No. 09-1035

# In the Supreme Court of the United States

IMAD SALIM HEREIMI, PETITIONER

*v.*

UNITED STATES OF AMERICA

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

**BRIEF FOR THE UNITED STATES IN OPPOSITION**

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## QUESTIONS PRESENTED

1. Whether the district court abused its discretion in giving a deliberate ignorance instruction.

2. Whether the district court abused its discretion in excluding defense evidence of other bad acts committed by petitioner's accomplice.

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## OPINION BELOW

The memorandum opinion of the court of appeals (Pet. App. 1-2) is unreported.

## JURISDICTION

The judgment of the court of appeals was entered on November 23, 2009. The petition for a writ of certiorari was filed on February 22, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

After a jury trial in the United States District Court for the District of Alaska, petitioner was convicted of 20 counts of committing honest-services fraud by mail, in violation of 18 U.S.C. 1341. Pet. App. 4. He was sentenced to five years of probation and ordered to pay res-

titution and a fine, each in the amount of $13,219.91. *Id.* at 5-13. The court of appeals affirmed. *Id.* at 1-2.

1. a. Petitioner was convicted of 20 counts of violating 18 U.S.C. 1341, which makes it illegal to use the United States Postal Service or any private commercial interstate carrier for the purpose of executing a "scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises." The code defines "scheme or artifice to defraud" to include "a scheme or artifice to deprive another of the intangible right of honest services." 18 U.S.C. 1346; see Pet. App. 22.

The charges stemmed from petitioner's association with Nezar Khaled "Mike" Maad, who was indicted with petitioner. Pet. App. 16-22. Maad was employed by the State of Alaska as a Publication Technician II for Financial & Management Services, a branch of the State's Department of Health and Social Services (DHSS). 8/20/08 Tr. 111; 8/21/08 Tr. 88. His duties included writing and designing printed material for publication by DHSS. 8/21/08 Tr. 143-144. In 2005 and 2006, Maad and petitioner, the owner of a donut shop, 8/20/08 Tr. 30, carried out a scheme to defraud Alaska and its citizens of public funds and of their right to Maad's honest services as a public employee. Pursuant to the scheme, petitioner obtained an Alaska business license for Horizon Graphics. 8/20/08 Tr. 152; 8/21/08 Tr. 122; 8/22/08 Tr. 32, 41-42. Thereafter, Maad arranged for state printing orders to be completed at set prices by various printing companies in the Anchorage area and elsewhere. 8/20/08 Tr. 31-32, 41, 66; 8/21/08 Tr. 67, 75, 134-135; 8/22/08 Tr. 92-116, 118-127. Maad paid the companies with cash or by using credit cards previously obtained by petitioner for Horizon. 8/20/08 Tr. 39-42, 47-

50, 108, 153; 8/21/08 Tr. 66-72, 67-75, 212; 8/22/08 Tr. 18-19, 56-57. Petitioner and Maad then created invoices for the printing jobs in the name of Horizon, inflating the prices but adding no value, 8/22/08 Tr. 92-116, 118-127, and Maad submitted the inflated invoices to the State for payment, 8/21/08 Tr. 21; 8/22/08 Tr. 92-116, 118-127. After Maad received the payments, he mailed them to petitioner for deposit into Horizon's bank account. 8/20/08 Tr. 141-149; 8/21/08 Tr. 29-50; 8/22/08 Tr. 39-41. As a "business," Horizon consisted only of a stack of paperwork and a ledger checkbook kept on a shelf in the business office of petitioner's donut shop. 8/22/08 Tr. 35. Petitioner told authorities that he did not know how much Horizon had made from the State because it was hard to keep track of how many checks he had received. Gov't C.A. S.E.R. 17.

b. At trial, petitioner argued that he lacked the requisite criminal intent because he had been duped by Maad. See Pet. App. 24. In support of that defense, petitioner sought to introduce evidence of Maad's poor reputation for honesty and his history of ingratiating himself with people and then cheating or stealing from them. *Id.* at 24-25. Specifically, petitioner sought to introduce evidence that Maad had embezzled money from the business of his then-father-in-law in 1981 and had stolen money and items of clothing from a men's clothing store in which he worked. *Ibid.* The district court denied petitioner's motion to introduce such evidence. See *id.* at 37-48. Although the court noted that petitioner sought to introduce the evidence to show Maad's "propensity to lie, steal and cheat people * * * who trusted him"—an improper purpose under Federal Rule of Evidence 404(b), Pet. App. 44-45—the court excluded the evidence under Federal Rule of Evidence 403

because the prejudicial effect of the evidence outweighed its probative vlaue, Pet. App. 45-47. The court reasoned that the nexus between the prior incidents and the charges against petitioner was "very weak", *id.* at 45; that the incidents were "too remote" to be probative, *id.* at 46; and that their probative value was outweighed by the danger that the evidence would confuse the jury by shifting its attention from the issues in the case to Maad's dealings with third parties in the past, *ibid.*

c. In charging the jury, the district court instructed that, in order to convict petitioner of honest-services fraud, the jury must find "beyond a reasonable doubt that [petitioner] acted with the knowledge that Honest Services Fraud was being committed by Maad." Pet. App. 52. The court added:

> An act is done knowingly if the Defendant is aware of the act and does not act through ignorance, mistake, or accident. The Government is not required to prove that [petitioner] knew that his acts or omissions were unlawful. The Government must prove that [petitioner] knew that Maad was under a duty to disclose material conflicts of interest to his state employers and that he concealed a material conflict of interest from the State in connection with Maad's activities on behalf of Horizon Graphics.

Gov't C.A. S.E.R. 38. The court then gave the jury the following deliberate ignorance instruction:

> You may find that [petitioner] acted knowingly if you find beyond a reasonable doubt that the [petitioner]:
>
> 1. was aware of a high probability that Mike Maad had not disclosed to the State of Alaska * * * his relationship with Horizon Graphics, i.e., Maad's

> conflict of interest, and that Maad was using his official position for their personal gain, and
>
> 2. deliberately avoided learning the truth.
>
> You may not find such knowledge, however, if you find that [petitioner] actually believed that there was no conflict of interest, or that a conflict existed, but that Maad had disclosed it to the State, or you find that [petitioner] was simply careless.

Pet. App. 52-53. The jury found petitioner guilty of 20 counts of honest-services fraud by mail. *Id.* at 4.

2. On appeal, petitioner argued that the district court erred in excluding the prior-bad-acts evidence concerning Maad's embezzelment of money from his former father-in-law and his theft from a previous employer. The court of appeals rejected that argument, holding that the district court had not abused its discretion in finding that the evidence was inadmissible under Rule 403 because "the probative value of the evidence in question was substantially outweighed by its tendency towards unfair prejudice and confusion of the issues." Pet. App. 2. The court also noted that the district court "thought that the bad acts were too remote in time and too dissimilar to be properly admissible pursuant to Federal Rule of Evidence 404(b)." Pet. App. 2.

Petitioner also argued that the district court erred in giving the jury a deliberate ignorance instruction. Construing petitioner's argument as a challenge to "the propriety of deliberate indifference instructions in general," the court of appeals held that that argument was foreclosed by the Ninth Circuit's en banc decision upholding a deliberate ignorance instruction in *United States* v. *Heredia*, 483 F.3d 913, 924, cert. denied, 552 U.S. 1077 (2007). Pet. App. 2. The court also rejected petitioner's

"suggestion" that, to the extent deliberate ignorance instructions are permissible, one should not have been given in this case. *Ibid.*

**ARGUMENT**

Petitioner argues (Pet. 13-22) that the district court abused its discretion both in instructing the jury about deliberate ignorance and in declining to allow petitioner to introduce evidence of bad acts allegedly committed by Maad (petitioner's accomplice). His arguments do not warrant further review because the unpublished memorandum decision of the court of appeals affirming petitioner's convictions is correct and does not conflict with any decision of this Court or any other court of appeals.[1]

1. Petitioner contends (Pet. 13-16) that the district court erred in giving the deliberate ignorance instruction because it failed to include a "motive element"—by which he apparently means an instruction that, in order to find deliberate ignorance, the jury had to conclude that his motive in deliberately failing to learn the truth was to provide himself with a defense in case he should

[1] Although petitioner was charged with honest-services fraud, he does not raise any objection to that theory in his petition for a writ of certiorari. In any case, any error in charging the jury on honest-services fraud would have been harmless. Based on the evidence presented to the jury, a rational jury could not have found a scheme to deprive the State of Alaska of its intangible right to honest services separate from a criminal scheme to obtain money through fraudulently over-billing Alaska for printing services. See *Moore* v. *United States*, 865 F.2d 149, 153-154 (7th Cir. 1989). Nevertheless, the Court may wish to hold the petition in this case pending its resolution of issues pertaining to honest-services fraud in *Black* v. *United States*, No. 08-876; *Weyhrauch* v. *United States*, No. 08-1196; and *Skilling* v. *United States*, No. 08-1394.

be charged with a crime.[2] Because petitioner did not present that argument to the court of appeals, it is waived. See *United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977). Even if it were not, he also did not object to the deliberate ignorance instruction in the district court on the basis that it should have included a motive element; therefore, his argument is at most reviewed for plain error. Fed. R. Crim. P. 52(b). In *United States* v. *Olano*, 507 U.S. 725, 732 (1993), this Court explained that Rule 52(b) requires a defendant to demonstrate that there was "an 'error' that is 'plain' and that 'affect[s] substantial rights'"; even then, a reviewing court should correct the error only if it seriously affects the fairness, integrity, or public reputation of judicial proceedings. Accord *Johnson* v. *United States*, 520 U.S. 461, 466-467 (1997). Petitioner cannot satisfy any element of that analysis.

The district court did not err in instructing the jury about deliberate ignorance. The standard deliberate ignorance instruction given in federal courts does not include a requirement that the defendant acted based on a motive to create a defense. See 1 Leonard B. Sand et al., *Modern Federal Jury Instructions*, Inst. 3A-2 (2009); see also, *e.g.*, *United States* v. *Nektalov*, 461 F.3d 309, 313-314 (2d Cir. 2006); *United States* v. *Lizardo*,

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[2] Petitioner does not explain what type of motive instruction he would have had the court include, nor did he request a motive instruction in the district court. But courts of appeals cases discussing deliberate ignorance instructions indicate that including a motive element would entail informing the jury that it must find that the defendant's "motive in deliberately failing to learn the truth was to give himself a defense in case he should be charged with the crime." *United States* v. *Heredia*, 483 F.3d 913, 919 (9th Cir. 2006) (en banc), cert. denied, 552 U.S. 1077 (2007).

445 F.3d 73, 85 n.7 (1st Cir.), cert. denied, 549 U.S. 1007 (2006); *United States* v. *Willis*, 277 F.3d 1026, 1031-1032 (8th Cir. 2002); *United States* v. *Wert-Ruiz*, 228 F.3d 250, 254-255 (3d Cir. 2000); *United States* v. *Delreal-Ordones*, 213 F.3d 1263, 1267-1269 (10th Cir.), cert. denied, 531 U.S. 915 (2000); *United States* v. *Campbell*, 977 F.2d 854, 857 (4th Cir. 1992), cert. denied, 507 U.S. 938 (1993); *United States* v. *Beaty*, 245 F.3d 617, 619-620 (6th Cir.), cert. denied, 534 U.S. 895 (2001). Although several courts of appeals have noted that it is appropriate for a district court to give a deliberate ignorance instruction when the evidence shows that a defendant deliberately remained ignorant in order to maintain a defense to a later prosecution, none has held that such an instruction must include a motive prong. *United States* v. *Puche*, 350 F.3d 1137, 1149 (11th Cir. 2003); *Willis*, 277 F.3d at 1032; *Delreal-Ordones*, 213 F.3d at 1267-1269. Thus, the court of appeals' decision upholding the district court's instruction does not conflict with any decision from this Court or any other court of appeals. That alone establishes that this issue does not merit further review.

In any case, petitioner does not even attempt to demonstrate that he satisfies the plain-error test. Relief under that test requires that petitioner show that any alleged error seriously affected the fairness, integrity, and public reputation of judicial proceedings. *United States* v. *Cotton*, 535 U.S. 625, 632-633 (2002) (assuming an effect on substantial rights, but finding relief unwarranted under the fourth prong of plain-error analysis); *Johnson*, 520 U.S. at 469-470 (same). "The fourth prong is meant to be applied on a case-specific and fact-intensive basis." *Puckett* v. *United States*, 129 S. Ct. 1423, 1433 (2009). The fourth prong of plain-error re-

view of petitioner's forfeited claim takes into account the fairness of the trial as a whole. See *ibid.* ("We have emphasized that a '*per se* approach to plain-error review is flawed.'") (quoting *United States* v. *Young*, 470 U.S. 1, 17 n.14 (1985)).

Petitioner has not established that the inclusion of a motive element would materially alter the effect of the deliberate ignorance instruction. The instruction's requirement that the jury find that a defendant acted deliberately to avoid learning the truth protects defendants whose actions were coerced, motivated by exigent circumstances, or unintentional. See *Heredia*, 483 F.3d at 920. Nor does petitioner argue that any omission from the jury instructions affected his substantial rights or seriously affected the fairness, integrity, or public reputation of judicial proceedings. Thus, even if review of petitioner's jury-instruction claim were otherwise warranted, this case would be an inappropriate vehicle because he cannot obtain relief under the plain-error rule.[3]

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[3] Petitioner also suggests (Pet. 16)—though he does not develop any argument in support of his suggestion—that the district court's deliberate ignorance instruction permitted the jury to find that he acted with deliberate ignorance "based on a high probability, rather than proof beyond a reasonable doubt." That suggestions lacks merit because the instruction explicitly stated that, in order to convict petitioner based on deliberate ignorance, the jury must find "beyond a reasonable doubt" that (1) petitioner was aware of a "high probability" that Maad had not disclosed his conflict of interest to the State and that he was using his official position for private gain, and (2) that petitioner deliberately avoided learning the truth about these matters. Pet. App. 52-53. The courts of appeals have uniformly upheld or approved use of the "high probability" standard in deliberate ignorance instructions, and petitioner does not contend otherwise. See, *e.g.*, *Chaney* v. *Dreyfus Serv. Corp.*, 595 F.3d 219, 240 (5th Cir. 2010); *United States* v. *Chavez-Alvarez*, 594

2. At his trial, petitioner sought to introduce evidence that Maad had stolen from other people more than two decades before the acts alleged in the indictment in order to show that petitioner was not criminally culpable because Maad had duped him. Under Federal Rule of Evidence 404(b), although "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith," it is admissible "for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." See *Huddleston* v. *United States*, 485 U.S. 681, 685 (1988). Petitioner asks this Court to grant his petition to decide whether the prohibition in Rule 404(b) against introducing other-acts evidence in order to prove the propensity of a person to commit crimes applies to evidence of other acts committed by someone other than the defendant in order to support the defendant's defense. Further review of that issue is not warranted because the holdings of the district court and the court of appeals do not conflict with any decision of this Court or of any court of appeals, because the decisions were correct, and because review of that question would make no difference to the admissibility of the evidence petitioner sought to introduce even if his view of Rule 404(b) were to prevail.

Petitioner is incorrect in suggesting (Pet. 18-20) that the circuits disagree about whether a defendant seeking

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F.3d 1062, 1067 (8th Cir. 2010); *United States* v. *Garcia-Bercovich*, 582 F.3d 1234, 1237-1238 (11th Cir. 2009), cert. denied, 130 S. Ct. 1562 (2010); *United States* v. *Thomas*, 467 F.3d 49, 54 n.5 (1st Cir. 2006), cert. denied, 549 U.S. 1294 (2007); *United States* v. *Flores*, 454 F.3d 149, 158 (3d Cir.), cert. denied, 549 U.S. 1046 (2006); *Beaty*, 245 F.3d at 621-622; *United States* v. *Cruz*, 58 F.3d 550, 557 (10th Cir. 1995); *United States* v. *Feroz*, 848 F.2d 359, 360 (2d Cir. 1988).

to introduce other-acts evidence about a third party must satisfy Rule 404(b)'s proper-purpose requirement. On the contrary, the courts of appeals to have considered the question agree that a defendant seeking to admit such evidence under Rule 404(b) must do so for a proper purpose—*i.e.*, a purpose other than to show that the third party has a propensity to commit crimes. See, *e.g.*, *United States* v. *Myers*, 589 F.3d 117, 123-124 (4th Cir. 2009), petition for cert. pending, No. 09-10199 (filed Apr. 13, 2010); *United States* v. *Montelongo*, 420 F.3d 1169, 1174-1175 (10th Cir. 2005); *United States* v. *Lucas*, 357 F.3d 599, 604-605 (6th Cir. 2004); *Agushi* v. *Duerr*, 196 F.3d 754, 759-761 (7th Cir. 1999); *United States* v. *Stevens*, 935 F.2d 1380, 1404-1406 (3d Cir. 1991); *United States* v. *McCourt*, 925 F.2d 1229, 1235 (9th Cir.), cert. denied, 502 U.S. 837 (1991); *United States* v. *Cohen*, 888 F.2d 770, 776 (11th Cir. 1989); *United States* v. *Aboumoussallem*, 726 F.2d 906, 912 (2d Cir. 1984); *United States* v. *McClure*, 546 F.2d 670, 672-673 (5th Cir. 1977). Those courts have also held that any evidence admissible under Rule 404(b) must pass muster under Rules 401 and 403. See, *e.g.*, *Myers*, 589 F.3d at 124; *Montelongo*, 420 F.3d at 1174; *Lucas*, 357 F.3d at 605; *Agushi*, 196 F.3d at 761; *Stevens*, 935 F.2d at 1404-1405; *Cohen*, 888 F.2d at 776; *Aboumoussallem*, 726 F.2d at 912. Those cases are fully consistent with the approach the lower courts took in this case. The district court noted that the evidence petitioner sought to introduce would not have been admissible under Rule 404(b) because it was intended to show propensity, Pet. App. 40, 44-45, but excluded the evidence under Rule 403 based on its conclusion that any slight probative value of the evidence would have been overly prejudicial and confusing to the jury, *id.* at 45-46. The court of appeals held that the

district court had not abused its discretion in so ruling. *Id.* at 1-2.

The courts' conclusion that a criminal defendant may not introduce evidence of a third party's prior acts in order to prove the bad character of that person or that person's propensity to engage in illegal activity is consistent with Rule 404(b). The Rule prohibits the introduction of "[e]vidence of other crimes, wrongs, or acts * * * to prove the character of *a person* in order to show action in conformity therewith." Fed. R. Evid. 404(b) (emphasis added). The prohibition applies to evidence regarding any "person['s]" prior acts and character; it is not limited to a defendant's prior acts or character. See *Lucas*, 357 F.3d at 605; *Agushi*, 196 F.3d at 760.

In any case, even if this Court were to conclude that a defendant is entitled under Rule 404(b) to introduce evidence of a third party's prior acts in order to prove the bad character of that person, such a ruling would have no effect on petitioner's case. Neither the district court nor the court of appeals based its ruling on the inadmissibility of the proffered evidence under Rule 404(b). Both courts relied on the conclusion that the evidence would be impermissibly prejudicial and confusing under Rule 403, which affords trial courts discretion to exclude relevant evidence when "its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

The court of appeals was correct that the district court did not abuse its discretion in excluding the evidence under Rule 403. Petitioner sought to introduce evidence that Maad had stolen from his former father-

in-law and from a former employer more than two decades ago in order to show that petitioner lacked criminal intent because Maad had tricked him into aiding and abetting his fraudulent scheme. But none of the evidence petitioner sought to introduce involved Maad's tricking an innocent person into assisting him with a criminal scheme. That lack of a factual nexus, combined with the temporal remoteness of the evidence, renders its relevance questionable at best. There was, moreover, already sufficient evidence before the jury of Maad's untrustworthy nature. The evidence showed, for example, that Maad might have been involved in the vandalism of his own printing shop; that he had been convicted of lying on a loan application; that he had a reputation for being dishonest and a con artist; and that, according to his own daughter, he had throughout her life been known to gain the trust of people and then to destroy it. See Gov't C.A. Br. 25-28. In light of this evidence of Maad's more recent deceitful conduct and reputation, the evidence of the 25-year-old thefts, to the degree it had any probative value at all, would have been cumulative.

The district court correctly concluded that the admission of such evidence would have posed precisely the dangers enumerated in Rule 403 by distracting the jury from the essential factual issues about petitioner's conduct and mental state and by unduly prolonging the proceedings. See Pet. App. 46. The district court acted well within its discretion in determining that these risks vastly outweighed whatever probative value the evidence may have had, and the court of appeals correctly

affirmed the district court's ruling on that basis. *Id.* at 1-2.[4]

**CONCLUSION**

The petition for a writ of certiorari should be denied. In the alternative, the Court should hold the petition pending its resolution of issues related to honest-services fraud in *Black* v. *United States*, No. 08-876; *Weyhrauch* v. *United States*, No. 08-1196; and *Skilling* v. *United States*, No. 08-1394, and then dispose of the petition accordingly.

Respectfully submitted.

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[4] In upholding the district court's Rule 403 determination, the court of appeals concluded that the evidence in question had a "tendency towards unfair prejudice and confusion of the issues." Pet. App. 2. Petitioner challenges the court's reliance on the unfair-prejudice factor on the ground that the other-crime evidence did not prejudice *him*. Pet. 21. But the Advisory Committee Notes make clear that the Rule was intended to be party neutral, defining "unfair prejudice" as a "tendency to suggest decision on an improper basis." Fed. R. Evid. 403, 1972 Advisory Comm. Note. In this case, the admission of the other-crime evidence threatened to unfairly prejudice the government by confusing the jury with collateral issues that had no substantial bearing on the question of petitioner's guilt.