No. 18–___

In the
Supreme Court of the United States

Sarjo Dambelly,

Petitioner,

v.

United States of America,

Respondent.

On Petition for a Writ of Certiorari to
The United States Court of Appeals
For the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Global–Tech Appliances, Inc. v. SEB S.A.*, 563 U.S. 754, 769 (2011), the Court held that the doctrine of "willful blindness" embodies "two basic requirements: (1) the defendant must subjectively believe that there is a high probability that a fact exists and (2) the defendant must take deliberate actions to avoid learning of that fact." The Court emphasized the need for evidence of "deliberate steps" or "active efforts" to avoid knowledge, *id.* at 768 n.8, 770, 771, holding that mere "deliberate indifference" to a known risk of wrongdoing is not enough. *Id.* at 766, 770.

This case presents an important question that divides the courts of appeals concerning the application of *Global–Tech*'s willful-blindness standard in federal criminal cases:

Whether, in light of *Global–Tech*, the Second Circuit errs by holding, contrary to at least six other circuits, that willful blindness in a criminal case does not require proof that the defendant took "deliberate actions" or made "active efforts" to avoid learning the truth.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes:

Other Authorities:

PETITION FOR A WRIT OF CERTIORARI

Petitioner Sarjo Dambelly respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit affirming the judgment of conviction against him.

OPINIONS AND ORDERS BELOW

The Second Circuit's decision (App. 1a–5a[1]) is reported at 714 F. App'x 87 (2d Cir. 2018). The district court's oral decision overruling petitioner's objections to the inclusion of a jury instruction on willful blindness appears at App. 12a.

JURISDICTION

The court of appeals entered judgment on March 15, 2018. App. 1a. On May 16, 2018, Justice Ginsburg extended the time within which to file this petition to and including July 13, 2018. *See* No. 17A1265. This Court has jurisdiction under 28 U.S.C. § 1254(1). The court of appeals had jurisdiction under 28 U.S.C. § 1291. The district court had jurisdiction under 18 U.S.C. § 3231.

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[1] "App." refers to the appendix to this petition.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

No constitutional or statutory provision is at issue in this case.

INTRODUCTION

This case offers the Court an opportunity to resolve a circuit split that has emerged in the aftermath of *Global–Tech Appliances, Inc. v. SEB S.A.*, 563 U.S. 754 (2011), regarding the doctrine of willful blindness[2] in the criminal context. That doctrine permits a factfinder to conclude that a defendant acted knowingly if he or she (1) "subjectively believe[d] that there [was] a high probability that a fact exist[ed]" and (2) took "deliberate actions to avoid learning of that fact." *Id.* at 769.

The courts of appeals are divided over the second requirement. Specifically, despite *Global–Tech*, the Second Circuit holds, contrary to all other circuits to have addressed the question, that willful blindness does not require that a defendant take "deliberate actions" to avoid knowledge. App. 3a (decision below); *United States v. Whitman*, 555 F. App'x 98, 104–05 (2d Cir. 2014); *United States v. Ghailani*, 733 F.3d 29, 54 n.20 (2d Cir. 2013); *United States v. Goffer*, 721 F.3d 113, 128 (2d Cir. 2013). The

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[2] Some courts use the phrase "conscious avoidance," "willful ignorance," or "deliberate ignorance" rather than "willful blindness." Petitioner uses the term "willful blindness" because the Court appeared to prefer it in *Global–Tech*. *See* 563 U.S. at 766–71 (referring throughout to "willful blindness").

Fourth, Fifth, Seventh, Eighth, Ninth, and Tenth Circuits have all held to the contrary.

This case provides an excellent vehicle for resolving this lopsided split. The question presented is a pure issue of law that was squarely addressed by the Second Circuit below (App. 3a) and, previously, in *Ghailani*, 733 F.3d at 54 n.20, and *Goffer*, 721 F.3d at 128—published opinions that the panel below treated as binding and dispositive. The issue is also outcome-determinative: the Second Circuit's decision to affirm rested entirely on its legal conclusion that willful blindness does not require evidence of "deliberate actions" to avoid actual knowledge. App. 3a. If this Court were to reject that conclusion, the Second Circuit's judgment would have to be vacated and the matter remanded for that court to determine whether a willful-blindness instruction was appropriate under the correct legal standard. It was not. As the Seventh Circuit has recognized, "deliberate actions" under *Global–Tech* require affirmative *conduct* to avoid learning the truth; a deliberate "action" does not include *in*action—i.e., merely failing to question or investigate suspicious circumstances. *See United States v. Macias*, 786 F.3d 1060, 1062–64 (7th Cir. 2015) (Posner, J.); *see also United States v. L.E. Myers Co.*, 562 F.3d 845, 854 (7th Cir. 2009) (holding even before *Global–Tech* that "[f]ailing to display curiosity is not enough; the defendant must affirmatively *act* to avoid learning the truth")

(emphasis in original). The court of appeals acknowledged the absence of evidence of "deliberate actions" or "active measures" here. App. 3a.

Finally, review is warranted because the Second Circuit's position is wrong. *Global–Tech* held in the civil context that willful blindness requires proof the defendant took "deliberate actions" or made "active efforts" to avoid knowledge. 563 U.S. at 769, 770. While other circuits have properly construed *Global–Tech* to require such evidence before a jury may find willful blindness in criminal cases, the Second Circuit incorrectly holds that *Global–Tech* requires no such evidence. As a consequence, the court persists in holding that taking no action—i.e., not questioning or investigating suspicious circumstances—is sufficient to constitute willful blindness. That position confuses "deliberate indifference" with willful blindness, contrary to *Global–Tech*, and obliterates the careful distinction *Global–Tech* drew between willful blindness (which is tantamount to actual knowledge) and recklessness (which is not). That distinction is even more critical in the criminal context—where the defendant's liberty is at stake—because the difference between recklessness and willful blindness often means the difference between conviction and acquittal.

STATEMENT OF THE CASE

A. The charges

Petitioner is a 47-year-old immigrant from West Africa who has a wife and five young children, including a six-year-old daughter with autism. Born and raised in The Gambia, petitioner fled the political violence of that country in 2002 and came to the United States to build a better life for himself and his family. Until he was convicted in this case, he had no criminal record.

In October 2016, a federal grand jury in the Southern District of New York returned a five-count superseding indictment charging petitioner with various crimes relating to a scheme to export stolen cars from the United States. The superseding indictment alleged that, from January 2014 to September 2015, petitioner and others conspired to export, transport, and possess stolen motor vehicles, in violation of 18 U.S.C. § 371 (Count One); exported and attempted to export stolen motor vehicles, in violation of 18 U.S.C. § 553(a)(1) (Count Two); transported stolen motor vehicles, in violation of 18 U.S.C. §§ 2312 and 2 (Count Three); and possessed stolen motor vehicles, in violation of 18 U.S.C. §§ 2313(a) and 2 (Count Four). Count Five charged petitioner alone with knowingly submitting false or misleading export information about the stolen cars, in violation of 13 U.S.C. § 305(a)(1).

Conviction of each of these offenses required proof that, *inter alia*, petitioner acted "knowingly," i.e., with knowledge that the cars were stolen. App. 13a. Petitioner maintained his innocence and proceeded to a jury trial in November 2016.

B. The trial

1. The scheme to export stolen cars

The evidence showed that, between 2013 and 2015, law-enforcement officials investigated a car-theft scheme operating in multiple American cities. The scheme involved renting luxury cars from car-rental companies and, instead of returning them, shipping them in containers to destinations in West Africa. Bills of lading for the shipments stated falsely that the containers held salvaged motor vehicles. The scheme generally operated as follows:

Individuals involved in the scheme rented luxury cars from car-rental companies such as Hertz and Avis, sometimes using false identification. The individuals drove the cars to a prearranged location, such as a parking garage, where the cars were stored temporarily. Other members of the scheme would pick up the cars and drive them to a second location where they were loaded into shipping containers. The containers were then hauled by truck to a seaport and placed on ships bound for West Africa.

2. The evidence against petitioner

Petitioner never disputed that he was employed by people who shipped cars and other items to Africa. Nor did he dispute that, as part of his duties, he assisted those people in transporting, preparing, and loading cars for export. But he contended that he was merely an unsophisticated worker who did not know the cars were stolen.

The government offered no proof that petitioner ever rented or stole any cars. Rather, to establish his knowing participation in the scheme, the government presented circumstantial evidence, including the following:

First, video evidence and law-enforcement testimony showed that petitioner participated in loading stolen cars into shipping containers. Moreover, evidence showed that he drove some of the cars from a parking garage to various loading locations.

Second, some of the stolen cars contained identifying information, such as rental stickers, rental keys, rental agreements, or rental "E-Z passes" indicating that the cars had once belonged to Hertz, Avis, or other rental-car companies. Surveillance footage showed petitioner sitting in one of the cars and removing some of this identifying information as he prepared the car for overseas shipment. While the government contended that this evidence showed the defendant's knowledge of the scheme, other evidence showed that rental-car companies routinely decide to sell their cars after

as little as 25,000 miles worth of use. The defense contended that, while petitioner may have been careless, naïve, or even reckless, he did not know the rental cars were stolen.

Third, the government introduced shipping documents that contained false information about the cars being exported. Some of these documents contained petitioner's name or contact information, and listed him as the person responsible for the shipment. The defense contended, however, that no evidence showed that petitioner prepared these documents or knew his name was being used in this manner.

Fourth, the government presented testimony from a cooperating witness, Adama Kamara, who pleaded guilty in July 2016 to various counts relating to the criminal scheme. He testified at petitioner's trial that, on three or four occasions, he saw petitioner and others loading cars into shipping containers. Kamara also claimed that, in 2013 or 2014, while he was operating a car dealership, he received a phone call from someone who identified himself as "Sarjo." The caller allegedly said he knew someone who wanted a 2013 or 2014 Range Rover. The caller said he would come over to Kamara's car dealership to discuss the matter further because "we don't talk on the phone," but the caller never showed up. Kamara claimed at trial that he understood the caller to be asking for a stolen car.

3. The willful-blindness charge and verdict

The government sought a willful-blindness instruction. The defense objected, arguing that no factual predicate for the charge existed. Though the defense acknowledged the evidence of "red flags" suggesting to a reasonable person that the rental cars might have been stolen (*see* App. 8a), the defense argued that no proof showed that petitioner "took any affirmative steps" or "positive steps" to avoid learning the truth. App. 8a, 10a. The court overruled the objection: "Given the totality of the evidence," the court ruled, "there is certainly a circumstantial evidence argument to be made that the defendant, having been exposed to many a re[d] flag, intentionally avoided knowledge of the fact that the cars at issue here were stolen." App. 12a.

The court instructed the jury on willful blindness as follows:

> All of the charges that I have described require the government to prove, among other things, the defendant acted knowingly, as I have already defined that term.
>
> In determining whether the defendant acted knowingly, you may consider whether the defendant deliberately closed his eyes to what would otherwise have been obvious to him. If you find beyond a reasonable doubt that the defendant acted with a conscious purpose to avoid learning the truth, then you may find that he acted knowingly. However, guilty knowledge may not be established by demonstrating that the defendant was merely negligent, foolish, or mistaken.

App. 13a.

The court then summarized the doctrine of willful blindness for the jury this way: "If you find the defendant was aware of the high probability of a fact and that the defendant acted with deliberate disregard of that fact, you may find that the defendant acted knowingly. However, if you find that the defendant actually believed that the fact was not so, you may not find that he acted knowingly." App. 14a.

The jury found petitioner guilty of all counts, save one: it acquitted him of knowingly submitting false and misleading export information (Count Five).

C. Sentencing

Petitioner was sentenced on each count to a term of imprisonment of one year and one day, to run concurrently—well below the advisory Guidelines range of 78–97 months. The court cited petitioner's lack of a criminal record, the important role he played in his family and the community, and his likely deportation to Gambia.

D. The appeal

Petitioner argued on appeal that the district court erred by giving the jury a willful-blindness instruction (referred to in some circuits as an "ostrich instruction" or "*Jewell* instruction," *see United States v. Jewell*, 532 F.2d 697 (9th Cir. 1976) (en banc)). In particular, petitioner noted the absence of evidence that he took "deliberate actions" or made "active

efforts" to avoid learning of the stolen nature of the cars, as *Global–Tech* requires.[3]

The court of appeals affirmed in a summary order, relying on a straightforward application of its prior, published decisions in *United States v. Svoboda*, 347 F.3d 471, 480–81 (2d Cir. 2003), and *United States v. Goffer*, 721 F.3d 113, 128 (2d Cir. 2013). App. 3a. *Svoboda* held before *Global–Tech* that willful blindness (known in the Second Circuit as "conscious avoidance") may be established where the defendant purposely avoided knowledge by failing to question "overwhelmingly suspicious" circumstances. *Svoboda*, 347 F.3d at 480. *Goffer* held that *Global–Tech* "did not alter or clarify the [willful-blindness] doctrine"; nor did it undermine the Second Circuit's preexisting willful-blindness case law by requiring proof of "deliberate actions" by the defendant to avoid knowledge. *Goffer*, 721 F.3d at 128; *see also United States v. Ghailani*, 733 F.3d 29, 54 n.20 (2d Cir. 2013) (noting that *Goffer* "specifically rejected" the argument that *Global–Tech* requires a finding that defendant took "deliberate actions" to avoid knowledge).

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[3] Petitioner also argued that the willful-blindness instruction failed to make clear that willful blindness could not be used as a substitute for specific intent. Petitioner does not pursue that issue in this Court.

Applying those holdings here, the court found no evidence that petitioner took deliberate actions to avoid learning that he was participating in criminal activity. Indeed, the court acknowledged "[t]he absence of evidence that Dambelly actively did something to avoid knowledge . . . ." App. 3a. Nevertheless, the court held that "[n]o such evidence was required" because "[a] conscious-avoidance instruction may be given even where the defendant has taken no active measures to avoid learning of criminal activity." *Id.*

The court expressly rejected petitioner's argument that *Global–Tech* requires "evidence of active measures to avoid knowledge." *Id.* at n.1. The panel reiterated *Goffer*'s holding that *Global–Tech* "simply summarizes existing case law" and does "not abrogate our existing precedents on the conscious-avoidance instruction." *Id.* The court also cited Judge Leval's concurring opinion in *United States v. Fofanah*, 765 F.3d 141, 148 (2d Cir. 2014) (Leval, J., concurring), in which he opined that *Global–Tech*'s reference to "deliberate actions" was "mistaken," *id.* at 151 n.2, and that "[a] finding that a defendant's ignorance of incriminating facts was a conscious choice on the defendant's part in no way requires a finding that the defendant took affirmative steps to avoid gaining the knowledge," *id.* at 150. App. 3a.

REASONS FOR GRANTING THE PETITION

Certiorari is warranted for four overriding reasons. First, *Global–Tech* has triggered a six-to-one circuit split. While the Second Circuit holds that *Global–Tech*'s willful-blindness standard does not require evidence that the defendant took "deliberate actions" to avoid acquiring actual knowledge, every other circuit to consider the question holds that *Global–Tech* requires just that. Second, the split is important because of the prevalence of willful-blindness instructions in federal criminal cases. Third, this case provides an excellent vehicle for resolving the conflict. And fourth, the Second Circuit's position is incorrect, inconsistent with *Global–Tech*, and unfair to accused persons like petitioner who may have been careless or reckless but did knowingly participate in criminal activity, as the statutes of conviction here (and in most criminal cases) require.

I.

The circuits are split over the application of the willful-blindness doctrine in the wake of *Global–Tech*.

The decision below implicates an entrenched conflict among the courts of appeals over whether, after *Global–Tech*, a willful-blindness instruction is improper in a criminal case where the government shows only that the defendant disregarded suspicious circumstances, without taking any

affirmative "deliberate actions" or "active steps" to avoid knowledge. The Court should grant review to resolve this split.

In *Global–Tech*, a patent-infringement case, the Court summarized the basic requirements of willful blindness as follows: "(1) the defendant must subjectively believe that there is a high probability that a fact exists and (2) the defendant must take deliberate actions to avoid learning of that fact." 563 U.S. at 769. The Court emphasized the second requirement: "We think these requirements give willful blindness an appropriately limited scope that *surpasses recklessness and negligence*. Under this formulation, a willfully blind defendant is one who takes *deliberate actions* to avoid confirming a high probability of wrongdoing and who can almost be said to have actually known the critical facts." *Id.* (emphases added).

Global–Tech held that the Federal Circuit erred by requiring only "deliberate indifference": "in demanding only 'deliberate indifference' to that risk [that the critical fact existed], the Federal Circuit's test does not require *active efforts* by an inducer to avoid knowing [that fact]." *Id.* at 770 (emphasis added).

In the seven years since *Global–Tech* was decided, the courts of appeals have generally agreed, as has the government, that *Global–Tech*'s willful-blindness standard extends to criminal cases. *See, e.g.*, *Macias*, 786 F.3d at 1062 ("[A]lthough *Global–Tech* was a civil case, several courts of

appeal[s] have deemed its definition of willful blindness applicable to criminal cases."); Brief for the United States in Opposition at 19, 2017 WL 1020037, *Farha v. United States*, 137 S. Ct. 1814 (2017) (No. 16–188) ("Although *Global–Tech* was a civil case, its reliance on general criminal law to articulate the correct standard for deliberate ignorance confirms that that standard applies in civil and criminal contexts."). But the courts of appeals have splintered over *Global–Tech*'s meaning. The Second Circuit holds, despite the language of *Global–Tech*, that willful blindness does not require proof of "deliberate actions," 563 U.S. at 769, "deliberate steps," *id.* at 768 n.8, 771, or "active efforts, " *id.* at 770, to avoid knowledge. App. 3a (decision below); *Ghailani*, 733 F.3d 29 at 54 n.20; *Goffer*, 721 F.3d at 128.

On the other hand, at least six circuits—the Fourth, Fifth, Seventh, Eighth, Ninth, and Tenth—hold in criminal cases that *Global–Tech* means what it says: willful blindness requires proof of "deliberate actions" to avoid knowledge, 563 U.S. at 769. *E.g.*, *United States v. Hale*, 857 F.3d 158, 168 (4th Cir. 2017) (quoting *Global–Tech* and upholding willful-blindness instruction because record contained "ample evidence from which to find that Hale took deliberate actions to avoid confirming that the goods were in fact stolen"); *United States v. Brooks*, 681 F.3d 678, 703 (5th Cir. 2012) (*Global–Tech* requires "active effort[s]" or "deliberate

actions" to avoid knowledge); *Macias*, 786 F.3d at 1062 (7th Cir.) (reversing conviction because evidence did not show defendant took "deliberate *actions*" to avoid knowledge) (quoting *Global–Tech,* 563 U.S. at 769) (emphasis by Seventh Circuit); *id.* at 1063 (defendant must "*act* to avoid learning the truth") (quoting *United States v. Giovanetti*, 919 F.2d 1223, 1228 (7th Cir. 1990) (Posner, J.) (emphasis by Seventh Circuit)); *United States v. Sigillito*, 759 F.3d 913, 939 (8th Cir. 2014) ("defendant must take deliberate actions to avoid learning of th[e] fact") (quoting *Global–Tech*, 563 U.S. at 769); *United States v. Li*, 704 F.3d 800, 804 (9th Cir. 2013) (defendant must take "deliberate actions" to avoid learning truth) (citing *Global–Tech*, 563 U.S. at 769); *United States v. Sorensen*, 801 F.3d 1217, 1233 (10th Cir. 2015) (same; quoting *Global–Tech*). *See also United States v. Allen*, 712 F. App'x 527, 537 (6th Cir. 2017) (describing *Global–Tech* as "holding" that willful blindness or "deliberate ignorance" requires the defendant "to take deliberate actions to avoid learning of [wrongdoing]").[4]

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[4] In addition, the circuits that require "deliberate actions" are divided among themselves over whether such actions include deliberate *in*action, i.e., failing to investigate suspicious circumstances. *Compare, e.g., United States v. Ramos–Atondo*, 732 F.3d 1113, 1120 (9th Cir. 2013) (holding that "a failure to investigate can be a deliberate action"), *with Macias*, 786 F.3d at 1061, 1062, 1063 ("deliberate action" requires "some active measure," "active steps," or "*act* to avoid learning the truth") (emphasis in

Moreover, the Seventh Circuit's decision in *Macias* demonstrates that the circuit split is not a minor semantic dispute over how to phrase the elements of willful blindness; the split is producing inconsistent outcomes. In *Macias*, a former smuggler of illegal immigrants was recruited to smuggle drug profits from the United States to Mexico. He was indicted for participating in a drug-distribution conspiracy. His defense was that he thought the money came from immigrant smuggling and did not know it represented drug proceeds. *See* 786 F.3d at 1061. The government obtained a willful-blindness instruction that, like the instruction given in petitioner's case, allowed the jury to find the defendant acted knowingly if he had a "strong suspicion" of the crucial fact (there, that he was transporting drug proceeds; here, that petitioner was transporting stolen cars), and "*deliberately avoided the truth*." *Id.* (emphasis in original). On appeal, the Seventh Circuit, applying *Global–Tech*, held that no willful-blindness instruction should have been given, and reversed the defendant's conspiracy conviction, because "[t]here is no evidence that suspecting he might be working for a drug cartel Macias took *active steps* to avoid having his suspicions confirmed." *Id.* at 1063 (emphasis added); *see also, e.g., United States v. L.E. Myers Co.*, 562 F.3d 845, 854 (7th Cir.

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original). This Court need not decide that issue to reverse because the Second Circuit holds that no "deliberate actions" are necessary.

2009) ("Failing to display curiosity is not enough; the defendant must *affirmatively act* to avoid learning the truth.") (emphasis in original).

Similarly, if the Seventh Circuit's interpretation of *Global–Tech* is correct, no willful-blindness instruction should have been given in petitioner's case given the absence of evidence that he took "active steps" to avoid confirming that the cars he handled were stolen. Accordingly, since application of the federal willful-blindness doctrine in criminal cases should not depend on the geographical happenstance of where the defendant is prosecuted, the Court should grant review.

II.

The question presented is important and recurring.

The conflict is significant and warrants resolution. The willful-blindness instruction, once given only in "rare" circumstances, *United States v. Lara–Velasquez*, 919 F.2d 946, 951 (5th Cir. 1990), now appears routinely in cases where knowledge is an element of the offense. *See, e.g.*, *United States v. Heredia*, 483 F.3d 913, 924 n.16 (9th Cir. 2007) (en banc) (disavowing statements in past cases that a willful-blindness instruction should rarely be given); *United States v. Alston–Graves*, 435 F.3d 331, 337, 338 (D.C. Cir. 2006) (noting that, despite their "problematic" nature,

willful-blindness instructions "are now commonly given and commonly upheld").

Because the willful-blindness doctrine is invoked so frequently in federal criminal cases, the confusion over *Global–Tech*'s articulation of the doctrine should not be allowed to continue. This Court's intervention is especially appropriate now for two reasons. First, willful blindness is a judge-made doctrine; although Congress has enacted statutory willful-blindness provisions in a few instances, *e.g.*, 18 U.S.C. § 844(c)(3)(B), the doctrine is overwhelmingly a creature of common-law decision-making. If the willful-blindness doctrine is to be deployed in a criminal system that eschews common-law theories of liability,[5] the Court should ensure it is applied uniformly and appropriately.

Second, the Court has insisted for decades that the *mens rea* elements of federal criminal statutes be strictly enforced. It has not hesitated to review and reverse lower court decisions that dilute the knowledge or intent elements of criminal provisions. *See, e.g.*, *Arthur Andersen LLP v. United States*, 544 U.S. 696 (2005); *Staples v. United States*, 511 U.S. 600 (1994); *Ratzlaf v. United States*, 510 U.S. 135 (1994); *Cheek v. United*

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[5] There is no federal criminal common law. All federal crimes are statutory. *See, e.g.*, *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 181 (1994); *Liparota v. United States*, 471 U.S. 419, 424 (1985).

States, 498 U.S. 192 (1991); *United States v. United States Gypsum Co.*, 438 U.S. 422 (1978); *Morissette v. United States*, 342 U.S. 246 (1952). The Court's careful policing of *mens rea* recognizes that in the federal criminal system the requisite mental state is often what separates the guilty from the innocent.

The Court should likewise grant certiorari here to decide whether the willful-blindness doctrine as applied by the Second Circuit improperly blurs the crucial *mens rea* line. *Global–Tech*, consistent with this Court's other *mens rea* decisions, cabined the willful-blindness doctrine to reduce the risk it would undermine the knowledge element of many federal civil and criminal statutes. The Second Circuit, as an inferior court, is not free to depart from *Global–Tech*'s requirements—even if it believes those requirements to be "mistaken." *Fofanah*, 765 F.3d at 151 n.2 (Leval, J., concurring). Accordingly, the Court should grant the writ to ensure that *Global–Tech* is being followed and properly construed.

III.

This case is an appropriate vehicle for clarifying the willful-blindness doctrine and the meaning of *Global–Tech*.

This petition also provides a clean opportunity for the Court to resolve the confusion *Global–Tech* has generated.

First, the issue presented was preserved below for this Court's review. Petitioner objected at trial to any willful-blindness instruction on the ground that no evidence showed he took "affirmative steps" to avoid actual knowledge, and the district court considered that objection at length before rejecting it. App. 7a–12a. The issue was then fully considered by the court of appeals, which analyzed it under its binding precedents construing *Global–Tech*. App. 3a.[6]

Second, the issue is presented with crystal clarity because the Second Circuit acknowledged "[t]he absence of evidence that [petitioner] actively did something to avoid knowledge . . . ." App. 3a.

Third, the issue is outcome-determinative. If, as *Global–Tech* and many circuits state, "deliberate actions" to avoid knowledge are necessary for willful blindness, petitioner would be entitled to a remand for the Second Circuit to decide whether the absence of deliberate actions here

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[6] Thus, the unpublished nature of the Second Circuit's decision is no bar to review. This Court regularly reviews unpublished decisions that rely on settled circuit precedent, including in four cases from the October 2016 Term alone. *See, e.g.*, *Manuel v. City of Joliet*, 137 S. Ct. 911 (2017) (reviewing *Manuel v. City of Joliet*, 590 F. App'x 641 (7th Cir. 2015)); *Manrique v. United States*, 137 S. Ct. 1266 (2017) (reviewing *United States v. Manrique*, 618 F. App'x 579 (11th Cir. 2015)); *Beckles v. United States*, 137 S. Ct. 886 (2017) (reviewing *Beckles v. United States*, 616 F. App'x 415 (11th Cir. 2015)); *California Pub. Employees' Ret. Sys. v. ANZ Sec., Inc.*, 137 S. Ct. 2042 (2017) (reviewing *In re Lehman Bros. Sec. & ERISA Litig.*, 655 F. App'x 13 (2d Cir. 2016)).

warrants a new trial. It does. An error in defining an element of an offense can be harmless only if the government shows "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Neder v. United States*, 527 U.S. 1, 15 (1999). The government cannot meet that burden because petitioner's knowledge was both the central issue at trial and hotly contested. And the Second Circuit, in contrast to its practice in other willful-blindness cases, said nothing to indicate it would find harmless error in this case. *Cf. Fofanah*, 765 F.3d at 145 (declining to resolve whether willful-blindness charge should have been given because any error "was harmless" in light of "overwhelming evidence" of defendant's actual knowledge that cars were stolen); *United States v. Ferrarini*, 219 F.3d 145, 157 (2d Cir. 2000) (unwarranted willful-blindness charge was harmless because there was "overwhelming evidence" of defendant's actual knowledge); *United States v. Adeniji*, 31 F.3d 58, 63–64 (2d Cir. 1994) (same).

Finally on this point, no further "percolation" is necessary. At least seven circuits have issued published decisions addressing whether willful blindness in criminal cases requires "deliberate actions" under *Global–Tech*. *See Ghailani*, 733 F.3d at 54 n.20 (2d Cir.); *Hale*, 857 F.3d at 168 (4th Cir.); *Brooks*, 681 F.3d at 703 (5th Cir.); *Macias*, 786 F.3d at 1062–64 (7th Cir.); *Sigillito*, 759 F.3d at 939 (8th Cir.); *Li*, 704 F.3d at 804–05

(9th Cir.); *Sorensen*, 801 F.3d at 1233 (10th Cir.). But the Second Circuit has repeatedly adhered to its position rejecting *Global–Tech*'s "deliberate actions" requirement. *See* App. 3a; *Ghailani*, 733 F.3d at 54 n.20; *Goffer*, 721 F.3d at 128. Since the division stems from confusion over what *Global–Tech* means, only this Court can definitively clarify the matter. There is no reason to believe the disagreement among the lower courts will resolve itself.

IV.

The Second Circuit's position is wrong.

Lastly, certiorari is warranted because the Second Circuit's position is erroneous, contrary to *Global–Tech*, and unfair. If uncorrected, the court's approach threatens to dilute the statutory *mens rea* requirement in many prosecutions, thereby allowing defendants to be convicted and imprisoned for reckless conduct Congress has not defined as criminal.

The Second Circuit recognized "[t]he absence of evidence that [petitioner] actively did something to avoid knowledge." App. 3a. Nevertheless, the court upheld allowing the jury to convict petitioner on a willful-blindness theory. The court ruled that, under its pre-*Global–Tech* precedents, inaction—the failure to question suspicious circumstances—can establish a "purposeful contrivance" to avoid knowledge and, therefore, willful blindness. *Id.* The defendant need not take any

deliberate *actions* to shield himself from learning the truth. *Id.* These precedents, the court held, remain valid despite *Global-Tech*. *Id.* at n.1.

The Second Circuit's decision is wrong for several reasons. First, and most importantly, it contravenes both the language and holding of *Global–Tech*. As this Court there repeatedly stated, "the defendant must take deliberate *actions* to avoid learning of [the suspected] fact." 563 U.S. at 769 (emphasis added). *See also id.* ("[A] willfully blind defendant is one who take deliberate *actions* to avoid confirming a high probability of wrongdoing and who can almost be said to have actually known the critical facts.") (emphasis added). This Court was not merely providing a casual summary of existing law. On the contrary, the Court clarified the willful-blindness doctrine by holding that the Federal Circuit had erred precisely because it failed to "require *active efforts*" to avoid culpable knowledge. *Id.* at 770 (emphasis added). Thus, *Global–Tech*'s "deliberate actions" or "active efforts" requirement was necessary to the holding.

Second, the Second Circuit's approach eviscerates the distinction *Global–Tech* drew between recklessness and negligence on one hand and willful blindness on the other. By requiring "deliberate actions" to avoid learning the truth, this Court sought to "give willful blindness an appropriately limited scope that *surpasses recklessness and negligence*." *Global–Tech*, 563 U.S. at 769 (emphasis added). A reckless defendant,

according to the Court, "knows of a substantial and unjustified risk of ... wrongdoing." *Id.* at 770. Recklessness thus corresponds to the first prong of the willful-blindness standard—a "subjective belie[f] that there is a high probability that a fact exists." *Id.* at 769.

The second prong of willful blindness—the "deliberate actions" requirement—is thus what distinguishes the willfully blind defendant from the merely reckless one. A reckless defendant knows of a substantial risk that a fact exists and deliberately disregards it (or, put differently, is deliberately indifferent to it). *See id.* at 759; *Farmer v. Brennan*, 511 U.S. 825, 839 (1994) (to act recklessly, person must "consciously disregard a substantial risk of serious harm"). A willfully blind defendant, in contrast, knows of a substantial risk (or "high probability") that a fact exists and takes *deliberate actions* to avoid confirming the fact. *Global–Tech*, 563 U.S. at 769. But if no deliberate action is required, as the Second Circuit holds, *see* App. 3a; *Ghailani*, 733 F.3d at 54 n.20; *Goffer*, 721 F.3d at 128, this Court's carefully drawn distinction vanishes; a reckless defendant who disregards a "substantial and unjustified risk of wrongdoing"—by definition, *every* reckless defendant—will be found willfully blind.

Thus, as the Seventh Circuit has recognized, *Macias*, 786 F.3d at 1061, 1062–64, it is not enough to warrant a willful-blindness instruction that the defendant consciously—but passively—ignored circumstances that

were "overwhelmingly suspicious." App. 3a; *Svoboda*, 347 F.3d at 480. Rather, the government must show the defendant made "*active efforts*" to avoid acquiring actual knowledge. *Global–Tech*, 563 U.S. at 770 (emphasis added). In other words, the defendant must do more than disregard what she sees; she must take *actions* to avoid learning the truth. As the Seventh Circuit has stated:

> The most powerful criticism of the ostrich instruction is, precisely, that its tendency is to allow juries to convict upon a finding of negligence for crimes that require intent . . . . The criticism can be deflected by thinking carefully about just what it is that real ostriches do (or at least are popularly supposed to do). They do not just fail to follow through on their suspicions of bad things. They are not merely *careless* birds. They bury their heads in the sand so that they will not see or hear bad things. They *deliberately* avoid acquiring unpleasant knowledge. The ostrich instruction is designed for cases in which there is evidence that the defendant, knowing or strongly suspecting that he is involved in shady dealings, *takes steps* to make sure that he does not acquire full or exact knowledge of the nature and extent of those dealings.

United States v. Giovanetti, 919 F.2d 1223, 1227–28 (7th Cir. 1990) (first two emphases by the Seventh Circuit; last two emphases added); *see also Macias*, 786 F.3d at 1062 (reversing conviction because no evidence showed defendant "*took active steps* to avoid having his suspicions confirmed") (emphasis added).

The Second Circuit, by rejecting *Global–Tech*'s "deliberate actions" requirement, invites the very danger the Seventh Circuit warns against

and *Global–Tech* sought to eliminate: allowing a jury to find that a defendant acted with the equivalent of actual, culpable knowledge simply because he or she may have disregarded or failed to investigate a known or suspected risk of wrongdoing (i.e., was reckless).

In sum, the Second Circuit's incorrect position warrants this Court's review to ensure the courts of appeals apply *Global–Tech*'s willful-blindness standard faithfully and uniformly in the criminal context.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Edward S. Zas
Counsel of Record

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APPENDIX

17-1594
United States v. Dambelly

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

Rulings by summary order do not have precedential effect. Citation to a summary order filed on or after January 1, 2007, is permitted and is governed by Federal Rule of Appellate Procedure 32.1 and this Court's Local Rule 32.1.1. When citing a summary order in a document filed with this Court, a party must cite either the Federal Appendix or an electronic database (with the notation "summary order"). A party citing a summary order must serve a copy of it on any party not represented by counsel.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 15th day of March, two thousand eighteen.

PRESENT: JOSÉ A. CABRANES,
REENA RAGGI,
Circuit Judges,
LAWRENCE J. VILARDO,
District Judge.[*]

UNITED STATES OF AMERICA,

Appellee, 17-1594

v.

SARJO DAMBELLY,

Defendant-Appellant,

---

[*] Judge Lawrence J. Vilardo, of the United States District Court for the Western District of New York, sitting by designation.

LAMIN SAHO,

Defendant.†

FOR APPELLEE: Michael D. Neff, Matthew Laroche, and Daniel B. Tehrani, Assistant United States Attorneys, *for* Geoffrey Berman, United States Attorney for the Southern District of New York, New York, NY.

FOR DEFENDANT-APPELLANT: Edward S. Zas, Appeals Bureau, Federal Defenders of New York, Inc., New York, NY.

Appeal from a May 11, 2017 judgment of the United States District Court for the Southern District of New York (Jesse M. Furman, *Judge*).

UPON DUE CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the May 11, 2017 judgment of the District Court be, and it hereby is, **AFFIRMED.**

Defendant-Appellant Sarjo Dambelly ("Dambelly") appeals the District Court's judgment entered May 11, 2017. The judgment convicted him after a jury trial of one count each of conspiracy to export, transport, and possess stolen motor vehicles in violation of 18 U.S.C. § 371; exportation of or attempt to export stolen vehicles in violation of 18 U.S.C. §§ 2, 553(a)(1); transportation of stolen vehicles in violation of 18 U.S.C. §§ 2, 2312; and possession of stolen vehicles in violation of 18 U.S.C. §§ 2, 2313(a). The judgment also sentenced him principally to a year and a day's imprisonment on each count, the terms to run concurrently. We assume the parties' familiarity with the underlying facts and the procedural history of the case. We discuss in turn below the two issues that Dambelly raises on appeal.

1. **Evidentiary Basis for the Conscious-Avoidance Instruction**

Dambelly argues that the District Court erred by giving a conscious-avoidance instruction to the jury because "[t]here was no evidence" that he had taken "deliberate actions or made active efforts to shield himself from knowledge" of criminal activity. Br. Def.-Appellant 14.

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† The Clerk is directed to amend the caption to read as shown above.

(a) Law

"We review challenged jury instructions *de novo* but will reverse only if all of the instructions, taken as a whole, caused a defendant prejudice. . . . A jury instruction is erroneous if it misleads the jury as to the correct legal standard or does not adequately inform the jury on the law." *United States v. Applins*, 637 F.3d 59, 72 (2d Cir. 2011) (internal quotation marks and citations omitted).

"A conscious avoidance instruction may only be given if (1) the defendant asserts the lack of some specific aspect of knowledge required for conviction . . . and (2) the appropriate factual predicate for the charge exists, i.e., the evidence is such that a rational juror may reach [the] conclusion beyond a reasonable doubt . . . that [the defendant] was aware of a high probability [of the fact in dispute] and consciously avoided confirming that fact[.] The second prong of this test thus has two components[:] there must be evidence that the defendant (1) was aware of a high probability of the disputed fact and (2) deliberately avoided confirming that fact. Of course, the same evidence that will raise an inference that the defendant had actual knowledge of the illegal conduct ordinarily will also raise the inference that the defendant was subjectively aware of a high probability of the existence of illegal conduct. Moreover, the second prong may be established where[a] defendant's involvement in the criminal offense may have been *so overwhelmingly suspicious* that the defendant's failure to question the suspicious circumstances establishes the defendant's purposeful contrivance to avoid guilty knowledge." *United States v. Svoboda*, 347 F.3d 471, 480 (2d Cir. 2003) (second, third, fourth, fifth, sixth, eighth alterations in original) (emphasis in original) (internal quotation marks and citations omitted).

(b) Analysis

The absence of evidence that Dambelly actively did something to avoid knowledge does not make the District Court's conscious-avoidance instruction erroneous. No such evidence was required. A conscious-avoidance instruction may be given even when the defendant has taken no active measures to avoid learning of criminal activity. *See, e.g., id.* at 480–81 (finding a sufficient evidentiary basis for a conscious-avoidance instruction in facts that do not include any active measures taken by the defendant); *see also United States v. Fofanah*, 765 F.3d 141, 150 (2d Cir. 2014) (Leval, J., concurring) ("A finding that a defendant's ignorance of incriminating facts was a conscious choice on the defendant's part in no way requires a finding that the defendant took affirmative steps to avoid gaining the knowledge.").[1]

[1] Dambelly cites the decision in *Global-Tech Appliances, Inc. v. SEB S.A.*, 563 U.S. 754 (2011), in support of his argument that there must be evidence of active measures to avoid knowledge. But we have already stated that *Global-Tech* simply summarizes existing case law. *United States v. Goffer*, 721 F.3d 113, 128 (2d Cir. 2013). *Global-Tech* did not abrogate our existing precedents on the conscious-avoidance instruction.

2. Language of the Conscious-Avoidance Instruction

Dambelly also argues that, even if it was proper to give a conscious-avoidance instruction, the District Court erred when giving the instruction to the jury on three counts: the counts of exportation of or attempt to export stolen vehicles in violation of 18 U.S.C. §§ 2, 553(a)(1); transportation of stolen vehicles in violation of 18 U.S.C. §§ 2, 2312; and possession of stolen vehicles in violation of 18 U.S.C. §§ 2, 2313(a). The District Court erred, according to Dambelly, because it "failed to make clear" to the jury "that the theory of conscious avoidance could not be applied to the aiding-and-abetting or attempt charges" on those counts. Br. Def.-Appellant 20. To convict someone of aiding and abetting or attempt of an offense, "proof of specific intent, not mere knowledge," is required, he asserts. *Id.* By contrast, a conscious-avoidance instruction permits a jury only to infer knowledge, not intent, from the defendant's avoidance.

(a) Law

We review the correctness of jury instructions *de novo*. *Applins*, 637 F.3d at 72. "In reviewing a jury instruction, we examine not only the specific language that the defendant challenges but also the instructions as a whole to see [whether] the entire charge delivered a correct interpretation of the law." *United States v. Al Kassar*, 660 F.3d 108, 127 (2d Cir. 2011) (internal quotation marks omitted).

Dambelly concedes, however, that he did not raise this issue in the District Court. We therefore review the District Court's instructions on this issue for plain error. *See, e.g.*, *United States v. Middlemiss*, 217 F.3d 112, 121 (2d Cir. 2000). Plain error exists when "(1) there is an error; (2) the error is clear or obvious, rather than subject to reasonable dispute; (3) the error affected the appellant's substantial rights, which in the ordinary case means it affected the outcome of the district court proceedings; and (4) the error seriously affect[s] the fairness, integrity or public reputation of judicial proceedings." *United States v. Marcus*, 560 U.S. 258, 262 (2010) (alteration in original) (internal quotation marks omitted).

As Dambelly points out, one of the prerequisites for a conscious-avoidance instruction is that "the defendant [have] assert[ed] the lack of some specific aspect of knowledge required for conviction." *Svoboda*, 347 F.3d at 480. A conscious-avoidance instruction permits the jury to draw an inference of knowledge, not an inference of specific intent. *See United States v. Samaria*, 239 F.3d 228, 239–40 (2001), *abrogated on other grounds*, *United States v. Huezo*, 546 F.3d 174 (2d Cir. 2008). To convict a defendant of aiding and abetting, a jury must find that the defendant had the specific intent to commit the underlying substantive offense; mere knowledge is not enough. *United States v. Frampton*, 382 F.3d 213, 223 (2d Cir. 2004). Conviction on a charge of attempt requires proof of intent unless it is clear from the language of the statute that only knowledge, not intent, is required. *See United States v. Kwong*, 14 F.3d 189, 194 (2d Cir. 1994) (citing *Braxton v. United States*, 500 U.S. 344, 351 n. (1991)).

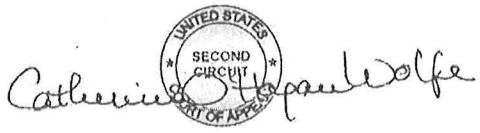
(b) Analysis

We conclude that the District Court's instruction was not erroneous, much less plainly erroneous. Reading the jury instructions as a whole, we note that the District Court correctly described the elements of both aiding and abetting and attempt. *See* Special App. Def.-Appellant 40, 44, 51–53. The District Court specifically instructed the jury that aiding and abetting required proof that the defendant had acted "willfully," and it explained that willfulness requires "an intention to do something that the law forbids"—i.e., specific intent. *Id.* at 51. It also correctly instructed the jury that attempt requires a finding "that the defendant intended to commit the crime charged." *Id.* at 44. And the District Court explicitly told the jury that "[c]onscious avoidance may apply only to the defendant's knowledge"—and therefore not intent. *Id.* at 53–54.

CONCLUSION

We have reviewed all of the arguments raised by Dambelly on appeal and find them to be without merit. We therefore **AFFIRM** the May 11, 2017 judgment of the District Court.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk



UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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UNITED STATES OF AMERICA,

v. 16 CR 002 (JMF)

SARJO DAMBELLY,

Defendant.

----------x

New York, N.Y.
November 17, 2016
9:15 a.m.

Before:

HON. JESSE M. FURMAN,

District Judge
and a jury

APPEARANCES

PREET BHARARA
United States Attorney for the
Southern District of New York
MICHAEL NEFF
MATTHEW LAROCHE
HOWARD MASTER
Assistant United States Attorneys

FEDERAL DEFENDERS OF NEW YORK
Attorneys for Defendant
BY: JENNIFER WILLIS
JONATHAN MARVINNY

ALSO PRESENT: STEVEN THAU, Task Force Officer
COLLEEN GEIER, Paralegal
JASON FISHER, Paralegal
SARAH GOMEZ, Paralegal
PA DRAMMEH, Mandingo Interpreter

Dambelly confessed. He certainly didn't. It seems redundant.

THE COURT: The gravamen of the government's point before was the instruction with respect to the evidence that was taken in connection with the questioning, not the questioning itself. So I think a separate instruction with respect to statements is appropriate. If you have an objection to the particular language, we will go through that when your time comes.

I'll get back to the government in a second.

Obviously, the instruction on page 17 with respect to the defendant's election to testify I will remove, and on page 18 the paragraph about the defendant presenting evidence I will remove.

Back to you, Mr. Laroche. Next.

MR. LAROCHE: Nothing further from the government, your Honor.

THE COURT: Other than the willfully caused?

MR. LAROCHE: That's correct.

THE COURT: Mr. Marvinny, why don't we discuss your requests first, and then we will turn back to willfully caused.

MR. MARVINNY: Thank you. One moment, your Honor.

Your Honor, we object to the Court's inclusion of a conscious avoidance charge, page 41. Our argument is that the government hasn't laid a sufficient factual predicate to warrant that charge.

Before I say this, I understand there is no rule against alternative theories if the evidence supports it. But in this case the government's theory is that Mr. Dambelly orchestrated these shipments, was heavily involved, controlled these shipments, submitted information about these shipments.

They have presented no evidence that Mr. Dambelly deliberately closed his eyes to anything that would have otherwise been obvious to him. That is certainly one of the factual predicates that must be present before the Court gives a conscious avoidance charge.

THE COURT: Why would it not suffice, given the evidence of the rental car documents that were in each of these cars, given the keys that were Hertz keys, given the Never Lost system in each of these cars, and so on and so forth, that there were ample red flags? If he didn't know in fact that the cars were stolen, there were certainly reg flags to that effect.

MR. MARVINNY: Agreed, your Honor, there are red flags, but I don't think that was the standard. The standard is did he deliberately closed his eyes to them. The question isn't just should he have known. The question is did he actually deliberately close his eyes, what steps did he take to learn about them.

There is no evidence that he took any affirmative steps to avoid learning of those facts. The government's

theory is he was in those cars with the Never Lost system and with the rental agreements next to it. So what steps are they alleging that he deliberately took?

I have a economy you have cites. United States v. Ferrarini, 219 F.3d 145 (2d Cir. 2000). I'll briefly quote from page 157 where the circuit said a conscious avoidance instruction was inappropriate because "the evidence shows that Viera, one of the defendants, actually knew of the frauds. It is not sufficient to permit a finding that he consciously avoided confirming them.'"

I will also cite United States v. Kaplan, 490 F.3d 110, another Second Circuit case from 2007. It cites Ferrarini and says, "Evidence sufficient to find actual knowledge doesn't necessarily constitute evidence sufficient to find conscious avoidance. The only record evidence," this is at page 128," indicates that Kaplan had actual knowledge of the witness tampering and there was no factual predicate for a conscious avoidance charge."

Finally, your Honor, I would cite a case that is very similar to this one, United States v. Fofanah, 765 F.3d 141 (2d Cir. 2014). That was a cars to Africa case, your Honor, with very similar facts.

To be clear, the second didn't reach ultimately the question of whether the conscious avoidance charge there was given in error because it found there was overwhelming evidence

of actual knowledge. But I think it is fair to say from reading that case that the Second Circuit at least hinted that in a case like this it may be error to give a conscious avoidance charge where there is really not a factual predicate that the defendant took affirmative steps to close his eyes.

Those are just some cites, your Honor. It is simply not enough to say it must have been obvious to him and therefore we need a conscious avoidance charge. There needs to be something in the record that shows he took positive steps to avoid learning of the facts.

MR. LAROCHE: This is very different than several of the cases that he cited that I am familiar with. Start with the Fofanah case, your Honor. There were direct conversations in that case. Here we are not asking the jury to base it on direct conversations about these specific cars. We are asking the jury to infer.

Defense counsel in its opening spent most of that talking about how he didn't know, how he was just some lowly worker who was asked to move cars from point A to point B. We cited several cases that I think are directly on point. One, United States v. Brito, 907 F.2d 392, which says that "The conscious avoidance charge is appropriate when the defendant," like here, "claims a lack of knowledge of the relevant facts but the surrounding circumstances would permit a reasonable juror to conclude that the defendant should have known about

them."

Some of the facts that were just discussed -- the rental agreements that are in the case that he picked up, the rental keys, the stickers, all of those things -- I think should let the jury infer that he knew or, in the alternative, that he clearly deliberately disregarded it. So we think the charge is appropriate

THE COURT: What is your response to Mr. Marvinny's argument that there needs to be evidence that the defendant took deliberate steps or actions to avoid confirming what the red flags would suggest?

MR. LAROCHE: He repeatedly picked up cars that had these rental agreements in there, that had the rental keys. The fact that he came into contact with these and chose not to confirm it himself would permit that charge. I think it would be appropriate in those circumstances.

THE COURT: I'll take a look at the cases, but at the moment my inclination is to include the charge. I think it is a pretty classic case of that being a viable alternative theory given the various glaring red flags present here.

Next, Mr. Marvinny.

MR. MARVINNY: Your Honor, our last objection is to the Court's proposed verdict form. We respectfully request that "not guilty" be listed before "guilty." I wish I had the cases at my fingertips. There is case law that supports this

obligations. My colleague Ilan Graff is going to sit in in my stead. We are fungible.

THE COURT: I will try not to take it personally, but you may go.

MR. MASTER: Thank you, your Honor.

THE COURT: Have you folks collected the evidence that has been admitted or is that process under way? If you could make sure that it happens and that counsel is in agreement about the exhibits being submitted, that would be helpful. Thank you.

(Recess)

THE COURT: First, I did review the conscious avoidance cases, and I am going to keep the instruction in. Given the totality of the evidence, there is certainly a circumstantial evidence argument to be made that the defendant, having been exposed to many a reg flag, intentionally avoided knowledge of the fact that the cars at issue here were stolen.

Second, Ms. Willis, Mr. Marvinny, do you want me to ask if you have a case in front of the jury or should I just advise the jury that you have elected not to present a case?

MS. WILLIS: We will rest in front of the jury, your Honor.

THE COURT: All right. Anything else before we start?

MR. LAROCHE: No, your Honor.

MR. NEFF: Sorry, your Honor, two quick things. The

Did he participate in the crime charged as something he wished to bring about?

Did he associate himself with the criminal venture knowingly and willfully?

Did he seek by his actions to make the criminal venture succeed?

If he did, then the defendant is an aider and abettor, and therefore guilty of the offense. If he did not, then the defendant is not an aider and abettor and is not guilty of the offense.

All of the charges that I have described require the government to prove, among other things, the defendant acted knowingly, as I have already defined that term.

In determining whether the defendant acted knowingly, you may consider whether the defendant deliberately closed his eyes to what would otherwise have been obvious to him. If you find beyond a reasonable doubt that the defendant acted with a conscious purpose to avoid learning the truth, then you may find that he acted knowingly. However, guilty knowledge may not be established by demonstrating that the defendant was merely negligent, foolish, or mistaken.

Keep in mind, however, that in considering the conspiracy charged in Count One, you cannot rely on conscience avoidance to support a finding that the defendant intentionally joined the conspiracy. Conscious avoidance may apply only to

the defendant's knowledge of specific facts, including the specific objectives of the conspiracy, not to whether the defendant joined the conspiracy in the first place. It is logically impossible for the defendant to intend and agree to join a conspiracy if he does not actually know that it exists.

If you find the defendant was aware of the high probability of a fact and that the defendant acted with deliberate disregard of that fact, you may find that the defendant acted knowingly. However, if you find that the defendant actually believed that the fact was not so, you may not find that he acted knowingly.

It is entirely up to you whether you find the defendant deliberately closed his eyes and any inferences to be drawn from the evidence on this issue.

In addition to all of the elements I have described for you, in order to convict the defendant of any count of the indictment, you must also decide whether any act in furtherance of that count occurred within the Southern District of New York. I instruct you that the Southern District of New York includes Manhattan and the Bronx.

I should note that on this issue -- and this issue alone -- the government need not prove venue beyond a reasonable doubt, but only by a mere preponderance of the evidence. Thus, the government has satisfied its venue obligations if you conclude that it is more likely than not

AO 245B (Rev. 11/16) Judgment in a Criminal Case
Sheet 1

UNITED STATES DISTRICT COURT

Southern District of New York

UNITED STATES OF AMERICA
v.
SARJO DAMBELLY

JUDGMENT IN A CRIMINAL CASE

Case Number: S1 16-CR-002-1 (JMF)

USM Number: 72956-054

Jennifer Elaine Willis
Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to count(s)

☐ pleaded nolo contendere to count(s) which was accepted by the court.

☑ was found guilty on count(s) after a plea of not guilty. 1s-4s of the S1 Indictment.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18 USC § 371	CONSPIRACY TO EXPORT, TRANSPORT AND POSSESS	11/4/2015	1s
18 USC § 553	IMPORT OR EXPORT OF STOLEN MOTOR VEHICLES	11/4/2015	2s
18 USC § 2312	TRANSPORTATION OF STOLEN VEHICLES	11/4/2015	3s

The defendant is sentenced as provided in pages 2 through 8 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☑ The defendant has been found not guilty on count(s) 5s

☑ Count(s) All open counts ☐ is ☑ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

5/2/2017
Date

Sign

Hon. Jesse M. Furman U.S.D.J.
Name and Title of Judge

5/2/2017
Date

DEFENDANT: SARJO DAMBELLY
CASE NUMBER: S1 16-CR-002-1 (JMF)

ADDITIONAL COUNTS OF CONVICTION

Title & Section	Nature of Offense	Offense Ended	Count
18 USC § 2313	POSSESSION OF STOLEN VEHICLES	11/4/2015	4s

DEFENDANT: SARJO DAMBELLY
CASE NUMBER: S1 16-CR-002-1 (JMF)

IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of:

One (1) year and one (1) day on each count, to be served concurrently.

☑ The court makes the following recommendations to the Bureau of Prisons:

The Court recommends that the defendant be incarcerated in a facility as close to New York City as possible to maintain his family ties. It is also recommended that the defendant receive mental health counseling and treatment, and that he participate in any mental health programs available.

☑ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____.

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on _____.

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

a _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: SARJO DAMBELLY
CASE NUMBER: S1 16-CR-002-1 (JMF)

SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of :

Three (3) years.

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.
   - ☐ The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. *(check if applicable)*
4. ☑ You must cooperate in the collection of DNA as directed by the probation officer. *(check if applicable)*
5. ☐ You must comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. § 16901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in the location where you reside, work, are a student, or were convicted of a qualifying offense. *(check if applicable)*
6. ☐ You must participate in an approved program for domestic violence. *(check if applicable)*

You must comply with the standard conditions that have been adopted by this court as well as with any other conditions on the attached page.

DEFENDANT: SARJO DAMBELLY
CASE NUMBER: S1 16-CR-002-1 (JMF)

STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. For further information regarding these conditions, see *Overview of Probation and Supervised Release Conditions*, available at: www.uscourts.gov.

Defendant's Signature _____ Date _____

DEFENDANT: SARJO DAMBELLY
CASE NUMBER: S1 16-CR-002-1 (JMF)

ADDITIONAL SUPERVISED RELEASE TERMS

1. The defendant shall obey the immigration laws and comply with the directives of immigration authorities.

2. The defendant shall participate in an outpatient mental health program approved by the U.S. Probation Office. The defendant shall continue to take any prescribed medications unless otherwise instructed by the health care provider. The defendant shall contribute to the costs of services rendered not covered by third-party payment, if the defendant has the ability to pay. The Court authorizes the release of available psychological and psychiatric evaluations and reports to the health care provider.

3. The defendant shall submit his person, residence, place of business, vehicle, and any property or electronic devices under his control to a search on the basis that the probation officer has reasonable belief that contraband or evidence of a violation of the conditions of the release may be found. The search must be conducted at a reasonable time and in reasonable manner. Failure to submit to a search may be grounds for revocation. The defendant shall inform any other residents that the premises may be subject to search pursuant to this condition.

3. The defendant shall provide the probation officer with access to any requested financial information unless the defendant has satisfied his financial obligations.

4. The defendant shall not incur new credit charges or open additional lines of credit without the approval of the probation officer unless the defendant has satisfied his financial obligations.

5. The defendant shall be supervised by the district of residence.

DEFENDANT: SARJO DAMBELLY
CASE NUMBER: S1 16-CR-002-1 (JMF)

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	JVTA Assessment*	Fine	Restitution
TOTALS	$ 400.00	$	$	$

☑ The determination of restitution is deferred until 7/31/2017 . An *Amended Judgment in a Criminal Case (AO 245C)* will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss**	Restitution Ordered	Priority or Percentage

TOTALS	$ 0.00	$ 0.00	

☐ Restitution amount ordered pursuant to plea agreement $ _____

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ the interest requirement is waived for the ☐ fine ☐ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

* Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.
** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: SARJO DAMBELLY
CASE NUMBER: S1 16-CR-002-1 (JMF)

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

A ☑ Lump sum payment of $ 400.00 due immediately, balance due

☐ not later than _____, or
☐ in accordance with ☐ C, ☐ D, ☐ E, or ☐ F below; or

B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or

C ☐ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after the date of this judgment; or

D ☐ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within _____ *(e.g., 30 or 60 days)* after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☐ Special instructions regarding the payment of criminal monetary penalties:

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Defendant and Co-Defendant Names and Case Numbers *(including defendant number)*, Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) JVTA assessment, (8) penalties, and (9) costs, including cost of prosecution and court costs.