No. 20-

IN THE

Supreme Court of the United States

FRANQUI FRANCISCO FLORES DE FREITAS,
Petitioner,

v.

UNITED STATES OF AMERICA *et al.,*
Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

MICHAEL A. LEVY*
DAVID M. RODY
MICHAEL D. MANN
DAVID S. KANTER
ALYSSA M. HASBROUCK
SIDLEY AUSTIN LLP
787 Seventh Avenue
New York, NY 10019
(212) 839-5300
mlevy@sidley.com

Counsel for Petitioner

* Counsel of Record

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QUESTIONS PRESENTED

1. Can a jury be instructed that it may convict based on a criminal defendant's conscious avoidance of knowledge of a necessary fact, without needing to find the defendant's actual knowledge of that fact, where the evidence shows that the defendant was aware of a high probability that the fact existed, but does not show that the defendant took deliberate steps to avoid confirming the existence of that fact?

2. Does the Sentencing Guidelines' enhancement for using a private aircraft "to import" a controlled substance, U.S.S.G. § 2D1.1(b)(3)(A), apply when a private aircraft is merely used (or planned to be used) to bring the controlled substance from one place outside of the United States to another place outside of the United States, but not used (or planned to be used) to bring the controlled substance across the border into the United States?

PARTIES TO THE PROCEEDING

Petitioner is Franqui Francisco Flores de Freitas, a defendant-appellant below.

Respondents are Efrain Antonio Campo Flores, a defendant-appellant below, and the United States of America, appellee below.

RELATED PROCEEDINGS

United States District Court (S.D.N.Y.):

United States v. *Campo Flores, et al.*, No. 15-cr-00765 (Dec. 15, 2017)

United States Court of Appeals (2d Cir.):

United States v. *Campo Flores, et al.*, Nos. 17-4039(L), 17-4141(Con) (Dec. 20, 2019), petition for reh'g denied, March 20, 2020

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PETITION FOR A WRIT OF CERTIORARI

Franqui Francisco Flores de Freitas respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The District Court's opinion denying motions for a judgment of acquittal and a new trial (Pet. App. 74a-91a) is not reported but is available at 2017 WL 1133430. The Second Circuit's opinion affirming (Pet. App. 1a-73a) is reported at 945 F.3d 687.

JURISDICTION

The Second Circuit issued its opinion and entered judgment on December 20, 2019, and denied a timely petition for rehearing on March 20, 2020. See Pet. App. 1a-73a, 92a-93a. On March 19, 2020, by general order, the Court extended the time to file this petition to August 17, 2020. This Court has jurisdiction under 28 U.S.C. § 1254(1).

PROVISIONS INVOLVED

Section 952(a) of Title 21 of the United States Code provides in relevant part:

> It shall be unlawful … to import into the United States from any place outside thereof, any controlled substance in schedule I or II of subchapter I, or any narcotic drug in schedule III, IV, or V of subchapter I, or ephedrine, pseudoephedrine, or phenylpropanolamine ….

21 U.S.C. § 952(a).

Section 959(a) of Title 21 of the United States Code (effective October 13, 1996 to May 15, 2016) provides in relevant part:

> It shall be unlawful for any person to manufacture or distribute a controlled substance in schedule I or II or flunitrazepam or listed chemical—(1) intending that such substance or chemical will be unlawfully imported into the United States or into waters within a distance of 12 miles of the coast of the United States; or (2) knowing that such substance or chemical will be unlawfully imported into the United States or into waters within a distance of 12 miles of the coast of the United States.

21 U.S.C. § 959(a) (2012) (effective Oct. 13, 1996 to May 15, 2016).

Section 963 of Title 21 of the United States Code provides in relevant part:

> 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.

21 U.S.C. § 963.

Section 2D1.1(b)(3)(A) of the United States Sentencing Guidelines provides in relevant part:

> If the defendant unlawfully imported or exported a controlled substance under circumstances in which … an aircraft other than a regularly scheduled commercial air carrier was used to import or export the controlled substance, … increase by **2** levels.

U.S. Sentencing Guidelines Manual ("U.S.S.G.") § 2D1.1(b)(3)(A) (U.S. Sentencing Comm'n 2018).

STATEMENT OF THE CASE

This case exposes a deeply troubling trend in the Second Circuit that has pulled that Court out of line with its Sister Circuits' teachings and this Court's instructions: Permitting juries in criminal cases to rely on conscious avoidance of knowledge as a substitute for the otherwise required *mens rea* of actual knowledge where the proof shows merely that the defendant was *reckless* in the face of the high probability of the existence of a required fact, but does *not* show that the defendant *deliberately avoided* confirming that fact. That troubling state of affairs was confirmed in this case.

Here, defendant Franqui Francisco Flores de Freitas ("Flores") and his co-defendant, Efrain Antonio Campo Flores ("Campo"), were tried on one count of conspiring to import cocaine into the United States, and to distribute cocaine intending and knowing that it would be imported into the United States. The charge stemmed from a sting operation in which the defendants purportedly agreed to deliver hundreds of kilograms of cocaine from their home country of Venezuela to Drug Enforcement Administration ("DEA") informants in Honduras.

But that conduct alone is not a federal crime. To obtain a conviction, the Government was also required to show that the defendants *knew* that the cocaine would thereafter be imported *into the United States*. On this point—that the defendants actually knew that the drugs would be imported into the United States—the Government's evidence was thin, at best.

In light of that, and apparently concerned it could not prove its case, the Government persuaded the District Court over defense objection to give the jury a conscious avoidance instruction; *i.e.*, an instruction that

the jury could convict even without finding that the defendants actually knew that the drugs were bound for the United States if the jury concluded that the defendants deliberately avoided learning that fact. For such an instruction to be proper, there must be sufficient evidence not only that the defendant believed that there was a high probability that a culpable fact existed, but also that the defendant took "deliberate actions" to avoid learning of that fact. *Glob.-Tech Appliances, Inc.* v. *SEB S.A.*, 563 U.S. 754, 769 (2011).

In this case, as to that second requirement, which gives conscious avoidance "an appropriately limited scope that surpasses recklessness and negligence," *id.*, there was no evidence—other than the defendants' "nonresponses" when drug trafficking into the United States was generically discussed in their presence, see Pet. App. 47a—that the defendants took *deliberate* steps to avoid learning that the drugs they had discussed transporting to Honduras would be imported into the United States. Nonetheless, the Second Circuit concluded that those "nonresponses," standing alone, were enough to permit conviction on the basis of conscious avoidance.

That cannot be right. If it is, it eviscerates this Court's and other Circuits' precedents that require evidence of a defendant's *deliberate actions* to avoid learning the culpable fact before a conscious avoidance instruction is appropriate. The Second Circuit's confirmation in this case that it has parted ways with this Court and its Sister Circuits on this issue is hardly benign. What it means is that nothing is needed for a criminal conviction in that Circuit beyond evidence that a defendant was subjectively aware of the high probability that a culpable fact existed—in other words, hornbook recklessness. Permitting that watered-down *mens rea* to sustain a criminal conviction

undermines the "the basic principle that 'wrongdoing must be conscious to be criminal.'" *Elonis* v. *United States*, 135 S. Ct. 2001, 2009 (2015). This Court must grant review to confirm—once and for all—that conscious avoidance cannot be manipulated to obtain a criminal conviction based on nothing more than a defendant's recklessness.

Separately, in its review of the defendants' sentences, the Second Circuit committed another error warranting review. The panel rejected without explanation the defendants' argument that the two-level Sentencing Guidelines enhancement for using a private aircraft "to import" a controlled substance, U.S.S.G. § 2D1.1(b)(3)(A), could not be (but was) applied in this case, because the enhancement requires that the private aircraft be used to bring drugs across the United States border *into* the country, and the District Court here specifically found that the defendants planned to use a private plane only to transport drugs from Venezuela to Honduras before the drugs were to be brought into the United States by *other* means. By affirming the application of the private aircraft enhancement where the plane was only to be used to transport drugs from one place outside of the United States to another place outside of the United States, the Second Circuit ignored the plain language of the enhancement and created a split with the Ninth Circuit's contrary and correct holding that the enhancement only applies if the use of the plane was to bring the drugs into the United States. See *United States* v. *Joelson*, 7 F.3d 174 (9th Cir. 1993).

A. Factual Background

The DEA sting operation that ultimately ensnared the defendants was set in motion in early October 2015, when Flores and Campo flew from Venezuela to Honduras to meet with an individual nicknamed "El

Sentado," who, unbeknownst to the defendants, was a DEA informant. Tr. 176-80.[1] The meeting was not recorded, Tr. 314-15, and no evidence was introduced at trial about what was discussed. However, based on whatever El Sentado reported back to his DEA handlers, DEA Special Agent Sandalio Gonzalez thereafter directed two other DEA informants to pose as Mexican drug traffickers from the Sinaloa cartel and travel to Venezuela to meet with Flores and Campo. Tr. 181-82, 860-61. The informants did so, meeting with Flores and Campo in Venezuela on three occasions in late October 2015. Tr. 1306, 1311.

During these meetings, which the DEA informants recorded, Flores, Campo, and the informants discussed a potential cocaine deal. J.A. 332-820. As the discussions evolved, Flores and Campo agreed that they would obtain 800 kilograms of cocaine and have the cocaine transported to Honduras, where El Sentado would receive it. Tr. 619-20, 652-55.

At 13 scattered points during the course of the entire sting operation—including five times during these October meetings in Venezuela—the various DEA informants inserted into their discussions with Campo and Flores general references to the traffic of drugs to the United States. J.A. 336 (one reference), 426 (one reference), 524 (one reference), 525 (one reference), 535 (one reference), 782 (two references), 783 (one reference), 785 (two references), 787 (two references), 819 (one reference); see also Tr. 1360 (defense summation), 1448 (Government rebuttal summation). In each of these 13 instances, Flores and Campo remained effec-

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[1] Citations to "Tr." refer to the Trial Transcript, and citations to "J.A." refer to the Joint Appendix filed in the Second Circuit on April 19, 2018.

tively silent, reacting with only "vague or inaudible responses—or nonresponses," Pet. App. 47a, seeking neither confirmation nor clarification, *id.* at 44a-46a.

For example, in one meeting in Venezuela, one of the DEA informants interrupted a story that Campo was telling to say, "You know that we sent a lot of that to …." Before the informant could finish, Campo interjected, "of course." The DEA informant finished the thought, saying "… to New York, all that." Campo returned to his story without addressing the interjection. J.A. 336-37. At another meeting, a different DEA informant said in reference to no particular shipment of cocaine, "[I]f I sell in New York, I sell it for forty-seven thousand, and if I sell in Canada, I sell for sixty, and if I sell in Ottawa, I sell for ninety thousand per kilo." Campo responded, "Where?" The DEA informant repeated, "In Ottawa, Canada." J.A. 525.

Following the October 2015 meetings, the DEA shifted its attention to the receiving end of the sting in Honduras. To that end, the DEA directed El Sentado and another informant to meet on November 5, 2015 with two targeted employees of the Roatan, Honduras airport. Tr. 1315-17, 1319. During the meeting, which an informant recorded, the two Honduran airport employees agreed that they would assist in allowing a shipment of drugs to land at the airport and be unloaded and driven away. Tr. 1319. On November 6, 2015, Flores flew to Honduras and met with El Sentado and two additional DEA informants. Tr. 1146-50. During the meeting, which was recorded, one of the DEA informants provided instructions on how to land a drug-laden plane at Roatan airport, unload it, and drive the drugs away. Tr. 1153-58.

With the foregoing in place—namely, a plan that Flores and Campo would cause a planeload of cocaine

to be flown from Venezuela to Honduras—the DEA decided to take down the case and make arrests. To that end, at the DEA's direction, Flores and Campo were lured to Haiti with a promise of an unusually large advance payment of $11 million dollars. Tr. 869-70.

Flores and Campo flew into Port-au-Prince on the morning of November 10, 2015. Tr. 112-13. Upon arriving in Haiti, Flores and Campo met with a DEA informant in a restaurant near the airport. Tr. 713-15. Over the course of the three men's conversation, which the DEA informant recorded, the DEA informant rapidly inserted eight more of the aforementioned 13 references to trafficking drugs in the United States. For example, at one point, the DEA informant said, "I sell very little in Canada, I sell almost everything in the United States, the East Coast, New York, see … all of, Chicago …." J.A. 782. Campo replied, "And how much are they paying for that in Canada?" J.A. 782. The DEA informant responded, "Look, in, in, in Canada it depends, look, in New York, a kilo in California, in California through the Pacific …." J.A. 782. At another point, Campo asked the DEA informant, "[Y]ou don't like working in Europe?" J.A. 783. The DEA informant replied that he did not, and then returned the subject to the United States, saying, "[F]or example, in New York I sell it for thirty-six, thirty-nine for each one." J.A. 783. Campo responded, "Sure." J.A. 783. Several minutes later, the DEA informant again inserted into the conversation that "[his] business is right there inside the United States," but changed the subject to payment before Flores or Campo could respond. J.A. 785.

When the DEA informant excused himself from the table, ostensibly to retrieve the $11 million, Tr. 715-18, Haitian police officers entered the restaurant and arrested Flores and Campo. Tr. 95-96. Several hours

later, the Haitian government handed them over to the DEA at the Port-au-Prince airport. Tr. 116-20. Flores and Campo were put on a DEA aircraft and flown to White Plains, New York. Tr. 120, 123.

B. Proceedings Below

On November 4, 2015, Campo and Flores were charged by indictment in the Southern District of New York with conspiring to import cocaine into the United States and to manufacture or distribute cocaine intending and knowing that it would be imported into the United States. J.A. 44.

To convict on a conspiracy to commit either object of this importation charge, the Government could not merely prove that Campo and Flores knew the cocaine would be shipped from Venezuela to Honduras; rather, it had to prove that they knew (or, more accurately in the context of a fictional sting, believed) that the cocaine would ultimately be shipped into the United States.

The Government argued at trial that the evidence—principally the recorded conversations—demonstrated beyond a reasonable doubt that the defendants actually knew that the drugs were eventually bound for the United States. See Tr. 1321. But, in the alternative, the Government sought a jury instruction on the separate theory of conscious avoidance, arguing that if the defendants did *not* actually know that the drugs were bound for the United States, then they could be convicted on the theory that they consciously avoided finding out. Tr. 1279.

Flores and Campo objected. J.A. 907-09; Tr. 1278-83. Noting that such an instruction may only be given if there is sufficient evidence that a defendant was (1) subjectively aware of a high probability that a culpable fact exists and (2) took deliberate actions to avoid

learning of that culpable fact, the defendants maintained that there was no evidence from which a jury could find that the second element was satisfied; that is, whatever indications there were that the planned cocaine shipment might be bound for the United States, there was no evidence that the defendants deliberately avoided confirming the supposed destination. J.A. 906-09; see Tr. 1280. In other words, the Government never identified any proof showing that Flores and Campo affirmatively "shut their eyes to" where the cocaine was headed after it reached Honduras. Tr. 1278-83. The District Court overruled the objection, saying simply: "[T]here's lots of evidence that suggests that the drugs … were destined for only one place and that's the United States …. [I]f the two defendants knew that or believed it but then shut their eyes to it, I think this is an appropriate charge[.]" Tr. 1282. The District Court made no effort to identify any evidence that could satisfy the second element of conscious avoidance.

Nor did the Government. At the charging conference, when the defendants opposed the instruction based on the absence of proof of any deliberate effort to avoid knowledge, the Government offered no response on that score. See Tr. 1279-83. And after securing the conscious avoidance instruction from the District Court, the Government discussed it with the jury in its rebuttal summation as though the second element did not exist. Specifically, after advising the jurors that the judge was going to instruct them on conscious avoidance, the Government identified evidence solely in support of the first prong of conscious avoidance—the defendants' supposed awareness of a high probability that the conspiracy targeted the United States—pointing back to the "13 times, on

tape" when trafficking in the United States was mentioned. Tr. 1448. The Government never identified any evidence showing that Flores and Campo deliberately avoided confirming this supposedly high probability that the conspiracy contemplated importation into the United States.

The District Court subsequently instructed the jury on conscious avoidance, saying: "[I]f you find that the defendants were aware of a high probability that the conspiracy at issue in Count One was to import cocaine into the United States, and the defendants consciously avoided confirming that fact, you may infer that they implicitly had knowledge …." Tr. 1505. The District Court also told the jury that it could not find conscious avoidance where the defendants were merely "careless or negligent," Tr. 1504-05, but it did not similarly carve off recklessness, which—in the absence of proof or argument that the defendants *deliberately* avoided confirming the high probability that the drugs were bound for the United States—was what the Government was actually arguing supported conviction.

The jurors subsequently found Flores and Campo guilty. Post-trial, Flores and Campo moved for a judgment of acquittal and for a new trial, arguing that there was insufficient evidence to support a conscious avoidance instruction, among other errors. The District Court denied their motion. Pet. App. 74a-91a.

At sentencing, the District Court applied an enhancement pursuant to Section 2D1.1(b)(3)(A) of the Sentencing Guidelines, which provides for a two-level enhancement "[i]f the defendant unlawfully imported or exported a controlled substance under circumstances in which … an aircraft other than a regularly scheduled commercial air carrier was used to import or export the controlled substance." U.S.S.G. § 2D1.1(b)(3)(A). The District Court found that Flores

and Campo's plan was only "to transport cocaine from Venezuela to Honduras using a private aircraft and there was going to be subsequent transportation of the cocaine into the United States [by] other means." J.A. 1014. However, the District Court—over defense objection—still concluded that this private aircraft enhancement applied. J.A. 1014. The District Court ultimately sentenced each defendant to 216 months' imprisonment.

Flores and Campo appealed, and the Second Circuit affirmed their convictions and sentences, including the propriety of the conscious avoidance instruction and the application of the private aircraft enhancement. On conscious avoidance, the court held that there was sufficient evidence to permit a jury to "conclude that if in fact defendants did not actually know their cocaine was to be sent to the United States, they deliberately avoided knowing it." Pet. App. 47a. According to the panel, that evidence consisted of the fact that when one of the informants "mentioned the United States in connection with defendants' cocaine," the defendants gave "vague or inaudible responses—or nonresponses," *id.*, whereas the defendants had supposedly shown enthusiasm for conversing when the subject was "higher prices that other drugs could be sold for 'in the United States,'" *id.*

As an additional point of support, the Second Circuit noted with emphasis (as the District Court had below) that Flores's co-defendant, Campo, had arguably admitted to the DEA in a post-arrest statement that he had deliberately avoided confirming his suspicion about the destination of the drugs. Pet. App. 45a-46a. This statement was, indeed, the type of evidence of deliberate avoidance that will support a conscious avoidance instruction. But Campo's post-arrest statement was inadmissible hearsay as to Flores, leaving only the

Second Circuit's other rationale for allowing a conscious avoidance instruction as to Flores.

As for the private aircraft enhancement, the Second Circuit rejected with explanation a defense argument that the enhancement only applies to *actual* use of an airplane, not planned use, but the court failed to address the defendants' argument that, even if the enhancement applies to inchoate crimes, it only applies where the plan was for the private aircraft to be used to import drugs across the United States border and not, as here, to move drugs from one country outside of the United States to another country outside of the United States. See Pet. App. 59a-73a. Accordingly, the panel held that the District Court did not err in applying the enhancement to Campo and Flores. *Id.* at 73a.

The Second Circuit denied Flores's petition for rehearing on March 20, 2020. Pet. App. 92a-93a.

REASONS FOR GRANTING THE PETITION

I. THE SECOND CIRCUIT'S CONSCIOUS AVOIDANCE STANDARD PERMITS MERE RECKLESSNESS TO SUSTAIN A CRIMINAL CONVICTION.

In affirming the convictions in this case, the Second Circuit found a sufficient factual predicate for a conscious avoidance instruction, despite the absence of any evidence that Flores took *deliberate actions* to avoid learning the culpable fact in question. This reflects the latest step in an evolution of that Circuit's conscious avoidance decisions, which have strayed from the logical underpinnings of the doctrine and now allow the Government to use conscious avoidance impermissibly to secure conviction based on equivocal

proof of actual knowledge without any proof of *avoidance* of knowledge. This watered-down standard conflicts with this Court's own conscious avoidance precedent and the decisions of other Circuits properly in line with that guidance. As a consequence, in the Second Circuit, the Government need only prove a defendant's recklessness to obtain a conviction for a crime that requires knowledge—undermining "the basic principle that 'wrongdoing must be conscious to be criminal.'" *Elonis*, 135 S. Ct. at 2009. To protect this bedrock principle—one that "is 'as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil,'" *id.*—this Court must grant review.

1. As this Court has previously made clear, the doctrine of conscious avoidance—also known as willful blindness or deliberate ignorance—has "two basic requirements: (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." *Glob.-Tech*, 563 U.S. at 769. The second of these two required elements gives "willful blindness an appropriately limited scope that surpasses recklessness and negligence." See *id.* That is because "a willfully blind defendant is"—critically—"one who takes *deliberate actions* to avoid confirming a high probability of wrongdoing," whereas "a reckless defendant is one who *merely knows* of a substantial and unjustified risk of such wrongdoing." *Id.* at 769-70 (emphases added). Accordingly, a proper conscious avoidance standard "require[s]" proof of "*active* efforts" and "*deliberate* steps" by the defendant to remain ignorant of the culpable knowledge. *Id.* at 770-71 (emphases added). The Second Circuit's decision in this

case confirms that that Circuit has effectively eliminated the second, critical element of conscious avoidance—leaving recklessness as a *mens rea* that can sustain even the most severe of criminal convictions.

Specifically, to obtain a conviction of conspiracy to import cocaine into the United States in this case, the Government could not merely show that the defendants had agreed to try to deliver cocaine from Venezuela to Honduras; it also needed to show that the defendants *knew* that the cocaine would be imported into the United States. As noted, to satisfy that requirement, the Government persuaded the District Court over objection to instruct the jury that it could convict if it concluded that the defendants consciously avoided finding out that the drugs were destined for the United States. As to the first element of conscious avoidance—that the defendants were aware of a high probability that the cocaine would end up in the United States—Flores does not dispute that the evidence was sufficient, since there were numerous instances of DEA informants making generic references to their trafficking of drugs in the United States. See, *e.g.*, J.A. 533-36. But, critically, there was no proof that Flores took any *deliberate step* or made any conscious decision to avoid finding out whether the drugs he was preparing to deliver to Honduras were intended for the United States.

In both the District Court's and the Second Circuit's decisions, the *only* evidence cited with respect to *Flores's* supposed deliberate avoidance of knowledge was that he and Campo remained effectively silent—*i.e.*, did not seek confirmation or clarification—when the DEA informants dropped their various oblique hints that suggested that the drugs might eventually be

bound for the United States. Pet. App. 44a-47a.[2] That is hornbook recklessness, see *Glob.-Tech*, 563 U.S. at 770 ("[A] reckless defendant is one who merely knows of a substantial and unjustified risk of … wrongdoing …."), not conscious avoidance, see *id.* at 769 ("[A] willfully blind defendant is one who takes deliberate actions to avoid confirming a high probability of wrongdoing ….").

The Second Circuit's reliance on Flores's silence in the face of oblique references to drug trafficking into the United States—as that Court described it, his "vague or inaudible responses—or nonresponses," Pet. App. 47a—*cannot* be an adequate predicate for conscious avoidance. Such conduct, on its own, is equally indicative of recklessness. Plainly and simply, permitting a jury to find a deliberate avoidance of knowledge based, as here, on the satisfaction of the first element (subjective awareness of the high probability of a fact) coupled with nothing more than a failure to make further inquiry impermissibly permits conviction without requiring "deliberate steps" by the defendant "to avoid knowing" the culpable fact. *Glob.-Tech*, 563 U.S. at 771.

2. The panel's error in this case was hardly a one-time occurrence in the Second Circuit, as a watered-down conscious avoidance standard has become firmly entrenched in that Circuit's law. In *United States* v.

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[2] The Second Circuit, like the District Court, also relied on *Campo's* post-arrest statement allegedly admitting that he heard the informants' comments about the drugs' potential progression to the United States but that he "didn't emphasize it." Pet. App. 45a-46a. That post-arrest statement by Flores's codefendant is irrelevant to the case against Flores. See *Richardson* v. *Marsh*, 481 U.S. 200, 206 (1987) ("[T]he pretrial confession of one [defendant] cannot be admitted against the other ….").

Svoboda, 347 F.3d 471 (2d Cir. 2003), the Second Circuit, ostensibly following the Fifth Circuit's lead, collapsed the conscious avoidance test into a single element, allowing conviction where the defendant was subjectively aware of a high probability of the disputed fact and did not inquire further about the disputed fact under circumstances "*so overwhelmingly suspicious* that the defendant's failure to question the suspicious circumstances establishes the defendant's purposeful contrivance to avoid guilty knowledge," *id.* at 480 (emphasis in original) (quoting *United States* v. *Lara-Velasquez*, 919 F.2d 946, 952 (5th Cir. 1990)). This watered-down method of satisfying the second requirement of conscious avoidance has been regularly repeated in the Second Circuit post-*Svoboda*. See, *e.g.*, *United States* v. *Lange*, 834 F.3d 58, 77-78 (2d Cir. 2016); *United States* v. *Cuti*, 720 F.3d 453, 463 (2d Cir. 2013); *United States* v. *Kozeny*, 667 F.3d 122, 133-34 (2d Cir. 2011).

This standard has become entirely unmoored. In *Lara Velasquez*—the Fifth Circuit case from which it was adopted—the "overwhelmingly suspicious" circumstances the Court had in mind were such that what was being portrayed to the defendant was grossly out of keeping with reality, like where the defendant was "offered $10,000 to deliver a load of cabbage into the United States … even though the job usually paid only $1000." *Lara-Velasquez*, 919 F.2d at 952 (emphasis omitted). Under those truly extreme circumstances, it could be inferred that the only way the defendant could have failed to inquire about the truth was by deliberate choice. But, in the Second Circuit, no such extreme circumstances are required. The concept is now—and regularly—used there to support a conscious avoidance conviction in *any* circumstance where a defendant offers a "lack of knowledge defense,

despite … deep involvement in the transactions that effectuated" the offense. *Cuti*, 720 F.3d at 464.

This case shows just how far the doctrine has come in the Second Circuit. There were no "overwhelmingly suspicious" circumstances here. Assuming that Flores was aware of a high probability that the drugs would be shipped to the United States, there would have been nothing inconsistent with ordinary reality if, instead, the drugs were to be shipped somewhere else. The circumstances may have highly favored one possibility over the other, but that says no more than that the first element of conscious avoidance is satisfied, not the second. The fact that Flores did not inquire—which is the only thing the Second Circuit relied on as satisfying the second element—is as consistent with mere recklessness as it is with a deliberate decision to avoid knowledge. All that can be known from Flores's failure to ask is that he did not ask, not why he did not ask.

This Court should grant review to clarify and confirm, once and for all, the requirements of the second element of conscious avoidance. In the past, the Second Circuit understood that that element required—as this Court instructs—some proof of deliberate avoidance of knowledge. Later, the Second Circuit contemplated that it could be satisfied by a mere failure to inquire, so long as the circumstances were at least "overwhelmingly suspicious." Now, it can apparently be satisfied by mere failure to inquire under *any* circumstance where the defendant was aware of a high probability of the fact in question; *i.e.*, any time the first element is satisfied. This Court should halt that erosion and make clear that *deliberate avoidance* of knowledge, not mere recklessness, is required.

3. The Second Circuit's tack to let mere recklessness into the criminal law through the backdoor not only

undermines "the basic principle that 'wrongdoing must be conscious to be criminal,'" see *Elonis*, 135 S. Ct. at 2009, and is inconsistent with this Court's precedent, see *Glob.-Tech*, 563 U.S. at 769-71, but, unsurprisingly, it also is in conflict with the decisions of its Sister Circuits. As only a sampling:

- In *United States* v. *Macias*, 786 F.3d 1060 (7th Cir. 2015), where the defendant was convicted of conspiring to distribute cocaine, the Seventh Circuit determined that a conscious avoidance instruction had been improperly given and reversed the conviction, *id.* at 1060-64. The Seventh Circuit acknowledged that there was evidence that the defendant "suspect[ed] he might be working for a drug cartel"—*i.e.*, there was evidence in support of the *first* of the two required elements for conscious avoidance—but, given that suspicion, there was "no evidence that … [the defendant] took active steps to avoid having his suspicions confirmed." *Id.* at 1062. In short, the defendant "did not *act* to avoid learning the truth." *Id.* at 1063 (quoting *United States* v. *Giovannetti*, 919 F.2d 1223, 1228 (7th Cir. 1990)). Specifically, "he was not acting unnaturally in failing to inquire" whether the money he had been asked to transport from the United States to Mexico was the proceeds of drug dealing. *Id.* at 1064.
- In *United States* v. *Oti*, 872 F.3d 678 (5th Cir. 2017), the Fifth Circuit found that a conscious avoidance instruction "was inappropriate"—even under permissive plain error review—where the evidence might have permitted a finding that the defendants "actually knew of [a] pill mill," but, if they did not know, there was

no "specific evidence in the record that demonstrate[d] [the defendants] purposely contrived to avoid learning of the pill mill activities," *id.* at 696-98. The Fifth Circuit "emphasize[d] … that the deliberate ignorance instruction should rarely be given" and that it "is not a failsafe mechanism that the government can implement to relieve itself of proving the *mens rea* requirement of a crime." *Id.* at 699.

- In *United States* v. *Little*, 829 F.3d 1177 (10th Cir. 2016), the Tenth Circuit found that a conscious avoidance instruction "was improper" in a felon-in-possession case where there was "evidence suggesting [the defendant] knew or should have known that the firearms were in the … house" where he resided, but there was no "evidence in the record suggesting that [he] deliberately avoided knowledge of the firearms," *id.* at 1185. The Tenth Circuit admonished that allowing a conscious avoidance instruction in those circumstances "reduces the standard for conviction from knowledge to recklessness or negligence." *Id.*

The teaching of these cases is clear: Evidence that a defendant subjectively believed that there is a high probability that a culpable fact exists is simply not enough to permit a conscious avoidance instruction; there must also be some evidence that the defendant took deliberate actions—beyond, as here, merely "failing to inquire," *Macias*, 786 F.3d at 1064—to avoid learning the culpable fact. This Court must grant review to rectify the Second Circuit's unfortunate split from its Sister Circuits' precedents—not to mention this Court's own—and to stamp mere recklessness out of the criminal law.

II. THE SECOND CIRCUIT'S MISINTERPRETATION OF THE GUIDELINES' PRIVATE AIRCRAFT ENHANCEMENT SPLITS WITH THE NINTH CIRCUIT'S CONTRARY AND CORRECT INTERPRETATION.

In affirming the sentences in this case, the Second Circuit held that Section 2D1.1(b)(3)(A) of the Sentencing Guidelines applies to inchoate crimes, like conspiracies, when the use of a private aircraft "to import" a controlled substance is planned, even if it is not accomplished. But the court did not address—and thus, *sub silentio*, rejected—the defendants' argument that Section 2D1.1(b)(3)(A) applies only when a private aircraft is used (or planned to be used) to bring drugs across the United States border *into* the country (*i.e.*, to "import" them), rather than merely used (or planned to be used) to bring drugs from one place outside of the United States to another place outside of the United States.[3] By permitting the enhancement to be applied here, when the District Court found that a private plane would be used only to move the drugs from Venezuela to Honduras, after which the drugs would be brought into the United States by "other means," see J.A. 1014, the Second Circuit created a split with the Ninth Circuit's contrary and correct holding that the enhancement only applies if the use of the plane was to bring the drugs into the United States. This Court must grant review to correct that error.

1. Section 2D1.1(b)(3) provides for a two-level enhancement:

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[3] The Second Circuit's rejection of this argument was no mere oversight, as Flores raised it a second time as one of only two issues in his petition for rehearing, but the Second Circuit again—and again without explanation—rejected it. See Pet. App. 92a-93a.

> If the defendant unlawfully imported or exported a controlled substance under circumstances in which (A) an aircraft other than a regularly scheduled commercial air carrier was used to import or export the controlled substance, (B) a submersible vessel or semi-submersible vessel … was used, or (C) the defendant acted as a pilot, copilot, captain, navigator, flight officer, or any other operation officer aboard any craft or vessel carrying a controlled substance ….

U.S.S.G. § 2D1.1(b)(3).

That the private aircraft enhancement—Subsection (A)—applies only when a private aircraft is used to import drugs across the United States border is the only defensible conclusion. The Ninth Circuit said as much in *Joelson*. There, "the cocaine was delivered to a landing strip in Guatemala" in a private plane, but the cocaine ultimately "flew … into the United States on a commercial Pan Am flight." 7 F.3d at 179-80. In those circumstances, the Ninth Circuit concluded that the enhancement did not apply, explaining: "Stretching the definition of 'used to import' to incorporate any use of a private airplane, regardless of whether it was used during the actual importation of the cocaine, flies in the face of the 'plain language' of" Section 2D1.1(b)(3)(A). *Id.* at 180.

The Second Circuit has now split with the Ninth. Its decision in this case allows the enhancement to apply even if a private aircraft is used solely to transport drugs from one foreign country to another foreign country and the ultimate importation is carried out (or planned to be carried out) by some other means.

2. Aside from contravening the clear, unambiguous "used to *import*" language that the Ninth Circuit relied on, the broader context of Section 2D1.1(b)(3) confirms

that the enhancement only applies when the use of the private aircraft is to move drugs across the United States border. See *Robinson* v. *Shell Oil Co.*, 519 U.S. 337, 341 (1997) (meaning of language is determined by "reference to the language itself" and the "specific context in which that language is used").

Section 2D1.1(b)(3) already states in its prefatory language that it applies to the circumstance where a defendant "unlawfully imported or exported a controlled substance." U.S.S.G. § 2D1.1(b)(3). Accordingly, the reading that the Second Circuit has embraced—that use of a private plane at any point in the offense is sufficient so long as the drugs are later imported in any manner—would be accomplished if the enhancement omitted the language at issue here and said no more than it applies "[i]f the defendant unlawfully imported or exported a controlled substance under circumstances in which (A) an aircraft other than a regularly scheduled commercial air carrier was used." *Id.* § 2D1.1(b)(3)(A). But the text does not stop there. It continues, requiring that the plane "was used *to import or export the controlled substance*." *Id.* (emphasis added). That critical language would be redundant under the Second Circuit's interpretation, contravening the basic canon of construction to avoid readings that render statutory language surplusage. See *Direct Mktg. Ass'n* v. *Brohl*, 135 S. Ct. 1124, 1132 (2015). The natural and obvious interpretation that avoids this redundancy is that the "used *to import*" language specifies that the private plane must not merely have been *used* in an importation offense, but must be the means by which the drugs were *imported* into the United States.

This reading is further confirmed by the other two subparts of Section 2D1.1(b)(3)—the submersible vessel enhancement and the pilot enhancement—which

do *not* contain the private aircraft enhancement's "used to import" qualifier. Read in full (*i.e.*, with Section 2D1.1(b)(3)'s prefatory language), those subparts provide for an enhancement "[i]f the defendant unlawfully imported or exported a controlled substance under circumstances in which … (B) a submersible vessel or semi-submersible vessel … *was used*, or (C) the defendant acted as a pilot, copilot, captain, navigator, flight officer, or any other operation officer aboard *any craft or vessel carrying a controlled substance* …." U.S.S.G. § 2D1.1(b)(3) (emphases added). In other words, the submersible vessel enhancement applies if such a vessel is used *at any point* in the commission of an importation offense, and the pilot enhancement applies if the defendant piloted a craft or vessel that contained drugs *at any point* in the commission of an importation offense. The private aircraft enhancement, by contrast, contains the distinct, additional qualifier that the plane must have been "used to import" the drugs. As such, where this "certain language" was used "in one part of the [Guideline] and different language in another, … different meanings were intended." *Sosa* v. *Alvarez-Machain*, 542 U.S. 692, 711 n.9 (2004) (quoting 2A Norman J. Singer, *Statutes and Statutory Construction* § 46:6, p. 194 (6th rev. ed. 2000)). The clearly intended meaning of the "used to import" qualifier is that a private aircraft had to be the actual or planned means by which the drugs would move across the United States border. Indeed, the Government has elsewhere admitted this plain understanding of the private aircraft enhancement. See, *e.g.*, Defendant's Sentence Memorandum ¶ 5, *United States* v. *Cardona*, No. 1:11-CR-00573-001, 2014 WL 2861030 (E.D. Va. June 12, 2014) ("[T]he parties are in agreement [that Section 2D1.1(b)(3)(A)] should not apply to the present case inasmuch as use of the non-

commercial aircraft was limited to providing transportation services between Colombia and … Guatemala and was not used at any time to transport cocaine directly into the United States, as required by the plain reading of the statute ….").

The Second Circuit's sharp break with *Joelson* is the second instance of a Circuit parting ways with the Ninth Circuit's sound interpretation in that case. See *United States* v. *Iacullo*, 140 F. App'x 94, 102 (11th Cir. 2005) (per curiam) (affirming application of the private aircraft enhancement where the plane in question was used only "to move cocaine from Colombia to Mayaguana Island [in the Bahamas]"). To resolve that split—and confirm the only defensible interpretation of the private aircraft enhancement—this Court must grant review.

CONCLUSION

This Court should grant the petition.

Respectfully submitted,

MICHAEL A. LEVY*
DAVID M. RODY
MICHAEL D. MANN
DAVID S. KANTER
ALYSSA M. HASBROUCK
SIDLEY AUSTIN LLP
787 Seventh Avenue
New York, NY 10019
(212) 839-5300
mlevy@sidley.com

Counsel for Petitioner

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* Counsel of Record