No. 18-5251

IN THE SUPREME COURT OF THE UNITED STATES

SARJO DAMBELLY, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals erred in holding that the evidence in this case supported the district court's decision to give the jury a willful blindness instruction.

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OPINION BELOW

The order of the court of appeals (Pet. App. 1a-5a) is not published in the Federal Reporter but is reprinted at 714 Fed. Appx. 87.

JURISDICTION

The judgment of the court of appeals was entered on March 15, 2018. On May 16, 2018, Justice Ginsburg extended the time within which to file a petition for a writ of certiorari to and including July 13, 2018, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted of conspiracy to export, transport, and possess stolen motor vehicles, in violation of 18 U.S.C. 371; exporting or attempting to export stolen motor vehicles, in violation of 18 U.S.C. 553(a)(1) and 2; transporting stolen motor vehicles in interstate commerce, in violation of 18 U.S.C. 2312 and 2; and possessing stolen motor vehicles that have crossed state lines, in violation of 18 U.S.C. 2313 and 2. Pet. App. 15a-16a. He was sentenced to one year and one day of imprisonment, to be followed by three years of supervised release. Id. at 17a-18a. The court of appeals affirmed. Id. at 1a-5a.

1. In 2014, petitioner and his co-conspirators embarked on a scheme to steal luxury cars, principally from rental car companies, for export to West Africa. Gov't C.A. Br. 3-4. The scheme involved depositing the stolen vehicles in parking garages in the Bronx and later driving them to various locations to be loaded into shipping containers. Id. at 4. Petitioner personally drove some of the stolen cars to a garage and from the garage to loading locations. Id. at 5, 8. He also directed and helped others to load stolen cars into shipping containers. Id. at 6. At trial, petitioner primarily contested whether the evidence established that he knew the cars were stolen. Id. at 10.

To establish petitioner's knowledge, the government introduced evidence that he transported cars that obviously had been stolen from rental car companies because they contained rental agreements and were equipped with GPS devices, windshield stickers, and key chains all bearing the rental company's logo. Gov't C.A. Br. 5-6, 17. Additionally, petitioner was observed loading stolen cars on five separate occasions and was recorded by surveillance footage driving the stolen cars out of the parking garage where they had been stashed prior to being exported. Id. at 17. Petitioner was also videoed picking up one of the stolen cars from a parking garage and removing a toll pass device bearing a rental car company logo from the car's windshield before driving the car to a loading location. Id. at 6, 17-18. When petitioner and others loaded the cars into the shipping containers, they hid the cars behind innocent-looking items like barrels, furniture, mattresses, and boxes. Id. at 18.

A cooperator who had participated in the conspiracy testified that he personally witnessed petitioner load stolen luxury vehicles with rental-company stickers into shipping containers. Gov't C.A. Br. 8. The same cooperator testified that petitioner once called the cooperator's used car dealership, which did not sell Range Rovers, and inquired about acquiring a Range Rover but would not discuss the details on the phone. Ibid. The cooperator understood this to mean that petitioner was looking for a stolen

Range Rover. Ibid. The cooperator also testified that petitioner worked with loaders who doubled their normal going rate when loading stolen vehicles -- indicating both that the loaders themselves knew or could tell that the vehicles were stolen and that petitioner sometimes paid the loaders double their normal rate for otherwise identical work. Id. at 8, 18. Finally, petitioner's name and his company's name appeared on various shipping documents that falsely described what was being shipped. Id. at 9, 18.

At the end of trial, the district court instructed the jury that to find petitioner guilty it must find that he had "acted knowingly." Pet. App. 13a. Over petitioner's objection, see id. at 7a, the court also instructed the jury that it could consider, in assessing whether the government had proved knowledge beyond a reasonable doubt, whether petitioner had willfully blinded himself to what he was actually doing, see id. at 13a. The court described this as "a pretty classic case" for such an instruction "given the various glaring red flags" that the cars were stolen. Id. at 11a. The court instructed the jury:

> 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.

Id. at 13a. The court further explained that "[i]f 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." Id. at 14a.

The jury found petitioner guilty of conspiracy to export, transport, and possess stolen motor vehicles, in violation of 18 U.S.C. 371; exporting or attempting to export stolen motor vehicles, in violation of 18 U.S.C. 553(a)(1) and 2; transporting stolen motor vehicles in interstate commerce, in violation of 18 U.S.C. 2312 and 2; and possessing stolen motor vehicles that have crossed state lines, in violation of 18 U.S.C. 2313 and 2. Pet. App. 15a-16a. The jury acquitted petitioner of submitting false or misleading information through the Automated Export System, in violation of 13 U.S.C. 305. See C.A. App. 22, 733.

2. The court of appeals affirmed in an unpublished summary order. Pet. App. 1a-5a. The court rejected petitioner's contention that the district court erred in giving a willful blindness instruction where, according to petitioner, "'there was no evidence' that he had taken 'deliberate actions'" to avoid learning that the cars were stolen. Id. at 2a (quoting Pet. C.A. Br. 14) (brackets omitted). The court of appeals emphasized that a "conscious avoidance instruction may only be given if" evidence exists that "the defendant (1) was aware of a high probability of the disputed fact and (2) deliberately avoided confirming that

fact." Id. at 3a (quoting United States v. Svoboda, 347 F.3d 471, 480 (2d Cir. 2003), cert. denied, 541 U.S. 1044 (2004)). The court explained, however, that a defendant need not take "active measures" to avoid learning the truth in order to justify the instruction. Ibid. The court explained that, in some circumstances, 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." Ibid. (quoting Svoboda, 347 F.3d at 480) (emphasis omitted). The court observed that instructing the jury on willful blindness in such circumstances was consistent with this Court's decision in Global-Tech Appliances, Inc. v. SEB S.A., 563 U.S. 754 (2011), which "summarize[d] existing case law" and did not create a new requirement of "active measures to avoid knowledge" before a willful blindness instruction may be given. Pet. App. 3a n.1.

ARGUMENT

The court of appeals correctly determined that a willful blindness instruction was appropriate on the specific facts of this case. The Second Circuit's standard for giving such an instruction does not conflict with Global-Tech Appliances, Inc. v. SEB S.A., 563 U.S. 754 (2011), or with the decision of any other court of appeals. This Court has repeatedly denied review of petitions for writs of certiorari raising similar questions after

Global-Tech. See Salman v. United States, 136 S. Ct. 899 (2016) (No. 15-628) (denying review of second question presented); Bourke v. United States, 569 U.S. 917 (2013) (No. 12-531); Jinwright v. United States, 568 U.S. 1093 (2013) (No. 12-6350); Brooks v. United States, 568 U.S. 1085 (2013) (No. 12-218). The Court should do the same here, particularly because overwhelming evidence showed that the petitioner had actual knowledge that the cars were stolen.

1. The question presented in Global-Tech was whether, to be liable for actively inducing patent infringement under 35 U.S.C. 271(b), a person "must know that the induced acts constitute patent infringement." 563 U.S. at 757. The Court held that the statute requires knowledge of the infringing nature of the acts, not mere "deliberate indifference," but that the knowledge requirement may be satisfied by "willful blindness." Id. at 766.

The Court looked to the well-established concept of willful blindness in criminal law to formulate a standard for the induced-infringement context. Global-Tech, 563 U.S. at 766-768. Surveying the courts of appeals, the Court explained that "[w]hile the Courts of Appeals articulate the doctrine of willful blindness in slightly different ways" in criminal cases, they "all appear to agree on two basic requirements: (1) [t]he 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." Id. at 769. The Court stated that "[w]e think

these requirements give willful blindness an appropriately limited scope that surpasses recklessness and negligence." Ibid.

In the course of distilling those requirements from existing law, the Court cited a number of illustrative decisions, see Global-Tech, 563 U.S. at 769 n.9, including the same decision the panel relied upon below (Pet. App. 3a), United States v. Svoboda, 347 F.3d 471 (2d Cir. 2003), cert. denied, 541 U.S. 1044 (2004). In Svoboda, the Second Circuit stated that a willful blindness instruction is appropriate if the evidence shows that the defendant "was aware of a high probability of the disputed fact" and "deliberately avoided confirming that fact." 347 F.3d at 480. The Court also cited a Fifth Circuit decision that held that a willful blindness instruction is appropriate if the record supports the inferences that the defendant was "subjectively aware of a high probability of the existence of" a fact and "purposely contrived to avoid learning" of it. United States v. Freeman, 434 F.3d 369, 378 (2005) (quoting United States v. Scott, 159 F.3d 916, 922 (5th Cir. 1998)); see Global-Tech, 563 U.S. at 769 n.9.

Nothing in Global-Tech suggests that the Court intended to abrogate the Second Circuit's (or the Fifth Circuit's) decision. To the contrary, the Court recognized that the standards articulated by most courts of appeals, including the Second Circuit, are only "slightly different" formulations of the same "basic requirements" the Court adopted in the context of Global-

Tech itself. 563 U.S. at 769. The Federal Circuit's test, by contrast, had "depart[ed] from the proper willful blindness standard" because it required only a "'known risk'" of infringement and "'deliberate indifference'" to that risk, rather than a subjective belief that infringement has likely occurred and "active efforts * * * to avoid knowing about the infringing nature of the activities." Id. at 770. That standard was akin to mere recklessness and thus meaningfully lower than the consensus willful blindness standards employed by the other courts of appeals, including the Second Circuit. See id. at 769.

2. Petitioner contends (Pet. 23-27) that the Second Circuit's standard for giving a willful blindness instruction is inconsistent with Global-Tech's statement that "the defendant must take deliberate actions to avoid learning" the disputed fact. 563 U.S. at 769. That is incorrect. The Second Circuit's standard requires evidence from which a rational juror could find that the defendant "was aware of a high probability of [a] disputed fact" and "deliberately avoided confirming that fact." Svoboda, 347 F.3d at 480 (emphasis added); see also, e.g., United States v. Lange, 834 F.3d 58, 78 (2d Cir. 2016) (requiring evidence that the defendant "consciously avoided confirming" the disputed fact) (citation omitted), cert. denied, 137 S. Ct. 677, and 137 S. Ct. 685 (2017); United States v. Cuti, 720 F.3d 453, 463 (2d Cir. 2013) (same), cert. denied, 135 S. Ct. 402 (2014). As already noted,

the Court in Global-Tech cited that very standard in its illustrative list of the widespread "agree[ment]" among the courts of appeals on the "basic requirements" of willful blindness. 563 U.S. at 769 & n.9.

Applying Svoboda, the court of appeals correctly found that the evidence in this case supported the district court's decision to give a willful blindness instruction. Pet. App. 3a. Petitioner's theory of the defense was that he did not know the cars that he transported and loaded into shipping containers were stolen, but the evidence at trial demonstrated "glaring red flags," id. at 11a, of that fact -- including, for example, numerous signs that the cars were stolen from rental car companies. See pp. 3-4, supra. Surveillance video showed petitioner tearing off a toll pass device with a rental car company logo from the windshield of a car that he then drove to be loaded into a shipping container. Gov't C.A. Br. 6, 17-18. In light of that evidence, the jury was appropriately charged that, in "determining whether the defendant acted knowingly," it could "consider whether the defendant deliberately closed his eyes to what would otherwise have been obvious to him" and "acted with a conscious purpose to avoid learning the truth." Pet. App. 13a.

Those instructions -- the language of which petitioner does not challenge in this Court -- were consistent with Global-Tech's description of willful blindness as requiring "deliberate actions

to avoid confirming a high probability of wrongdoing." 563 U.S. at 769. The instructions made clear that the jury could not find willful blindness unless it found that petitioner took "deliberate actions," ibid., to avoid learning that the cars were stolen. A person cannot "deliberately close[] his eyes to what would otherwise have been obvious to him," Pet. App. 13a, or "act[] with deliberate disregard" of a fact, id. at 14a, without engaging in "deliberate" conduct, Global-Tech, 563 U.S. at 769; see also id. at 769 n.9 (citing with approval instructions requiring that a defendant "intentionally failed to investigate th[e] facts" or "purposely closed his eyes to avoid knowing" facts) (citations omitted).

The court of appeals' observation that a willful blindness instruction may be appropriate even when "the defendant has taken no active measures to avoid learning of criminal activity," Pet. App. 3a, is also not inconsistent with Global-Tech. In context, that observation in the summary order was a reference to the court's longstanding view that the jury may properly infer that a defendant consciously managed his affairs in a manner calculated to avoid learning the truth when he has engaged in "overwhelmingly suspicious" criminal activity but "fail[ed] to question the suspicious circumstances." Ibid. (quoting Svoboda, 347 F.3d at

480) (emphasis omitted).* In Svoboda itself, for example, the defendant's deliberate conduct consisted of trading on tips received under such highly suspicious circumstances that the jury could properly conclude that the defendant's putative ignorance of the fact that the tips "were based on inside information * * * was due to a conscious effort to avoid confirming an otherwise obvious fact." 347 F.3d at 481.

Petitioner accordingly errs in insisting (Pet. 23-25) that the Second Circuit would permit a finding of willful blindness where a defendant was merely reckless or negligent. Global-Tech explained that two "basic requirements" for a finding of willful blindness -- knowledge of a high probability that a fact exists and deliberate efforts to avoid learning of it -- properly "give willful blindness an appropriately limited scope that surpasses recklessness and negligence." 563 U.S. at 769. The instruction that the court of appeals approved in this case conveyed both those requirements and, therefore, appropriately reflected willful blindness, rather than a lesser standard of recklessness. The instruction also cautioned the jury that "guilty knowledge may not be established by demonstrating that the defendant was merely

* In any event, there was in fact ample evidence that petitioner took "active steps" (Pet. 18) to avoid learning that the cars were stolen. For example, petitioner tore off the toll pass bearing the rental company's logo, and he avoided asking the loaders why they charged twice their legitimate rate to load these cars. Gov't C.A. Br. 17-18.

negligent, foolish, or mistaken." Pet. App. 13a. Given the "almost invariable assumption of the law that jurors follow their instructions," Richardson v. Marsh, 481 U.S. 200, 206 (1987), no risk exists that the properly instructed jury found willful blindness based on recklessness or negligence.

3. Contrary to petitioner's argument (Pet. 13-20), no conflict exists among the courts of appeals on the application of the willful-blindness doctrine following Global-Tech. Far from providing any basis for the development of such a conflict, Global-Tech drew on the widespread "agree[ment]" among the courts of appeals in formulating its willful blindness standard. 563 U.S. at 769. In doing so, the Court recognized the fundamental uniformity of prevailing circuit standards, even if articulated in somewhat different ways, and did not suggest any need to change course or adopt a singular linguistic formulation.

Petitioner's assertion of a conflict relies principally (Pet. 3, 17-18, 25-26) on the Seventh Circuit's decision in United States v. Macias, 786 F.3d 1060 (2015), but that decision is consistent with the decision below. In Macias, the government's case relied on proving that the defendant knew that the funds he was transporting were the proceeds of illegal drug sales, but the defendant testified that he thought they came from smuggling aliens. Id. at 1061. The defendant "never asked what was being smuggled, and so (if his testimony is believed) never was disabused

of his assumption that it was people, not drugs, that were being smuggled." Ibid. In reasoning that the evidence did not support a willful blindness instruction, the Seventh Circuit emphasized what it perceived as the absence of evidence that Macias suspected "he might be working for a drug cartel" or that he "took active steps to avoid having his suspicions confirmed." Id. at 1062; see ibid. ("It seems more likely that the cartel would not have told him what it was smuggling. For he had no need to know -- and sophisticated gang members, like naval officers, know that 'loose lips sink ships.'"). The court recognized that "there indeed are circumstances in which a failure to ask questions is unnatural" and "perhaps therefore the equivalent of taking evasive action to avoid confirming one's suspicions," but it did not find such circumstances to be presented by the facts before it. Id. at 1063.

Unlike in Macias, petitioner here had numerous reasons to suspect that the cars were stolen, and the jury could therefore permissibly infer that any lack of knowledge was the result of deliberate action. This was not, as in Macias, a question of the precise nature of illegal activity conducted by others, but instead a question of the legality of highly suspicious activity in which petitioner was intimately involved. Petitioner transported cars that clearly belonged to rental companies, and he actively removed evidence that the cars were rentals. As the district court explained, there were "various glaring red flags present here."

Pet. App. 11a. In light of that evidence, a decision by petitioner not to confirm that the cars were stolen was deliberate action, in contrast to Macias's mere "fail[ure] to display curiosity," Macias, 786 F.3d at 1063 (citation omitted). To the extent that petitioner did not have actual knowledge, he deliberately (and unnaturally) acted to avoid substantiating that which he must have thought to be true.

Petitioner also relies (Pet. 15-16) on decisions from other circuits quoting Global-Tech with approval, but those decisions do not reflect any disagreement with the Second Circuit on the "basic requirements" identified by Global-Tech, 563 U.S. at 769. Indeed, one of the decisions, United States v. Hale, 857 F.3d 158 (4th Cir. 2017), approved a willful blindness instruction for conduct closely resembling petitioner's. There, the defendant avoided confirming that goods were stolen by not asking why the goods were marked with stickers from local supermarkets and instead asking the employees to remove those stickers. Id. at 169. Here, petitioner avoided confirming that cars were stolen by not asking why they were marked with rental car stickers and tearing off a toll device with a rental company logo.

The remaining circuit decisions cited by petitioner (Pet. 16) simply illustrate this Court's observation that the circuits use "slightly different" words, Global-Tech, 563 U.S. at 769, to capture the same essential concepts. See United States v. Allen,

712 Fed. Appx. 527, 537 (6th Cir. 2017) (rejecting the argument that Global-Tech undermined a jury instruction permitting the jury to find willful blindness if "the defendant deliberately closed her eyes to what was obvious," and noting that the instruction "explicitly incorporates the requirement that a defendant act deliberately to avoid full knowledge") (citation and internal quotation marks omitted); United States v. Sorensen, 801 F.3d 1217, 1235 (10th Cir. 2015) (stating that a "deliberate-ignorance instruction is appropriate where the defendant 'purposely contrived to avoid learning all of the facts'") (citation omitted), cert. denied, 136 S. Ct. 1163 (2016); United States v. Sigillito, 759 F.3d 913, 939 (8th Cir. 2014) (explaining that a willful blindness instruction is appropriate when the defendant's "failure to investigate is equivalent to burying one's head in the sand") (citation omitted), cert. denied, 135 S. Ct. 1019 (2015); United States v. Yi, 704 F.3d 800, 805 (9th Cir. 2013) (approving a willful blindness instruction where the defendant "engaged in a deliberate pattern of failing to read documents that might clarify" the disputed fact); United States v. Brooks, 681 F.3d 678, 701 (5th Cir. 2012) (noting that a willful blindness instruction may be given if the defendant "purposely contrived to avoid learning of the illegal conduct") (citation omitted), cert. denied, 568 U.S. 1085 (2013).

4. In any event, this case would be a poor vehicle to address any conflict regarding the question presented because the evidence overwhelmingly established that petitioner actually knew that the cars were stolen, and therefore any error in the willful blindness instruction was harmless. See Neder v. United States, 527 U.S. 1, 8-13 (1999). Petitioner's actual knowledge was demonstrated by, inter alia, the evidence that he transported cars that that bore obvious indicia that they had been stolen from rental car companies; helped to pack those cars into shipping containers and to hide them with seemingly innocent household items; paid the loaders twice their normal, legitimate rate; and requested a stolen Range Rover from a cooperator and would not discuss the details over the phone. See pp. 3-4, supra. In total, petitioner was involved in attempting to ship at least 39 stolen cars to West Africa. Gov't C.A. Br. 17.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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