No. _____

In the Supreme Court of the United States

NOE JUAREZ, *Petitioner*,

v.

United States of America, *Respondent*.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The questions presented are:

(1) What is the proper framework for determining whether a prosecutor's improper propensity-based arguments related to 404(b) evidence warrant a new trial?

(2) When, if ever, is a deliberate ignorance (or conscious avoidance) instruction appropriate in a conspiracy case?

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IN THE
SUPREME COURT OF THE UNITED STATES

NOE JUAREZ,

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

PETITION FOR WRIT OF CERTIORARI

Petitioner Noe Juarez respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit.

JUDGMENT AT ISSUE

On August 7, 2017, a panel of the Fifth Circuit Court of Appeals affirmed Mr. Juarez's convictions but vacated his sentence and remanded the case for resentencing. A new judgment was imposed on Mr. Juarez on May 2, 2018. Mr. Juarez again appealed his convictions. Recognizing that his claims were foreclosed by the Fifth Circuit's decision in his previous appeal, Mr. Juarez moved for summary disposition so that he could pursue further review of his claims by this Court. On March 12, 2019, a panel of the Fifth Circuit granted the motion for summary

disposition and affirmed the district court's judgment on the grounds that the arguments raised by Mr. Juarez were foreclosed under the law of the case doctrine. A copy of the Fifth Circuit's orders from August 7, 2017, and March 12, 2019, are attached to this petition as an appendix.

JURISDICTION

The judgment of the Fifth Circuit Court of Appeals was entered on March 12, 2019. No petition for rehearing was filed. This petition is filed within 90 days after entry of judgment. *See* Sup. Ct. R. 13.1. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RULE AND STATUTES INVOLVED

Federal Rule of Evidence 404(b) provides:

> **Crimes, Wrongs, or Other Acts**.
>
> > **(1) Prohibited Uses**. Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.
> >
> > **(2) Permitted Uses; Notice in a Criminal Case**. This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. On request by a defendant in a criminal case, the prosecutor must:
> >
> > > **(A)** provide reasonable notice of the general nature of any such evidence that the prosecutor intends to offer at trial; and
> > >
> > > **(B)** do so before trial — or during trial if the court, for good cause, excuses lack of pretrial notice.

21 U.S.C. § 846 provides:

> Any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

18 U.S.C. § 924(o) provides:

> A person who conspires to commit an offense under subsection (c) shall be imprisoned for not more than 20 years, fined under this title, or both; and if the firearm is a machinegun or destructive device, or is equipped with a firearm silencer or muffler, shall be imprisoned for any term of years or life.

STATEMENT OF THE CASE

On April 2, 2015, the Government indicted Petitioner Noe Juarez—a former Marine and a twenty-year veteran of the Houston Police Department—on two conspiracy charges: (1) a conspiracy to distribute five kilograms or more of cocaine hydrochloride, in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(A), and 846, and (2) a conspiracy to possess firearms in furtherance of a drug trafficking crime, in violation of 18 U.S.C. § 924(o). The indictment did not describe the nature or details of the conspiracy, but it did name a single co-conspirator: Sergio Grimaldo. Maintaining that he did not knowingly join a conspiracy, Mr. Juarez pleaded not guilty and proceeded to trial.

I. The Trial Proceedings

At trial, Mr. Juarez stood accused of assisting Sergio Grimaldo and his brother, Efrain Grimaldo—known members of the Los Zetas drug cartel—in an extensive, international cocaine conspiracy, stretching from Mexico through Houston and Houma up to Baltimore. The Government conceded that Mr. Juarez never "personally touched cocaine," but instead alleged that he participated in the conspiracy by providing "firearms, police vests, vehicles, police scanners, money that he received from the conspirators to buy them cars that he registered in his name, that he insured in his name, that he titled in his name, and that he financed in his name." In an effort to prove that Mr. Juarez committed these acts, the Government produced the testimony of police officers and other alleged co-conspirators.

But the crux of the Government's case did not focus on Mr. Juarez's alleged involvement in the charged conspiracy. Instead, the Government trained the jury's

sight on Mr. Juarez's purported involvement in two separate, uncharged conspiracies—evidence that was admitted under Federal Rule of Evidence 404(b), and that the Government described as "the most chilling of all." Prior to trial, Mr. Juarez challenged the admission of this evidence, arguing that the probative value was substantially outweighed by the danger of unfair prejudice. However, the district court ruled against him, finding that the evidence was "relevant to proving intent," and that "any potential prejudice caused by the extrinsic evidence does not outweigh its probative value." In spite of this finding, the district court recognized the potential prejudice arising out of the admission of the evidence, observing that "extensive similarity between the offenses may also increase the risk of prejudice." In an effort "to avoid potentially overwhelming the intrinsic evidence of the crimes charged," the court imposed certain requirements on the Government—specifically, the court: (1) limited the testimony to one full day; (2) ordered the Government to present the evidence separately from its intrinsic evidence; and (3) announced that it would issue limiting instructions prior to the presentation of the evidence.

While the Government technically complied with the court's instructions, it violated the prohibitions of Rule 404(b)(1) by explicitly relying on the evidence as proof of Mr. Juarez's character—*i.e.*, to show that he is the type of person who would commit the charged conspiracies. In particular, the Government argued that the evidence would prove that Mr. Juarez was "an opportunist who will join drug and gun conspiracies to benefit himself." In other words, the Government centered the case

around the 404(b) evidence and argued its relevance to the jury in a way that improperly prejudiced Mr. Juarez in violation of Rule 404(b)(1).

In its opening statement, the Government briefly described its intrinsic evidence before highlighting to the jury that certain "special evidence" would show that Mr. Juarez participated in other conspiracies in which he did "[a]lmost the same thing" alleged in this case. Then, in addition characterizing Mr. Juarez as an "opportunist," the Government emphasized that the "special evidence" was "particularly important because now we have Noe Juarez on tape, on video and audiotape"—implicitly acknowledging that the extrinsic evidence was the most incriminating. According to the Government, this "shocking and heartbreaking" 404(b) evidence also contained "the most chilling of all" conversations the jury would hear—evidence that Mr. Juarez directed an individual to remove serial numbers on guns he provided to them.

The Government presented the 404(b) evidence over a full day of testimony, concluding its case-in-chief with the testimony of eight witnesses who testified exclusively about the extrinsic evidence. At one point, the testimony from one of the witnesses became so extensive that the court cautioned the Government against presenting further 404(b) testimony, telling the prosecutor that if "the point of this is the 404(b) evidence, this is way enough to accomplish whatever it is that you intended to on this. I think you need to wrap this up." But the Government continued with six more witnesses, describing Mr. Juarez's involvement in two entirely separate conspiracies through the testimony of police officers and confidential informants.

Following the evidence, the court circulated the proposed jury instructions for review and discussion by the parties. Defense counsel objected to the inclusion of a deliberate ignorance instruction, which the court apparently had included prior to any request by the Government. The instruction read in its entirety:

> You may find that a defendant had knowledge of a fact if you find that the defendant deliberately closed his eyes to what would otherwise have been obvious to him. While knowledge on the part of the defendant cannot be established merely by demonstrating that the defendant was negligent, careless, or foolish, knowledge can be inferred if the defendant deliberately blinded himself to the existence of a fact.

In response to the defense's objection, the court stated: "I think there's evidence in the record supporting the charge, so that's why it's here." The Government agreed, "contend[ing] that because these folks spoke in code, a deliberate ignorance instruction is appropriate to inform the jurors." The court added: "There's also the contention that this was a mistake or that – and there was evidence that he would have had closed his eyes to what was there not to know what was going on."

Mr. Juarez was ultimately convicted of both charges and sentenced to 365 months of imprisonment.

II. The Appeal Proceedings

On appeal, Mr. Juarez challenged the admission of the 404(b) evidence, the inclusion of the deliberate ignorance instruction, and the application of a certain sentencing enhancement to his Guideline calculation. The Fifth Circuit agreed with Mr. Juarez's sentencing challenge, vacating his judgment and remanding the case for resentencing. *See United States v. Juarez*, 866 F.3d 622, 626 (5th Cir. 2017). However,

it found no abuse of discretion by the district court in admitting the 404(b) evidence or giving the deliberate ignorance instruction. *Id.* Accordingly, it affirmed Mr. Juarez's convictions, and reaffirmed those convictions in his subsequent appeal (following resentencing) based on the law of the case doctrine. *Id.*; *see also United States v. Juarez*, 756 F. App'x 492, 493 (5th Cir. 2019).

Although Mr. Juarez's claim related to the 404(b) evidence clearly was directed to the prosecution's improper *use* of that evidence at trial, the Fifth Circuit reviewed the claim under the framework for determining *admissibility* of evidence under Rule 404(b), rather than under a prosecutorial misconduct framework. *Juarez*, 866 F.3d at 627. The Fifth Circuit weighed the probative value of the evidence against its prejudicial effect, including the prejudice created by the Government's misconduct, and ultimately rejected Mr. Juarez's claim. *Id.* In doing so, the court considered (1) the government's need for the extrinsic evidence, (2) the similarity between the extrinsic evidence and charged offenses, (3) the amount of time separating the two offenses, (4) the court's limiting instruction, and (5) the overall prejudicial effect of the evidence—*i.e.*, the factors that the Fifth Circuit considers when weighing evidence under Rule 403. *Id.*

With respect to the first three factors, the Fifth Circuit found no error in the district court's conclusion that they weighed in favor of admission, and similarly concluded that the district court took preventive measures (including limiting instructions) to reduce the prejudicial effect of the evidence. *Id.* at 627-29. With respect to prejudice, however, the Fifth Circuit agreed that "the Government's

statement that [the 404(b)] evidence proved Juarez was 'an opportunist who will join drug and gun conspiracies to benefit himself' was *highly prejudicial* because it characterized Juarez as the kind of person who commits criminal acts—the thing Rule 404(b) prohibits." *Id.* at 629-30 (emphasis added). The Fifth Circuit also concluded that, "[g]iven the similarity of the offenses and the nature of the evidence, there was a definite risk that the jury would place undue weight on the extrinsic evidence and convict Juarez based on his involvement in the uncharged conspiracies." *Id.* at 629. The court further noted that the 404(b) evidence "was likely more concrete" for the jury than witness testimony and that, although the presentation of the 404(b) evidence was limited to one day, "the jury nevertheless heard from eight witnesses who testified regarding Juarez's involvement in the prior conspiracies." *Id.* at 629-30.

But, despite this finding of prejudice, the Fifth Circuit concluded that the district court did not abuse its discretion in weighing, and ultimately admitting, the extrinsic evidence under Rule 404(b). According to the Fifth Circuit, "[t]he Government's need for the evidence, the similarity of the offenses, and the closeness in time between the charged and uncharged conspiracies made the extrinsic evidence highly probative in proving key issues at trial." *Id.* at 630. Moreover, "[t]he district court also gave limiting instructions and structured the trial such that the jury would not get confused about the purpose of the evidence" and "[t]he majority of the trial was spent on the charged conspiracy and the extrinsic evidence did not take up an undue amount of time." *Id.* The Fifth Circuit concluded that, "[w]hile highly persuasive, the extrinsic evidence was unlikely to incite the jury to convict purely

based on its emotional impact" because Mr. Juarez's conduct "was not of a heinous or violent nature." *Id.* "Accordingly, [the Fifth Circuit found] that the district court did not abuse its discretion in admitting extrinsic evidence of the prior conspiracies under Rule 404(b)." *Id.*

The Fifth Circuit analyzed the deliberate ignorance instruction under its two-prong test for determining whether such an instruction is appropriate, which requires that the evidence showed the defendant's "(1) subjective awareness of a high probability of the existence of illegal conduct, and (2) purposeful contrivance to avoid learning of the illegal conduct." *Id.* at 631. With respect the first prong, the Fifth Circuit concluded that the evidence "was such that the jury could have found Juarez had actual knowledge or was at least subjectively aware of a high probability of illegal activity by the Grimaldos." *Id.* On the second prong, the Fifth Circuit found that "[t]he combination of Juarez's routinely suspicious behavior and his continual lack of inquiry into what his associates would do with the firearms, cash, and vehicles suggests that he purposefully contrived to remain ignorant regarding the Grimaldos' drug conspiracy." *Id.* at 632. Accordingly, the Fifth Circuit found no abuse of discretion by the district court in issuing the deliberate ignorance instruction. *Id.*

REASONS FOR GRANTING THE PETITION

I. This Court's guidance is necessary to resolve circuit conflict regarding the appropriate framework for determining whether a prosecutor's improper propensity-based arguments related to 404(b) evidence warrant a new trial.

"Admission of Rule 404(b) evidence . . . does not grant the government free rein to use that evidence however it wishes." *United States v. Richards*, 719 F.3d 746, 764 (7th Cir. 2013). "Having obtained admission of the evidence for a specific, non-propensity purpose, the government cannot then deploy the Rule 404(b) evidence in support of some other argument or inference." *Id.* "Rather, it must limit its use of the evidence to the purpose proffered when admitting the evidence. It cannot ever rely upon that evidence to argue propensity." *Id.* Unfortunately, lower courts have lost sight of that clear principle, as exemplified by Mr. Juarez's trial in which the Government successfully accomplished exactly that. The Fifth Circuit recognized that the Government's conduct was not only problematic but "highly prejudicial," yet the review framework that the appellate court applied to the claim prevented it from fixing the problem.

The first question presented is: what is the proper framework for determining whether a prosecutor's improper propensity-based arguments related to 404(b) evidence warrant a new trial? Several circuit Courts of Appeals review challenges to the Government's improper use of 404(b) evidence under a prosecutorial misconduct framework, reversing convictions and ordering a new trial upon a finding of prejudice to the defendant. However, the Fifth Circuit reviews such claims under the 404(b) admissibility framework, weighing the prejudice against the probative value under

Rule 403. This Court should exercise its discretion to resolve inconsistency among the circuits and provide clarity regarding the proper review framework for these types of claims.

A. Most circuit Courts of Appeals review these claims under a prosecutorial misconduct framework.

Several circuits—including at least the Second, Fourth, Sixth, Seventh, Eighth, Ninth, Eleventh Circuit Courts of Appeals—generally review improper prosecutorial comments regarding 404(b) evidence under a prosecutorial misconduct framework. *See, e.g.*, *United States v. Escalera*, 536 F. App'x 27, 32 (2d Cir. 2013); *United States v. Basham*, 561 F.3d 302, 329 (4th Cir. 2009); *Sheard v. Klee*, 692 F. App'x 780, 786 (6th Cir. 2017); *United States v. Basham*, 561 F.3d 302, 329 (4th Cir. 2009); *Richards*, 719 F.3d at 764; *United States v. Green-Bowman*, 816 F.3d 958, 964-65 (8th Cir. 2016); *United States v. Brown*, 327 F.3d 867, 871 (9th Cir. 2003); *United States v. Hodges*, 616 F. App'x 961, 967 (11th Cir. 2015). If the prosecutor's conduct was improper and prejudiced the defendant, then the defendant is entitled to a new trial. Such claims are subject to harmless error review if preserved, and plain error review if not.

For example, in *Richards*, the Seventh Circuit remanded a case for retrial because the government relied on the admitted 404(b) evidence to argue propensity and, in doing so, prejudiced the defendant. *Id.* at 764. Although the district court gave limiting instructions regarding the admitted 404(b) evidence, the Seventh Circuit explained that such instructions only mitigate prejudice "when the government offers the evidence for some permissible purposes and *actually argues that permissible*

purpose at closing." *Id.* at 766 (emphasis added). "When the government explicitly argues propensity, however, the curative value of a limiting instruction diminishes dramatically." *Id.*

In *United States v. Brown*, the Ninth Circuit similarly determined that a prosecutor's improper, propensity-based arguments to the jury regarding 404(b) evidence "affected the jury's ability to judge the evidence fairly."[1] 327 F.3d at 871. The Ninth Circuit determined that, "[b]ased on the disfavored nature of propensity evidence, its placement within the larger context of the prosecutor's closing argument, and the district court's failure to cure the improper statement, it is more probable than not that the prosecutor's misconduct materially affected the verdict." *Id.* at 872 (internal quotation marks and alterations omitted). Accordingly, the court remanded the case for a new trial. *Id.* at 872; *see also United States v. Lugo*, 613 F. App'x 581, 583 (9th Cir. 2015) (concluding on plain error review that the government's improper arguments, including propensity-based arguments, "prejudiced Lugo's trial and seriously affected the fairness, integrity, or public reputation of the proceedings").

Other circuits similarly review claims that the government made improper, propensity-based arguments regarding admitted 404(b) evidence under a prosecutorial misconduct rather than admissibility framework. *See, e.g.*, *Sheard*, 692

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[1] The prosecution stated at closing: "And my question to you is, if a man is willing to cheat a little bit over here, wouldn't he be willing to cheat just a little bit over here?" Because defense counsel objected to the statements, the Ninth Circuit reviewed the challenge for harmless error rather than under a plain error standard of review.

F. App'x at 786 (reviewing a prosecutor's improper propensity arguments for harmlessness); *Green-Bowman*, 816 F.3d at 964-65 (stating that the defendant "is entitled to relief if the government acted improperly and deprived him of a fair trial" through its use of 404(b) evidence in closing arguments); *Escalera*, 536 F. App'x at 32 (holding that even if the prosecution's arguments regarding 404(b) evidence improperly urged propensity, the error did not substantially influence the jury verdict and therefore was harmless); *Hodges*, 616 F. App'x at 967 (evaluating claim that the government made an improper propensity argument under prosecutorial misconduct framework); *United States v. Duran*, 596 F.3d 1283, 1299-1300 (11th Cir. 2010) (same); *United States v. Basham*, 561 F.3d at 329 (considering whether the district court erred in allowing the government's argument, which the defense claimed was an improper propensity argument, as opposed to whether the district court erred in deciding to admit the evidence).

B. The Fifth Circuit's review of these claims under the 404(b) admissibility framework is impractical, and Mr. Juarez's case is the perfect vehicle to address the issue.

In contrast with the majority of circuits, the Fifth Circuit currently reviews challenges to the government's use of 404(b) evidence under the admissibility framework—*i.e.*, weighing the prejudice to the defendant (including that created by the prosecution's improper arguments) against the evidence's probative value. In Mr. Juarez's case, the Fifth Circuit recognized that the "crux" of the 404(b) argument was focused on the government's presentation and arguments related to the 404(b) evidence. *Juarez*, 866 F.3d at 629. The court then found a clear Rule 404(b) violation, concluding that the prosecution made a "highly prejudicial" comment to the jury that

"characterized Juarez as the kind of person who commits criminal acts—the thing Rule 404(b) prohibits." *Id.* at 629-30. The court also acknowledged the possibility that the jury could have found the extrinsic evidence to be "more concrete" and afforded it undue weight, resulting in a conviction based on Mr. Juarez's involvement in the uncharged conspiracies. *Id.* at 629. Nevertheless, the Fifth Circuit reviewed the claim under the admissibility framework, considering whether the district court's *pretrial* decision to admit the evidence was an abuse of discretion. *Id.* at 627-30. The court ultimately concluded that the extrinsic evidence was "highly probative in proving the key issue at trial" and, despite concluding that the evidence and its presentation had "prejudicial effect," held that "the district court's weighing of the evidence" was not an abuse of discretion. *Id.* at 630.

The Fifth Circuit regularly applies this admissibility framework to challenges to the government's improper use of 404(b) evidence at trial. For example, in *United States v. Jackson*, 339 F.3d 349 (5th Cir. 2003), the Fifth Circuit held that the district court *did* abuse its discretion in admitting evidence because the probative value was substantially outweighed by undue prejudice. *Id.* at 357. However, the decision relied in part on the prosecutor's invitation to the jury to consider the defendant's character. *Id.* at 356-57. Of course, the district court could not have foreseen the prosecutor's improper comments when it made its discretionary determination to admit the evidence. Yet the Fifth Circuit's decision to remand the case for a new trial was based on a determinaion that the district court abused its discretion in making that pretrial admission determination—not based on a finding of prejudicial misconduct by the

government. *See also United States v. Monsivais*, 737 F. App'x 668, 675 (5th Cir. 2018) (holding that "the improper aspects of the closing argument did not predominate over the probative aspects of the closing argument").[2]

The Fifth Circuit's application of the admissibility framework to claims of improper, prejudicial use of 404(b) evidence by the government at trial is impractical. The admissibility framework applied by the district court in determining whether to admit 404(b) is necessarily speculative when it comes to the potential for prejudice, whereas the appellate review of improper prosecutorial arguments regarding the evidence involves *actual* prejudice that could not have been known by the district court at the time of its decision. Thus, it is impossible to properly rule on a 404(b) evidentiary challenge using the admissibility framework when the challenge is based, in part or in whole, on the prosecution's improper arguments and characterizations of the evidence at trial. Indeed, an appellate court can only properly review for error a district court's "assessment of the evidence" if all of the evidence was actually before the district court when it made its ruling. *See Cooter & Gell v. Hartmarx, Corp.*, 496 U.S. 384, 405 (1990) (explaining that a district court abuses its discretion when the decision is based "on an erroneous view of the law or on a clearly erroneous assessment of the evidence").

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[2] Although Fifth Circuit dicta appears to suggest that reversal is warranted if the government's arguments prejudice the defendant, that does not appear to be the court's practice, as the Fifth Circuit affirmed Mr. Juarez's convictions despite finding that the government's statement was "highly prejudicial."

Moreover, Mr. Juarez's case is the perfect vehicle to address this inconsistency among the circuits and the Fifth Circuit's improper approach to these claims. When the district court ruled on the admissibility of the Government's 404(b) evidence in this case, it expressed concern about the potential prejudice that could arise out of its admission. As a result, the court took precautions to minimize that prejudice. But it could not have been aware at the time of its ruling that the Government would use improper, propensity-based arguments to inject into the trial the exact prejudice that the district court sought (and Rule 404(b) strives) to avoid. The Fifth Circuit then determined that the prosecutor's statement to the jury was "highly prejudicial." But it refused to reverse the convictions, "[d]espite the prejudicial effect" of the evidence and the government's arguments, based on the probative value of the evidence to the Government's case. Had Mr. Juarez's claim been considered under the prosecutorial misconduct framework, the Fifth Circuit's conclusion that the statements were improper and prejudicial likely would have mandated a new trial. Thus, the Fifth Circuit's framework altered the outcome and resulted in Mr. Juarez's convictions being affirmed.

II. The Court should resolve the question of when, if ever, deliberate ignorance instructions are appropriate in conspiracy cases.

"Conspiracy to commit a particular substantive offense cannot exist without at least the degree of criminal intent necessary for the substantive offense itself." *Ingram v. United States*, 360 U.S. 672, 678 (1959) (internal quotation marks and alterations omitted). "A conspirator must intend to further an endeavor which, if completed, would satisfy all of the elements of a substantive criminal offense[.]"

Salinas v. United States, 522 U.S. 52, 65 (1997). "The partners in the criminal plan must agree to pursue the same criminal objective[.]" *Id.* at 63. In the context of a drug trafficking conspiracy under 21 U.S.C. § 846, the Government must prove: "(1) the existence of an agreement between two or more persons to violate narcotics laws, (2) the defendant's knowledge of the conspiracy, and (3) the defendant's voluntary participation in the conspiracy." *United States v. Fuchs*, 467 F.3d 889, 908 (5th Cir. 2006). Similarly, to establish a violation of 18 U.S.C. § 924(o), the Government must prove: (1) "an agreement to commit the crime" (*i.e.*, using, carrying, or possessing a firearm in furtherance of a drug trafficking crime); (2) "the defendant's knowledge of the agreement;" and (3) "his voluntary participation in the agreement."

The majority of the circuit Courts of Appeals currently permit deliberate ignorance instructions in conspiracy cases. Although some circuits have expressly limited the use of the instruction to proving knowledge—holding that deliberate ignorance cannot establish intent—there is inconsistency among the circuits regarding when and how the instruction may be used in conspiracy cases. Moreover, even the most narrowly tailored restrictions on the use of the instruction run afoul of this Court's precedent describing the *mens rea* requirement for conspiracy convictions. No doubt, there is significant overlap in the evidence used to establish knowledge and intent, especially in the context of conspiracy where both *mens rea* elements are directed to a specific agreement to commit a crime. As a result, the circuit Courts of Appeals have severely lowered the bar for conspiracy convictions.

This Court should grant certiorari to resolve the confusion among circuits and clarify its own precedent.

A. The Courts of Appeals generally agree that deliberate ignorance instructions are dangerous and should rarely be given, but they nevertheless allow the instruction in conspiracy cases.

Multiple circuit Courts of Appeals have recognized the dangers inherent in deliberate ignorance instructions—such as the potential to dilute the *mens rea* requirement—and therefore have advised that they should rarely be given. *See, e.g.*, *Untied States v. Araiza-Jacobo*, 917 F.3d 360, 366 (5th Cir. 2019); *United States v. Espinoza*, 244 F.3d 1234, 1242 (10th Cir. 2001); *United States v. Mari*, 47 F.3d 782, 785 (6th Cir. 1995); *United States v. Barnhart*, 979 F.2d 647, 651 (8th Cir. 1992); *United States v. Rubio-Villareal*, 967 F.2d 294, 297 (9th Cir. 1992). Nevertheless, every circuit to address this issue appears to permit deliberate ignorance instructions in conspiracy cases, despite the fact that knowledge of the agreement and intent to further the criminal objective are central elements of the crime.

For example, the Fifth Circuit has expressly rejected the argument that a deliberate ignorance instruction cannot be given in conspiracy cases. *See, e.g.*, *United States v. Oti*, 872 F.3d 678, 697 (5th Cir. 2017). In *Oti*, the Fifth Circuit held that "the deliberate ignorance instruction is consistent with the elements of conspiracy." *Id.* The court explained that it has "consistently upheld deliberate ignorance instructions in the conspiracy context, so long as sufficient evidence supported the instruction." *Id.*

Despite their consistent allowance of deliberate ignorance instructions in conspiracy cases, the circuit Courts of Appeals have imposed inconsistent and

confusing limitations on their use. For example, the Second Circuit and others have held that the deliberate ignorance instruction *cannot* be used to prove intent, but *can* be used to prove knowledge of the conspiracy's unlawful goals. *See, e.g.*, *United States v. Ferrarini*, 219 F.3d 145, 155 (2d Cir. 2000) ("Conscious avoidance may not be used to support a finding as to the former, i.e., intent to participate in a conspiracy, but it may be used to support a finding with respect to the latter, i.e., knowledge of the conspiracy's unlawful goals."); *see also United States v. Jewell*, 532 F.2d 697, 700 (9th Cir. 1976) (en banc) ("In conformity with this view our precedents establish that the doctrine may be invoked to prove defendant had knowledge of the unlawful conspiracy. But we do not permit the doctrine to be used to prove intent to participate in a conspiracy."); *United States v. Willner*, 795 F.3d 1297, 1315 (11th Cir. 2015) (same). In contrast, the Fifth Circuit does not appear to have drawn such a line. *See, e.g.*, *United States v. Investment Enterprises, Inc.*, 10 F.3d 263, 269 (5th Cir. 1993) ("To the extent that the instruction is merely a way of allowing the jury to arrive at the conclusion that the defendant knew the unlawful purpose of the conspiracy, it is hardly inconsistent with a finding that the defendant intended to further the unlawful purpose.").

B. This Court has yet to provide guidance on the proper use of deliberate ignorance instructions in conspiracy cases, and Mr. Juarez's case is the perfect vehicle to address this issue.

The logic relied upon by the circuit courts to justify the use of deliberate ignorance instructions in conspiracy cases conflicts with this Court's precedent regarding conspiracy offenses, even if the instruction is limited to proving a certain element. According to the Ninth Circuit's en banc decision, "once [a] defendant's

participation in a conspiracy has been proved, conscious avoidance may properly be used to prove his knowledge of its unlawful objectives." *Jewell*, 532 F.2d at 700. But this Court has held that the intent requirement for conspiracy offenses requires an agreement "to pursue the same criminal objective." *Salinas*, 522 U.S. at 63. It is illogical to suggest that a person can knowingly and intentionally join and participate in a criminal conspiracy while being ignorant—deliberately or otherwise—of the specific unlawful objectives.

This Court has never addressed whether deliberate ignorance instructions are appropriate in conspiracy cases, and Mr. Juarez's case is the perfect vehicle to do so. Mr. Juarez was convicted of two conspiracy charges. He was neither charged with nor convicted of any substantive criminal offenses. Therefore, there is no question that the deliberate ignorance instruction was used to support the conspiracy convictions. Thus, if the deliberate ignorance instruction is inappropriate in conspiracy cases, Mr. Juarez's convictions must be reversed. Moreover, the district court issued a generic deliberate ignorance instruction, without any additional guidance or safeguards against improper reliance on the instruction to establish intent and voluntary participation. Thus, to the extent *limited* deliberate ignorance instructions may be permissible in conspiracy cases, Mr. Juarez's convictions still would require reversal.

Finally, the Government acknowledged at trial that Mr. Juarez never "personally touched cocaine" and instead focused the jury's attention on extrinsic evidence related to uncharged conspiracies. Under these circumstances, it is extremely likely that the deliberate ignorance instruction allowed Mr. Juarez to be

convicted of the charged conspiracies without the Government proving beyond a reasonable doubt that he knowingly and voluntarily joined agreements to commit substantive criminal offenses. For these reasons, Mr. Juarez's case is a perfect vehicle for addressing this problematic and pervasive use of deliberate ignorance instructions in conspiracy cases, which necessarily lowers the standard for proving offenses beyond a reasonable doubt.

CONCLUSION

For the foregoing reasons, Mr. Juarez's petition for a writ of certiorari should be granted.

Respectfully submitted June 10, 2019,

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