No. 99-1511

In the Supreme Court of the United States

PETER HALAT, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court properly instructed the jury that it could infer knowledge from deliberate ignorance.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-34a) is reported at 193 F.3d 852.

JURISDICTION

The judgment of the court of appeals was entered on October 20, 1999. A petition for rehearing was denied on December 14, 1999 (Pet. App. 35b-36b). The petition for a writ of certiorari was filed on March 13, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Mississippi, petitioner was convicted of conspiring to violate the racketeering statute, in violation of 18 U.S.C. 1962(c); obstruction of justice, in violation of 18 U.S.C. 1503; conspiring to obstruct justice, in violation of 18 U.S.C. 371; and conspiracy to commit wire fraud, in violation of 18 U.S.C. 371.[1] He was sentenced to 216 months' imprisonment, to be followed by a five-year term of supervised release. The court of appeals affirmed. Pet. App. 1a-34a.

1. Petitioner's convictions arose from his involvement in the prison-based criminal activities of Kirksey McCord Nix and the murders of Vincent and Margaret Sherry. Those events resulted in the 1991 convictions of Nix and Sheri LaRa Sharpe for fraud, conspiracy to commit murder-for-hire, and related offenses. See *United States* v. *Sharpe*, 995 F.2d 49 (5th Cir.), cert. denied, 510 U.S. 885 (1993). Following the 1991 trial, new facts came to light implicating petitioner and Thomas Holcomb in those matters. As a result of the new information, a grand jury issued a 52-count indictment against petitioner, Nix, Holcomb, and Sharpe. Following a new trial, Nix and Sharpe were again

[1] Petitioner was acquitted of violating the racketeering statute and four counts of obstruction of justice; one obstruction of justice count was dismissed. Co-conspirator Kirksey McCord Nix, Jr. was convicted of RICO conspiracy, substantive RICO, conspiracy to escape from federal custody, money laundering, wire fraud, conspiracy to obstruct justice, and conspiracy to commit wire fraud; co-conspirator Sheri LaRa Sharpe was convicted of obstruction of justice and conspiracy to obstruct justice; and co-conspirator Thomas Leslie Holcomb was convicted of RICO conspiracy and conspiracy to obstruct justice.

convicted, and petitioner and Holcomb were also convicted for their respective roles in the affairs. Pet. App. 2a.

a. While serving a life sentence for murder at Angola State Penitentiary in Louisiana, Nix built a criminal empire from which he hoped to earn enough money to buy his way out of prison. Although the enterprise generated some money from insurance fraud and drug dealing, its primary money-making scheme was a scam designed to defraud homosexual men. Nix and his prison syndicate would place personal advertisements in national homosexual magazines, and, when men would respond to them, Nix or one of his associates would indicate that he was having financial difficulties and request the respondent to wire money to a Nix associate outside prison. Nix took in hundreds of thousands of dollars from this scam. Pet. App. 2a-3a; Gov't C.A. Br. 8-10.

Mike Gillich, the alleged "underworld boss" of Biloxi, Mississippi, aided Nix in his various schemes. Petitioner, a Biloxi attorney, who was aware of Nix's scam, maintained a trust account for Nix. Although Nix had no known means of generating money, petitioner allowed Nix to run thousands of dollars through this trust account. Moreover, bank statements for Nix's main bank account at the State National Bank of Eufaula, in Oklahoma, were sent to petitioner's office. On one occasion, while driving to see Nix at Angola, petitioner explained to Gillich that Nix was making a lot of money through the scam, and petitioner later showed Gillich the bank statement. Although petitioner claimed Nix was a client, petitioner never filed any pleadings or performed any legal services for Nix, and never billed him for any services. Pet. App. 3a; Gov't C.A. Br. 10a-12a & n.14.

Nix's girlfriend, LaRa Sharpe, also assisted in the schemes. Although she was not an employee of petitioner's firm, petitioner gave her complete run of his office. Sharpe and petitioner rented a safety deposit box, to which only they had access, in which they kept cash generated by Nix's operations. Moreover, petitioner submitted numerous affidavits to the Angola Prison, in which he falsely swore that Sharpe was a paralegal employed by him, and in which he gave her "attorney-client" privileges to visit Nix and his associates. Pet. App. 3a; Gov't C.A. Br. 11-12.

In December 1986, while petitioner and Gillich drove to Angola State Penitentiary to visit Nix, petitioner told Gillich that approximately $100,000 of Nix's "buy-out" money was missing. Petitioner voiced his suspicion that Vincent Sherry, petitioner's former law partner and a Mississippi Circuit Judge, had stolen the money. Coincidentally, Judge Sherry's wife, Margaret, was a Biloxi mayoral candidate critical of Gillich's operations. In February 1987, petitioner told Gillich that he would like to run for mayor, because that was how "you could make money," but that he could not because of Vincent Sherry's wife. Pet. App. 3a; Gov't C.A. Br. 13-14.

b. In mid-1987, Nix and Gillich agreed to split the cost of having Vincent Sherry killed. They considered as possible hit men ex-convict John Ransom and Robert Hallal, but ultimately selected Thomas Holcomb to perform the murder for $20,000. In early September 1987, petitioner asked Gillich how things were progressing, and Gillich replied that the hit was "on." Petitioner offered to pay half, and Gillich told him that it had been taken care of. Petitioner also expressed concern that the killer might mistake him for Vincent Sherry. Gillich told him not to worry. A few days later,

petitioner told Gillich that the Sherry children would not be at the Sherry house since they all lived elsewhere. Gov't C.A. Br. 15-16.

Holcomb shot and killed the Sherrys in their home on the evening of September 14, 1987. When Judge Sherry did not appear in court on September 16, calls were placed to petitioner's office for assistance in locating him. Petitioner and a firm associate drove to the Sherry house. There, after the two men had searched outside the house for several minutes, the associate noticed that the door was unlocked, and called petitioner over. Petitioner pushed past the associate a few steps into the house, and immediately exited, announcing that both Vincent and Margaret Sherry were dead. Petitioner, however, had not had time to reach the back of the house where Margaret's body was located. Although the time of the deaths was a closely held investigative fact, petitioner, overhearing investigators mention that a woman had claimed to have talked to the Sherrys on Tuesday, blurted out that this was not possible since the Sherrys had been killed on Monday. A few days after the murders, petitioner asked Gillich whether he needed to worry about anything; Gillich stated that petitioner was not in danger. Gov't C.A. Br. 17-19.

Thereafter, petitioner brought Gillich some documents reflecting the scam, stating that the police would be going through his office. Nix told Gillich to destroy the papers. One year later, petitioner brought more Nix-related records to Gillich to be disposed of, explaining: "Looks like, you know, it's going to be investigated." In the fall of 1989, a few days before petitioner —by then Mayor of Biloxi—was publicly linked in news reports to the Sherry murders, petitioner's office manager retrieved the Nix file from petitioner's office,

telling an office associate that she had to take the Nix file over to "Pete" at City Hall. Gov't C.A. Br. 20-21.[2]

2. In its general charge to the jury, before instructing on the elements of the offenses charged, the court instructed:

> Now, the word "knowingly," as the term has been used from time to time in these instructions, means that the act was done voluntarily and intentionally, not because of mistake or accident.
>
> You may find that a defendant had knowledge of a fact if you find that defendant deliberately closed his eyes to what would otherwise have been obvious to him. While knowledge on the part of a defendant cannot be established merely by demonstrating that the defendant was negligent, careless or foolish,

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[2] At the first trial in 1991 for fraud and the Sherry murders, the government argued that Nix hired Ransom to kill the Sherrys. Bill Rhodes, an associate of Ransom, testified that Ransom had murdered the Sherrys, and Gillich testified that petitioner was not involved with the homosexual scam or with the murders. As a result, the government elected not to prosecute petitioner. The jury convicted Nix, Gillich, Sharpe, and Ransom of wire fraud and conspiracy to commit wire fraud. The jury also found Nix and Gillich guilty of travel in aid of murder-for-hire. Pet. App. 3a-4a.

Following the trial, the government continued its investigation into the scam and murders, concentrating its efforts on determining what role petitioner played in the crimes. In 1994, Gillich agreed to cooperate in return for a reduction in his sentence and admitted that petitioner was involved in the scams and the murders. Gillich further indicated that it was not Ransom who had murdered the Sherrys, but rather Holcomb. As a result of its further investigation and Gillich's testimony, the government in 1996 brought a new indictment against Nix, Sharpe, petitioner, and Holcomb. Pet. App. 4a.

> knowledge can be inferred if the defendant deliberately blinded himself to the existence of a fact.

Tr. 5304 (Fifth Circuit Pattern Jury Instruction 1.35). Thereafter, in instructing the jury on the elements of RICO conspiracy, the court charged that the government was required to prove that "a conspiracy or agreement * * * existed between two or more persons to participate in the affairs of an enterprise that affected interstate commerce through a pattern of racketeering activity;" that "the defendant * * * deliberately joined or became a member of the conspiracy or agreement with knowledge of its purposes;" and that the defendant "willfully and knowingly conspired with at least one other person by agreeing that someone, not necessarily that defendant, would commit at least two of the racketeering acts detailed in Count 1 of the indictment." Tr. 5306-5307. See also Tr. 5310 ("The defendant that you're considering must have deliberately agreed to become a member of that agreement" and must have "deliberately and willfully becom[e] a part of the conspiracy."). The court further instructed that "[i]f a defendant understands the unlawful nature of a plan or scheme and knowingly and intentionally joins in that plan or scheme on one occasion, that is sufficient to convict him of conspiracy even though that defendant had not participated before and even though that defendant played only a minor role." Tr. 5308. The court cautioned, however, that "the mere fact that certain persons have associated with each other, and may have assembled together and discussed common aims and interests, does not necessarily establish proof of the existence of a conspiracy," and that "a person who has no knowledge of a conspiracy, but who happens to act in a way which advances some purpose of a

conspiracy, does not thereby become a conspirator." Tr. 5308-5309. The court gave similar instructions as to the wire fraud conspiracy. See Tr. 5325, 5330 ("[B]efore a defendant may be held criminally responsible for the acts of others, it is necessary that the particular defendant being considered deliberately associate himself in some way with the crime and * * * participate in it with the intent to bring about the crime.").

After instructing the jury, the court invited counsel to object to any aspect of the charge or to request further instructions. Tr. 5338-5341. Petitioner's counsel objected to the deliberate ignorance instruction on the following ground: "I understand the Court's ruling that they believe it's appropriate on the facts of this case. We believe it wasn't part of the proof of the government." Tr. 5341. The court overruled the objection, explaining that specific testimony supported the charge, such as the enormous number of telephone calls made from petitioner's office to Nix, Sharpe's presence in petitioner's office, and Nix's status as an inmate at Angola prison, which prevented him from generating any legal income. "[T]his is the classic case of where a closing-your-eyes-deliberately-closing your eyes instruction should be given." Tr. 5342.

3. The court of appeals affirmed. Pet. App. 1a-34a. The court rejected petitioner's claim that there was no evidence to support the giving of a deliberate ignorance instruction. The court found that the evidence showed that petitioner "knew the high probability of illegal conduct, and he purposely contrived to avoid learning it." Thus, petitioner "managed the thousands of dollars that Nix's operation generated, and he gave Sharpe, Nix's girlfriend, free run of his office." Further, petitioner "met and spoke with those planning the Sherrys' murders." *Id.* at 30a.

The court also rejected petitioner's contention—raised for the first time on appeal—that the district court "erred in not limiting the deliberate ignorance instruction because the instruction was inconsistent with the essential elements of the conspiracy." The court declined petitioner's request that it adopt the rule that a deliberate ignorance instruction may not be given in relation to the issue of knowing participation in a conspiracy. Citing *United States* v. *Scott*, 159 F.3d 916, 924 n.6 (5th Cir. 1998), the court noted that it had consistently approved the giving of a deliberate ignorance instruction in conspiracy cases when the instruction was supported by sufficient evidence. Pet. App. 30a-31a.[3]

ARGUMENT

Petitioner contends (Pet. 12-21) that it was error for the district court to give a "deliberate ignorance" instruction[4] in relation to any of the three conspiracy

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[3] The court also rejected petitioner's claim that the RICO conspiracy and obstruction of justice charges were duplicitous; that the proof established multiple conspiracies; that the RICO and wire fraud conspiracy charges were barred by the statute of limitations; that the district court erred in failing to give a unanimity instruction as to the obstruction of justice count; that his ten-year sentence for obstruction of justice violated the Ex Post Facto Clause of the Constitution; and that the government knowingly presented perjured testimony. Petitioner does not renew any of these claims in this Court.

[4] Courts refer to a group of somewhat similar instructions as "deliberate ignorance" and "conscious avoidance" instructions. The specific instructions may differ from one another in important respects. Nonetheless, nothing in the analysis in this case turns on the differences between specific instructions given in individual cases. Accordingly, we use the terms "deliberate ignorance" and "conscious avoidance" interchangeably in this brief.

offenses that were charged in this case. He contends that the decision below upholding the use of the instruction in this case conflicts with decisions of the Second Circuit holding that it is error to give a deliberate ignorance instruction in relation to the issue of a defendant's knowing participation in a conspiracy.

1. Petitioner did not object to the deliberate ignorance instruction on the ground that such an instruction may not be given in a conspiracy case. He can therefore prevail on his claim only if it constituted plain error. See Fed. R. Crim. P. 30, 52(b); *United States* v. *Olano*, 507 U.S. 725, 732-737 (1993). Under the plain error standard, an error does not warrant reversal unless it was "clear" or "obvious" and affected a defendant's substantial rights, *i.e.*, likely affected the outcome of the proceedings in the trial court. *Id.* at 732-734. Even then, a reviewing court need not correct the error unless it seriously affected the fairness, integrity, or public reputation of the proceedings. *Id.* at 736. Petitioner has not established error in the charge, much less plain error. Indeed, even under the Second Circuit's standard, it was proper to give a deliberate ignorance charge in this case. In any event, because review in this case would be for plain error only, it would not present an appropriate vehicle to address any conflict between the Fifth and Second Circuits on the issue.

2. The deliberate ignorance instruction given in this case was appropriate. It permitted the jury to draw the inference that petitioner knew the relevant facts regarding the conspiracies with which he was charged if it found that petitioner acted in deliberate ignorance of those facts. The instruction told the jury that "[y]ou may find that a [petitioner] had knowledge of a fact if you find that [he] deliberately closed his eyes to what

would otherwise have been obvious to him." Tr. 5304. See also *ibid.* ("knowledge can be inferred if the defendant deliberately blinded himself to the existence of a fact"). It thus informed the jury of an inference it was permitted—but not required—to draw in determining whether petitioner had the requisite knowledge for conviction. Because a permissive inference "leaves the trier of fact free to credit or reject the inference and does not shift the burden of proof," it is invalid "only if, under the facts of the case, there is no rational way the trier could make the connection permitted by the inference." *County Court* v. *Allen*, 442 U.S. 140, 157 (1979).

Contrary to petitioner's assertion (Pet. 20), the deliberate ignorance instruction in this case also made clear that, although the jury was entitled to infer knowledge from circumstantial evidence that petitioner "deliberately blinded himself to the existence of a fact" (Tr. 5304), the jury ultimately had to find that petitioner had actual knowledge of the conspiracy before it could find him guilty. The instruction stated that "knowledge on the part of [petitioner] cannot be established merely by demonstrating that [petitioner] was negligent, careless or foolish." *Ibid.* The instruction thus informed the jury that, where a failure to inquire in the face of highly suspicious circumstances is present, it may—not must—draw an inference that the defendant had actual knowledge of the facts not investigated.

3. The court of appeals' decision in this case does not conflict with any decision of the Second Circuit. In a series of cases beginning with *United States* v. *Mankani*, 738 F.2d 538, 547 n.1 (1984), the Second Circuit has stated that, although "application of the 'conscious avoidance' theory is appropriate where the

essential mental element of the crime is 'guilty knowledge,'" it is inappropriate to prove membership in a conspiracy, where "the requisite mental state * * * is intent, not mere knowledge." Neither in *Mankani* nor in any other case, however, has the Second Circuit ever reversed a conspiracy conviction because a "conscious avoidance" or "deliberate ignorance" instruction was given. In *Mankani* itself, the court's comments came in the course of a discussion of the sufficiency of the evidence to convict the defendant of conspiracy. See 738 F.2d at 547. Although the court criticized the government's deliberate ignorance theory with respect to one aspect of the evidence that the defendant participated in the conspiracy, the opinion does not reflect that the jury was instructed on deliberate ignorance, and the court therefore did not address the precise effect of a particular deliberate ignorance instruction.

An examination of the Second Circuit's later cases indicates that that court would approve the instruction in the circumstances present in this case. In *United States* v. *Lanza*, 790 F.2d 1015, cert. denied, 479 U.S. 861 (1986), the Second Circuit noted that the passage from *Mankani* quoted above was "dicta," and the court "reject[ed] [the defendants'] argument that the conscious avoidance charge was inappropriate in this conspiracy case simply because the underlying substantive offense was not charged." 790 F.2d at 1022. The court explained that *Mankani* was concerned with use of the conscious avoidance instruction to substitute for proof of "knowing *participation or membership*" in the conspiracy. *Ibid.* (emphasis added). Conscious avoidance does not itself establish a defendant's agreement or participation in a conspiracy, because there is a difference between mere knowledge of a conspiracy's goals and agreement to join in achieving them. See

United States v. *Ciambrone*, 787 F.2d 799, 810 (2d Cir.) ("membership in a *conspiracy* cannot be proven by conscious avoidance"), cert. denied, 479 U.S. 1017 (1986). As the court recognized in *Lanza*, however, conscious avoidance may be used as a basis for inferring knowledge of the conspiracy's goals or objectives. See 790 F.2d at 1023 ("[A] conscious avoidance charge was appropriate vis-a-vis knowledge of the objectives of the scheme charged.").

In subsequent cases, the Second Circuit has adhered to that distinction. See *United States* v. *Eltayib*, 88 F.3d 157, 170 ("[C]onscious avoidance will not support a finding that a defendant knowingly participated in the conspiracy," but "conscious avoidance may support a finding with respect to the defendant's knowledge of the objectives or goals of the conspiracy."), cert. denied, 519 U.S. 1045 (1996); *United States* v. *Aulicino*, 44 F.3d 1102, 1115 (2d Cir. 1995) ("Where there is sufficient evidence that the defendant was a member of the conspiracy, a conscious-avoidance instruction may properly be given, permitting the jury to convict if it finds that the defendant deliberately attempted to remain ignorant of the conspiracy's precise goals."); *United States* v. *Fletcher*, 928 F.2d 495, 502 (2d Cir.) ("We have repeatedly held that a conscious avoidance charge is appropriate where the knowledge of the fraudulent goals of a conspiracy, as contrasted with knowing and intentional participation in the conspiracy, is at issue."), cert. denied, 502 U.S. 815 (1991); see also *United States* v. *Boothe*, 994 F.2d 63, 69 (2d Cir. 1993) (finding no error in giving conscious avoidance

instruction in case involving both conspiracy and substantive counts).[5]

In this case, the instruction at issue expressly concerned only proof of petitioner's knowledge of the unlawful aims and objectives of the conspiracy—not proof of his intent to participate in the conspiracy.[6] The in-

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[5] Petitioner cites (Pet. 17) *United States* v. *Scotti*, 47 F.3d 1237, 1243 (2d Cir. 1995). In that case, however, the court held that the conscious avoidance instruction was not given with respect to the conspiracy count. *Ibid.* ("Here, the knowledge at issue does not pertain to membership in a conspiracy, but participation in conduct proscribed by the substantive offense of [18 U.S.C.] 894(a)(1).").

[6] Petitioner mistakenly asserts (Pet. 18) that the First and Sixth Circuits have adopted the Second Circuit's reasoning that a deliberate ignorance instruction should not be given with respect to a conspiracy charge. Petitioner cites *United States* v. *Hurley*, 63 F.3d 1, 10 (1st Cir. 1995), cert. denied, 517 U.S. 1105 (1996), and *United States* v. *Warshawsky*, 20 F.3d 204, 210-211 (6th Cir. 1994), for that proposition. In *Hurley*, however, in response to a claim that the trial court had improperly refused to instruct the jury that deliberate ignorance did not apply to the RICO conspiracy count, the First Circuit merely observed that the deliberate ignorance instruction "appears to have been aimed at the 'knowing' requirements of substantive counts." 63 F.3d at 10. With respect to the possibility that the instruction "diluted the express 'intent' requirement for the conspiracy count," the court noted that the instructions had "guarded against that risk with cautionary instructions stressing that the defendants must have joined the conspiracy intentionally." *Ibid.* See also *United States* v. *Brandon*, 17 F.3d 409, 453 n.75 (1st Cir.) (noting that a deliberate ignorance instruction can be permissible with respect to a conspiracy charge), cert. denied, 513 U.S. 820 (1994). In *Warshawsky*, the Sixth Circuit noted its prior approval of a deliberate ignorance instruction in a conspiracy case where the defendant had denied knowledge of any illegal activity. The court observed that the defendant would be entitled to no relief under the standard established in the Second Circuit, because the instruction "was offered to prove [the defendants'] *knowledge of the aims of the*

struction preceded the specific instructions on the conspiracy and substantive counts with which petitioner was charged, and it defined the term "knowingly" as used throughout the instructions. It did not suggest that deliberate ignorance could be used as a substitute for proof of the defendant's intent to participate in the conspiracy and achieve its goals. Later, during the instructions on the conspiracy offenses, the court made clear that the government had the burden of proving that petitioner "deliberately joined or became a member of the conspiracy or agreement with knowledge of its purposes," Tr. 5306; that he "deliberately agreed to become a member of the [conspiratorial] agreement" and "deliberately and willfully bec[ame] a part of the conspiracy," Tr. 5310; and that he "underst[ood] the unlawful nature of [the] plan or scheme and knowingly and intentionally join[ed] in that plan or scheme," Tr. 5308. Thus, the Second Circuit would find the instructions in this case appropriate.[7]

4. In any event, the courts of appeals agree that even if the district court erred in instructing the jury on deliberate ignorance, a conviction may be affirmed if

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conspiracy, not to prove *the existence of an agreement*." 20 F.3d at 210-211.

[7] Petitioner notes (Pet. 18) that the Seventh Circuit has stated that its position permitting use of a deliberate ignorance instruction in conspiracy cases is "contrary to the precedent in the Second Circuit." *United States* v. *Diaz*, 864 F.2d 544, 549 (7th Cir. 1988), cert. denied, 490 U.S. 1070 (1989). *Diaz*, however, was decided before the Second Circuit's decisions in *Eltayib*, *Aulicino*, and *Fletcher*, and the only Second Circuit decision cited in *Diaz* was *Mankani*. The Second Circuit's post-*Mankani* cases have clarified its position on this issue. For the reasons stated in text, the Second Circuit's current position on this issue appears to be consistent with the position of the Seventh Circuit.

the evidence was overwhelming with respect to the defendant's knowledge, so that a court can conclude that the error was harmless. See, *e.g.*, *United States* v. *Adeniji*, 31 F.3d 58, 63-64 (2d Cir. 1994); *United States* v. *Whittington*, 26 F.3d 456, 464 (4th Cir. 1994); *United States* v. *Boutte*, 13 F.3d 855, 859 (5th Cir.), cert. denied, 513 U.S. 815 (1994); *United States* v. *Barnhart*, 979 F.2d 647, 652-653 (8th Cir. 1992). Here, the evidence was overwhelming that petitioner actually knew of the illegal goals of the conspiracy. See pp. 3-5, *supra* (petitioner's statement to Gillich that Nix was making a lot of money through the homosexual scam; petitioner's personal access to a safety deposit box in which cash generated by Nix's operations was kept; petitioner's directions to Gillich to destroy documents reflecting the scam because there was going to be an investigation; petitioner's conversations with Gillich bearing on the planned murder of Vincent Sherry). Accordingly, any error in giving a deliberate ignorance instruction would have been harmless and certainly could not have risen to the level of plain error.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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