

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
Reply Brief in Support of Petition for Certiorari

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PETITIONER’S REPLY BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

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.

A. The government’s merits argument is not a reason to deny review. Further, it is incorrect.

The government chiefly stakes its opposition to review on a merits argument: that juries follow instructions.¹ Accordingly, argues the government, a jury is simply not likely to convict a defendant for deliberate ignorance in the absence of evidence.² Of course, none of this provides a reason to deny review: uniformity in federal law is a value independent of the outcome.

The government’s merits argument also ignores the particular dynamics of deliberate ignorance instructions. Correctly, the government notes a general presumption that juries will follow their instructions.³ It analogizes the improper provision of deliberate ignorance instructions to another kind of instructional error: instructions that authorize conviction on theories unsupported by the evidence.⁴ This Court has held that this latter kind of error need not be reversed, because juries are unlikely to convict on theories without evidence.⁵

But deliberate ignorance instructions carry special risks of wrongful conviction not present in other kinds of instructional error. The challenged instruction deals with the notoriously elusive concept of a defendant’s mental state.⁶ To a jury of lay citizens, the difference between a “conscious

¹ See Brief for the United States in Opposition to Certiorari (“Brief in Opposition”), at pp.9-12.

² See Brief in Opposition, at pp.9-12.

³ See *Richardson v. Marsh*, 481 U.S. 200 (1987).

⁴ See Brief in Opposition, at pp.11-12.

⁵ See *Griffin v. United States*, 502 U.S. 46 (1991).

⁶ *United States v. Heredia*, 483 F.3d 913, 918 (9th Cir. 2007)(*en banc*)(referring to deliberate ignorance precedent as “a somewhat perplexing body of caselaw.”); *Dun & Bradstreet, Inc. v. Grove*, 404 U.S. 898, 902 (1971)(Douglas, J., dissenting from denial of certiorari)(“Proof of knowledge that a statement is false requires slippery proof of a mental state, as does a showing of reckless disregard.”); *Bottazzi v. Petroleum Helicopters, Inc.*, 664 F.2d 49, 50-51 (5th Cir. 1981) (“‘Mind’ is

disregard of risk” (recklessness) and a “defendant deliberately clos[ing] his eyes to what would otherwise have been obvious to him” (deliberate ignorance) may seem blurry indeed. Thus, the courts of appeals has consistently discouraged deliberate ignorance instructions.⁷ Indeed, the particular concern that such instructions will be thought to authorize conviction upon mere recklessness – or less – is extremely widespread.⁸ The problem is not simply the jury’s willingness to follow its instructions, but the risk of jury confusion in this most difficult area of criminal law.

In cases where the evidence supports a finding of deliberate ignorance, that risk is justified by the need to let the prosecution prove its case. After all, deliberate ignorance, may “constitute[] an awareness of so high a probability of the existence of the fact as to justify an inference of knowledge of it.”⁹ And the prosecution has never been prevented from obtaining conviction merely because the law is complicated. But when the evidence does not support a deliberate ignorance finding, the instruction simply offers a gratuitous risk of conviction on a lower burden of proof. Indeed, where no evidence of wilful blindness exists, the jury is *more likely* to reduce the

a slippery concept, mental and psychological states and their causes more so; but surely the psychological state of a given person at a given time is a unitary matter.”); *State v. Rodriguez*, 429 A.2d 919 (Conn. 1980)(“The state of mind of one accused of a crime is often the most significant and, at the same time, the most elusive element of the crime charged.”)

⁷ See *United States v. Concha*, 233 F.3d 1249, 1252 (10th Cir. 2000); *United States v. de Francisco-Lopez*, 939 F.2d 1405, 1409 (10th Cir. 1991); *United States v. Ruhe*, 191 F.3d 376, 385 (4th Cir. 1999); *United States v. Prather*, 205 F.3d 1265, 1270 (11th Cir. 2000); *United States v. Ciesiolka*, 614 F.3d 347, 353 (7th Cir. 2010); *United States v. Sanchez-Robles*, 927 F.2d 1070, 1073 (9th Cir. 1991); *United States v. Mendoza-Medina*, 346 F.3d 121, 127 (5th Cir. 2003); *United States v. Mancuso*, 42 F.3d 836, 846 (4th Cir. 1994)(“wary” of the instructions).

⁸ See *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 (3^d 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); *United States v. Alston-Graves*, 435 F.3d 331, 338 (D.C. Cir. 2006); *United States v. Saucedo-Munoz*, 307 F.3d 344 (5th Cir. 2002); *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).

⁹ *United States v. Restrepo-Granda*, 575 F.2d 524, 529 (5th Cir. 1979).

prosecution's burden of proof of actual knowledge. The jury is unlikely to believe that the instruction was offered gratuitously, and is therefore more likely to give it the only effect possible – to lower the prosecution's burden of proof on the intent element.

None of this was remotely at issue in *Griffin v. United States*, 502 U.S. 46 (1991), cited by the government. In *Griffin* the jury was instructed that it could convict on the basis of a conspiracy against the operations of the IRS or a conspiracy against the operations of the DEA.¹⁰ Where the jury heard no evidence of a conspiracy against the DEA, the instruction posed no risk of confusion.¹¹ Certainly, it posed no risk of confusion comparable to that potentially engendered by a deliberate ignorance instruction. Accordingly, it is no conflict with *Griffin* to say that deliberate ignorance instructions are not harmless *per se* where the evidence does not support them.

B. Substantial divisions of authority regarding the prejudice analysis in cases involving erroneous deliberate ignorance instructions merit the court's attention. They are directly implicated by the instant case.

Merits aside, there is plainly a division of authority on the proper standard of prejudice in deliberate ignorance cases. The government concedes as much, but quibbles over the depth and significance of the circuit split.¹² At least one circuit, however, has expressly recognized the split.¹³ Further, the government's effort to show the uniformity of existing law – picking through each adverse precedent in search of some reason to regard it – hardly demonstrates a national consensus in its favor. The issue is frequently litigated, and involves a critical protection against wrongful conviction, namely, fair instructions regarding the required mental state. *Certiorari* is appropriate.

¹⁰ See *Griffin*, 502 U.S. at 47-49.

¹¹ See *id.* at 59.

¹² See Brief in Opposition, at p.15 (“Petitioner Okechuku correctly points out ... that four other courts of appeals have applied a slightly different harmless-error standard in some of their decisions.”)

¹³ See *United States v. Stone*, 9 F.3d 934, 941 (11th Cir. 1993).

- 1. The circuits are divided as to whether sufficient evidence of actual knowledge necessarily implies the absence of prejudice, irrespective of the content of the deliberate ignorance instruction; the present case implicates this split.**

According to the government, the “majority position” finds harmless error under the following conditions:

(where the challenged) 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.¹⁴

But this notably is not the position of the Fifth Circuit, and was not the rule applied below. Nor did the instruction provided to Dr. Iwuoha’s jury meet these standards. The Fifth Circuit will find harmless error so long as there is sufficient evidence of actual knowledge to convict,¹⁵ a rule the government endorses.¹⁶ As a consequence, both the rationale of the decision below and the government’s defense of it have been rejected by a majority of the circuits.

The government maintains that one of the extra precautions required by the majority position is implicit from a general reasonable doubt instruction: the requirement that the jury find evidence of deliberate ignorance beyond a reasonable doubt as a precondition to using this theory.¹⁷ But, again, this ignores the dynamics particular to deliberate ignorance instructions. A jury instructed that it may substitute a lesser mental state for actual knowledge is likely to understand that the burden of proof on the *mens rea* element has been reduced. In any case, the view of the government – that a specific reasonable doubt instruction regarding deliberate ignorance is unnecessary – is not the view of many

¹⁴ Brief in Opposition at p.13.

¹⁵ See [Appx. A, at p.27]; *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).

¹⁶ See Brief in Opposition, at pp.9-12.

¹⁷ See Brief in Opposition, at pp.14-15.

courts of appeals.¹⁸ Because the district court did not require a specific finding of deliberate ignorance beyond a reasonable doubt here, this Court may resolve the conflict by taking the case.¹⁹

2. The circuits are divided as to whether overwhelming evidence of actual knowledge is necessary to show the absence of prejudice; this case implicates that disagreement.

The government notes six opinions from four circuits that all require overwhelming evidence of actual knowledge to find harmless error.²⁰ This volume of conflicting precedent should not be overlooked based on the government's case-by-case efforts to discredit each individual authority. They represent a significant current of judicial opinion that is likely to impact future decisions.

Without question, at least the Seventh and Ninth Circuits apply a rule more favorable to the defense than the government's "majority position." Following the ordinary standards of prejudice

¹⁸ See *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); *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).

¹⁹ The companion Petition erroneously states that this issue was not presented in Dr. Iwuoha's Petition for Certiorari. The three-way split between the circuits is encompassed by Dr. Iwuoha's Question Presented, and fully discussed in the body of the Petition. Both cases well-present the issue.

²⁰ See Brief in Opposition, at pp.15-16 (citing *United States v. Barnhart*, 979 F.2d 647 (8th Cir. 1992), *United States v. Covington*, 133 F.3d 639, 644-645 (8th Cir. 1998), *United States v. Mapelli*, 971 F.2d 284, 287 (1992); *United States v. Sanchez-Robles*, 927 F.2d 1070, 1075-1076 (1991), *United States v. Quinones*, 635 F.3d 590, 595 (2d Cir. 2011), and *United States v. Macias*, 786 F.3d 1060, 1063 (7th Cir. 2015)).

enunciated in Federal Rule of Criminal Procedure 52, these courts require overwhelming evidence of actual knowledge to disregard an erroneous submission of deliberate ignorance.²¹

The government's efforts to minimize this clear division of authority do not represent a persuasive view of the law in the Seventh and Ninth Circuits. As to the Ninth Circuit, *United States v. Mapelli*, 971 F.2d 284, 286 (9th Cir. 1992), reversed a conviction in spite of an explicit finding that there was sufficient evidence of actual knowledge to convict.²² The government contends that *Mapelli* has been undermined by *United States v. Heredia*, 483 F.3d 913 (9th Cir. 2007)(*en banc*).²³ But *Heredia* did not find the submission of a deliberate ignorance instruction to be error on the facts of the case, so it had no occasion to pass on the question of harm.²⁴ Further, it explicitly instructed district courts **not** to submit deliberate ignorance instructions in the absence of supporting evidence for that theory, even as it cited *Griffin*.²⁵ These words of caution would be irrelevant if the error were in every case harmless, as the government contends. And the court in *Heredia* also expressly required the jury to find deliberate ignorance beyond a reasonable doubt.²⁶ And it noted that the jury in that case was cautioned against finding guilt on mere negligence.²⁷ Neither of those precautions are required in the Fifth Circuit, and neither were implemented by the district court. The rule applied by the Ninth Circuit – even after *Heredia* – would have required reversal in this case.

²¹ See *United States v. L.E. Myers Co.*, 562 F.3d 845, 855 (7th Cir. 2009); *United States v. Ciesiolka*, 614 F.3d 347, 355 (7th Cir. 2010); *United States v. Macias*, 786 F.3d 1060, 1063 (7th Cir. 2015); *United States v. Mapelli*, 971 F.2d 284, 286 (9th Cir. 1992).

²² See *Mapelli*, 971 F.2d at 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.”)

²³ See Brief in Opposition at p.17.

²⁴ See *Heredia*, 483 F.3d at 923.

²⁵ See *id.* at 924.

²⁶ See *id.*

²⁷ See *id.*

The Seventh Circuit's precedent²⁸ likewise conflicts directly with those that do not require overwhelming evidence of actual knowledge. Like the Ninth Circuit, the Seventh Circuit has reversed the error at bar where the evidence of actual knowledge fell between sufficient and overwhelming.²⁹ It did so in *United States v. Ciesiolka*, 614 F.3d 347 (7th Cir. 2010), where it 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."³⁰ The circuit split, in other words, alters the outcome, and is not merely theoretical.

The government seeks to minimize the significance of conflicting Seventh Circuit decisions on two grounds. First, it notes that the Seventh Circuit applied a higher standard of prejudice in *Ciesiolka* because it believed the error to be constitutional in nature.³¹ As well it should have – the risk that a jury will be confused about the standard of proof on a critical element is undoubtedly a concern of constitutional dimension.³² Anyway, the government's disagreement with the Seventh Circuit's rationale does not show uniformity in federal law.

Second, the government points to earlier Seventh Circuit cases that it believes to follow "the majority rule."³³ It thus suggests that the Seventh Circuit might spontaneously reject the holding of *Ciesiolka* in favor of its earlier precedents.³⁴ This is not what is happening in the Seventh Circuit. Rather, the holding of *Ciesiolka* was reaffirmed in *United States v. Macias*, 786 F.3d 1060, 1063 (7th

²⁸ The government mistakenly asserts that only Petitioner Okechuku asserted a conflict with the Seventh Circuit. This is not correct. *See* Petition for Certiorari of Emmanuel Iwuoha, at p.11.

²⁹ *See Ciesiolka*, 614 F.3d at 354-355 .

³⁰ *See id.*

³¹ *See* Brief in Opposition, at p.19, n.4.

³² *See Sullivan v. Louisiana*, 508 U.S. 275 (1993).

³³ *See* Brief in Opposition, at pp.18-19 (citing *United States v. Salinas*, 763 F.3d 869 (7th Cir. 2014), and *United States v. Malewicka*, 664 F.43d 1099 (7th Cir. 2011))

³⁴ *See* Brief in Opposition, at p.19.

Cir. 2015).³⁵ Notably, also, this argument contradicts the government’s view of Eighth Circuit law, where it maintained that an earlier precedent, *United States v. Barnhart*, 979 F.2d 647 (8th Cir. 1992), could be disregarded in light of the later precedent, *United States v. Hernandez-Mendoza*, 611 F.3d 418 (8th Cir. 2010).³⁶ Further, the government dismisses at least one Seventh Circuit authority requiring overwhelming evidence of actual knowledge that predates *Ciesiolka*.³⁷

The Ninth and Seventh Circuits require overwhelming evidence of actual knowledge, reflecting the ordinary standards of prejudice under Rule 52 as those courts interpret it. This requirement has clearly survived *Griffin*. This demonstrates a clear circuit split, worthy of review.

C. The present case is an appropriate vehicle.

The court below expressly found error in the submission of the deliberate ignorance in this case.³⁸ It expressly applied a *per se* rule of no-prejudice where the government introduces sufficient evidence of actual knowledge.³⁹ And the evidence was not so one-sided as to make the standard of prejudice irrelevant to the outcome. These facts together demonstrate the wisdom of taking the case at bar to resolve the long-standing circuit split.

1. The shift in the burden of persuasion does not justify the Fifth Circuit’s *per se* rule of no-prejudice.

The government maintains that review should be denied because the court below applied plain error review.⁴⁰ That fact does not affect the suitability of the instant case to test the *per se* rule of no-prejudice. Because the absence of preservation shifts the burden of persuasion on prejudice,

³⁵ See *Macias*, 786 F.3d at 1063.

³⁶ See Brief in Opposition, at p.15.

³⁷ See *United States v. L.E. Myers Co.*, 562 F.3d 845, 855 (7th Cir. 2009); *United States v. Ciesiolka*, 614 F.3d 347, 355 (2010).

³⁸ [Appx. A, at p.25].

³⁹ [Appx. A, at p.27] (“giving the instruction is harmless where there is substantial evidence of actual knowledge.”)(quoting *Kuhrt*, 788 F.3d at 417).

⁴⁰ See Brief in Opposition, at p.19.

we may assume that it would affect the required showing of actual knowledge required to disregard the error.⁴¹ But it would not permit the irrebutable presumption – employed by the court below, and defended by the government here – that there is *never* prejudice if the evidence of actual knowledge is sufficient to sustain a conviction. Rather, when a reviewing court finds plain error, it should reverse if there is a reasonable probability of a different result.⁴² That showing is less even than a preponderance of the evidence.⁴³ Rather it is defined as a probability sufficient to undermine confidence in the outcome.⁴⁴ A plausibly contested case on intent should be enough to satisfy this standard.

Alternatively, the preservation holding below does not withstand scrutiny. “[A]n objection which is ample and timely to bring the alleged . . . error to the attention of the trial court and enable it to take appropriate corrective action is sufficient to . . . preserve the claim for review.”⁴⁵ Petitioner’s district court objection easily met this standard. That objection alerted the court to the defense contention: that the instruction lowered the government’s burden of proof on intent. The district court thus had ample reason to consider the propriety of the challenged instruction. Indeed, the government does not even try to defend this aspect of the Fifth Circuit’s ruling. This Court has the authority to re-evaluate the preservation ruling in order to decide the question presented.⁴⁶ If it does, it will reach the merits.

⁴¹ See *United States v. Olano*, 507 U.S. 725, 734 (1993).

⁴² See *United States v. Dominguez-Benitez*, 542 U.S. 74, 83 (2004).

⁴³ See *Dominguez-Benitez*, 542 U.S. at 83, n.9.

⁴⁴ See *id.* at 83.

⁴⁵ *Osborne v. Ohio*, 495 U.S. 103, 125 (1990)(quoting *Douglas v. Alabama*, 380 U.S. 415, 422 (1965)); see also *United States v. Pineiro*, 470 F.3d 200, 204 (5th Cir. 2006)(adopting this standard for the application of Fed. R. Crim. P. 51).

⁴⁶ See *United States v. Hasting*, 461 U.S. 499, 510 (1983)(observing that the Court “plainly has the authority” to address questions like harm that determine disposition of the case).

2. The government’s suggestion that error is not plain should not defeat review.

While the government suggests that the error is not plain,⁴⁷ this is at odds with the opinion below, which proceeded all the way to the prejudice prong of the plain error inquiry.⁴⁸ Further, the government’s suggestion that all evidence of actual knowledge is necessarily evidence of deliberate ignorance is at odds with a consensus of the courts of appeals. These courts do not permit submission of the instruction where the evidence permits only a binary choice between actual knowledge and deliberate ignorance.⁴⁹ Accordingly, they reject the notion that some evidence of actual knowledge is necessarily some evidence of deliberate ignorance. The government, indeed, itself rejects this notion. It maintains – relying on *Griffin* – that a jury will necessarily reject a deliberate ignorance theory of conviction when there is evidence of actual knowledge but none of deliberate ignorance.

3. The evidence of actual knowledge is not overwhelming.

The government maintains that overwhelming evidence of actual knowledge would produce the same result under any standard, but this relies on a slanted view of the record.⁵⁰ Concentrating on Petitioner Okechuku, the government notes only one fact that pertains directly to Petitioner Iwuoha’s knowledge:

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.⁵¹

This is hardly evidence so overwhelming that it could withstand scrutiny under any standard of prejudice. Putting aside the qualifier “almost” in “almost invariably,” the government ignores expert

⁴⁷ See Brief in Opposition, at pp.21-22.

⁴⁸ See [Appx. A at p.27].

⁴⁹ See *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).

⁵⁰ See Brief in Opposition, at p.19.

⁵¹ Brief in Opposition, at p.20.

testimony from the defense that visits of this duration might be medically appropriate in some cases.⁵² Notably, the court below actually addressed a sufficiency of the evidence challenge from Dr. Iwuoha; it did not characterize the evidence of guilt as overwhelming.⁵³ Rather, it relied on the proposition that credibility determinations must be resolved in favor of the verdict.⁵⁴ This places the present case in the zone between insufficient and overwhelming evidence of actual knowledge, where the Seventh and Ninth Circuits have reversed.

The government finally argues that the Petition should be denied because the Court has previously denied review, and, it says “[n]o reason exists for a different result in this case.”⁵⁵ But a review of available Briefs in Opposition shows case-specific claims against review advanced in the most recent cases.⁵⁶ These prior cases demonstrate the persistence of an important division of authority, as the government labors to find case-specific reasons to deny review. This could continue indefinitely.

⁵² (ROA.2329).

⁵³ See [Appx. A, at p.9].

⁵⁴ See [Appx. A, at p.9, n.7].

⁵⁵ Brief in Opposition, at p.10

⁵⁶ See Brief in Opposition in *Lopez v. United States*, 15-517, 2016 WL 369498, at *14 (Filed January 29, 2016) *certiorari denied* 136 S.Ct. 1376 (2016)(“...this case is an unsuitable vehicle for addressing the question petitioners present because the court of appeals did not decide whether the district court erred in giving the instruction and petitioners would not prevail even under the harmless-error standard that they advocate.”); Brief in Opposition in *Geisen v. United States*, 10-720, 2011 WL 792956, at *27 (March 4, 2011) (“Regardless, this case does not present a suitable vehicle for determining the proper approach to the harmless-error issue, for two reasons. First, petitioner’s claim is based on the premise that there was an insufficient factual basis for the deliberate-ignorance instruction. ... Second, any error would be harmless even on the standard most favorable to petitioner.”).

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.

The Sixth Amendment interposes the jury between the defendant and the government in order to ensure democratic control of the criminal apparatus.⁵⁷ That function is radically undermined when the jury’s finding is simply disregarded by the sentencing court *en route* to a higher Guideline range. The Sixth Amendment implications of this troubling practice are an open question that ought to be settled by this Court.

The government suggests that the issue is settled by *United States v. Watts*, 519 U.S. 148 (1997), but that view is incorrect for two reasons.⁵⁸ First, *Watts* has been treated as a narrow double-jeopardy holding.⁵⁹ It does not determine the defendant’s rights under the jury trial guarantee of the Sixth Amendment.⁶⁰ Second, *Watts* was undercut by *United States v. Booker*, 543 U.S. 220 (2005), which held that the use of judge-found facts to increase a defendant’s sentence under mandatory Guidelines violates the Sixth Amendment.⁶¹ This is so even if the judge’s findings do not contradict the jury’s. *A fortiori*, the constitution would no longer permit judge-found findings to increase mandatory Guidelines if they *did in fact* contradict the jury’s.

The government points to the constitutional permissibility of judge-made findings under advisory Guidelines.⁶² That is not at issue. It is one thing for a judge to resolve a factual dispute that

⁵⁷ See *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)).

⁵⁸ Brief in Opposition, at p.23.

⁵⁹ 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.”).

⁶⁰ See *id.*

⁶¹ See *id.* at 226.

⁶² See Brief in Opposition, at p.24.

is never presented to a jury, for the sake of efficiency. But when a jury's acquittal is *affirmatively contradicted* at sentencing, the democratic function of that institution is undermined – both perceptually and practically – in a different and more severe way. The former practice authorized by *Booker* simply allots different questions to judge and jury, and renders each sovereign in its own realm. The latter practice – the one undertaken to Dr. Iwuoha's detriment below – has each institution answer the same question, and holds the judge's answer binding as against the jury's. It sends a clear message that an unelected government official – the judge – has more power than the people themselves in determining the outcome of their fellow citizen's criminal case.

Accordingly, neither *Booker* nor *Watts* address the constitutional issue at bar: whether the Sixth Amendment guarantee of a jury trial permits the judge to increase the defendant's advisory Guideline range on the basis of acquitted conduct. And to the extent that *Watts* inferentially addresses this issue, it has been discredited by *Booker*.

The government correctly notes the absence of a circuit split on this issue.⁶³ But while there is no formal split in the holdings of the lower courts, there is hardly an absence of dissension. The use of acquitted conduct at sentencing has been roundly criticized by federal judges.⁶⁴ And this Court has not always awaited a division of authority to rectify a widespread violation of fundamental

⁶³ See Brief in Opposition, at p.24.

⁶⁴ See *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.”).

constitutional rights.⁶⁵ The case is thus like *Alleyne v. United States*, where lower courts were uniform in their holdings that the constitution permits judges to find the facts that trigger the mandatory minimum, but where many judges criticized the rule.⁶⁶

The instant case is like *Alleyne* in another respect – it involves the relative primacy of judge and jury. These are the strongest cases for intervention in the absence of a circuit split, because they are those in which the judiciary’s view of the constitution is most institutionally suspect. Even a uniform agreement among judges that they should have more power than the people should not prevent constitutional review of that conclusion. And there is nothing but uniform agreement.

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 20th day of April, 2018.

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⁶⁵ See Petition for Certiorari in *Alleyne v. United States*, No. 11-9335, 2012 WL 4750325 (Filed, March 14, 2012)(identifying no controlling holding that supported the Petitioner’s view in any court), *granted* 568 U.S. 936 (October 5, 2012).

⁶⁶ See Petition for Certiorari in *Alleyne*, 2012 WL 4750325, at *10-12.