No. 12-531

In The Supreme Court of the United States

FREDERIC BOURKE, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

I. THE COURT SHOULD GRANT THE WRIT TO RESOLVE THE SPLIT IN THE CIRCUITS OVER THE "WILLFUL BLINDNESS" DOCTRINE IN THE WAKE OF *GLOBAL-TECH*.

The government[1] opposes the writ on the *Global-Tech* issue on three grounds. We address them in turn.

1. First, the government professes to find no material difference between the willful blindness instruction in this case (and similar formulations from other circuits) and the *Global-Tech* standard. Opp. 12-15. The government is wrong; those differences are obvious and significant. *Global-Tech* requires that the defendant be "aware of a high probability" that a fact exists and that the defendant "take deliberate actions to avoid learning of th[e] fact." *Global-Tech Appliances, Inc. v. SEB S.A.*, 131 S. Ct. 2060, 2070 (2011). The instruction approved by the Second Circuit here contains the "high probability" element but requires only that the defendant "consciously and intentionally avoided confirming" the fact at issue. App. 17.

Global-Tech thus requires "deliberate actions" (or, as the Court put it elsewhere, "active efforts") to avoid knowledge. By contrast, the instruction here

[1] Brief for the United States in Opposition ("Opp.").

allowed the jury to infer knowledge based on an awareness of a high probability of a fact coupled with an entirely passive decision not to confirm that fact--*without any accompanying action*. The instruction is practically indistinguishable from the "deliberate indifference" standard that the Court found inadequate in *Global-Tech*. 131 S. Ct. at 2071.

The difference between a passive decision to avoid confirming a suspected fact and "active efforts" to avoid knowledge is crucial. *Global-Tech* holds that willful blindness requires a state of mind more culpable than recklessness, which the Court defined as "know[ing] of a substantial and unjustified risk" of the fact at issue. *Id*. at 2070-71; *see Farmer v. Brennan*, 511 U.S. 825, 839 (1994) (to act recklessly, person must "consciously disregard a substantial risk of serious harm"). The defendant's "deliberate actions" (or "active efforts") to avoid knowledge separate willful blindness from recklessness or deliberate indifference. By omitting the "deliberate actions" requirement, and failing to instruct the jury expressly that recklessness does not suffice for willful blindness, the instruction here created an unacceptable risk that the jury would find Bourke willfully blind to Kozeny's alleged bribes based on recklessness with respect to them.

The government insists that these differences in language--what it calls "varying verbal formulations"--do not matter. Opp. 12-13. But this Court "presume[s] that jurors, conscious of the gravity of their task, attend closely the particular language of the trial court's instructions in a criminal case and strive to understand, make sense

of, and follow the instructions given them." *United States v. Olano*, 507 U.S. 725, 740 (1993) (quotation omitted). A juror who is "attend[ing] closely the particular language of the trial court's instructions" and striving to "understand, make sense of, and follow" them will seize upon the difference between "deliberate actions" to avoid knowledge and a mere passive decision not to inquire. Especially in an area as fraught as willful blindness--a judge-made construct that supplants the statutory element of knowledge--precision is critical in guiding the presumptively attentive jurors.

2. Second, the government insists that there is no split in the circuits, because the circuits' pattern instructions (two of which have been rewritten to comply with *Global-Tech*) do not have binding effect. Opp. 15-16.

The government overlooks the practical significance of pattern instructions. As Judge Jerome Frank observed, "A legal system is not what it says, but what it does. Our 'criminal law,' then, cannot be described accurately in terms merely of substantive prohibitions; the description must also include the methods by which those prohibitions operate in practice." *United States v. Antonelli Fireworks Co.*, 155 F.2d 631, 662 (2d Cir. 1946) (Frank, J., dissenting). One of those "methods" is the pattern jury instructions that many circuits have developed to guide trial courts.

District judges in circuits that have pattern instructions routinely follow them, because those

instructions are likely to survive appellate review.[2] Courts of appeals encourage this use. *See, e.g., United States v. Peppers*, 697 F.3d 1217, 1221 (9th Cir. 2012) (although district courts have latitude in tailoring instructions, "the preferred practice is for district courts, where possible, to follow the model instructions"), *cert. denied*, 2013 U.S. LEXIS 1812 (Feb. 25, 2013); *United States v. Alverio-Melendez*, 640 F.3d 412, 423 n.5 (1st Cir.) (pattern instructions, although not mandatory, are "often helpful"), *cert. denied*, 132 S. Ct. 356 (2011); *United States v. Tomblin*, 46 F.3d 1369, 1380 n.16 (5th Cir. 1995) ("Although the fact that the [district] court used a pattern instruction is not conclusive, we encourage their use."); *United States v. Ridinger*, 805 F.2d 818, 821 (8th Cir. 1986) (pattern instructions, although not mandatory, are "helpful to the trial judge" and often are "compendiums of instructions which have survived appellate review").

Because district courts generally follow their circuit's pattern instructions, those instructions have much the same practical effect as a definitive ruling by the court of appeals. That means that in the Third and Eighth Circuits--which have modified

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[2] Some district judges even have standing orders that refer to the circuit's pattern instructions and, in some instances, require justification for deviation from them. *See, e.g.,* Hon. Maxine M. Chesney, Order for Criminal Pretrial Preparation at 3 (N.D. Cal.) (available at www.cand.uscourts.gov/mmcorders); Hon. Susan Illston, Order for Pretrial Preparation at 1 (N.D. Cal.) (available at www.cand.uscourts.gov/siorders); Hon. Timothy Savage, Procedures in Criminal Cases at 1 (E.D. Pa.) (available at www.paed.uscourts.gov/procedures/savpola.pdf); Hon. Joel H. Slomsky, Procedures in Criminal Cases at 2 (E.D. Pa.) (available at www.paed.uscourts.gov/documents/procedures/slopol4.pdf).

their model instructions to reflect the *Global-Tech* "deliberate actions" requirement--a defendant cannot be found willfully blind based merely on a passive decision not to seek out knowledge of a fact that he is aware has a high probability of existence.[3] By contrast, a defendant in the Second, Fifth, and Ninth Circuits *can* be found willfully blind based solely on a decision not to investigate such a suspected fact.[4] The Court should grant the writ to eliminate this disparity and to establish *Global-Tech* as a uniform national willful blindness standard.

3. Third, the government maintains that the evidence supports the willful blindness instruction even under the *Global-Tech* formulation. Opp. 16-17. The Court need not address this question. If the Court determines that the willful blindness instruction was erroneous because it did not comply with *Global-Tech*, it can leave the

[3] Similarly, the Fourth Circuit--which does not have model instructions--has adopted the *Global-Tech* "deliberate actions" requirement by judicial decision. *United States v. Jinwright*, 683 F.3d 471, 480 (4th Cir. 2012), *cert. denied*, 133 S. Ct. 843 (2013). Although the government argues that the *Jinwright* instruction was "virtually indistinguishable" from the one given here, Opp. 15, that is wrong. That instruction advised the jury that recklessness would not suffice to establish willful blindness and required that the jury find that the defendants "*acted with deliberate disregard*" to facts that they were aware had a high probability of existing. 683 F.3d at 480 (emphasis in original). The district court here neither told the jury that recklessness would not suffice nor required a finding of action taken to avoid knowledge. App. 17.

[4] *See, e.g., United States v. Yi*, 704 F.3d 800 (9th Cir. 2013) (acknowledging *Global-Tech* standard, but finding adequate the Ninth Circuit pattern instruction, which does not require "deliberate actions" and does not exclude recklessness); *United States v. Brooks*, 681 F.3d 678, 701-03 (5th Cir. 2012), *cert. denied*, 133 S. Ct. 839 (2013).

consequences of that determination to the court of appeals on remand.

It bears noting, however, that the government presents a distorted version of the evidence. It exaggerates Kozeny's purported "reputation for corrupt dealings" (Opp. 16)--a "reputation" that appears to have rested primarily on a single critical magazine article and that did not deter former Senator George Mitchell, Columbia University, AIG, and other highly reputable investors from participating in the privatization investment along with Bourke. Similarly, the government faults Bourke for "never ask[ing] his attorneys to undertake the due diligence that other investors undertook." Opp. 17. In fact, Bourke's due diligence was as extensive as any of the prominent investors listed above. The government's implication--that Bourke did not ask his attorneys to look into Kozeny--contradicts what it said at trial. There, the prosecutor asserted that Bourke "asked questions. He asked them again. Mr. Hempstead, his lawyer, testified he sometimes asked the questions three times. And that's what he did here." JA942.

The government asserts that Bourke "proposed the formation of the American advisory companies to shield himself and other American investors from potential liability from payments made in violation of FCPA, indicating that he was concerned about that possibility--but again, he decided not to investigate further." Opp. 17. This again distorts the record; it was experienced counsel from Hale and Dorr and Proskauer Rose who recommended establishing the American advisory

companies, not Bourke, T.1583, and (as the prosecutor acknowledged at trial) Bourke pressed his counsel incessantly to obtain more information.

Apart from its factual errors, the government's argument shows the danger of a lax willful blindness standard. The government faults Bourke (incorrectly) for not asking his attorneys to undertake due diligence and for "decid[ing] not to investigate further." But that is--at most--the "deliberate indifference" to the existence of a fact that this Court found insufficient for willful blindness in *Global-Tech*. 131 S. Ct. at 2071. The government cites no evidence--and there is none--of "deliberate actions" or "active efforts" by Bourke to avoid knowledge. The government's argument thus demonstrates the risk that a willful blindness standard that omits the requirement of "deliberate actions" or "active efforts" to avoid knowledge, and that fails to tell the jury that recklessness is not enough, will reduce the statutory element of knowledge and permit conviction on the theory that this Court rejected in *Global-Tech*.

II. THE COURT SHOULD GRANT THE WRIT TO RESOLVE THE SPLIT IN THE CIRCUITS OVER THE NEED FOR UNANIMITY ON A SPECIFIC OVERT ACT.

1. The government downplays the circuit split over unanimity on an overt act by trivializing the circuits' pattern jury instructions. Opp. 22-23. For the reasons outlined above, those instructions have significant practical effect. In the Third,

Eighth, and Ninth Circuits,[5] the pattern instructions mean that district courts will routinely instruct jurors that they must unanimously agree on a particular overt act to return a guilty verdict on a conspiracy charge under 18 U.S.C. § 371. In those circuits, therefore, there is no risk of a "patchwork" verdict, where some jurors find one overt act, other jurors find another overt act, and so on. In the Second, Fifth, and Seventh Circuits, district courts will not require unanimity on a particular overt act--meaning that patchwork verdicts are permitted. The practice in other circuits will vary from one district judge to the next. This disparity among the circuits requires the Court's intervention.

2. The government relegates to a footnote a critical aspect of this case: the government's need to prove an overt act *within the limitations period*. Opp. 21 n.4; *see* Pet. 27. The Court recently observed, "To be sure, we have held that the Government must prove the time of the conspiracy offense if a statute-of-limitations defense is raised." *Smith v. United States*, 133 S. Ct. 714, 721 (2013). To meet its limitations burden in a § 371 case, the government proves "the time" of the conspiracy by proving an overt act within the limitations period. It would diminish this requirement substantially if, instead of proving "the time" (an overt act) on which jurors agreed unanimously, the government could

[5] As noted in the petition, Pet. 25 & n.14, the Ninth Circuit pattern jury instructions require unanimity on a particular overt act, but recent case law is equivocal on that point. *See United States v. Liu*, 631 F.3d 993, 1000 n.7 (9th Cir. 2011); *United States v. Vu Nguyen*, 2013 U.S. Dist. LEXIS 7069, at *16-*17 (D. Nev. Jan. 16, 2013) (district court gave unanimity instruction, but notes it may not be required under *Liu*).

propose a series of "times" (overt acts) within the limitations period without having to convince the jury of any of them unanimously.

III. THE COURT SHOULD GRANT THE WRIT TO ADDRESS THE IMPORTANCE OF RULE 106 IN CRIMINAL CASES, WHERE CONSTITUTIONAL CONCERNS UNDERSCORE ITS TRUTH-SEEKING PURPOSE.

The government makes two errors in discussing Fed. R. Evid. 106.

First, it focuses on whether the withheld portions of the Schmid memorandum were the statements of Schmid or of Bodmer. Opp. 24-25. In doing so, it joins the district court and court of appeals in traducing the basic holding of *Beech Aircraft v. Rainey*, 488 U.S. 153 (1988). That holding was that Rule 106 trumps hearsay rule distinctions of the kind that the government is indulging.

Second, the government relegates its discussion of *Beech Aircraft* to a footnote, and then says that "No such distortion occurred here." Opp. 26 n.6. Such distortion did occur, and in a way that shows the need to reassert and reaffirm *Beech Aircraft*. The withheld portions of the document, if believed, would have pointed toward Bourke's acquittal. It has been the government's theory that Bodmer gave Bourke the incriminating knowledge of bribery. The excluded portions of the memorandum say that Bodmer had no guilty knowledge to impart. It is a "distortion" to admit evidence of guilt, and

then to ignore this Court's holding and Rule 106's plain text to exclude evidence of innocence.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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