

No. _____

In the
Supreme Court of the United States

GABRIEL RIVERO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

This case involves the mens rea required to convict a defendant of smuggling goods from the United States when charged in connection with exporting munitions without a license. In the decision under review, the court of appeals held that the Government is not required to prove that a defendant had knowledge he was dealing with ammunition or had a specific intent to violate 22 U.S.C. § 2778. The question presented for review is:

Whether the Government may obtain a conviction for smuggling goods from the United States in violation of 18 U.S.C. § 554 charged in conjunction with 22 U.S.C. § 2778 without first proving that the defendant knew he was dealing with ammunition intended for export.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Gabriel Rivero respectfully petitions this Honorable Court for a writ of certiorari to review the judgment of the United States Court of Appeals affirming Rivero's conviction.

OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit affirming Rivero's conviction is reported as *United States v. Rivero*, 889 F.3d 618 (9th Cir. 2018).

JURISDICTIONAL STATEMENT

The district court had jurisdiction over these proceedings pursuant to 18 U.S.C. § 3231. The Court of Appeals for the Ninth Circuit had jurisdiction over Rivero's appeal pursuant to 28 U.S.C. § 1291. The Court of Appeals affirmed Rivero's conviction on May 2, 2018. This petition for a writ of certiorari is therefore timely and this Honorable Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 554(a) imposes criminal penalties on “[w]hoever fraudulently or knowingly exports...or attempts to export...any merchandise, article or object contrary to any law or regulation of the United States.”

The Government alleged that Rivero violated 18 U.S.C. § 554(a) by exporting items contrary to 22 U.S.C. § 2778 and associated regulations. Sections 2778(a), (b)(1), and (b)(2) impose a requirement that anyone intending to export certain munitions obtain a license. The applicable federal regulations delineate the types of ammunition subject to the requirements of § 2778(b)(2) and require that anyone intending to export such items obtain government approval prior to export. *See* C.F.R. §§ 121.1, 123.1(a). Section 2778(c) provides that “[a]ny person who willfully violates any provision of this section...shall upon conviction be fined for each violation not more than \$1,000,000 or imprisoned not more than 20 years, or both.”

STATEMENT OF THE CASE

In April 2016, a federal grand jury for the District of Arizona indicted Gabriel Rivero and charged him with one count of smuggling goods from the United States in violation of 18 U.S.C. § 554 and 22 U.S.C. § 2778 (Count 1) as well as one count of possession of ammunition by a convicted felon in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2) (Count 2). Prior to trial, Mr. Rivero moved to sever Count 2 for the purpose of trial. The district court granted that motion. Mr. Rivero then proceeded to trial on Count 1 of the indictment.

1. Rivero's arrest and trial

On February 11, 2016, Gabriel Rivero drove a truck from the United States into Mexico at the Mariposa Port of Entry. Approximately 300 yards North of the border, Mr. Rivero's truck went over a speed bump and a spare tire fell from underneath the vehicle. Mr. Rivero stopped the vehicle, got out to check on the tire, and attempted to load the tire back into the bed of the truck. The tire had ruptured – presumably from the weight of the ammunition – and dozens of loose rounds of ammunition had spilled out onto the roadway. Eventually, Mr. Rivero moved the tire to the side of the road and continued to drive into Mexico. When the tire was later seized by authorities, it was found to contain 5,441 rounds of ammunition.

The entire incident was captured by video camera and investigative measures quickly connected Mr. Rivero to the tire. When Mr. Rivero attempted to enter the United States on March 12, 2016, he was detained and subsequently arrested. Upon his arrest, Mr. Rivero unequivocally invoked his right to counsel. However, as he was about to be transported from the Border Patrol station to the county jail, Mr. Rivero asked to speak with agents. Mr. Rivero has not argued at any stage of these proceedings that his statements to agents were anything but voluntary. This statement was not recorded, even though means to record it were readily available, and Mr. Rivero disputed the Government's version of his statement first at trial and again on appeal.

Mr. Rivero was tried in December 2016. At the outset of the case, the district court laid out the elements of the charge against Mr. Rivero. Absent from the court's reading of the elements was any requirement that the Government prove that Mr. Rivero knew he was dealing with ammunition that was intended for export.

Throughout the trial, it was clear that Mr. Rivero's defense was that he was unaware that the spare tire contained ammunition as he was driving the truck and that he only realized the contents of the tire after it had fallen from the truck and he observed the ammunition scattered on the roadway. In its closing argument, the Government told the jury that "it's important to point out that the defendant doesn't need to know...simply that he knew he was transporting an item and that he knew that that item was intended to be taken outside of the United States." Mr. Rivero argued in the alternative: that the Government was required to prove beyond a reasonable doubt that he had knowledge he was dealing with ammunition in order to secure a conviction.

Following closing arguments, the district court instructed the jury that the elements of the offense for 18 U.S.C. § 554(a) were as follows:

First, the defendant knowingly attempted to export and send from the United States any item, or received, concealed, bought, sold, or in any manner facilitated the transportation, concealment or sale of the item prior to exportation.

Second, the defendant knew the item was intended for exportation; and

Third, the exportation of the item is contrary to any law or regulation of the United States.

Mr. Rivero objected to this jury instruction on the ground that it would allow the jury to convict Mr. Rivero without the Government proving that he had knowledge he was dealing with ammunition intended for export. The district court overruled the objection. Mr. Rivero was convicted of Count 1 and sentenced to 92 months in prison followed by 3 years of supervised release.

2. Rivero's appeal

In his appeal, Mr. Rivero argued that his conviction on Count 1 should be reversed because the jury instructions failed to accurately define the elements of a statutory crime. A panel of the Ninth Circuit affirmed, holding that “[n]othing in the language of the statute requires knowledge of the nature of the merchandise, article, or object.” *Rivero*, 889 F.3d 618, 621-22 (9th Cir. 2018).

In affirming Mr. Rivero’s conviction on Count 1, the panel rejected Mr. Rivero’s argument that *United States v. Cardenas* 810 F.3d 373 (5th Cir. 2016) (per curiam) provided persuasive support on the issue of proof of knowledge. In denying Mr. Rivero’s appeal, the Ninth Circuit held that “the Fifth Circuit did not consider whether § 554(a) required the Government to prove...knowledge.” *Rivero*, 889 F.3d at 622. Two sentences later the Ninth Circuit noted that “[i]nstead, the Fifth Circuit held that ‘to establish an offense under § 554(a), the Government is required to prove only that the defendant knew he was dealing with ammunition that was intended for export...’” and concluded that “[a]ccordingly, *Cardenas* provides no support for Rivero’s argument that the Government had to prove he knew he was exporting or attempting to export ammunition...” *Id.*

These statements by the Ninth Circuit cannot be reconciled with one another, nor can they be reconciled with the Fifth Circuit’s holding in *Cardenas*. Either the Government is required to prove a defendant knew he was dealing with ammunition, or it is not. The Fifth Circuit plainly held in *Cardenas* that it is. The Ninth Circuit held here that it is not. The Ninth Circuit’s decision here is in direct conflict with the Fifth Circuit’s decision in *Cardenas*. Moreover, given the nature of the interplay between the statutes at hand and the federal regulations which have been promulgated, the fact that jury instructions on this specific issue differ in substance is understandable. Many of the federal circuits have no model jury instruction that a district court can rely on, and as such there is a need for uniformity in jury instructions nationwide on an issue that will surely continue to arise.

ARGUMENT AND REASONS FOR GRANTING THE WRIT

Introduction

The crime of smuggling goods from the United States (18 U.S.C. § 554(a)) carries with it differing penalties which depend on the type of goods being smuggled. In the event a defendant is found guilty of smuggling fish, wildlife, or plants, the base offense level is 6. *See U.S.S.G. § 2Q2.1(a)*. In the event a defendant is found guilty of exporting ammunition without a license, the base offense level is 26. *See U.S.S.G. § 2M5.2(a)(1)*. All else equal, a defendant being sentenced for a level 26 offense will generally receive a far greater sentence than a defendant being sentenced for a level 6 offense. “Historically the penalty imposed under a statute has been a significant consideration in determining whether the statute should be construed as dispensing with mens rea.” *Staples v. United States*, 511 U.S. 600, 615, 114 S.Ct. 1793, 1802 (1994). It logically follows that in order to convict a defendant of exporting ammunition without a license, thereby exposing him to significantly harsher penalties than simply smuggling goods from the United States, the Government should be required to prove the defendant knew he was dealing with ammunition. Put another way, the “knowingly” requirement in 18 U.S.C. § 554(a) should apply not only to the exportation or attempted exportation clause, but to the nature of the “merchandise, article, or object” provision of the statute as well.

1. **The Circuit Courts are in conflict over whether smuggling goods from the United States when charged in conjunction with exporting munitions without a license requires proof the Defendant knew he was dealing with ammunition intended for export**

When *Cardenas* came before the Fifth Circuit, the defendant’s knowledge that he was dealing with ammunition intended for export was not at issue. The defendant in *Cardenas* had conceded his knowledge, as well as his belief that the ammunition was destined for Mexico. *Id.* 810 F.3d at 375. Nevertheless, the Fifth Circuit published an opinion which reiterated what it had held five years prior in the unpublished case of *United States v. Bernadino*: that “culpability required that [the defendant] know that he was dealing with weapons and ammunition that were

intended for export..." *United States v. Bernadino*, 444 Fed.Appx. 73, 74 (5th Cir. 2011). The Fifth Circuit restated that plainly in *Cardenas*, holding that "to establish an offense under § 554(a), the Government is required to prove only that the defendant knew he was dealing with ammunition that was intended for export and that the exportation was illegal." *Cardenas*, 810 F.3d at 374.

At his trial, Mr. Rivero asked the district court to hold the Government to the exact same standard, via a jury instruction which listed knowledge he was dealing with ammunition as an element of the crime. Instead, the jury instruction the district court gave omitted any reference to ammunition. This error was magnified when counsel for the Government told the jury that the Government need only prove that the defendant knew he was exporting an item, and that the item was intended for export, and the item was exported contrary to law.

In affirming Mr. Rivero's conviction, the Ninth Circuit held that "§ 554(a) does not require the Government to prove that the defendant knew the nature of the merchandise, article, or object..." *Rivero*, 889 F.3d at 619. By so holding, the Ninth Circuit has created a split in the courts of appeals.

In support of its holding here, the Ninth Circuit expounded that "interpreting § 554(a) to require the Government to prove that the defendant knew the nature of the 'merchandise, article or object' would lead to the absurd result that individuals could avoid criminal liability simply by being willfully blind to the precise nature of the goods they were unlawfully exporting." *Rivero*, 889 F.3d at 622. That simply is not the case. Rather, in a case such as this, the Government possesses a powerful jury instruction entitled deliberate ignorance. That instruction allows the Government to argue and for a jury to find that a defendant acted knowingly if the jury finds beyond a reasonable doubt that the defendant was aware of a high probability that ammunition was in the defendant's automobile, and the defendant deliberately avoided learning the truth. This jury instruction protects against the unreasonable, absurd, or irrational result of which the Ninth Circuit was concerned. Compelling the Government to argue deliberate ignorance to prove a defendant's mens rea, thereby

actually proving each and every element of the charge, rather than vitiating that requirement altogether, is sound jurisprudence.

In its holding here, the Ninth Circuit made two conflicting statements: first, that “§ 554(a) does not require the Government to prove that the defendant knew the nature of the ‘merchandise, article, or object’” and second, that “[t]he Government proved...the § 554(a) offense by establishing that Rivero knowingly exported ammunition without a license, in violation of § 2778(b).” *Cf. Rivero*, 889 F.3d at 619; *Rivero*, 889 F.3d at 623. The jury instruction at issue did not require the Government to prove Mr. Rivero knew he was dealing with ammunition. Moreover, counsel for the Government specifically told the jury that it did not have to prove that Mr. Rivero knew he was dealing with ammunition. Therefore, it is impossible to conclude that the jury found that the Government proved that Mr. Rivero acted with the mens rea of knowingly unless the word knowingly applies only to the act of exporting and not also to the nature of the merchandise. If that was the intent of the Ninth Circuit, its holding is inconsistent with provisions of statutory construction as discussed below. If, however, the intent of the Ninth Circuit – and it is reasonable to believe that it was – was to hold that to secure a conviction under 18 U.S.C. § 554, the Government need not prove the defendant knew he was dealing with ammunition, then the holding stands in direct conflict with *Cardenas*.

2. **The decision of the Ninth Circuit decided an important question of federal law that has not been, but should be, settled by this Court. Courts around the country need guidance on an appropriate jury instruction for the offenses charged here**

“[A] jury should be given guidance in its decisionmaking.” *Gregg v. Georgia*, 428 U.S. 153, 192-93, 96 S.Ct. 2909, 2934 (1976). “Juries are invariably given careful instructions on the law and how to apply it before they are authorized to decide the merits...It would be virtually unthinkable to follow any other course in a legal system that has traditionally operated by following prior precedents and fixed rules of law.” *Id.* “When erroneous jury instructions are given, retrial is often required. It is quite

simply a hallmark of our legal system that juries be carefully and adequately guided in their deliberations.” *Id.*

Defendants around the country are being charged with violations of 18 U.S.C. § 554(a) in conjunction with 22 U.S.C. § 2778(a). They are receiving materially different jury instructions, specifically as it relates to knowledge of nature of the merchandise, article, or object. Shortly after Mr. Rivero was convicted, Katherine O’Neal went to trial in the United States District Court for the District of Colorado.¹ Ms. O’Neal was charged with several counts. She was convicted of just one: unlicensed export of firearms.

The jury instruction given in O’Neal’s trial was substantially similar to the one given in Mr. Rivero’s, with two key exceptions: the inclusion of firearms in the first element of the charge and the requirement that the defendant knew his actions were contrary to law. Compare the two:

Ms. O’Neal’s instruction:

For you to find the Defendant guilty of this crime, you must be convinced that the Government has proved each of the following beyond a reasonable doubt:

First, that the defendant knowingly or fraudulently exported, or attempted to export, an article described in the indictment—in this case, firearms;

Second, that the Defendant’s exportation was contrary to a United States statute—in this case, the Arms Export Control Act, 22 U.S.C. § 2778, and regulations promulgated thereunder; and

Third, **that the defendant knew that** exporting firearms was contrary to law or regulation.

United States v. O’Neal, 2018 WL 3145523, 10 (D. Colorado, June 27, 2018).

Mr. Rivero’s instruction:

In order for the Defendant to be found guilty of this charge, the Government must prove each of the following elements beyond a reasonable doubt:

First, the defendant knowingly attempted to export and send from the United States any item, or received,

¹ United States v. O’Neal, No. 15-CR-353-WJM, United States District Court, D. Colorado.

concealed, bought, sold, or in any manner facilitated the transportation, concealment or sale of the item prior to exportation.

Second, the defendant knew the item was intended for exportation; and

Third, the exportation of the item is contrary to any law or regulation of the United States.

“The Government must prove beyond a reasonable doubt every element of a charged offense.” *Victor v. Nebraska*, 511 U.S. 1, 5, 114 S.Ct. 1239, 1242 (1994). In most cases, the elements of a crime are easily identifiable. In such cases, a jury instruction from one jurisdiction will naturally look largely identical to the corresponding instruction from another. Take, for instance, wire fraud, charged as 18 U.S.C. § 1343. A defendant on trial in the Northern District California would hear the district court inform the jury that wire fraud has four elements: (1) knowingly participated in, devised, or intended to devise a scheme to defraud; (2) made false statements that were material; (3) acted with an intent to defraud; and (4) used or caused to be used a wire communication to carry out an essential element. A defendant in the Eastern of District of Texas would hear the same four elements described by his trial judge. This makes logical sense: a defendant charged with a federal crime should enjoy the same protections of due process regardless of the jurisdiction in which he is charged.

Smuggling goods from the United States in violation of 18 U.S.C. § 554(a) charged in connection with 22 U.S.C. § 2778 is the same crime in Portland, Maine as it is in Portland, Oregon. To be convicted of this crime tomorrow in the Fifth Circuit, a defendant must be shown to have known he was dealing with ammunition. A defendant in the Ninth Circuit need not, because “§ 554(a) does not require the Government to prove that the defendant knew the nature of the ‘merchandise, article, or object’ that the defendant was exporting or attempting to export.” *Rivero*, 889 F.3d at 619.

In support of its ruling affirming Mr. Rivero’s conviction, the Ninth Circuit cited to *Dixon v. United States*, indicating that *Dixon* provided guidance on

interpreting the term ‘knowingly’ as it relates to the statute Mr. Rivero was charged with violating. *Rivero*, 889 F.3d at 621; *Dixon v. United States*, 548 U.S. 1, 5, 126 S.Ct. 2437 (2006). In *Dixon*, the defendant’s knowledge was not at issue – she conceded her knowledge, and instead argued duress. *Id.* 548 U.S. at 3-4. Nevertheless, this Court explained that the Government met its burden “when petitioner testified that she knowingly committed certain acts...” *Id.* 548 U.S. at 6. Among those acts were knowingly: (1) putting a false address on forms; (2) falsely claiming to be the actual buyer; and (3) falsely claiming to not be under indictment at the time. *Id.* It is clear from a reading of *Dixon* that the “knowingly” mens rea applied to each of these three actions, and not simply the first.

Here, the term “knowingly” appears twice in the statute charged. For the Ninth Circuit to hold that the term knowingly simply applies to the act of exporting and not to the nature of the merchandise being exported is not supported by *Dixon*. Rather, it is wholly antithetical. It is for reasons and cases such as this that both district and appellate courts across the country would benefit from guidance regarding the required elements of 18 U.S.C. § 554.

CONCLUSION

For the foregoing reasons, Mr. Rivero respectfully urges this Court to grant this petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit.

Dated this 30th day of July, 2018.

Respectfully submitted,

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