No. 19-5436

IN THE SUPREME COURT OF THE UNITED STATES

MARTIN ARAIZA-JACOBO, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly determined that giving the jury a deliberate-ignorance instruction that was legally correct, but that the court concluded lacked an adequate evidentiary basis, was harmless error because the government had presented substantial evidence that petitioner had actual knowledge that he was carrying a controlled substance.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (S.D. Tex.):

United States v. Araiza-Jacobo, No. 1:17-cr-88 (Oct. 20, 2017)

United States Court of Appeals (5th Cir.):

United States v. Araiza-Jacobo, No. 17-40958 (Feb. 28, 2019)

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is reported at 917 F.3d 360.

JURISDICTION

The judgment of the court of appeals was entered on February 28, 2019. A petition for rehearing was denied on May 1, 2019 (Pet. App. 14a-15a). The petition for a writ of certiorari was filed on July 30, 2019. 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 Texas, petitioner was convicted on one count of conspiracy to possess with intent to distribute more than 50 grams of methamphetamine, in violation of 21 U.S.C. 841(a)(1) and 846, and 21 U.S.C. 841(b)(1)(A) (2012); one count of possessing with intent to distribute more than 50 grams of methamphetamine, in violation of 21 U.S.C. 841(a)(1) and 18 U.S.C. 2, and 21 U.S.C. 841(b)(1)(A) (2012); one count of conspiracy to import into the United States from Mexico more than 50 grams of methamphetamine, in violation of 21 U.S.C. 952(a) and 963, and 21 U.S.C. 960(b)(1) (2012); and one count of importing into the United States from Mexico more than 50 grams of methamphetamine, in violation of 21 U.S.C. 952(a) and 18 U.S.C. 2, and 21 U.S.C. 960(b)(1) (2012). Judgment 1-2. Petitioner was sentenced to 120 months of imprisonment, to be followed by five years of supervised release. Judgment 3-4. The court of appeals affirmed. Pet. App. 1a-13a.

1. Petitioner is a lawful permanent resident of the United States who worked as a "cruzador" carrying goods on foot over the Gateway Bridge connecting Brownsville, Texas, and Matamoros, Mexico. Pet. App. 2a (emphasis omitted). In January 2017, two Customs and Border Protection agents inspected petitioner as he was crossing the bridge into the United States. Ibid.; Indictment 1. Petitioner told the agents that he was returning to his home

in Brownsville and that he was carrying two sandwiches and two bags of candy. Pet App. 2a. The two bags were labeled "Piñata Party Candy Mix" and were partly transparent, revealing the candy inside. Ibid. Petitioner attempted to divert the agents' attention away from the candy bags and toward the sandwiches. Ibid. One of the agents became suspicious of the bags, however, because their weight appeared to be heavier than the weight listed on the packaging, and one of the types of candy inside the bags did not appear to match the depictions of the candy on the outside of the bags. Ibid. Although the packaging indicated that the candies were lollipops, some of the candies in fact had no sticks. Id. at 3a; see Gov't C.A. Br. 6-8.

When the agents inspected the bags more closely, petitioner became "really nervous." Pet. App. 3a. The agents sent the bags through an x-ray machine and observed that the two types of candies appeared different from each other in the x-ray images. Id. at 2a-3a. The agents also observed that the mismatched candies, i.e., those that did not appear to match the depictions on the packaging, were unusually hard; when petitioner was asked why, he suggested that the harder candies were "old." Id. at 3a. The agents then cut into the mismatched candies with a knife, causing a crystalized white powdery substance to spill out. Ibid. Petitioner suggested that the substance was "Sal-Limon" -- a salty and sour powder sometimes sold as candy. Ibid. The agents then called in a drug-sniffing dog, which alerted to the presence of drugs. Ibid.

Testing ultimately revealed that the candies contained more than five kilograms of 98% pure methamphetamine. Ibid.

After the drugs were discovered, two Homeland Security Investigations (HSI) agents interrogated petitioner. Pet. App. 3a. Petitioner told the HSI agents that a candy vendor on the Mexican side of the bridge had introduced him to an anonymous man who offered him seven dollars to bring the two bags of candy into the United States. Ibid. Petitioner further stated that the man had said that he would later call petitioner with the name and description of a woman who would receive the candy. Ibid. According to petitioner, the anonymous man "looked trustworthy." Ibid.

Although petitioner initially told the HSI agents that he had spoken to the anonymous man only once, the agents' inspection of petitioner's phone revealed several calls between petitioner's phone and the anonymous man's number. Pet. App. 4a, 11a. When confronted with that fact, petitioner stated that he had given the man his number while they were at the candy vendor's cart and that the man may have tried to call him while he was being questioned by the agents. Gov't C.A. Br. 23-24. The HSI agents informed petitioner that some of the calls appeared to have occurred several days beforehand. Id. at 24. Petitioner then changed his story and stated that the candy vendor had given the anonymous man his phone number a few days earlier and that the two men subsequently spoke on the phone several times. Ibid.

At the time petitioner was detained, he was carrying $440 in cash. Pet. App. 4a. He stated that he had that money in his possession because he saved all the money that he earned through odd jobs and that his wife also gave him money. Ibid. Petitioner later stated, however, that he was estranged from his wife and that she had not given him any money in the past two years. Ibid.

2. A grand jury in the Southern District of Texas returned an indictment charging petitioner with one count of conspiracy to possess with intent to distribute more than 50 grams of methamphetamine, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(A), and 846; one count of possessing with intent to distribute more than 50 grams of methamphetamine with the intent to distribute it, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(A), and 18 U.S.C. 2; one count of conspiracy to import into the United States from Mexico more than 50 grams of methamphetamine, in violation of 21 U.S.C. 952(a), 960(b)(1), and 963; and one count of importing into the United States from Mexico more than 50 grams of methamphetamine, in violation of 21 U.S.C. 952(a), 960(b)(1), and 18 U.S.C. 2. Indictment 1-3. Each of those offenses requires the government to prove beyond a reasonable doubt that the defendant committed the offense "knowingly and intentionally." Pet. App. 4a (citation omitted).

Petitioner pleaded not guilty and claimed that he was unaware of the drug's presence in the candy bags. Pet. App. 4a. The government proceeded on two alternative theories of guilt:

(1) that petitioner had actual knowledge that he was carrying drugs; and (2) that petitioner had remained deliberately ignorant of the fact that he was carrying drugs. Id. at 5a. Following the close of the evidence, the government requested that the district court give the jury a deliberate-ignorance instruction. Id. at 6a. Over defense counsel's objection, the court granted the government's request, ibid., and charged the jury as follows:

> You may find that a defendant had knowledge of a fact if you find that the defendant was "deliberately ignorant," meaning that the defendant deliberately closed his eyes to what would otherwise have been obvious to him. Knowledge on the part of the defendant cannot be established merely by demonstrating that the defendant was negligent, careless, or foolish, however, knowledge can be inferred if the defendant deliberately blinded himself to the existence of a fact. "Deliberate ignorance" does not lessen the government's burden to show, beyond a reasonable doubt, that the knowledge elements of the crimes have been satisfied.

Id. at 17a.

The jury found petitioner guilty on all four counts. Pet. App. 7a. The district court sentenced petitioner to concurrent ten-year terms of imprisonment for each count. Ibid.

3. The court of appeals affirmed, concluding that the deliberate-ignorance instruction was unwarranted but finding the error harmless. Pet. App. 1a-13a.

The court of appeals explained that a deliberate-ignorance instruction is appropriate only when the evidence shows that the defendant had a subjective awareness of the high probability of illegal conduct and that the defendant purposefully contrived to avoid learning of the illegal conduct. Pet. App. 8a (citing United

States v. Nguyen, 493 F.3d 613, 619 (5th Cir. 2007)). The court concluded that the district court had erred in giving the deliberate-ignorance instruction here, stating that no evidence showed that petitioner purposefully had contrived to avoid learning of the illegal conduct. Id. at 9a-10a.

The court of appeals further explained, however, that even if a trial court erroneously gives a deliberate-ignorance instruction, such an error is "harmless where there is substantial evidence of [the defendant's] actual knowledge." Pet. App. 11a (quoting United States v. Oti, 872 F.3d 678, 698 (5th Cir. 2017) (brackets in original), cert. denied, 138 S. Ct. 1988, and 138 S. Ct. 1990 (2018)). And the court of appeals found that, in this case, "the government introduced substantial evidence showing [that petitioner] had actual knowledge that the candy bags contained controlled substances." Id. at 12a. The court observed that petitioner's conflicting accounts of "the extent and nature of his contacts with the unknown man who gave him the drugs" indicated that petitioner had actual knowledge that he was in fact transporting drugs. Id. at 11a. The court also noted that the "large quantity of drugs seized" -- more than five kilograms of methamphetamine -- likewise was "circumstantial evidence of [petitioner's] actual knowledge of illegal activity." Id. at 12a. Finally, the court determined that petitioner's efforts to distract the border agents' attention from the bags of candy and to explain away the candy's unusual texture and powdery filling

also showed that he had actual knowledge of the candy bags' illicit contents. Ibid.

ARGUMENT

Petitioner contends (Pet. 11-27) that the court of appeals applied an incorrect standard for determining the harmlessness of a deliberate-ignorance instruction that it viewed as lacking an adequate evidentiary basis. This Court has repeatedly denied review of petitions claiming the identical circuit conflict alleged here. See, e.g., Okechuku v. United States, 138 S. Ct. 1990 (2018) (No. 17-1130); Lopez v. United States, 136 S. Ct. 1376 (2016) (No. 15-517); Geisen v. United States, 563 U.S. 917 (2011) (No. 10-720); Hernandez-Mendoza v. United States, 562 U.S. 1257 (2011) (No. 10-6879); Kennard v. United States, 551 U.S. 1148 (2007)(No. 06-10149). No reason exists for a different result in this case. The court of appeals' decision is correct, and the purported conflict does not warrant this Court's review. Moreover, this case is an unsuitable vehicle for addressing the question presented because petitioner would not prevail even under the harmless-error standard that he advocates.

1. The court of appeals determined that, notwithstanding the perceived lack of support for the deliberate-ignorance instruction, the instruction was harmless because the government presented substantial evidence to support petitioner's conviction on an actual-knowledge theory. Pet. App. 11a-13a. That determination was correct.

a. "[T]he crucial assumption underlying the system of trial by jury is that juries will follow the instructions given them by the trial judge." Marshall v. Lonberger, 459 U.S. 422, 438 n.6 (1983) (citation and internal quotation marks omitted); see Kansas v. Carr, 136 S. Ct. 633, 645 (2016); Zafiro v. United States, 506 U.S. 534, 540-541 (1993); Richardson v. Marsh, 481 U.S. 200, 206 (1987). Under that principle, a reviewing court must presume that the jury followed the district court's instructions and that, if insufficient evidence of deliberate ignorance existed, the jury would not have found petitioner guilty based on a finding of deliberate ignorance. See, e.g., United States v. Lighty, 616 F.3d 321, 379-380 (4th Cir.), cert. denied, 562 U.S. 1118 (2010), and 565 U.S. 962 (2011); United States v. Stone, 9 F.3d 934, 938 (11th Cir. 1993), cert. denied, 513 U.S. 833 (1994). Accordingly, if the deliberate-ignorance instruction given in this case was not warranted on the facts, then giving that instruction was harmless because a court must presume that a properly instructed jury would have rejected it and instead relied on the alternative theory supported by the evidence -- namely, that petitioner actually knew that he was transporting drugs.

That is precisely the logic of this Court's decision in Griffin v. United States, 502 U.S. 46 (1991). In Griffin, the Court rejected the defendant's claim that a general verdict must be set aside where "one of the possible bases of conviction was neither unconstitutional * * * nor even illegal * * * but

merely unsupported by sufficient evidence." Id. at 56. As the Court explained, it was "settled law" that "a general jury verdict was valid so long as it was legally supportable on one of the submitted grounds -- even though that gave no assurance that a valid ground, rather than an invalid one, was actually the basis for the jury's action." Id. at 49. The Court distinguished between a jury instruction that misstates the law and one that merely presents one theory of conviction (out of several) that is not supported by the evidence. The Court explained:

> When * * * jurors have been left the option of relying upon a legally inadequate theory, there is no reason to think that their own intelligence and expertise will save them from that error. Quite the opposite is true, however, when they have been left the option of relying upon a factually inadequate theory, since jurors are well equipped to analyze the evidence.

Id. at 59 (emphasis omitted); see Sochor v. Florida, 504 U.S. 527, 538 (1992) ("We reasoned [in Griffin] that although a jury is unlikely to disregard a theory flawed in law, it is indeed likely to disregard an option simply unsupported by evidence.").

Here, petitioner claimed that the deliberate-ignorance instruction was unsupported by the evidence presented at trial. But under Griffin, the submission to the jury of the deliberate-ignorance theory -- even if the evidence at trial was insufficient to support that theory -- would not warrant reversal. See Stone, 9 F.3d at 937-942. Accordingly, given that petitioner's conviction can be upheld under an actual-knowledge theory, the court of

appeals correctly determined that the error in giving the deliberate-ignorance instruction was harmless.

b. Petitioner contends (Pet. 23-24) that "Griffin had nothing to do with harmless error" and that it is therefore incorrect to apply Griffin's holding in this context. But as other courts of appeals have correctly recognized, Griffin's holding

> is that where a jury is charged that a defendant may be found guilty on a factual theory that is not supported by the evidence and is charged on a factual theory that is so supported, and the only claimed error is the lack of evidence to support the first theory, the error is harmless as a matter of law.

United States v. Mari, 47 F.3d 782, 786 (6th Cir.), cert. denied, 515 U.S. 1166 (1995); see also United States v. Ayon Corrales, 608 F.3d 654, 658 (10th Cir. 2010); Stone, 9 F.3d at 939. Indeed, this Court made clear in Griffin that, "if the evidence is insufficient to support an alternative legal theory of liability, it would generally be preferable for the court to give an instruction removing that theory from the jury's consideration," but the refusal to do so "does not provide an independent basis for reversing an otherwise valid conviction." 502 U.S. at 60.

That is what the court of appeals determined here. The court concluded that the district court should not have given a deliberate-ignorance instruction, because in the court of appeals' view, the evidence at trial was insufficient to support a conviction on that theory. Pet. App. 9a-10a. But the court of appeals further determined that the district court's refusal to

remove that theory from the jury's consideration -- as petitioner had requested in objecting to the deliberate-ignorance instruction -- did not provide an independent basis for reversing a conviction amply supported by the evidence on an actual-knowledge theory. Id. at 11a-13a.

Petitioner additionally contends (Pet. 25-26) that the assumption that the jury will disregard an unsupported deliberate-ignorance instruction "overlooks that the instruction's natural tendency is to encourage jurors to conflate evidence of innocence -- that the defendant did not know but should have -- with evidence of guilt." But the district court in this case expressly cautioned the jury that "[k]nowledge on the part of the defendant cannot be established merely by demonstrating that the defendant was negligent, careless, or foolish." Pet. App. 17a (emphasis added). Given that cautionary instruction, "there was little risk that the jury was confused into convicting a defendant who merely should have known about the criminal venture," United States v. Fermin, 771 F.3d 71, 80 (1st Cir. 2014) (citation omitted); see also United States v. Heredia, 483 F.3d 913, 923-924 (9th Cir.) (en banc), cert. denied, 552 U.S. 1077 (2007).

2. Petitioner contends (Pet. 11-19) that this Court's review is warranted because the courts of appeals are divided over the correct standard for assessing harmlessness when a jury is erroneously given a deliberate-ignorance instruction. Petitioner overstates the degree and significance of any remaining

disagreement on this issue. In any event, this case does not squarely implicate the tension that petitioner alleges among the lower courts because the alleged error here was harmless under any standard, including the standard petitioner prefers.

Most courts of appeals to consider the question have held that instructing the jury on deliberate ignorance without sufficient factual support for the charge is harmless if the instruction is legally correct -- i.e., the instruction permits the jury to rely on deliberate ignorance only if the evidence shows such ignorance beyond a reasonable doubt, and it explains that deliberate ignorance requires more than negligence -- and the evidence is sufficient to prove guilt on an actual-knowledge theory. See Oti, 872 F.3d at 698; Fermin, 771 F.3d at 79; Lighty, 616 F.3d at 378-379; Ayon Corrales, 608 F.3d at 657-658; United States v. Leahy, 445 F.3d 634, 654 n.15 (3d Cir.), cert. denied, 549 U.S. 1071 (2006), abrogated on other grounds, Loughrin v. United States, 573 U.S. 351 (2014); United States v. Alston-Graves, 435 F.3d 331, 341-342 (D.C. Cir. 2006); Mari, 47 F.3d at 786-787; Stone, 9 F.3d at 938-939. Those courts have generally reasoned, in accord with Griffin, that if the evidence is insufficient to support a theory of deliberate ignorance but is sufficient to support a finding of actual knowledge, then the jury "must not have convicted the defendant on the basis of deliberate ignorance" but rather "on the basis of [the defendant's] positive knowledge." Mari, 47 F.3d at 785 (emphasis omitted).

Petitioner points out (Pet. 19-23) that other courts of appeals have applied a slightly different harmless-error standard in some of their decisions. The Eighth Circuit in United States v. Barnhart, 979 F.2d 647 (1992), stated that instructing a jury on deliberate ignorance does not constitute harmless error if the evidence of actual knowledge, although sufficient to support the jury's finding, is not overwhelming. See id. at 652-653 & n.1; see also United States v. Covington, 133 F.3d 639, 644-645 (8th Cir. 1998) (following Barnhart, but finding the error in giving deliberate-ignorance instruction to be harmless where evidence of actual knowledge was overwhelming). The Ninth Circuit reached the same conclusion in several decisions. See United States v. Mapelli, 971 F.2d 284, 287 (1992); United States v. Sanchez-Robles, 927 F.2d 1070, 1075-1076 (1991), disapproved of on other grounds by Heredia, supra. And some recent decisions of the Second and Seventh Circuits have also applied an overwhelming-evidence standard. See United States v. Quinones, 635 F.3d 590, 595 (2d Cir.), cert. denied, 565 U.S. 1080 (2011); United States v. Macias, 786 F.3d 1060, 1063 (7th Cir. 2015). The earliest of these decisions express a concern that, in the absence of evidence to support a deliberate-ignorance instruction, juries may incorrectly employ a negligence or recklessness standard. See, e.g., Barnhart, 979 F.2d at 652; Mapelli, 971 F.2d at 287.

For the reasons given above, the courts' articulation of the standard in decisions such as Barnhart, Mapelli, Macias, and

Quinones is incorrect. But this Court's review is unwarranted because the extent of any remaining disagreement reflected in these decisions is limited and unlikely to be outcome determinative in most cases (including this case, see pp. 19-20, infra). Two of the circuits that in the past failed to apply Griffin -- the Eighth and Ninth Circuits -- have more recently reevaluated that issue. In United States v. Hernandez-Mendoza, 611 F.3d 418, cert. denied, 562 U.S. 942 (2010), and 562 U.S. 1257 (2011), the Eighth Circuit retreated from its analysis in Barnhart and effectively overruled Barnhart because the court in that case had failed to consider and apply this Court's decision in Griffin. Id. at 418-419. Similarly, the Ninth Circuit decisions purportedly in conflict with the decision below did not mention Griffin and did not reject its application. And, in a more recent unpublished decision, the Ninth Circuit has applied Griffin in evaluating the harmlessness of a deliberate-ignorance instruction unsupported by the evidence. See United States v. Daly, 243 Fed. Appx. 302, 309, cert. denied, 552 U.S. 1070 (2007), and 552 U.S. 1211 (2008).

In addition, the en banc Ninth Circuit has rejected the view that giving a deliberate-ignorance instruction "risks lessening the state of mind that a jury must find to something akin to recklessness or negligence." Heredia, 483 F.3d at 924. It has further determined that, where (as here) the jury is instructed that it may not premise a guilty verdict on a finding that the defendant was merely careless, "[r]ecklessness or negligence never

comes into play, and there is little reason to suspect that juries will import these concepts, as to which they are not instructed, into their deliberations." Ibid. That en banc pronouncement undermines the reasoning of the Ninth Circuit's prior decisions in Mapelli and Sanchez-Robles, such that any nominal division of authority created by those earlier decisions is illusory.

The decisions petitioner cites (Pet. 14-17) from the Second, Seventh, and D.C. Circuits also do not establish a conflict that warrants this Court's review. In its earliest post-Griffin decision on this issue, the Second Circuit expressed agreement with what is now the majority rule -- i.e., that the erroneous instruction will be harmless when the evidence is sufficient to prove the defendant's actual knowledge -- and identified the "overwhelming" evidence of actual knowledge in that case as an additional reason for its harmlessness determination. United States v. Adeniji, 31 F.3d 58, 64 (2d Cir. 1994). Although in subsequent decisions the Second Circuit has proceeded directly to ask whether the evidence of actual knowledge was overwhelming, see Quinones, 635 F.3d at 595, petitioner identifies no decision in which that court has found that the evidence was sufficient to support guilt under an actual-knowledge theory but nevertheless reversed the conviction solely because such evidence was not "overwhelming."

In Macias, the Seventh Circuit reversed a conviction after determining that the evidence of the defendant's actual knowledge

"was sufficient but not overwhelming." 786 F.3d at 1063. But the court in Macias expressed concern that the deliberate-ignorance instruction given there could have been confusing to the jury because two clauses in the instruction were "in tension with one another." Id. at 1061. The court also emphasized that the government had raised a harmless-error argument only in a single sentence in its brief, causing the court to dismiss that argument as a "pure, unsubstantiated conclusion, entitled to zero weight." Id. at 1063. Moreover, in decisions predating Macias, the Seventh Circuit had found erroneous deliberate-ignorance instructions to be harmless under the majority rule -- that is, where the government presented "sufficient evidence" of the defendant's actual knowledge. United States v. Salinas, 763 F.3d 869, 881 (2014); United States v. Malewicka, 664 F.3d 1099, 1110 (2011). It is thus unclear whether the Seventh Circuit will continue to employ an overwhelming-evidence standard and, even if it does,

whether that standard will make a difference in all but exceptional cases.*

Petitioner also cites (Pet. 15) the D.C. Circuit's decision in Alston-Graves as an example of a decision applying a different harmless-error analysis than the decision below. But in Alston-Graves, the court determined that the error in giving a willful-blindness instruction was harmless because the "evidence showed beyond doubt that" the defendant acted knowingly. 435 F.3d at 342. In doing so, the court reasoned that, because the record provided "no factual basis for viewing [the defendant's] conduct as conscious avoidance," "[n]o reasonable juror" would have treated the only alleged example of conscious avoidance "in the manner the [willful-blindness] instruction permitted." Ibid. Thus, both the result and reasoning of Alston-Graves are consistent with the decision below in this case and with the principle,

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* Petitioner cites (Pet. 15-17) three other decisions in which the Seventh Circuit has applied an overwhelming-evidence standard. But in one of those decisions, the government did not argue that the erroneous deliberate-ignorance instruction was harmless, and the court did not address the issue. United States v. Giovannetti, 919 F.2d 1223, 1229 (1990). In another, the deliberate-ignorance instruction was one of two erroneous instructions on the defendant's mental state. See United States v. L.E. Myers Co., 562 F.3d 845, 855 (2009). And in that case and a third decision, the Seventh Circuit applied the higher standard under the apparent belief that the instructional error was constitutional in nature, requiring the government to prove harmlessness beyond a reasonable doubt. See ibid. (citing Neder v. United States, 527 U.S. 1, 18 (1999)); see also United States v. Ciesiolka, 614 F.3d 347, 355 (7th Cir. 2010) (same). In any event, any analytical tension among the Seventh Circuit's decisions is for that court to resolve in the first instance. See Wisniewski v. United States, 353 U.S. 901, 902 (1957) (per curiam).

derived from Griffin, that the jury is presumed to have followed the district court's instructions and that, if no evidence of deliberate ignorance existed, the jury would not have found the defendant guilty on a deliberate-ignorance theory.

3. In any event, this case does not directly implicate the tension that petitioner asserts in the language that courts of appeals have used to describe the harmlessness inquiry, because any error would be harmless even on the standard petitioner advocates. Petitioner's preferred standard (Pet. 15) asks whether the evidence at trial of actual knowledge was overwhelming. See, e.g., Quinones, 635 F.3d at 595-596 (finding error in giving deliberate-ignorance instruction harmless where evidence of guilt was overwhelming); Covington, 133 F.3d at 645 (same). That is the case here, because the evidence overwhelmingly supports petitioner's actual knowledge. See Pet. App. 12a (finding "substantial" evidence showing petitioner's actual knowledge that he was transporting drugs).

First, the Fifth Circuit has repeatedly recognized that "inconsistent statements," United States v. Moreno, 185 F.3d 465, 471-472 (1999), cert. denied, 528 U.S. 1095 (2000), and "implausible account[s]," United States v. Lopez-Monzon, 850 F.3d 202, 208 (2017), can provide persuasive circumstantial evidence of a defendant's guilty knowledge. And here, petitioner "contradicted himself and altered his story several times" on such "central" matters as when and how often he spoke with the anonymous

man who gave him the drugs, and where he obtained the cash that he was carrying when he was detained with the drugs. Pet. App. 3a, 11a.

Second, the Fifth Circuit has also recognized that a "particularly high value of drugs" may be "'probative of knowledge.'" Lopez-Monzon, 850 F.3d at 208 (citation omitted). As the court of appeals observed here, "[t]he quantity of drugs in this case -- 5.1 kilograms -- was significant and suggests that a drug trafficker would not have entrusted the shipment to an untested courier." Pet. App. 12a.

Third, the border agents also testified that, "when approaching them at the checkpoint," he was "'nervous'" and "tried to distract their attention from the bags with the sandwiches" -- further evidence that petitioner knew that the bags contained drugs, not just candy. Pet. App. 3a, 12a. Fourth, even courts that apply the rule petitioner advocates have held that "the risk of conviction for negligent or reckless behavior is particularly low when, as here, there is a conviction for conspiracy requiring proof of a conspiratorial agreement." Covington, 133 F.3d at 645.

Taken together, the evidence of petitioner's actual knowledge (which petitioner does not meaningfully contest) was overwhelming. Any difference in the circuits' formulation of the harmlessness inquiry would therefore not have been outcome-determinative here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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