No. _____

In the
Supreme Court of the United States

CHEN ZHAOPENG
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the rule of Farmer v. Brennan, 511 U.S. 825 (1994), should be extended to criminal cases, in which the defendant's knowledge of a certain fact is an element of the offense, and the government seeks to prove such knowledge with evidence of the defendant's deliberate ignorance.

LIST OF DIRECTLY RELATED PROCEEDINGS

United States v. Chen, D.N.M.I. Docket No. 1:15-cr-00014
Judgment entered December 27, 2016

United States v. Chen, Ninth Circuit Docket No. 17-10090
Judgment entered April 26, 2019

United States v. Huang, Ninth Circuit Docket No. 16-10403
Judgment entered January 23, 2017

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IN THE SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner Chen Zhaopeng[1] respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The final decision of the United States Court of Appeals for the Ninth Circuit is published at 768 Fed. App. 779, and is available on Westlaw at 2019 WL 1873272. It appears as Appendix A to this Petition. The Court of Appeals' contrary original decision is published at 738 Fed. App. 579, and is available on Westlaw at 2018 WL 4682037. It appears as Appendix B to this Petition. Neither decision was published in the Federal Reporter. The decision of the District Court for the Northern Mariana Islands is unpublished. It appears as Appendix C to this Petition.

JURISDICTION

The United States Court of Appeals for the Ninth Circuit finally decided this case on April 26, 2019. A timely petition by Chen for rehearing en banc was denied by the Court of Appeals on August 12, 2019. The order denying Chen's petition appears at Appendix D to this Petition. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

> Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance[.]

21 U.S.C. § 841(a)(1).

[1] All Chinese names herein, including Petitioner's, are given in their original Chinese order, *i.e.*, with the family name first.

STATEMENT OF THE CASE

Statement of Material Facts

Chen Zhaopeng traveled as a tourist from Malaysia to Saipan, in the Commonwealth of the Northern Mariana Islands, on December 1, 2015, together with five friends, staying at a small hotel owned by his relatives.

Four days later, on December 4, 2015, Huang Xi, also Chen's relative, arrived on Saipan from China, along with a companion named Cai. Huang and Cai had conspired between themselves to distribute illegal methamphetamine on Saipan. The drugs had previously been shipped to Saipan hidden inside paint cans, and the cans had been stored at the warehouse of the Sunleader department store. Huang and Cai's plan was to pick up the cans from the warehouse, and then to leave them, with the drugs still hidden inside, in a car parked outside a nearby hotel known as the Stanford.

Before going to pick up the drugs, Huang and Cai picked up Chen at his hotel, with the result that Chen was with them when they later picked up and dropped off the paint cans containing the drugs. However, Chen took no part in their activities, and denied any knowledge that the paint cans contained anything but paint. Nevertheless, Chen was arrested along with the others, and was charged, like them, with conspiracy to distribute a controlled substance under 18 U.S.C. § 841(a)(1). Huang and Cai pleaded guilty, but Chen went to trial. At trial, both Huang and Cai testified, but neither implicated Chen in their conspiracy.

At trial, the court, over Chen's objection, instructed the jury that the requisite *mens rea* ("knowingly") could be established if it found that Chen had been *deliberately ignorant* of the presence of the drugs in the cans.[2] Chen was convicted, and argued on appeal that the evidence

[2] The instruction provided in full as follows:

did not support such a "deliberate ignorance" instruction. In its original decision, the Ninth Circuit agreed, finding that this was not a case "where the facts strongly point toward illegal activity." Exhibit B at 4. On the Government's motion for rehearing, however, the court, without explanation, reversed course, with the same panel now calling the same facts "highly indicative of drug dealing." Exhibit A at 3. Chen's petition for rehearing *en banc* was denied.

Basis for Federal Jurisdiction in the Court of First Instance

The District Court for the Northern Mariana Islands had jurisdiction pursuant to 18 U.S.C. § 3231 (granting district courts jurisdiction over "all offenses against the laws of the United States"), by way of 48 U.S.C. §§ 1821-22 (establishing the District Court for the Northern Mariana Islands, and providing that it "shall have the jurisdiction of a district court of the United States").

REASONS FOR GRANTING THE WRIT

This case affords an opportunity to resolve an important question of federal law that has not been, but should be, settled by this Court, because the courts of appeals, including the Ninth Circuit in this case, have left it unresolved and too often even unaddressed – *i.e.*, the question of *how obvious* criminal conduct needs to be before a defendant, who has taken no steps to investigate it, can be said to have deliberately kept himself ignorant of it. The lower

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> You may find that the defendant acted knowingly if you find beyond a reasonable doubt that (1) he was aware of a high probability that drugs were being picked up from the Sunleader warehouse, and (2) he deliberately avoided learning the truth.
>
> A failure to investigate can be a deliberate action.
>
> You may not find such knowledge, however, if you find that the defendant actually believed that no drugs were being picked up, or if you find that the defendant was simply careless.
>
> You may not find that the defendant acted knowingly if the defendant was reckless or negligent. A reckless defendant is one who merely knew of a substantial and unjustifiable risk that his conduct was criminal; a negligent defendant is one who should have had similar suspicions but, in fact, did not.

Final Jury Instructions, District Court Dkt. No. 147, at 8-9.

courts typically skip over this question altogether, inevitably allowing evidence of negligence or recklessness to effectively take the place of the statutory requirement of *knowledge*.

The Problem: No Clear Standard Exists for Evaluating the Sufficiency of Circumstantial Evidence of Deliberate Ignorance

Deliberate ignorance – or, as it is sometimes called, "willful blindness" or "conscious avoidance" – was noted by this Court, in Global–Tech Appliances, Inc. v. SEB S.A., 563 U.S. 754, 769 & fn.9 (2011), to be a theory generally recognized by the circuit courts of appeals.[3] Under this theory, in a nutshell, a defendant's knowledge of a fact can be proved by evidence of his "deliberate ignorance" of that fact.[4] Deliberate ignorance has two elements – "(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.

The second element (deliberate action) can be proved by evidence of mere failure to investigate the existence of the fact, if the first element is already found to be present.[5] The second element has never been at issue in this case, as there was no dispute that Chen did not

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[3] The Court cited the following cases: United States v. Perez-Melendez, 599 F.3d 31, 41 (1st Cir. 2010); United States v. Svoboda, 347 F.3d 471, 477-78 (2nd 2003); United States v. Stadtmauer, 620 F.3d 238, 257 (3rd Cir. 2010); United States v. Schnabel, 939 F.2d 197, 203 (4th Cir. 1991); United States v. Freeman, 434 F.3d 369, 378 (5th Cir. 2005); United States v. Holloway, 731 F.2d 378, 380-81 (6th Cir. 1984); United States v. Draves, 103 F.3d 1328, 1333 (7th Cir. 1997); United States v. Florez, 368 F.3d 1042, 1044 (8th Cir. 2004); United States v. Heredia, 483 F.3d 913, 917, 920 (9th Cir. 2007) (en banc); United States v. Glick, 710 F.2d 639, 643 (10th Cir. 1983); United States v. Perez–Tosta, 36 F.3d 1552, 1564 (11th Cir, 1994); United States v. Alston–Graves, 435 F.3d 331, 339–41 (D.C. Cir. 2006).

[4] *See, e.g.*, Perez-Melendez, *supra*, 599 F.3d 31, 41 (1st Cir. 2010) ("Willful blindness serves as an alternate theory on which the government may prove knowledge."); Svoboda, *supra*, 347 F.3d at 480 ("[K]nowledge consciously avoided is the legal equivalent of knowledge actually possessed.").

[5] *See, e.g.*, United States v. Ramos-Atondo, 732 F.3d 1113, 1119 (9th Cir. 2013) ("A failure to investigate can be a deliberate action.").

ask questions or otherwise take any steps to "investigate" what Huang and Cai were up to. The issue here turned instead on the first element – *i.e.*, whether Chen ever believed it highly probable that there were drugs in the cans in the first place. Since there was no direct evidence of Chen's beliefs, the evidence on this point was entirely circumstantial.[6] Circumstantial evidence of the first element of "deliberate ignorance" often takes the shape of evidence of suspicious surrounding circumstances warning the defendant of the ongoing criminal activity – *e.g.*, suspicious times and places (*e.g.*, a dark alley, the Mexican border, the middle of the night),[7] suspicious amounts of money (*e.g.*, $10,000 to deliver a truckload of "cabbage"),[8] even suspicious coat hangers.[9] In this case, there was evidence of such things as Huang's "suspicious" roundabout driving route before and after picking up and dropping off the drugs.[10]

In such cases, the question becomes one of just how suspicious the circumstances need to be in order to support a finding of the defendant's "subjective belief" in the "high

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[6] *See, e.g.*, United States v. Baz, 442 F.3d 1269, 1271-72 (10th Cir. 2006) ("[I]n establishing the Defendant's deliberate ignorance, the prosecution 'is entitled to rely on circumstantial evidence and the benefit of the favorable inferences to be drawn therefrom.'") (*quoting* United States v. Espinoza, 244 F.3d 1234, 1242–43 (10th Cir. 2001); United States v. Delreal–Ordones, 213 F.3d 1263, 1268 (10th Cir. 2000)).

[7] *See, e.g.*, Draves, *supra*, 103 F.3d at 1334 ("pre-dawn, high-ticket shopping sprees between two branches of the same store located ten miles apart.")

[8] United States v. de Luna, 815 F.2d 301, 302 (5th Cir. 1987) (cited in United States v. Lara-Velasquez, 919 F.2d 946, 952 (5th Cir. 1990))). *See also, e.g.*, Freeman, *supra*, 434 F.3d 369, 378 (5th Cir. 2005) ("agreements with the investors that promised exorbitant returns").

[9] United States v. Restrepo-Granda, 575 F.2d 524, 527 (5th Cir. 1978) ("inordinately heavy and thick" coat hangers containing cocaine) (cited in Lara).

[10] Other circumstantial evidence of the first element can include evidence of the defendant's personal history, such as prior experience in similar situations. *See, e.g.*, Schnabel, *supra*, 939 F.2d at 204 (4th Cir. 1991) ("a wide variety of fraudulent practices" that had taken place at the defendant's prior workplace); Draves, *supra*, 103 F.3d at 1334 ("Draves had an intermittently cohabitational and sexual relationship with Parmelee, knew she was unemployed yet somehow had obtained a 'gold' credit card . . ."). This case did not involve such evidence.

probability" of a particular criminal fact. As this case demonstrates, with its consecutive, contradictory, and equally unexplained holdings that the same evidence is "highly indicative" of the same criminal activity to which is does not "strongly point," the case law offers no clear answer. The most common approach is to simply require the resulting "awareness" of a "high probability," begging the question of what circumstances are sufficient to create such an awareness, where direct evidence of the awareness itself is lacking.[11] If the nature of the circumstances is described at all, it is usually with the word "obvious."[12] Without more, however, a requirement of obviousness, or similar metaphorical terms such as "red flags,"[13] is simply a requirement that the defendant should know. Something obvious, like a red flag, should be noticed, and not to notice what one should is negligence. Indeed, the cases sometimes use language plainly suggestive of negligence.[14] The addition of a modifier such as

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[11] *See generally* First Circuit Model Criminal Jury Instruction 2.14 ("aware of a high probability"); Third Circuit Model Criminal Jury Instruction 5.06 ("subjectively believed that there was a high probability") Sixth Circuit Model Criminal Jury Instruction 2.09 ("deliberately ignored a high probability"); Seventh Circuit Model Criminal Jury Instruction 4.10 ("believed it was highly probable"); Eighth Circuit Model Criminal Jury Instruction 8.04 ("believed there was a high probability"); Ninth Circuit Model Criminal Jury Instruction 5.8 ("aware of a high probability"); Tenth Circuit Model Criminal Jury Instruction 1.37 ("aware of a high probability"); Eleventh Circuit Model Criminal Jury Instruction SI S8 ("aware of a high probability"). A similar approach of jumping straight to the conclusion is to require "facts that put [the defendant] on notice." *See, e.g.*, Florez, *supra*, 368 F.3d at 1044.

[12] *See, e.g.*, Holloway, *supra*, 731 F.2d at 381 ("closing her eyes to the obvious risk"). *See generally* Third Circuit Model Criminal Jury Instruction 5.06 ("what would otherwise have been obvious to (him)(her)"); *id*. ("what is obvious"); Fifth Circuit Model Criminal Jury Instruction 1.37A ("what would otherwise have been obvious to him"); Sixth Circuit Model Criminal Jury Instruction 2.09 ("deliberately ignoring the obvious"); Eighth Circuit Model Criminal Jury Instruction 7.04 ("what would otherwise have been obvious to [him][her]")

[13] *See, e.g.*, Alston–Graves, *supra*, 435 F.3d 331, 340 (*quoting* United States v. Craig, 178 F.3d 891, 898 (7th Cir. 1999) ("enough suspicious activities to raise several red flags")).

[14] *See, e.g.*, United States v. Nicholson, 677 F.2d 706, 710–11 (9th Cir. 1982) (finding deliberate ignorance instruction proper where "[t]he circumstances . . . would have put *any reasonable person* on notice that there was a 'high probability' that the undisclosed venture

"strongly" or "highly" adds little clarity.[15] At most, such terms only serve to elevate an implicit standard of negligence to one of "gross negligence."[16] At the same time, however, the cases are also explicit that negligence of any kind, or even recklessness, is not sufficient to constitute "deliberate ignorance."[17] A negligence standard is simply too far from the statutory

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was illegal") (emphasis added). *See also, e.g.*, United States v. Del Aguila-Reyes, 722 F.2d 155, 157 (5th Cir. 1983) ("From these suspicious facts, it was reasonable for the jury to infer that Del Aguila-Reyes *should have known* that his trip to Miami was prompted for some additional, probably illegal, reason.") (emphasis added); Perez-Melendez, *supra*, 599 F.3d at 41 ("Such an instruction allows the jury to impute knowledge to a defendant of what *should be obvious to him*, if it found, beyond a reasonable doubt, a conscious purpose to avoid enlightenment.") (emphasis added) (*citing* United States v. St. Michael's Credit Union, 880 F.2d 579, 585 (1st Cir.1989)) (internal punctuation omitted).

This language from Nicholson was cited by the district court. *See* Appendix C at 9.

[15] *See, e.g.*, Draves, *supra*, 103 F.3d at 1333 (requiring "a basis for a strong suspicion").

[16] An exception may be found in those cases requiring that circumstances be "overwhelmingly suspicious." *See, e.g.*, Svoboda, *supra*, 347 F.3d at 480 (*quoting* Lara-Velasquez, *supra*, 919 F.2d at 952).

[17] *See* Global-Tech, *supra*, 563 U.S. at 769 ("We think these requirements give willful blindness an appropriately limited scope that surpasses recklessness and negligence."). *See also, e.g.*, Heredia, *supra*, 483 F.3d at 918 fn. 4 ("[D]eliberate ignorance, otherwise known as willful blindness, is categorically different from negligence or recklessness."); Stadtmauer, *supra*, 620 F.3d at 256 ("a subjectively culpable state of mind that goes beyond mere negligence, a good faith misunderstanding, or even recklessness").

See also generally First Circuit Model Criminal Jury Instruction 2.14 ("mere negligence or mistake in failing to learn the fact is not sufficient."); Third Circuit Model Criminal Jury Instruction 5.06 ("It is not enough that [the defendant] may have been reckless or stupid or foolish"); Fifth Circuit Model Criminal Jury Instruction 1.37A ("knowledge on the part of the defendant cannot be established merely by demonstrating that the defendant was negligent, careless, or foolish"); Sixth Circuit Model Criminal Jury Instruction 2.09 ("Carelessness, or negligence, or foolishness on his part is not the same as knowledge, and is not enough to convict."); Seventh Circuit Model Criminal Jury Instruction 4.10 ("You may not find that the defendant acted knowingly if he was merely mistaken or careless in not discovering the truth"); Eighth Circuit Model Criminal Jury Instruction 7.04 ("You may not find the defendant acted 'knowingly' if you find he/she was merely negligent, careless or mistaken"); Ninth Circuit Model Criminal Jury Instruction 7.8 ("You may not find such knowledge . . . if you find that the defendant was simply negligent, careless, or foolish."); Tenth Circuit Model Criminal Jury Instruction 1.37 ("knowledge on the part of the defendant cannot be established merely by demonstrating that the defendant was negligent, careless, or foolish,"); Eleventh Circuit Model Criminal Jury Instruction SI S8 ("negligence, carelessness, or foolishness isn't enough").

terms "knowingly or intentionally."[18] Something is therefore required to distinguish between obvious facts which are so obvious that the oversight of them is negligence, and obvious facts which are so obvious that their oversight can only be deliberate. This case could have been decided as it was only in the absence of any clear standard for telling the difference.

The Solution:
Extend the Rule of *Farmer* to Deliberate Ignorance Cases

Such a standard can be found in Farmer v. Brennan, 511 U.S. 825 (1994). In Farmer, this Court was called on to define the kind of "deliberate indifference" by a prison official sufficient to constitute "punishment" within the meaning of the Eighth Amendment, and it did so in terms strikingly similar to the "deliberate ignorance" cases – *i.e.*, "by requiring a showing that the official was subjectively aware of the risk" of serious harm to the prisoner. *Id*. at 829. As in the "deliberate ignorance" cases, the Court emphasized that the proper standard was higher than mere "negligence."[19] It was higher than even "recklessness," as the term is used in civil matters, and corresponded instead to *criminal* recklessness – a state of mind requiring that a defendant "disregards a risk of harm of which he is aware." *Id*. at 837. *See generally id*. at 836-37. The Court noted that this kind of subjective awareness of a risk could be shown "in the usual ways, including inference from circumstantial evidence." *Id*. at 842. Thus, it can be shown by

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[18] *See, e.g.*, United States v. de Francisco-Lopez, 939 F.2d 1405, 1410 (10th Cir. 1991) ("Conviction because the defendant 'should have known' is tantamount to conviction for negligence, contrary to section 841(a) which requires intentional misbehavior."); United States v. Murrieta-Bejarano, 552 F.2d 1323, 1326 (9th Cir. 1977) (Kennedy, J., dissenting) ("The danger is that juries will avoid questions of scienter and convict under the standards analogous to negligence . . . wholly inconsistent with the statutory requirement of scienter.").

[19] *See id*. at 835 ("deliberate indifference entails something more than mere negligence"); *id*. at 837 ("the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference"); *id*. at 843 fn. 8 ("It is not enough merely to find that a reasonable person would have known, or that the defendant should have known[.]").

evidence "that the risk was obvious." *Id*. *See also id.* at 844 ("a trier of fact may infer knowledge from the obvious"). Up to this point, in other words, the Court's analysis was identical to what we have seen in the "deliberate ignorance" cases.

Unlike those cases, however, the Court then took the necessary next step of explaining *how* obvious the risk must be. It is not sufficient, the Court wrote, if it is only "so obvious that it *should* be known." *Id*. at 836 (emphasis added). That, the Court explained, would merely satisfy the standard for *civil* recklessness, which it held is insufficient. The risk must instead be so obvious that it *must* be known:

> For example, if an Eighth Amendment plaintiff presents evidence showing that a substantial risk of inmate attacks was longstanding, pervasive, well-documented, or expressly noted by prison officials in the past, and the circumstances suggest that the defendant-official being sued had been exposed to information concerning the risk and thus "must have known" about it, then such evidence could be sufficient to permit a trier of fact to find that the defendant-official had actual knowledge of the risk.

Id. at 842-43 (internal quotation marks omitted).

Adoption of this standard – so obvious that the defendant must have known – would fill the analytical gap we have seen in the "deliberate ignorance" cases. It is a higher standard than mere negligence, or even civil recklessness. It was developed in a civil context, but the Court itself acknowledged that the relevant concerns, applicable principles and ultimate result are the same as in the criminal law. *Id*. at 839-40 (it is "a familiar and workable standard"). It is objective enough to apply consistently in a variety of factual situations, without risking what unfortunately occurred in this case – a court jumping to two different conclusions, with no standard to guide its analysis along the way to either.

Had the Farmer standard been applied in this case, a different ultimate result would likely have been reached. The facts advanced in support of the "deliberate ignorance" instruction –

whether "Chen communicating with the conspirators prior to arriving on Saipan, renting a car at Huang's request, [or] driving around with Huang and Cai on the day in question" (Exhibit B at 4) – may have been sufficient to induce suspicion that something unusual was going on, perhaps even a suspicion that it was something illegal. None of it, however, made it *obvious* that the paint cans actually contained hidden drugs, to the point that Chen *must* have known it. The facts, therefore, would not support a deliberate ignorance instruction under the rule of Farmer.

The adoption of such a rule in "deliberate ignorance" case generally would bring similar clarity to such cases across the nation, and would eliminate the otherwise inevitable creep of negligence or recklessness into an analysis whose ultimate and only lawful basis is the statutory term "knowingly."

CONCLUSION

For the foregoing reasons, Petitioner submits that the writ of certiorari should be granted.

Respectfully submitted.

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