *inter alia*, that the district court had erred in submitting a deliberate ignorance instruction to the jury. He also contended that the constitution forbids a sentence enhancement on the basis of acquitted conduct.

The court of appeals affirmed. It first concluded that the defendant's challenge to the deliberate ignorance instruction was incompletely preserved.¹⁶ The defendants, it reasoned, had objected to the use of a deliberate ignorance instruction in conspiracy cases; they had not, according to the court, objected to the absence of evidence of deliberate ignorance.¹⁷ But in spite of the plain

¹³(ROA.2772-2773).

¹⁴(ROA.33607).

¹⁵(ROA.33607).

¹⁶ See [Appx. A], *United States v. Oti*, 872 F.3d 678, 696-697 (5th Cir. October 3, 2017).

¹⁷See *id.*

error standard of review, the court agreed with all defendants in their assertion that the instruction was erroneously given.¹⁸ Even so, and following Fifth Circuit precedent, the court found that the instruction was necessarily harmless because the record contained “substantial evidence” of actual guilty knowledge:

Even though it was error for the district court to give the deliberate ignorance instruction when the government's theory was that Okechuku, Oti, and Iwuoha actually knew of the pill mill operation, we have held “that giving the instruction is harmless where there is substantial evidence of actual knowledge.” [*United States v. Kuhrt*, 788 F.3d [403,] 417 [(5th Cir. 2015)]; *see also United States v. St. Junius*, 739 F.3d 193, 204–05 (5th Cir. 2013) (“Even if the district court errs in its decision to give the deliberate ignorance instruction, any such error is harmless where substantial evidence of actual knowledge is presented at trial.”). That is the situation here. As discussed above, there was ample evidence presented at trial, including Ezenagu's testimony, that Okechuku, Oti, and Iwuoha each knew of the illegal purposes for which Jerry Reed and others used the clinic's services. Therefore, we conclude that any error in using the instruction was harmless and that Okechuku, Oti, and Iwuoha cannot show that the district court plainly erred in giving the instruction. *Kuhrt*, 788 F.3d at 418 (“[T]here was testimony that Appellants were actual participants in the illegal activity. Therefore, the error was harmless.”).¹⁹

The court also rejected the acquitted conduct challenge as foreclosed by controlling law.²⁰

¹⁸*See id.* at 697-699.

¹⁹*Id.* at 698-699.

²⁰*See id.* at 700, n.1.

REASON FOR GRANTING THE PETITION

I. The courts of appeals are divided as to the proper standard of prejudice in cases involving the erroneous submission of a deliberate ignorance instruction.

Nearly every court of appeals authorizes the submission of “deliberate ignorance” instructions to the jury.²¹ These instructions – also called “wilful blindness”²² or “ostrich”²³ charges – permit a jury to infer actual knowledge from evidence that a defendant sought to avoid knowing an incriminating fact. Such instructions require a defendant’s subjective awareness of a high probability that the fact existed, coupled with evidence that the defendant deliberately eschewed actual awareness.²⁴

Yet the courts have also recognized some serious dangers accompanying the instruction. Most concerning, the instruction may lead the jury to believe that it can convict the defendant on something less than actual knowledge, such as recklessness, negligence, the fact that the defendant should have known an essential fact, or “mere stupidity.”²⁵ Of equal concern, juries may interpret

²¹See *United States v. Epstein*, 426 F.3d 431, 440 (1st Cir. 2005); *United States v. Mang Sun Wong*, 884 F.2d 1537, 1543 (2d Cir. 1989); *United States v. Caminos*, 770 F.2d 361, 365 (3d Cir. 1985); *United States v. Whittington*, 26 F.3d 456, 461-62 (4th Cir. 1994); *United States v. Restrepo-Granda*, 575 F.2d 524, 528 n.2 (5th Cir. 1978); *United States v. Giovannetti*, 919 F.2d 1223, 1228 (7th Cir. 1991); *United States v. Cunningham*, 83 F.3d 218, 221 (8th Cir. 1996); *United States v. Baron*, 94 F.3d 1312, 1318 n.3 (9th Cir. 1996); *United States v. Fingado*, 934 F.2d 1163, 1167 (10th Cir. 1991); cf. *United States v. Alston-Graves*, 435 F.3d 331, 338-340 (D.C. Cir. 2006)(discussing cases where the instruction was approved or suggested in *dicta*).

²²See *United States v. Heredia*, 483 F.3d 913, 933, n.2 (9th Cir. 2007).

²³See *United States v. Forbes*, 64 F.3d 928, 934 (4th Cir. 1995).

²⁴See *Leary v. United States*, 395 U.S. 6 (1969); *United States v. Ebert*, 1999 U.S. App. LEXIS 8453, *36-37 (4th Cir. 1999)(unpublished)(collecting cases).

²⁵See *United States v. Cassiere*, 4 F.3d 1006, 1023 (1st Cir. 1993); *United States v. One 1973 Rolls Royce*, 43 F.3d 794, 809 n.13 (3d Cir. 1994); *United States v. Ojebode*, 957 F.2d 1218, 1229 (5th Cir. 1992); *United States v. Carrillo*, 435 F.3d 767, 781 (7th Cir. 2006); *United States v. Ciesiolka*, 614 F.3d 347, 353 (7th Cir. 2010); *United States v. Giovannetti*, 919 F.2d 1223, 1228 (7th Cir. 1990); *United States v. Barnhart*, 979 F.2d 647, 652 (8th Cir. 1992); *United States v. Hilliard*, 31 F.3d 1509, 1517 (10th Cir. 1994); *Alston-Graves*, 435 F.3d at 338; *United States v. Saucedo-Munoz*, 307 F.3d 344 (5th Cir. 2002)(“mere stupidity”).

the instruction to shift the burden of proof to the defendant.²⁶ For these reasons, such instructions are consistently discouraged by the courts of appeals.²⁷ And yet, in spite of repeated warnings against their use, “in the federal courts, willful blindness instructions ... are now commonly given and commonly upheld.”²⁸

Deliberate ignorance instructions are not permitted when the evidence compels “a ‘binary choice’ between ‘actual knowledge’ and ‘complete innocence.’”²⁹ The Fifth Circuit found that the evidence in this case compelled this kind of binary choice, and that the district court therefore erred in giving the instruction.³⁰ Yet it affirmed, because there was substantial evidence of actual knowledge.³¹ Its reasoning on the prejudice question presents a question that has divided the courts of appeals.

To be sure, the kind of error noted by the court below may not always be prejudicial. In cases involving overwhelming evidence of actual guilty knowledge, for example, the deliberate ignorance instruction may not influence the verdict.³² The influential Eleventh Circuit decision in *United*

²⁶See *United States v. Murrieta-Bejarano*, 552 F.2d 1323, 1324 (9th Cir. 1977); *United States v. de Francisco-Lopez*, 939 F.2d 1405, 1411 (10th Cir. 1991); *United States v. Sasser*, 974 F.2d 1544, 1552 (10th Cir. 1992).

²⁷See *United States v. Concha*, 233 F.3d 1249, 1252 (10th Cir. 2000) (“rarely appropriate”); *United States v. de Francisco-Lopez*, 939 F.2d 1405, 1409 (10th Cir. 1991)(same); *United States v. Ruhe*, 191 F.3d 376, 385 (4th Cir. 1999) (“rare circumstances”); *United States v. Prather*, 205 F.3d 1265, 1270 (11th Cir. 2000) (“rare cases”); *United States v. Ciesiolka*, 614 F.3d 347, 353 (7th Cir. 2010) (“must be given cautiously”); *United States v. Sanchez-Robles*, 927 F.2d 1070, 1073 (9th Cir. 1991)(should be used “sparingly”); *United States v. Mendoza-Medina*, 346 F.3d 121, 127 (5th Cir. 2003) (“We have often cautioned against the use of the deliberate ignorance instruction.”); *United States v. Mancuso*, 42 F.3d 836, 846 (4th Cir. 1994) (“wary” of the instructions”).

²⁸*Alston-Graves*, 435 F.3d at 338.

²⁹*Giovannetti*, 919 F.2d at 1228 (citing *United States v. Alvarado*, 838 F.2d 311, 315-16 (9th Cir. 1988)); accord *United States v. Ochoa-Fabian*, 935 F.2d 1139, 1142 (10th Cir. 1991); *United States v. Jones*, 664 F.3d 966, 979 (5th Cir. 2011).

³⁰See [Appx. A]; *United States v. Oti*, 872 F.3d 676, 696-697 (5th Cir. October 3, 2017).

³¹See *id.*

³²See *Concha*, 233 F.3d at 1252-1253 (overwhelming evidence of actual knowledge demonstrated harmlessness); *United States v. Adeniji*, 31 F.3d 58, 63-64 (2d Cir. 1994)(same); *Whittington*, 26

States v. Stone, 9 F.3d 934 (11th Cir. 1993), however, held that the a deliberate ignorance instruction could be harmless even if the record ***did not*** contain overwhelming evidence of actual knowledge.³³

In *Stone*, the district court instructed the jury “that deliberate ignorance may be treated as the equivalent of positive knowledge if the jury found ‘from all the evidence ***beyond a reasonable doubt*** that [Stone] believed a false and fraudulent claim was being made against the United States’ and consciously avoided confirming his belief.”³⁴ Because “the jury was clearly instructed that a precondition to its application of the deliberate ignorance instruction was proof beyond a reasonable doubt that Stone deliberately kept himself ignorant,” the *Stone* court found harmless error.³⁵ It did so even though “[t]he evidence of actual knowledge in this case was sufficient to support a guilty verdict but was not overwhelming.”³⁶ Reasoning that juries are presumed to follow their instructions, the Eleventh Circuit concluded that the jury would not have convicted on anything other than a finding of actual knowledge beyond a reasonable doubt.³⁷ Notably, the *Stone* court contrasted its view with that of three circuits that had already passed on the issue, including the Ninth Circuit’s opinion in *United States v. Mapelli*, 971 F.2d 284 (9th Cir. 1992).³⁸

The Eleventh Circuit has recently reaffirmed that a reasonable doubt instruction – requiring the jury to find deliberate ignorance beyond a reasonable doubt before convicting on that theory –

F.3d at 464 (same).

³³*Stone*, 9 F.3d at 937.

³⁴*Id.* at 938 (emphasis in *Stone*).

³⁵*Id.*

³⁶*Id.*

³⁷*See id.* at 938-942.

³⁸*See id.* at 941.

is a precondition to the application of its harmless error rule.³⁹ It is joined in that view by the Fourth and Tenth Circuits.⁴⁰

In contrast, two circuits do not follow *Stone*'s reasoning. The Seventh and Ninth Circuits simply apply ordinary standards of prejudice dictated by the general precedent of this Court.⁴¹ The Seventh Circuit, notably, has reversed a conviction for the erroneous submission of a deliberate ignorance instruction, even though "there [wa]s sufficient inculpatory evidence for a jury to find [guilty knowledge]," because "the evidence certainly d[id] not compel that conclusion."⁴² According to that court, "the relevant question must be: 'Is it clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error?'"⁴³ And that question can be answered in the affirmative only when the evidence of actual knowledge is "conclusive," not merely "sufficient" or even "very firm."⁴⁴

³⁹*United States v. Garcia-Benites*, 2017 U.S. App. LEXIS 12335, *11 (11th Cir. 2017)(unpublished)("We presume the jury did not convict 'on a deliberate ignorance theory for which there was insufficient evidence' *so long as* (1) the instruction 'clearly stated the proper legal standards for the jury to apply, and . . . did not apply if there was insufficient evidence to prove deliberate ignorance beyond a reasonable doubt,' ... and (2) 'the jury was also instructed that it could convict based on a theory of actual knowledge,' and 'there was sufficient evidence to support the convictions under that theory.'")(emphasis added)(quoting *United States v. Rivera*, 944 F.2d 1563, 1572 (11th Cir. 1991).

⁴⁰*See United States v. Whittington*, 26 F.3d 456, 464 (4th Cir. 1994)(declining to apply *Stone* "[b]ecause the willful blindness instruction delivered by the district court in the case at bar did not specifically instruct the jury that a precondition to application of the instruction was a finding of proof beyond a reasonable doubt that the defendant kept himself or herself ignorant...")(emphasis added); *United States v. Scott*, 37 F.3d 1564, 1578-1579 (10th Cir. 1994)(citing *Stone* and finding harmless error because "the instruction required, *as a precondition to its application*, proof of deliberate ignorance beyond a reasonable doubt")(emphasis added).

⁴¹The Seventh Circuit seems never to have cited *Stone*. The Ninth Circuit has cited it but not adopted it. *See Heredia*, 483 F.3d at 933, n.2.

⁴²*Ciesiolka*, 614 F.3d at 354-355.

⁴³*Id.* (quoting *Neder v. United States*, 527 U.S. 1, 18 (1999)).

⁴⁴*Id.* at 354.

So, too, in the Ninth Circuit. In *United States v. Mapelli*, 971 F.2d 284, 286 (9th Cir. 1992), the Ninth Circuit reversed the submission of a deliberate ignorance instruction for want of evidence that the defendant had consciously avoided guilty knowledge of tax evasion.⁴⁵ Critically, it reversed in spite of its explicit statement that the record contained sufficient evidence to convict on a theory of actual knowledge.⁴⁶ That the instruction required proof “beyond a reasonable doubt of a conscious purpose to avoid enlightenment” likewise did not save the conviction.⁴⁷ This fact establishes a clear and distinct conflict with the Eleventh Circuit’s holding in *Stone*.

The Fifth Circuit, by contrast, has adopted an even more expansive rule than *Stone*. It has repeatedly held that merely sufficient evidence of actual knowledge can show that a deliberate ignorance instruction is harmless.⁴⁸ Indeed, the Fifth Circuit permits a finding of harmlessness if the evidence of actual knowledge is merely “substantial.”⁴⁹ And in Petitioner’s case, it found no prejudice even though the charge never required the jury to find deliberate ignorance beyond a reasonable doubt.⁵⁰

The positions adopted by the courts of appeals are irreconcilable. In some parts of the country, the erroneous submission of a deliberate ignorance charge is not harmless unless the

⁴⁵See *Mapelli*, 971 F.2d at 284.

⁴⁶See *id.* at 286 (“The government presented evidence that Mrs. Mapelli was an officer of the corporation and worked in close proximity to her husband; that she had first-hand knowledge of the accounting system; and that she made significant deposits of currency from the business into the couple’s personal bank account. This was evidence that Mrs. Mapelli was knowingly skimming, not that she deliberately avoided knowing”), 287 (“This is not to say that the evidence could not go to the jury on a theory that Mr. and Mrs. Mapelli were lying about her claimed ignorance of the critical facts, and that she knew they were skimming. ... But that would be knowledge, not deliberate ignorance.”).

⁴⁷*Id.* at 285.

⁴⁸[Appx. A]; *United States v. Kuhrt*, 788 F.3d 403, 417 (5th Cir. 2015); *United States v. St. Junius*, 739 F.3d 193, 204-05 (5th Cir. 2013).

⁴⁹*Kuhrt*, 788 F.3d at 417; *St. Junius*, 739 F.3d at 204-05.

⁵⁰See (ROA.597)(“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.”).

evidence of actual knowledge is overwhelming. Elsewhere, the submission is not harmful unless the defendant would otherwise be acquitted for insufficient evidence of actual knowledge, so long as the charge requires proof of wilful blindness beyond a reasonable doubt. And the Fifth Circuit goes even further – it doesn’t even insist that the instruction require proof of wilful blindness beyond a reasonable doubt. This division of authority should be reconciled. As evinced above, the issue is litigated frequently,⁵¹ and the answer should not turn on the happenstance of geography.

This is an appropriate case to align the circuits on this issue. True, the Fifth Circuit applied the plain error standard of review. Assuming – *dubitante*⁵² – that the defendant’s objection to the deliberate ignorance charge was inadequate, the outcome of the case would still turn on the issue that has divided the courts of appeals. The Seventh and Ninth Circuits apply ordinary standards of prejudice to deliberate ignorance charge errors.⁵³ When error is unpreserved, Rule 52 requires only a reasonable probability of a different result but for the error.⁵⁴ This standard requires less than a preponderance of the evidence.⁵⁵ And it is not at all equivalent to the standard applied in the opinion below, which requires merely “substantial evidence” of actual knowledge.

⁵¹See Notes 21-49, *supra*.

⁵²As the court below acknowledged, the defendants timely objected to the submission of the deliberate ignorance instruction on the ground that it lowered the burden of proof in conspiracy cases. The court of appeals found this objection inadequate because it didn’t distinguish the instant case from conspiracy cases in which the instruction might be appropriate. The gravamen of the objection and the appeal, however, were the same – the instruction lowered the government’s burden of proof on intent. In further splitting the hair, the Fifth Circuit seems to have disregarded its practice of “never requir[ing] a party to express its objection in minute detail or ultra-precise terms” *United States v. Pineiro*, 470 F.3d 200, 204 (5th Cir. 2006). In the event that this Court grants *certiorari* on the Fifth Circuit’s rule of *per se* harmlessness in cases involving “substantial evidence” of actual knowledge, it may wish to address preservation and determine the proper standard of prejudice itself. Alternatively, it may wish to remand to the Fifth Circuit to apply the ordinary standards of Rule 52 as that court sees fit.

⁵³See *Ciesiolka*, 614 F.3d at 354-355; *Mapelli*, 971 F.2d at 284.

⁵⁴See *United States v. Dominguez-Benitez*, 542 U.S. 74, 82-83 (2004)(quoting *Strickland v. Washington*, 466 U.S. 668, 694 (1984)).

⁵⁵See *Dominguez-Benitez*, 542 U.S. at 83 & n.9.

Petitioner can show a reasonable probability of a different result but for the error. There was evidence that could cause a reasonable jury to doubt whether the defendant acted outside of appropriate medical practice. This included evidence that legitimate patient visits could be brief, and evidence that Dr. Okechuku ultimately authorized the prescriptions for patients Petitioner saw. Similarly, Dr. Okechuku's testimony could have caused a reasonable jury to doubt whether Petitioner Iwuoha was actually aware of the clinic's participation in prescription resale. The doctor testified that he implemented protocols to prevent the diversion of medicine. A reasonable jury could have inferred that Petitioner believed the clinic was attempting to comply with the law, or at least entertained a doubt on that score. The outcome of this case will thus likely depend on whether the Fifth Circuit's specialized standard of harm correctly states the law.

II. The use of acquitted conduct to increase a defendant's advisory Guideline range is an important question of federal constitutional law that should be settled by this Court.

A jury acquitted Petitioner Emmanuel Iwuoha of criminal responsibility for the firearm possession of his boss's security guards. Disregarding the jury verdict, a judge decided that these firearms were foreseeable to the defendant and within the scope of his conspiracy. This spectacle – the direct contradiction of a jury by a judge to the detriment of a criminal defendant – undermines the jury's historic role as a check on government power.

In *United States v. Watts*, 519 U.S. 148, 156 (1997)(*per curiam*), this Court held that the double jeopardy clause permits sentencing courts to increase a defendant's mandatory Guideline range on the basis of acquitted conduct.⁵⁶ This narrow holding of *Watts* is now of little practical significance, if it has not been entirely overruled. *United States v. Booker*, 543 U.S. 220 (2005), subsequently held that judicial fact-finding violates the Sixth Amendment right to a jury trial when it increases the defendant's maximum sentence under mandatory Guidelines.⁵⁷ Further, this Court

⁵⁶See *Watts*, 519 U.S. at 156.

⁵⁷See *United States v. Booker*, 543 U.S. 220, 226 (2005).

has treated *Watts* as a narrow double jeopardy holding, having limited application to the Sixth Amendment or to due process.⁵⁸ Under advisory Guidelines, a judge may determine the defendant's Guideline range on the basis of his or her own fact-finding.⁵⁹ But this Court has not yet decided whether a judge may, after *Booker*. This is an important matter of federal constitutional law that should be settled by this Court.

The Sixth Amendment interposes the jury between the defendant and the government “‘to guard against a spirit of oppression and tyranny on the part of rulers,’ and ‘was from very early times insisted on by our ancestors in the parent country, as the great bulwark of their civil and political liberties.’”⁶⁰ For that reason, a defendant may not be convicted without a jury finding of every element of the crime.⁶¹ Nor may he or she suffer a higher maximum,⁶² or minimum,⁶³ punishment without a jury finding of every fact essential to the sentence.

As *Watts* noted, sentencing determinations need not be made using the same standard of proof that prevails at trial. Accordingly, a finding that the defendant vicariously possessed the firearm's of his employers security guards is, in some precise analytical sense, consistent with the jury's acquittal.⁶⁴ But this distinction is too fine to serve the purpose of the Sixth Amendment jury

⁵⁸ See *Booker*, 543 U.S. at 240 (“In *Watts*, relying on *Witte* [*v. United States*, 515 U.S. 389 (1995)], we held that the Double Jeopardy Clause permitted a court to consider acquitted conduct in sentencing a defendant under the Guidelines. In neither *Witte* nor *Watts* was there any contention that the sentencing enhancement had exceeded the sentence authorized by the jury verdict in violation of the Sixth Amendment.”)

⁵⁹ See *id.* at 259-260.

⁶⁰ *United States v. Gaudin*, 515 U.S. 506, 515 (1995) (quoting 2 J. Story, *Commentaries on the Constitution of the United States* §§1779, 1780, pp. 540-541 (4th ed. 1873)).

⁶¹ See *Gaudin*, 515 U.S. at 515.

⁶² *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000),

⁶³ *Alleyne v. United States*, 570 U.S. 99, 133 S.Ct. 2151, 2155 (2013).

⁶⁴ See *Watts*, 519 U.S. at 156 (quoting *Dowling v. United States*, 493 U.S. 342, 349 (1990)) (“an 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.”).

trial requirement. To the casual observer, sentencing on the basis of acquitted facts declares the jury impotent in the face of state power. Indeed, extensive judicial criticism of the *Watts* rule suggests that this impression is conveyed as well to the less-than-casual onlooker.⁶⁵ As a concurring opinion of the Second Circuit argued, “[a] just system of criminal sentencing cannot fail to distinguish between an allegation of conduct resulting in a conviction and an allegation of conduct resulting in an acquittal.”⁶⁶ No onlooker having seen the tension between judge and jury resolved in favor of the government would think “the jury today has stood ‘as the great bulwark of [our] civil and political liberties.’”

At Founding, most judges had an extremely limited role in sentencing – they simply translated the jury’s finding into the punishment affixed by the law.⁶⁷ There is, of course, no constitutional impediment to a broader sentencing range, nor to assigning judges rather than juries the task of choosing within the range.⁶⁸ But here the judge has done something no judge was empowered to do at founding: impose sentence on a factual basis that is affirmatively opposed to the jury’s findings.

⁶⁵See *United States v. Concepcion*, 983 F.2d 369, 396 (2d Cir.1992) (Newman, J., concurring); see also *United States v. Pimental*, 367 F.Supp.2d 143, 150 (D. Mass. 2005)(“In effect, juries rule on ‘legal guilt, guilt determined by the highest standard of proof we know, beyond a reasonable doubt. And when a jury acquit[s] a defendant based on that standard, one would have expected no additional criminal punishment would follow.’”)(quoting Judge Nancy Gertner, *Circumventing Juries, Undermining Justice: Lessons from Criminal Trials and Sentencing*, 32 Suffolk U.L.Rev. 419, 433 (1999); *United States v. Faust*, 456 F.3d 1342, 1350 (11th Cir. 2006)(Barkett, J., concurring)(criticizing *Watts* on the ground that “it is not the abstract dignity of the statutory maximum that is at stake in the Supreme Court’s Sixth Amendment jurisprudence, but the integrity of the jury right itself, the cornerstone of our criminal justice system.”); *United States v. Coleman*, 370 F.Supp.2d 661, 671 (S.D. Ohio 2005)(“[T]he jury’s central role in the criminal justice system is better served by respecting the jury’s findings with regard to authorized and unauthorized conduct.”).

⁶⁶*Concepcion*, 983 F.2d at 396 (Newman, J., concurring)

⁶⁷See *Alleyne*, 133 S.Ct. at 2158 (citing *United States v. Grayson*, 438 U.S. 41, 45 (1978), and *Commonwealth v. Smith*, 1 Mass. 245 (1804)).

⁶⁸See *Dillon v. United States*, 560 U.S. 817, 827-829 (2010).

A defendant's Guideline sentencing range determines his sentence in most cases, and influences the sentence in almost all of them.⁶⁹ When the jury's findings are disregarded by the district court upon a lesser standard of proof, the power of the jury is unconstitutionally invaded, and the democratic nature of our government is undermined.

CONCLUSION

Petitioner respectfully submits that this Court grant *certiorari* to review the judgment of the United States Court of Appeals for the Fifth Circuit. Alternatively, he prays for such relief as to which he may justly entitled.

Respectfully submitted this 2d day of January, 2018.

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⁶⁹See *Molina-Martinez v. United States*, __U.S.__, 136 S.Ct. 1338, 1346 (2016).