No. _____

IN THE SUPREME COURT OF THE UNITED STATES

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LUIS FRANCISCO MURILLO MORFIN,

Petitioner,

- v -

UNITED STATES OF AMERICA,

Respondent.

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

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PETITION FOR WRIT OF CERTIORARI

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TODD W. BURNS
Counsel of Record
Burns & Cohan, Attorneys at Law
1350 Columbia Street, Suite 600
San Diego, California 92101
619-236-0244
todd@burnsandcohan.com

Counsel for Petitioner

QUESTIONS PRESENTED FOR REVIEW

The questions presented are whether, in a criminal case, the government may rely on a deliberate ignorance theory of the knowledge *mens rea*:

(1) to establish a conspiracy, even though a conspiracy conviction requires that a defendant have the *mens rea* of "purpose," a higher *mens rea* than knowledge;

(2) when there is no evidence that the defendant took any sort of "deliberate action" to avoid learning (or "knowing") the fact at issue; or

(3) the evidence shows the defendant's "decision" to remain ignorant about the fact at issue was "influenced by coercion?"

STATEMENT OF RELATED CASES

United States v. Luis Francisco Murillo Morfin, No. 2:18-cr-0206-JFW, United States District Court for the Central District of California. District court proceeding in which the issue that is the subject of this petition was litigated. Judgment was entered on March 4, 2019.

United States v. Luis Francisco Murillo Morfin, No. 19-50076, United States Court of Appeals for the Ninth Circuit. Direct appeal deciding issue raised in this petition. Judgment was entered on August 26, 2020.

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ORDER AND OPINION BELOW

On October 31, 2018, following a bench trial, the district court found Luis Francisco Murillo Morfin guilty of conspiring to engage in prohibited monetary transactions under 18 U.S.C. §§1956(h) and 1957. The relevant portion of the trial transcript is attached in the appendix.

On August 26, 2020, the Ninth Circuit filed an unpublished opinion affirming Murillo's conviction. *See United States v. Murillo Morfin*, 818 Fed. App'x 759 (9th Cir. 2020) (attached in appendix).

JURISDICTION

The Ninth Circuit's opinion was filed on August 26, 2020, and Murillo did not seek rehearing. This Petition is timely and the Court has jurisdiction under 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

I. District Court Proceedings

A. The Indictment

On April 13, 2018, Murillo was charged in an indictment that alleged a kidnapping and ransom scheme. *See* ER 1.[1] That scheme originated when bad actors in Tijuana, Mexico, agreed to smuggle undocumented immigrants into the United States for a fee. *See* ER 4-5. The conspirators put the immigrants into the trunk of a car in Tijuana, drove a short distance and pretended to cross into the United States, then took the individuals to a house in Tijuana and claimed they were in the United States. Those individuals were then held hostage until their loved ones paid a "smuggling fee," and two of them were sexually abused while they were held. After the payments were made,

[1] The ER cites in this petition are to the Excerpts of Record submitted in the Ninth Circuit, at docket #18 in case number 19-50076. CR refers to the clerk's record in *United States v. Luis Francisco Murillo Morfin*, C.D. Cal. No. 2:18-cr-0206-JFW.

the kidnapping victims were released in Tijuana. *See* ER 5-15. The indictment alleges that this scheme was executed on two groups of people, on August 2-6 and 27-29, 2015.

Murillo was charged in all ten counts of the indictment, which alleged substantive kidnapping and a kidnapping conspiracy under 18 U.S.C. §1201(a)(1), transmitting ransom demands in foreign commerce under 18 U.S.C. §875(a), and conspiring to engage in prohibited monetary transactions under 18 U.S.C. §§1956(h) and 1957. *See* ER 2, 16-24. While the indictment says Murillo was involved in the entire scheme, the only factual specifics asserted with respect to him are that on August 4-5, 2015, $62,000 in ransom payments were deposited into his Wells Fargo bank account, and shortly thereafter Murillo withdrew those funds in San Ysidro, California. *See* ER 7-11.

B. Relevant Pretrial Proceedings

1. June 12, 2018 Pre-Trial Conference

At a pre-trial conference on June 12, 2018, the district court asked the prosecutor for a preview of the trial evidence. *See* ER 31. During that colloquy, the prosecutor said the individuals who carried out the kidnapping and ransom scheme were arrested in Mexico and were in the process of being extradited. *See* ER 42. The prosecutor also acknowledged that there was no evidence linking Murillo with those people or the kidnapping and ransom scheme. *See* ER 35, 40, 48-49. Instead, the prosecutor said, the evidence showed only that some of the ransom payments were deposited into Murillo's Wells Fargo account by the kidnapping victims' loved ones, at various locations in the United States, and Murillo later withdrew that money at the Wells Fargo branch in San Ysidro. *See* ER 41.

The prosecutor also told the court that Murillo was arrested crossing the border into the United States on May 19, 2018, and agreed to speak with agents. *See* ER 36. Murillo said that he opened the Wells Fargo account, and later withdrew the funds, because his stepfather, Roman Perez,

told him to do so. *See* ER 37. According to the prosecutor, Murillo also admitted that he "knew that . . . the money [he withdrew] was for some illicit purpose," but he did not know about the kidnapping scheme. ER 37. Furthermore, Murillo told the agents that his stepfather did not pay him, or give him anything, for getting the money – Murillo did it because he was afraid of his stepfather. *See* ER 37-39. Based on these statements, agents were seeking to apprehend Murillo's stepfather but they had not found him, likely because he is in Mexico. *See* ER 39.

Shortly after this hearing, Murillo waived his right to a jury trial and the case was later tried to the district court. *See* ER 56-62.

2. The Government's Trial Brief

In a trial brief filed shortly before trial, the government again acknowledged that there was no evidence that Murillo knew about, much less was involved with, the kidnapping and ransom scheme, thus the government said it would proceed solely on count 10, which charged the conspiracy to engage in prohibited monetary transactions. *See* ER 88; *see also* ER 108. The government's trial brief said two other things worth noting.

First, the government wrote that during his post-arrest statements, Murillo told agents that "he believed the money he withdrew on August 4 and 5, 2015, was the proceeds of illegal activity, specifically, human smuggling." ER 90. The government also claimed that Murillo repeated that statement during a June 2018 proffer session with his attorney, government counsel, and agents. *Id.* However, the district court held that the post-arrest statements were taken in violation of *Miranda v. Arizona*, and thus could only be used to impeach Murillo if he testified inconsistently with those statements during trial. *See, e.g.*, ER 72-73, 305-10. The same prohibition applied to Murillo's June 2018 proffer statements, under the terms of the parties' proffer agreement.

Second, the government indicated that at trial it would rely on a deliberate ignorance theory to show that Murillo "knew" the funds involved in the August 4-5, 2015 withdrawals were derived from criminal activity. *See* ER 93. That knowledge was the central – really the only – contested fact issue.

C. Bench Trial

1. Introduction

At the outset of the bench trial, the district court highlighted that the key fact issue was whether Murillo knew the funds he withdrew were criminally derived. *See* ER 114. (Importantly, to convict the government was not required to show that Murillo knew from what criminal conduct the funds were derived, just that he "knew" they were derived from some sort of criminal conduct.) As the discussion below shows, that is the issue on which the parties focused at trial, and the district court eventually convicted by relying on a "deliberate ignorance" theory of knowledge.

2. Government's Case-In-Chief

Murillo stipulated to the core conduct, specifically that: (1) on April 30, 2015, he opened an account at a Wells Fargo branch in San Ysidro, California; (2) on August 4, 2015, four deposits, totaling $50,000, were made into that account from four locations in the United States, to satisfy ransom demands; (3) on August 4, 2015, Murillo withdrew $16,000 from the account; (4) on August 5, 2015, two deposits, totaling $12,000, were made into the account from two locations in the United States, to satisfy ransom demands; and (5) on August 5, 2015, Murillo withdrew $46,000 from the account. *See* Trial Stip. #2 (CR 77).

The government also called three of the kidnapping victims and three of the people who made ransom payments, who testified about the events set out in the indictment. *See* ER 120-36, 138-43, 149-63, 164-67, 168-72, 176-80. None of those witnesses implicated Murillo in any way.

One of them said that on August 6, 2015, he went to police in the United States to report the kidnapping because after he paid ransom the kidnappers continued to demand more money. *See* ER 146.

Next the government called FBI Agent Lawrence Rose. Rose testified that Murillo opened his Wells Fargo account on August 30, 2015, and the account was dormant until the activity on August 4 and 5, 2015. *See* ER 183-85, 201. Rose also identified documents and photos that were entered by stipulation and showed that Murillo crossed from Mexico into San Ysidro, California, and made the subject withdrawals, on August 4 and 5, 2015. *See* ER 185-87, 190, 194-95.

On cross-examination, Rose acknowledged that the house where the kidnappers held their victims in Tijuana was raided by Mexican police in late August 2015, four people were arrested, and those people did not implicate Murillo in their conduct. *See* ER 195-96. Rose also said that from the time of that raid until his arrest nearly three years later, Murillo regularly crossed the border into the United States, and that one would expect Murillo to have stayed in Mexico, and thereby evade arrest, if he had been involved in the kidnapping scheme. *See* ER 205.

The government's final witness was Rosario Rodriguez, a Wells Fargo employee. She testified that when Murillo came into the bank to withdraw funds on August 4, 2015, she was only able to give him $16,000 because the other deposits had not yet been cleared for withdrawal. *See* ER 207-08. She also said that Murillo mentioned needing the money to purchase cars at an auction. *See* ER 207.

After the government rested, Murillo moved for judgment of acquittal under Federal Rule of Evidence 29, and that motion was denied. *See* ER 211-12, 218.

3. Defense Case

Murillo's defense was based largely on his testimony, which is summarized below. First, however, some common sense points bear noting because those indicate that Murillo did not have any prior knowledge of, much less was he involved with, the criminal conduct involved in this case.

To begin with, no one in his right mind would allow his own bank account to be used to collect ransom proceeds – that would be as dumb as having the ransom payments delivered to your home. This supports that Murillo was used as a pawn, one who was threatened, as he explained to the agents when he was arrested. Furthermore, if Murillo were part of the criminal scheme charged in the indictment, he would undoubtedly have learned that his confederates were arrested in late August 2015. Knowing that, he would not have regularly crossed the border into the United States afterwards. Instead, he would have hung out in Mexico, at least for some significant period of time. Finally, that Murillo was not involved with retrieving several of the ransom payments made on August 5 and 27-29, 2015, *see* ER 9-15, shows that he was used as a short-term dupe, and he was not a participant in the scheme. It is undoubtedly for these reasons, and the lack of affirmative evidence, that the government dismissed counts 1-9 of the indictment, and that, as discussed below, the district court struggled with whether Murillo was guilty of count 10, stating, "it's a close case." ER 339.

Turning to Murillo's trial testimony, he began by explaining that in April 2015 he was living in the United States but would often go to Tijuana to visit his mother and girlfriend and to run a clothing store he owned there. *See* ER 222. On April 30, 2015, when he was at his mother's home in Tijuana, his stepfather and mother's ex-husband, Roman Perez, told Murillo that he wanted Murillo to open a bank account for Perez in the United States. *See* ER 220. Murillo, who is now 35-years-old, testified that he had lived with Perez for much of his childhood and that Perez had

abused and bullied him throughout the years. *See* ER 242, 244. Murillo also explained that though his mom had divorced Perez, they maintained a relationship because they had a child together, Murillo's half-brother Jason. *See* ER 224, 243-44.

When Perez asked Murillo to open the bank account on April 30, 2015, Murillo protested, but he relented when Perez got angry and threatened to beat Murillo and his mother. *See* ER 220, 224. Based on his history with Perez, Murillo took those threats seriously, and Murillo had learned that when Perez threatened him it was better to go along and not ask questions. *See* ER 223-24. Thus, Murillo went to a Wells Fargo branch in San Ysidro, California, and opened an account that day, after which he gave the account paperwork to Perez. *See* ER 225-26.

Murillo forgot about the bank account until August 4, 2015, when Perez came to his mother's home in Tijuana and said he wanted Murillo to withdraw funds that were deposited into the account. *See* ER 226-27. When Murillo said he couldn't do that because he was busy, Perez again became threatening and Murillo reluctantly agreed to go withdraw the funds. *See* ER 227. Perez did not, however, tell Murillo how much money was in the account, he just said to withdraw all of the money. *See* ER 229.

When Murillo got to the bank a few hours later, a teller said that some deposited funds had not yet been cleared for withdrawal, thus Murillo could only withdraw $16,000. *See* ER 230. Murillo took that money back to Perez in Tijuana and explained that some funds couldn't be withdrawn because they had not yet cleared. *See* ER 234-35. Perez was angry and told Murillo he'd have to go back to the bank the next day and get the rest of the money. *See* ER 234-35.

The next day, Perez called Murillo and told him to go back to the bank to withdraw the rest of the money, but again he didn't tell Murillo how much that would be. *See* ER 239. Murillo did so, and he recalled that he received about $40,000 at the bank, which he gave to Perez. *See* ER 240.

Murillo testified that the sums of money he withdrew did not make him suspicious because he knew Perez ran a taco stand and coffee shop in Tijuana, and Murillo thought maybe Perez's brother, who lived in Las Vegas, had "sent" the funds to Perez by depositing them into Murillo's account, rather than, say, using Western Union and paying a fee. *See* ER 231, 240. Murillo said he didn't know Perez to be involved in criminal activity, and, at the time of the withdrawals, didn't think that the money was related to criminal activity. *See* ER 231, 238. Murillo also reiterated that he avoided asking Perez any questions about the money or what he was up to. *See* ER 272.

After Murillo gave the money to Perez, he forgot about these events. *See* ER 238. From August 2015 to May 2018, he continued operating his clothing store in Tijuana with his girlfriend, and he regularly came to the United States for work and personal reasons. *See* ER 244-46, 248. On May 19, 2018, when he was crossing into the United States at the San Ysidro Port of Entry, he was arrested with respect to this case. *See* ER 247. FBI agents came to question him shortly thereafter, and Murillo was shocked when they told him that he was charged in a kidnapping and ransom scheme. *See* ER 251-53, 282. Murillo explained to the agents the circumstances surrounding his picking up the money for Perez, and told them that at the time of the withdrawals he didn't know the money related to illegal activity. *See* ER 256, 266-67, 277. But he speculated during his interrogation, and later proffer meeting, that the money "might be from maybe trafficking people," because he believed that Perez's family members were involved in that. ER 257, 266, 269-70, 277-78.

Murillo's mother, Maria, also testified. She confirmed that Perez is a violent man and that he had abused her and Murillo in the past, which Murillo coped with by submitting to Perez. *See* ER 286-87, 289-91. Maria also testified that Perez had asked her to open a bank account for him

and she had done so because she did not know Perez was involved in criminal activity, and she knew that Perez owned a taco shop and a café. *See* ER 287-88, 290, 294.

4. Government Rebuttal Case

In its rebuttal case, the government re-called FBI Agent Rose, and through him it introduced a short video-clips of Murillo' post-arrest interrogation, in which there was the following exchange between Agent Rose and Murillo:

AGENT ROSE:	Did you know it was be – you might not know what exactly what it was for but do you know it was illegal or something like.
MURILLO:	Um, I uh, I have – ha – had the idea that what he was doing was um, crossing illegals through the border.
AGENT ROSE:	Mhm.
MURILLO:	And that's like – he never said it and it was something that was never spoken.
AGENT ROSE:	Mhm.
MURILLO:	But you get a jist of things.
AGENT ROSE:	So you had an idea that that's what the money was for?
MURILLO:	Yeah.

Gov't Trial Ex. 28; ER 297. On cross-examination, Agent Rose acknowledged that during the interrogation Murillo had also clearly said that when he withdrew the money, he didn't know it was tied to criminal activity. *See* ER 301.

Agent Rose also testified that during a June 2018 proffer session, Murillo said that "due to the large amount of money that was deposited into the account, he thought it had to be from illegal activity." ER 298. Agent Rose admitted, however, that Murillo said he did not have that suspicion

until after he made the withdrawal on August 5, 2015, which was the second of the two withdrawals he made for Perez. *See* ER 301-02, 304.

5. Closing Arguments

Due to the fact that it was a bench trial, there was a substantial amount of back-and-forth between the court and the parties during the closing arguments. That began prior to government's closing, when the court said the "the only issue in the case" was whether the government proved beyond a reasonable doubt that Murillo "knew the transaction involved criminally derived property." ER 311. The government re-stated that issue as "whether [Murillo] knew what he was doing when he made those withdrawals," specifically, at the time of the withdrawals, did Murillo know "the object of the conspiracy, which was to engage in monetary transactions involving more than $10,000 in criminally derived property." ER 312. According to the government, it had proved this element because Murillo admitted to Agent Rose during his interrogation and proffer session that he knew the money was "from" or "for" smuggling people. ER 313. However, recognizing that the evidence on this issue was weak, the government then shifted to a deliberate ignorance theory of guilt, stating:

> [T]here is overwhelming evidence that at the very, very least, defendant was deliberately ignorant, which is also sufficient to satisfy the knowledge requirement.
>
> Defendant knew that there was a high probability that the transactions involved the proceeds of an unlawful activity, and he deliberately avoided learning the truth. He deliberately chose not to ask questions to avoid the truth. Indeed, today when defendant testified, he repeatedly said: "I don't ask questions. My place is not to ask questions. I complied to get along, and I don't question." That is the very definition of deliberate ignorance.

ER 319. The government acknowledged that Murillo didn't ask questions because "[h]e was afraid that Perez would harm him or his mother if he did not do as Perez said." ER 320. But, the government claimed, Murillo's fear was insufficient to support a duress defense, "[a]nd without duress, all of these threats, this alleged fear, that's not an excuse for criminal conduct." ER 320, 323.

During the defense closing argument, the court raised Murillo's post-arrest statement that he thought maybe the funds he withdrew were derived from smuggling undocumented immigrants. The court said it did not find that statement persuasive because the court suspected the statement was prompted by the agents first telling Murillo about the faux-smuggling scheme charged in the indictment. *See* ER 331. On the other hand, the court said that it found compelling Murillo's alleged statement during the June 2018 proffer session that once he realized the amount of money involved – specifically, after making the $46,000 withdrawal on August 5, 2015 – he suspected the funds were tied to criminal activity. *See* ER 324. But, the court said, "[i]t's a close case" as to whether the government had established that Murillo knew the funds were criminally derived. ER 339.

In its rebuttal, the government tailored its theory accordingly. Specifically, government counsel argued that: (1) Murillo should have alerted bank and law enforcement officials after he made the second withdrawal and suspected, based on the large sum involved, that the funds might be related to criminal activity; and (2) Murillo could be convicted based on that post-withdrawal "deliberate ignorance" because his offense ran from that point (when he first developed the requisite *mens rea*) until he delivered the money to Perez in Tijuana. *See* ER 344-45. Government counsel also argued that Murillo's feeling threatened by Perez did not excuse his failure to "ask questions when he was asked to do something that should have put him on notice of a high probability that it was criminally derived property." ER 345-46. In sum, prompted by the district court's remarks during the defense closing, government counsel argued in rebuttal that: (1) Murillo didn't develop the requisite "knowledge" about the source of the funds involved in the transaction until after he withdrew the $46,000 on August 5; and (2) that "knowledge" was established based on Murillo

remaining deliberately ignorant as to the source of the funds from that point until he delivered the money to Perez.

6. District Court's Guilty Verdict

The district court adopted that reasoning when, moments later, it found Murillo guilty of count 10, stating:

> First, the Court finds that the defendant in his post-arrest statements and in his proffer admitted on more than one occasion that he knew that the money was the proceeds of a criminal offense. For example, he indicated that he knew the money was illegal because of the amount. And he also indicated that he knew that Perez Sanchez was involved in human trafficking. The Court finds that his – defendant's trial testimony where he attempts to avoid the consequences of his admissions is simply not credible.
>
> In addition, I find that the defendant was aware of a high probability that the money in the Wells Fargo account was a result of a criminal offense and that the defendant had deliberately avoided learning the truth, therefore, establishing that he acted knowingly.
>
> So as a result, the Court finds that the government has proved beyond a reasonable doubt that the defendant is guilty of the charge alleged in Count Ten of the Indictment.

10/31/18 Trial Tr. at 180-81 (attached in appendix); *see also* ER 346-47.

II. Ninth Circuit Opinion

On appeal, Murillo argued that the district court impermissibly relied on a deliberate ignorance theory of knowledge, *see, e.g., United States v. Jewell*, 532 F.2d 697, 702 (9th Cir. 1976) (*en banc*), to establish the key disputed fact at trial – that Murillo knew the funds he withdrew were derived from some sort of criminal activity. Murillo argued that theory was impermissible for three independent reasons: (1) it is undisputed that Murillo's "decision" to remain ignorant about the source of the funds was "influenced by coercion," and "[a] defendant who fails to investigate for th[at] reason[] has not deliberately chosen to avoid learning the truth," *United States v. Heredia*, 483 F.3d 913, 920 (9th Cir. 2007) (*en banc*); (2) the theory stands in for a "knowledge" *mens rea*, and the

sole charge of conspiracy in this case required the government to establish the higher *mens rea* of "purpose;" and (3) there was no evidence that Murillo took any sort of "action" to avoid learning the source of the funds, which is required to convict on the deliberate ignorance theory. *Id.*

In its opinion affirming Murillo's conviction, the Ninth Circuit concluded that the district court had found Murillo had "actual knowledge" that the funds were criminally derived, thus, it concluded, it "need not reach Murillo's remaining arguments as to deliberate ignorance . . . ." *United States v. Murillo Morfin*, 818 Fed. App'x 759, 760 (9th Cir. 2020) (attached in appendix).

REASONS FOR GRANTING THE PETITION

I. Introduction

The Ninth Circuit's conclusion that the district court convicted based on finding actual knowledge – rather than based on a deliberate ignorance theory of knowledge – is flatly contradicted by the record. As detailed above, during the defense closing argument the district court explicitly stated that it did not find the government's actual knowledge argument compelling, but it did find convincing Murillo's statement during the June 2018 proffer session that once he realized the amount of money involved, he *suspected* the funds were tied to criminal activity. *See* ER 324. Accordingly, in its subsequent rebuttal argument, the government focused on the deliberate ignorance theory. *See* ER 344-45. Moments later, the district court entered its verdict, and it based it on the deliberate ignorance theory:

> First, the Court finds that the defendant in his post-arrest statements and in his proffer admitted on more than one occasion that he knew that the money was the proceeds of a criminal offense. For example, he indicated that he knew the money was illegal because of the amount. And he also indicated that he knew that Perez Sanchez was involved in human trafficking. The Court finds that his – defendant's trial testimony where he attempts to avoid the consequences of his admissions is simply not credible.
>
> In addition, I find that the defendant was aware of a high probability that the money in the Wells Fargo account was a result of a criminal offense and that the defendant

> had deliberately avoided learning the truth, therefore, establishing that he acted knowingly.
>
> So as a result, the Court finds that the government has proved beyond a reasonable doubt that the defendant is guilty of the charge alleged in Count Ten of the Indictment.

ER 346-47. Although the very first sentence seems to reflect an actual knowledge finding, it is evident from what followed, and from what the court explicitly said during the defense closing minutes earlier, that the court relied on a deliberate ignorance theory of knowledge.

It is regrettable that the Ninth Circuit's mis-treatment of the facts allowed it to ignore the important issues with respect to the deliberate ignorance theory of knowledge on which the district court relied to convict. This Court should not make the same mistake, and should grant review, because, as addressed below, the issues implicated are important and should be decided by this Court, and this case is a good vehicle for addressing them. *See* S. Ct. R. 10(c).

II. The Deliberate Ignorance Theory May Not Be Used To Convict For A Conspiracy Because The Relevant Mens Rea Is Purpose, Not Knowledge

The deliberate ignorance theory could not be relied on to convict Murillo for conspiring to engage in prohibited monetary transactions because, as is evident from this Court's case law, that theory stands in for a showing of "knowledge," and to convict for conspiracy the government must show the higher *mens rea* of "purpose."

The Model Penal Code (MPC) is the source of the deliberate ignorance basis for showing knowledge. *See Global-Tech Appliances, Inc. v. SEB S.A.*, 563 U.S. 754, 767 (2011); *Turner v. United States*, 396 U.S. 398, 416-17 (1970); *Leary v. United States*, 395 U.S. 6, 46-47 & n.93 (1969). The MPC defines "a hierarchy of culpable states of mind . . . . commonly identified, in descending order of culpability, as purpose, knowledge, recklessness, and negligence." *United States v. Bailey*, 444 U.S. 394, 404 (1980); *see also* MPC §2.02(2). With respect to knowledge, the MPC

states that "[w]hen knowledge of the existence of a particular fact is an element of an offense, such knowledge is established if a person is aware of a high probability of its existence, unless he actually believes that it does not exist." MPC §2.02(7).

This Court's relatively recent decision in *Ocasio v. United States*, 136 S. Ct. 1423, 1435 (2016), clarifies that to establish a conspiracy the government must show more than knowledge. A "conspiracy requires 'a heightened mental state'" and therefore falls under the "purposely" category, the highest level of mens rea set forth in the MPC. Furthermore, *Ocasio* cited *Bailey*, which stated that "[p]erhaps the most significant, and most esoteric, distinction drawn by [the MPC] analysis is that between the mental states of 'purpose' and 'knowledge.'" *Bailey*, 444 U.S. at 404. To explain this distinction, the Court in *Bailey* used conspiracy as an example of an offense that falls into the highest, "purposely" category. *Id.* at 405 (citing MPC §2.02). The MPC confirms this approach, as its definition of conspiracy requires "purpose." MPC §5.03.

The foundation of the deliberate ignorance theory, MPC §2.02(7), does not apply to offenses that require a "purposely" mens rea. By its very terms, it only allows such a substitute mental state for offenses that fall into the "knowingly" category. Accordingly, it is error to rely on a deliberate ignorance theory when the offense at issue involves a heightened, "purposely" mens rea, such as conspiracy.

Notably, on direct appeal the government argued that the Ninth Circuit had approved of a deliberate ignorance theory in *United States v. Ramos-Atondo*, 732 F.3d 1113, 1120 (9th Cir. 2013), which involved a conspiracy charge. However, in that case the defendant was charged with *both* a substantive drug offense, which only required a knowingly mens rea, and a conspiracy, and the deliberate ignorance theory was permissible as to the former. Here, on the other hand, Murillo was *only* charged with conspiracy. Furthermore, the Ninth Circuit's analysis in *Ramos-Atondo* amounted

to a citation to *United States v. Nicholson*, 677 F.2d 706, 710 (9th Cir. 1982), but the defendant in that case did not even argue that the deliberate ignorance theory cannot apply to a conspiracy charge. More important, the Ninth Circuit decided *Ramos-Atondo* before this Court's opinion in *Ocasio* was issued, and that court had previously held that conspiracy does not require a heightened *mens rea*, it only requires the scienter for the underlying offense. *See, e.g.*, *United States v. Hansen-Sturm*, 44 F.3d 793, 795 (9th Cir. 1995); *United States v. Thomas*, 887 F.2d 1341, 1346-47 (9th Cir. 1989). The underlying drug offense in *Ramos-Atondo* only required a knowingly mens rea, and therefore, under the Ninth Circuit's precedent at the time, it may not have been error to allow the government to proceed with a deliberate ignorance theory. This Court's subsequent decision in *Ocasio*, however, demonstrates that the Ninth Circuit's view of conspiracy was wrong, as conspiracy requires a "heightened" purposely mens rea. *Ocasio*, 136 S. Ct. at 1435. Thus, *Ramos-Atondo* is contrary to this Court's holding in *Ocasio*.

Notably, in the Ninth Circuit's most recent *en banc* treatment of the reach of the deliberate ignorance theory, several members of that court, in dissent, expressed the view that a deliberate ignorance theory of guilt should not be permitted even when the charged offense involves a "knowingly" mens rea. *See Heredia*, 483 F.3d at 930-33 (Graber, J., dissenting). Particularly after *Ocasio*, such a theory should not be permitted to establish a conspiracy offense, which requires a heightened purposely *mens rea*.

III. The "Deliberate Ignorance" Theory Doesn't Apply Because Murillo Didn't "Act" To Avoid Learning The Funds Were Criminally Derived

The deliberate ignorance theory also doesn't apply here because there is no evidence that Murillo took "deliberate *actions* to avoid learning the" truth. *Global-Tech Appliances, Inc.*, 563 U.S. at 769 (emphasis added). Particularly in the context of a conspiracy charge that, as here, doesn't

require the government to show an overt act, if the government is allowed to rely on the deliberate ignorance theory it must be required to show the defendant undertook "*active efforts* . . . to avoid knowing" the fact at issue. *Id.* at 770 (emphasis added). Otherwise, the conspiracy offense, with its watered-down *actus reus* requirement, becomes even more malleable, with an equally watered-down *mens rea* requirement. For this reason, writing for the Seventh Circuit, Judge Posner relied on this Court's opinion in *Global-Tech* and found that it was error to permit conspiracy liability based on deliberate ignorance because that amounts to mere "psychological avoidance," which does not convey the requisite "action" needed for deliberate ignorance. *United States v. Macias*, 786 F.3d 1060, 1061-62 (7th Cir. 2015). In the same vein, the Ninth Circuit in *Heredia* stated that to establish guilt based on deliberate ignorance the government must show the defendant engaged in "[a] deliberate action." 438 F.3d at 920.

There is no evidence that Murillo took any action to avoid learning the source of the funds he withdrew. Murillo simply didn't ask questions of Roman Perez, because he was afraid of Perez. That is not sufficient to establish deliberate ignorance.

IV. The Deliberate Ignorance Theory Does Not Apply Here Because Murillo's "Decision" To Remain Ignorant Was "Influenced By Coercion"

It is undisputed that any "decision" Murillo made to remain ignorant about the source of the funds he picked up at Wells Fargo was "influenced by coercion," specifically his fear of Roman Perez. The government argued that fear was irrelevant because Murillo could not establish a duress defense. *See* ER 344-46. That is wrong, because Murillo's fear makes the deliberate ignorance theory of conviction impermissible.

A key issue addressed in the Ninth Circuit's *en banc* opinion in *Heredia* was whether the government may only rely on a deliberate ignorance theory if the evidence shows the "defendant's

motive in deliberately failing to learn the truth was to give himself a defense in case he should be charged with the crime." *Id.* at 918. The Ninth Circuit rejected that requirement in *Heredia*, however, concluding that "the requirement that defendant have *deliberately avoided* learning the truth . . . provides sufficient protections for defendants in these situations." *Id.* at 920 (emphasis added). As the court explained:

> A deliberate action is one that is "[i]ntentional; premeditated; fully considered." *Black's Law Dictionary* 459 (8th ed. 2004). *A decision influenced by coercion*, exigent circumstances or lack of meaningful choice *is, perforce, not deliberate*. A defendant who fails to investigate for these reasons has not deliberately chosen to avoid learning the truth.

Heredia, 483 F.3d at 920 (emphasis added). As an example tied to the facts in *Heredia*, the court said a defendant does not act "deliberately" to avoid learning a fact if her conduct is "motivated by safety concerns." *Id.*

In light of this clear-cut statement of the law, it is evident that the "deliberate ignorance" theory of guilt does not apply here because Murillo's failure to ask questions, and to instead remain ignorant about the source of the funds, was "influenced by coercion," thus that decision was "perforce, not deliberate." *Id.* at 920.

V. Conclusion

Each point discussed above is an independent reason that the district court erred by relying on the deliberate ignorance theory to convict. Because these important issues have wide-ranging impact throughout this country, and because the Ninth Circuit has refused to deal with them, this Court should grant review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

/s/ Todd W. Burns

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TODD W. BURNS
Counsel of Record
Burns & Cohan, Attorneys at Law
1350 Columbia Street, Suite 600
San Diego, California 92101-5008
(619) 236-0244
todd@burnsandcohan.com

Counsel for Petitioner