NO. _____

In The Supreme Court of the United States

OLUSOLA OLLA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether, in a criminal case where a statute requires proof of knowledge, the government may establish the requisite knowledge with evidence of a failure to investigate or failure to act.

PARTIES TO THE PROCEEDING

The Petitioner, Olusola Olla, is an individual. The Respondent is the United States. No corporate disclosure statement is required under Rule 29.6.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Olusola Olla respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The United States Court of Appeals for the Fourth Circuit affirmed the district court's judgment of conviction in an unpublished opinion dated November 7, 2018. App. 1a. Mr. Olla filed a timely petition for panel rehearing and rehearing *en banc* on November 21, 2018. The Fourth Circuit denied the petition for rehearing on January 23, 2019. App. 16a.

JURISDICTION

The Court of Appeals entered its judgment on November 7, 2018. Mr. Olla filed a timely petition for panel rehearing and rehearing *en banc*, which was denied on January 23, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The relevant portion of the federal money laundering statute, 18 U.S.C. § 1956(a)(1), provides:

> "Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity—
>
> …
>
> (B) knowing that the transaction is designed in whole or in part—
>
> (i) to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity; or

> (ii) to avoid a transaction reporting requirement under State or Federal Law,
>
> shall be sentenced to a fine or not more than $500,000 or twice the value of the property involved in the transaction, whichever is greater, or imprisonment for not more than twenty years, or both."

STATEMENT OF THE CASE

This case presents an exceptionally important issue of federal law with far reaching impact: where a criminal statute requires knowledge as an element of the offense, whether a defendant's knowledge can be established, under the doctrine of "willful blindness," through evidence of inaction and acts of omission.

The doctrine of "willful blindness" permits the prosecution to establish a statutory element of knowledge with proof of something that falls short of knowledge. It functions as a substitute for actual knowledge. Recognizing the doctrine's potential for abuse, this Court has limited willful blindness to situations where there is proof: (1) that the defendant subjectively believed in the high probability of a fact; and (2) took "deliberate action" to avoid learning of the fact. *Global-Tech Appliances, Inc. v. SEB S.A.*, 563 U.S. 754, 769 (2011).

The Fourth Circuit here issued a decision that entirely removes the second prong of willful blindness under *Global-Tech*. The Fourth Circuit held that a defendant's knowledge can also be established, under the doctrine of willful blindness, through proof of the defendant's omissions or failure to act. Thus, instead of requiring "deliberate action," the Fourth Circuit requires only inaction. The decision below is clearly in conflict with what this Court decided in *Global-Tech*.

This Court has the opportunity to clarify what is required for the doctrine of willful blindness, and should grant the petition for certiorari to resolve this important issue of federal criminal law.

I. Background

The Petitioner, Olusola Olla, was the owner and operator of a used car dealership in Greensboro, North Carolina. He was indicted in 2015 for his alleged role in an online dating fraud scheme, devised and operated by individuals in Nigeria.

According to the trial evidence, the Nigerian conspirators targeted on online dating websites. Using fictitious identities and stories, they convinced numerous victims to send money to U.S. bank accounts. The U.S. co-conspirators then transferred the money back to Nigeria. Importantly, in a number of instances, the Nigerian conspirators also used unwitting third parties to transfer money from the victims.

Mr. Olla's bank account received money from six victims of the dating fraud scheme. In several instances, but not all, Mr. Olla transferred money from his account to alleged co-conspirators within a short period (i.e., days or weeks) of receiving the deposits. In other instances, the money stayed in his account until the account was eventually closed by the bank.

The victims' deposits were made from outside the State of North Carolina. There was evidence that the amounts deposited were frequently, but not always, below the $10,000 reporting threshold. The amounts of the deposits were reflected in Mr. Olla's bank statements, but there was no evidence that Mr. Olla ever met with

a victim, communicated with a victim, or knew the names of the victims depositing money into his account. There was also no evidence that he was aware of the existence of a dating fraud scheme.

The indictment charged Mr. Olla with conspiracy to commit wire fraud, in violation of 18 U.S.C. § 1349 (Count One); conspiracy to commit money laundering, in violation of 18 U.S.C. § 1956(h) (Count Two)[1]; and structuring, in violation of 31 U.S.C. § 5324.

II. District Court Proceedings

The government indicted Mr. Olla in May, 2015. The indictment was replaced with a superseding indictment, with several changes not relevant to this petition, in March 2017. Mr. Olla proceeded to trial in June 2017. The government's case centered around evidence of the fraud proceeds deposited into Mr. Olla's bank accounts. The government's chief witnesses were five victims of the dating fraud scheme.[2] The victims testified regarding the circumstances under which they were defrauded. Although each victim was defrauded by someone they met through an online dating website, no victim ever met with or spoke to Mr. Olla.

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[1] Although drafted as a single Count, the money laundering conspiracy Count was further divided at trial into an allegation of conspiracy to commit promotional money laundering, and conspiracy to commit concealment money laundering. To convict Mr. Olla of the former type of conspiracy, the government had to prove that Mr. Olla was aware of the dating fraud conspiracy. To convict Mr. Olla of the latter type of conspiracy, the government argued (and the Court of Appeals agreed) that it had to only prove that Mr. Olla knew that the money came from some form of illegal activity.

[2] The facts surrounding a sixth Victim were presented to the jury through a written stipulation.

The government also called bank records custodians and law enforcement agents. Their testimony generally established that Mr. Olla's bank accounts received, over the years, substantial amounts of out-of-State cash deposits. Although the government insinuated that these cash deposits were illegitimate, no evidence was introduced, beyond the testimony of the six victims, that any other deposits made to Mr. Olla's account resulted from a fraud scheme.

The government attempted to link Mr. Olla to the conspiracy by evidence that on several occasions after victims deposited money into Mr. Olla's account, Mr. Olla wrote checks or deposited money into a co-conspirator's account. However, there was no forensic accounting any tracing analysis to establish the disposition of the fraud proceeds.

The government called an alleged co-conspirator. That co-conspirator had no testimony of substance regarding Mr. Olla, and could only testify about his own interactions with two other members of the conspiracy.

The defense case was centered around establishing that Mr. Olla was a legitimate used car dealer in Greensboro, North Carolina, who occasionally did business with a Nigerian named Adeniyi Marcus by selling and shipping cars to Marcus in Nigeria. The defense introduced evidence of Mr. Olla's communications with Adeniyi Marcus, which showed that Mr. Olla and Adeniyi Marcus negotiated the sale of cars through email (and occasionally through text). Additionally, the defense introduced evidence that Mr. Olla maintained an account for Adeniyi Marcus. This account appeared to include money that was identified as fraud proceeds at trial.

There was no evidence, however, that at the time Mr. Olla negotiated the sale of cars with Marcus, that he was advised of the nature or source of the money being deposited into his account, nor any evidence that Mr. Olla was otherwise informed about the illegitimate nature of the funds.

The defense argued that Mr. Olla was a legitimate car dealer who unwittingly received victim proceeds and transferred that money to conspirators through car sales or money transfers.

III. The Disputed Jury Instruction

Prior to closing argument, the district court held a charging conference. As relevant here, Mr. Olla objected to the government's proposed willful blindness instruction, asserting that there was no evidence to support such an instruction. The district court disagreed, and instructed the jury as follows:

> In determining whether the defendant acted knowingly for purposes of Count One, conspiracy to commit wire fraud, or Count Two, conspiracy to commit money laundering, you may consider whether the defendant engaged in "willful blindness," that is, whether he deliberately closed his eyes to what would otherwise have been obvious to him.
>
> A person is willfully blind if he (1) believes there is a high probability that a fact exits and (2) takes deliberate actions to avoid learning of that fact. However, guilty knowledge may not be established by demonstrating that the defendant was merely negligent, reckless, foolish, or mistaken or that the defendant should have known the truth.

The jury ultimately acquitted Mr. Olla of the wire fraud conspiracy. With respect to the money laundering conspiracy, the jury acquitted Mr. Olla of promotional money laundering conspiracy, but convicted him of concealment money

laundering conspiracy. Lastly, the jury convicted Mr. Olla of structuring. Mr. Olla filed a timely notice of appeal.

IV. The Appeal.

On appeal, Mr. Olla asserted several challenges to his conviction for the money laundering conspiracy. Relevant here, he argued that his money laundering conviction must be reversed because the district court erroneously issued a willful blindness instruction where there was no evidence that he took an affirmative act to avoid knowledge of the illegal source of the funds. App. 4a.

The Court of Appeals rejected this argument. In doing so, the Court of Appeals acknowledged this Court's decision in *Global-Tech*. App. 4a. The Court also did not dispute that the government "could only point to omissions or instances when he failed to investigate or ask questions." App. 6a. However, and crucially, the Court then held that "failures to act or investigate can constitute deliberate actions taken to avoid learning facts." *Id.*

Mr. Olla filed a petition for panel rehearing and rehearing en banc, specifically pointing out that the Fourth Circuit's decision on this point was directly in conflict with this Court's *Global-Tech* decision. The Fourth Circuit denied the petition for rehearing. The matter is now before this Court and ripe for disposition.

REASONS FOR GRANTING THE PETITION

This petition presents an important question meriting review. The Fourth Circuit adopted a view of the willful blindness doctrine that, as discussed below, has far-reaching consequences for the prosecution of criminal cases, and is at odds with what this Court held in *Global-Tech*.

I. "Willful blindness" requires proof of an action by the defendant to avoid guilty knowledge. "Deliberate indifference," by contrast, may be established through inaction.

Global-Tech Appliances, Inc. v. SEB S.A., 563 U.S. 754 (2011) was a patent infringement[3] case which, like the money laundering statute at issue here, requires proof of an alleged infringer's knowledge that a product is infringing. In deciding what conduct suffices to establish knowledge, this Court held that a standard of "deliberate indifference" is insufficient. *Id.* at 766.

This Court distinguished "deliberate indifference" from "willful blindness." "Willful blindness," this Court held, requires proof that: "(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." *Id.* at 769. By contrast, deliberate indifference requires only the existence of a "known risk," and "does not require active efforts by an inducer to avoid knowing about the infringing nature of the activities." Although deliberate indifference was not an appropriate standard where the statute requires proof of knowledge, this Court approved the use

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[3] Although Global-Tech arises out of a patent litigation case, the government never once disputed its applicability to the criminal context.

of the doctrine of willful blindness. *Id.* at 766 (affirming judgment "because the evidence in this case was plainly sufficient to support a finding of Pentalpha's knowledge under the doctrine of willful blindness.")

The distinction that this Court drew between deliberate indifference and willful blindness was crucial to the decision in *Global-Tech*, because this Court found that the twin requirements of: (1) a subjective belief by the defendant in the high probability of a fact; and (2) "deliberate actions to avoid learning of that fact" are necessary to "give willful blindness an appropriately limited scope that surpasses recklessness and negligence." *Id.* at 769. This Court cited with approval the statement that "a court can properly find willful blindness only where it can almost be said that the defendant actually knew." *Id.* at 770 (citing G. Williams, Criminal Law § 57, p. 159 (2d ed. 1961)).

Applying this test to Pentalpha's conduct, this Court found that there was sufficient evidence to establish willful blindness because Pentalpha took deliberate steps to: (1) copy an overseas model of a product that did not bear U.S. patent markings and (2) deliberately omitted to inform its patent attorney of the fact that its own product was copied from SEB's product. *Id.* at 771

II. The Fourth Circuit's decision removes the distinction between "willful blindness" and "deliberate indifference," and is therefore in conflict with this Court's decision in *Global-Tech*.

The Fourth Circuit's holding: that "failures to act or investigate can constitute deliberate actions taken to avoid learning facts" is directly at odds with *Global-Tech*. As discussed previously, this Court's *Global-Tech* decision drew a careful distinction

between willful blindness and deliberate indifference. Willful blindness requires proof of deliberate action; deliberate indifference does not. Willful blindness may be used to establish knowledge; deliberate indifference may not.

The Fourth Circuit's holding, however, removes any distinction between willful blindness and deliberate indifference. If a defendant's "failure to act" and "failure to investigate" can be treated as a "deliberate action," then every instance of deliberate indifference is also an instance of willful blindness.

The problem with the Fourth Circuit's holding is apparent when one considers that lower courts routinely treat failures to investigate as evidence of deliberate indifference. *See, e.g.*, *Alexander v. Perril*, 916 F.2d 1392, 1395 n.4 (9th Cir. 1990)(stating that a "failure to investigate constituted deliberate indifference"); *Lorillard Tobacco Co. v. A&E Oil, Inc.*, 503 F.3d 588 (7th Cir. 2007)(stating that "knowledge includes a willful blindness or a failure to investigate because one was afraid of what the inquiry would yield."); *United States v. Murrieta-Bejarano*, 552 F.2d 1323 (9th Cir. 1977)(holding that failure to investigate suggested deliberate indifference).

III. This Court should intervene, because without clarification or additional guidance from this Court, the distinction between "willful blindness" and "deliberate indifference" will likely continue to confuse the lower courts, resulting in inconsistent application of federal criminal law.

A review of the lower court decisions applying the doctrine of willful blindness suggests that clarification and additional guidance from this Court is necessary to address the proper scope of willful blindness.

Prior to this Court's decision in *Global-Tech*, courts have frequently treated deliberate indifference and willful blindness as equivalent standards. *See, e.g., Leavitt v. Corr. Med. Servs.*, 645 F.3d 484, 497 (1st Cir. 2011)("Willful blindness and deliberate indifference are not mere negligence; these concepts are directed at a form of scienter in which the official culpably ignores or turns away from what is otherwise apparent."); *Pierre v. Gonzales*, 502 F.3d 109, 118 (2d Cir. 2007)("concepts such as deliberate indifference, reckless disregard or willful blindness might well suffice in certain circumstances" to establish knowledge."); *League of Women Voters v. Brunner*, 548 F.3d 463, 476 (6th Cir. 2008)(reciting an argument that "the proper *scienter* requirement is, alternatively, knowledge, willful blindness, or deliberate indifference."); *United States v. Atkins*, 881 F.3d 621, 627 (8th Cir. 2018)("Atkins asserted a lack of guilty knowledge in the face of immense evidence supporting an inference of deliberate indifference—the very definition of a case supporting [a willful blindness] instruction.").

Of course, this Court's decision in *Global Tech* makes clear that the two standards are in fact not the same. Deliberate indifference may be shown through the defendant's inaction (i.e., failure to ascertain a fact) in the face of a known risk. Willful blindness requires deliberate action to avoid learning of a fact. Without this Court's intervention, the lower courts will likely continue to conflate the two standards, and apply the doctrine of willful blindness to circumstances where such a standard is inappropriate.

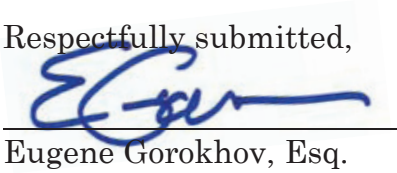
Willful blindness is a frequently used jury instruction in federal criminal cases. When the jury is instructed on willful blindness in a case that does not warrant the instruction, there is a real risk that innocent defendants may be convicted. More than forty years ago, Justice Kennedy dissented in the seminal case of *United States v. Jewell*, 532 F.2d 697 (9th Cir. 1976), which approved a willful blindness instruction, precisely because "the willful blindness doctrine is uncertain in scope" and can permit conviction without a finding of knowledge. *Id.* at 706. Today, it is more important than ever for this Court to take this case as an opportunity to clarify the proper scope of the willful blindness doctrine, and to limit it to cases where there was proof of deliberate actions by the defendant to avoid guilty knowledge.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Date: April 23, 2019

Respectfully submitted,



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