No. 19A16

IN THE
SUPREME COURT OF THE UNITED STATES

JAMES MICHAEL FARRELL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

---

PETITION FOR A WRIT OF CERTIORARI

Respectfully Submitted,

/s/ Barry Coburn

Barry Coburn
Coburn & Greenbaum, PLLC
1710 Rhode Island Avenue, N.W.
Second Floor
Washington, DC 20036
(202) 643-9472
barry@coburngreenbaum.com

Counsel for Petitioner

QUESTION PRESENTED

1. In the context of a criminal prosecution of a criminal defense lawyer who was charged with functioning as the "consiglieri" of a drug distribution organization, and who also was a criminal defense lawyers for members of this conspiracy, whether – in the context of a prosecution for money laundering -- the use of a willful blindness instruction in place of actual knowledge improperly lowers the government's burden of proof to a level that infringes on the defendant's right to due process of law?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

PETITION FOR A WRIT OF CERTIORI

Petitioner James Michael Farrell respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

DECISION BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit (App. A) is reported at 921 F.3d 116 (4th Cir. 2019). App 1-54. No written opinion was issued by the District Court in denying Defendant's Post-Trial Motion for Judgment of Acquittal and Defendant's Motion for New Trial. App 55. The reasons for the latter ruling were stated on the record. The District Court's judgment is found at App 57-63.

JURISDICTION

The Fourth Circuit entered judgment in this case on April 5, 2019. App 56. No petition for rehearing was filed. The Court extended the time for petitioner to seek a writ of certiorari to August 3, 2019, so it is timely under Supreme Court Rule 13.1. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

18 U.S.C. 1956(a)(1)(B)(i) provides, in pertinent part:

> 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 . . .
>
> Knowing that that 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. . . . .

18 U.S.C. 1956(h) provides, in pertinent part, "[a]ny person who conspires to commit any offense defined in this section or section 1957 shall be subject to the same penalties as those prescribed for the offense the commission of which was the object of the conspiracy."

STATEMENT OF THE CASE

Following a twelve-day jury trial and three days of jury deliberations, Mr. Farrell was convicted of money laundering conspiracy in violation of 18 U.S.C. § 1956(h), and six counts of substantive money laundering in violation of 18 U.S.C. § 1956(a)(1)(B)(i), as well as other counts not at issue here. Mr. Farrell was a trial lawyer who practiced for more than thirty years, with a majority of his career dedicated to criminal defense. The conduct at issued that resulted in his conviction arose from Mr. Farrell's legal representation of individuals who were being investigated in the District of Maryland in connection with a marijuana distribution organization. In order to sustain a conviction for money laundering or money laundering conspiracy, the government was required to show that Mr. Farrell knew the funds at issue had an illicit source. Given that there was no direct evidence that Mr. Farrell knew that the funds at issue were the proceeds of unlawful activity, the government sought and received a jury instruction on willful blindness.

Mr. Farrell appealed his conviction, which was affirmed by the Fourth Circuit. In issuing its opinion, the Fourth Circuit noted the fine line a criminal defense attorney must walk in certain situations, specifically the "line between

proper representation of a drug dealer and improper participation in his business. . . ." App 10, fn. 9. As the majority opinion notes, this distinction "is not also a clear one . . . ." *Id*. The majority opinion then takes a leap that we submit should cause this Court pause and warrants review. The Fourth Circuit held that Mr. Farrell placed himself in harm's way with his given profession, specifically that "a lawyer providing advice to an unlawful drug trafficking entity such as the Nicka Organization places himself at great personal risk." App 35. This observation, and this case, have patent Fourth Amendment implications. Given the "great personal risk" Mr. Farrell incurred, the fact that the government's burden of proof was substantially lowered by the administration of the willful blindness instruction warrants review by this Court.

REASONS FOR GRANTING THE PETITION

This Court should grant certiorari because the use of the concept of willful blindness in place of actual knowledge raises significant concerns when applied to alleged conduct by a criminal defense attorney in the course of his or her representation of a client. The decision of the Fourth Circuit has broad implications. As Judge Traxler noted in his concurring opinion, the Fourth Circuit's majority opinion may be read to "place defense attorneys in legal jeopardy for money laundering simply as a result of their representation of criminal defendants in the normal course." App 35. This could result in devastating consequences and hinder the zeal a criminal defense attorney will put forth based on fear of prosecution. This possibility is of utmost concern as "our criminal justice system

depends on a defense attorney's ability to effectively advise and represent his or her client without fear of criminal prosecution." App 35.

The Fourth Circuit's opinion assigns insufficient weight to the proposition that the relationship of loyalty and trust between a criminal defense lawyer and his client is one of the most important aspects of our criminal justice system. "At a minimum, the Sixth Amendment right to effective assistance of counsel encompasses the attorney's duty of loyalty to the client." *United States v. Magini*, 973 F.2d 261, 263 (4th Cir. 1992). Regardless of the nature or gravity of the allegations, criminal defendants are constitutionally entitled to loyalty from their attorneys, and thus cannot be subjected to open suspicion from, and constant investigation by, the very individuals who are supposed to zealously represent their interests in a conflict-free manner. Mr. Farrell was faced with a choice of upholding his ethical and constitutional obligations in representing and counseling individuals related to the investigation of the Nicka Organization. It appears that he was faced with the choice of upholding his obligations or protecting himself.

I. In the context of this case, the use of a willful blindness instruction in place of actual knowledge improperly lowers the government's burden of proof to a level that infringes on Due Process

In a money laundering case, the government must prove beyond a reasonable doubt that a defendant acted "knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity." 18 U.S.C. § 1956(a). The government cannot meet its burden by relying on willful blindness as a fallback theory of knowledge, employed just in case the jury is unconvinced by

evidence that the government asserts demonstrates actual knowledge. A willful blindness jury instruction is only proper if it is justified by specific factual support in the record, apart from any evidence the government may claim supports actual knowledge. *See United States v. Jinwright*, 683 F.3d 471, 479 (4th Cir. 2012) (evidence consistent with actual knowledge did not preclude a willful blindness instruction when the government *also* presented separate evidence that the defendants "purposely avoided learning the facts of their liability") (emphasis added); *United States v. Ebert*, No. 96-4871, 1999 U.S. App. LEXIS 8453, at *35 (4th Cir. May 3, 1999) (when the government's evidence is consistent with only actual knowledge, "an ostrich instruction is not allowed"); *United States v. Whittington*, 26 F.3d 456, 463 (4th Cir. 1994) ("A deliberate avoidance instruction, like all jury instructions, is proper only if there is a foundation in evidence to support a finding of deliberate avoidance.") (internal citations and quotation marks omitted).

To obtain a willful blindness jury instruction, the government must introduce evidence of *both* the defendant's subjective belief that there was a high probability that a relevant fact existed, *and* that the defendant took affirmative steps to avoid confirming that belief. *Global-Tech Appliances, Inc. v. SEB S.A.*, 563, U.S. 754, 769-70 (2011). When the government introduces no such evidence, a willful blindness instruction relieves the government of its burden of proof in violation of the defendant's due process rights. *In re Winship*, 397 U.S. 358, 364 (1970) ("Due process commands that no man shall lose his liberty unless the Government has borne the burden" of proving his "guilt beyond a reasonable doubt.").

Putting aside the issue of whether a willful blindness instruction should have been provided in the case of Mr. Farrell, the fundamental issue is the use of a willful blindness as a substitute for actual knowledge in the prosecution of a criminal defense attorney. Doing so puts the Sixth Amendment rights of the attorney's clients at risk. Criminal defendants have a Sixth Amendment right to loyal counsel free from conflicts. *United States v. Tatum*, 943 F.2d 370, 375 (4th Cir. 1991) ("The effective performance of counsel requires meaningful compliance with the duty of loyalty and the duty to avoid conflicts of interest, and a breach of these basic duties can lead to ineffective representation."). The prospect of a willful blindness instruction lends itself to the belief that an attorney must investigate his own client to determine the source of legal fees, or risk criminal liability himself. This situation results in a conflict between the attorney's interests and those of his client in a manner that precludes the effective representation to which the client is constitutionally entitled. The government cannot be permitted to interfere in the attorney-client relationship by using the threat of prosecution to cause criminal defense attorneys to breach their relationship of trust with their criminal defendant clients.

That is why it is so troubling when the government prosecutes a criminal defense attorney under 18 U.S.C. § 1956 for the receipt of legal fees: it circumvents an otherwise applicable safe harbor that expressly exempts from criminal liability transactions "necessary to preserve a person's right to representation as guaranteed by the Sixth Amendment to the Constitution." 18 U.S.C. § 1957(f)(1). *See also*

United States v. Rutgard, 116 F.3d 1270, 1291 (9th Cir. 1997) (noting that, without the safe harbor, "a drug dealer's check to his lawyer might have constituted a new federal felony."). Recognizing those constitutional risks, the Department of Justice (DOJ) has well-established policies regarding the prosecution of criminal defense lawyers for the receipt of fees for bona fide legal services and generally disapproves of them. The government in Mr. Farrell's case improperly skirted those important policies.

The government should be precluded from using willful blindness as a substitute for a criminal defense lawyer's actual knowledge of the unlawful source of funds used to pay for bona fide legal services in a criminal case in the absence of an adequate factual basis. It endangers not only the due process rights of the attorney defendant, but also the Sixth Amendment rights of the attorney's clients, and the institution of criminal defense as a whole.

The government's obligation to prove each and every element of the crimes it charges beyond a reasonable doubt is fundamental to every criminal defendant's constitutional right to due process. *See, e.g.*, *In re Winship*, 397 U.S. at 364 ("Due process commands that no man shall lose his liberty unless the Government has borne the burden" of proving his "guilt beyond a reasonable doubt."); *Sullivan v. Louisana*, 508 U.S. 275, 277-78 (1993) ("The prosecution bears the burden of proving all elements of the offense charged, and must persuade the factfinder 'beyond a reasonable doubt' of the facts necessary to establish each of those elements."). In a money laundering case like Mr. Farrell's, brought under 18 U.S.C.

§ 1956, the government's burden includes proving beyond a reasonable doubt that the defendant knew funds were the proceeds of specified unlawful activity and knowingly engaged in financial transactions with those funds to conceal that fact.

While the Fourth Circuit has upheld the use of willful blindness as a method for proving knowledge, it has also cautioned that the use of willful blindness as a substitute for actual knowledge "softens" the government's burden of proof, and raises a "serious concern" about "shift[ing] the burden to the defendant and forc[ing] him to prove his innocence," creating a presumption of guilt. *Ebert*, 1999 U.S. App. LEXIS 8453, at *35-36 (internal citations omitted). Because willful blindness relieves the government of the burden of proving actual knowledge, in exchange, the government must show that "the defendant subjectively believe[d] that there [was] a high probability that a fact exist[ed]," *and* that "the defendant [took] deliberate actions to avoid learning of that fact." *Ebert,* 1999 U.S. App. LEXIS 8453, at *35-36. *See also Global-Tech*, 563, U.S. at 769 (a willful blindness instruction is only appropriate when a defendant "takes deliberate actions to avoid confirming a high probability of wrongdoing and who can almost be said to have actually known the critical facts"); *Jinwright*, 683 F.3d at 480 (same) (citing *Global-Tech*, 563 U.S. at 769).

There is "no requirement that a lawyer…must know from where a client's money comes," and "concluding knowledge merely from not asking is outright speculation" that does not justify a willful blindness jury instruction. *United States v. Lieberman*, No. 96-4118, 1997 U.S. App. LEXIS 1057, at *4-*5 (4th Cir. Jan. 24,

1997) (finding insufficient evidence to support a willful blindness instruction in a money laundering case involving an attorney defendant whose client was a marijuana smuggler). But speculation is all the government had in Mr. Farrell's case, which illustrates the dangers of using the receipt of legal fees as a basis to prosecute criminal defense attorneys for money laundering under § 1956.

Instead of presenting evidence of Mr. Farrell's subjective belief of a high probability that the funds he received were tainted, the government merely pointed to Mr. Farrell's allocation of legal fees to other attorneys and record keeping practice. That argument is concerning because it is not unusual for defense attorneys to distribute legal fees to other attorneys with whom they are in a joint defense relationship. In the white-collar context, for example, corporate clients often pay for separate counsel for individual employees, and those payments may flow through the corporation's own counsel. Under the government's theory, those routine transactions would be "obvious[ly] illegal." That is why proof of the attorney's subjective belief of a high likelihood that legal fees are tainted is so important. Without that proof, the normal conduct of defense attorneys is potentially criminalized.

The problem is compounded when, as in Mr. Farrell's case, there is also no evidence of any affirmative steps taken to avoid learning that legal fees are tainted. At most, Mr. Farrell simply failed to inquire about the source of the legal fees,

which is not sufficient to establish the requisite affirmative steps. *Lieberman*, 1997 U.S. App. LEXIS 1057, at *5.[1]

A willful blindness should not be permitted when it is sought as a fallback in case the fact finder does not find actual knowledge. The majority found that "there was substantial evidence that Farrell knew that the money he deposited into his firm bank account was derived from the illegal source of drug trafficking," but found no issue with allowing the use of a willful blindness instruction. App 38. A willful blindness instruction is inappropriate when there is a lack of evidence of (1) the defendant's subjective belief that there was a high probability that funds received as legal fees were tainted, and (2) that the defendant took affirmative steps to avoid confirming his subjective belief that the funds were likely tainted. Without such evidence, a willful blindness theory functions merely as a contingency in the event the jury does not find actual knowledge, rather than as a separately proved basis for finding scienter beyond a reasonable doubt. Allowing the government to rely on a theory of liability it has not proven violates a defendant's due process rights.

Criminal defendants are constitutionally entitled to loyalty from their attorneys, and thus cannot be subjected to open suspicion from, and constant investigation by, the very individuals who are supposed to zealously represent their interests in a conflict-free manner. The Fourth Circuit opinion imposes obligations on criminal defense attorneys that infringe on this issue of paramount importance.

[1] The language of the district court's willful blindness instruction was, itself, deficient because the instruction did not reference "affirmative steps" at all, and was therefore inconsistent with the Supreme Court's holding in *Global-Tech*. 563 U.S. at 770 (holding that "deliberate indifference" to a "known risk" is not sufficient to support a willful blindness theory of knowledge and requiring a showing that the defendant made "active efforts" to avoid knowledge).

When willful blindness is used as a substitute for actual knowledge in money laundering cases, however, criminal defense lawyers representing people accused of profit-generating crimes (*e.g.*, drug or financial crimes) are forced to investigate their own clients in order to avoid criminal prosecution themselves. That conflict between the attorney's interests and the client's is detrimental to the client's Sixth Amendment right to counsel.

Relatedly, requiring a criminal defense lawyer to police the source of legal fees received conflicts with the lawyer's own ethical obligations. In particular, a lawyer may be understandably hesitant to inquire about the source of funds for fear of discovering information that would require him to act against his client's interests. Private attorneys would effectively be precluded from representing certain clients at all if there is any possibility that legal fees are proceeds of ongoing criminal activity. If a private lawyer does take on the representation, the only alternative he has to protect himself from criminal prosecution for money laundering is to affirmatively investigate his client's activities lest he be accused of being willfully blind. The threat of prosecution of a defense attorney under the willful blindness theory thus creates an ethical conundrum. *See* Model Rule of Prof. Conduct 1.7 (generally prohibiting representation of a client with whom there is a conflict of interest).

Furthermore, the lawyer would have to confront several problematic questions even if some investigation of the source of legal fees was feasible. For example, how much investigation is enough? If the client tells his attorney that the

funds used to pay legal fees are from a legitimate source, is that sufficient? How does the attorney know the client is telling the truth? Does the attorney have an obligation to independently corroborate his client's assertion about the legitimacy of the funds? How would an attorney even do so without breaking the attorney-client privilege? If the funds were lent to the client by a third party (*e.g.*, a friend or relative), does the attorney then need to investigate that person? It is easy to see why even the prospect of such an investigation would cause a prudent attorney to simply decline the representation.

Effectively precluding private criminal defense attorneys from representing certain defendants in this manner would begin a cascading failure in the criminal justice system as a whole because the alternative—representation by court-appointed attorneys and public defenders—would quickly overwhelm an already burdened system with clients who have nowhere else to turn regardless of their ability to pay. The United States' well-documented public defender crisis[2] would get exponentially worse if non-indigent defendants find themselves at the public defender's doorstep because they have no other option for obtaining the legal representation to which they are constitutionally entitled.

[2] *See, e.g.*, Oliver Laughland, "The Human Toll of America's Public Defender Crisis," THE GUARDIAN (Sept. 7, 2016), https://www.theguardian.com/us-news/2016/sep/07/public-defender-us-criminal-justice-system (describing public defenders as the "pack mules of the system" and noting the "bottomless caseloads" they face).

CONCLUSION

Based on the foregoing we respectfully submit that the petition for a writ of certiorari should be granted.

Respectfully Submitted,

/s/ Barry Coburn

Barry Coburn
Coburn & Greenbaum, PLLC
1710 Rhode Island Avenue, N.W.
Second Floor
Washington, DC 20036
(202) 643-9472
barry@coburngreenbaum.com

Counsel for Petitioner

CERTIFICATE OF SERVICE

Pursuant to Rule 29.5(b) of the Supreme Court of United States, I certify that I have been appointed to represent Mr. Farrell on appeal in the United States Court of Appeals for the Fourth Circuit pursuant to the Criminal Justice Act. I further certify that on August 5, 2019, at the time of filing this petition for writ of certiorari, I served it via the Court's electronic filing system and three copies via first-class mail to the following:

Sandra Wilkinson, Esq
Office of the United States Attorney for the District of Maryland
6406 Ivy Lane 8th Fl.
Greenbelt, MD 20770

Solicitor General of the United States
United States Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530

/s/ Barry Coburn

Barry Coburn