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White Collar Crime Report™

Drinker Biddle & Reath LLP attorneys Barry Gross and Stephen G. Stroup argue that the Supreme Court must make clear that the limitations on the doctrine of willful blindness it adopted in the patent case *Global-Tech Appliances Inc. v. SEB S.A.*—that the defendant must have subjectively believed there was a high probability of wrongdoing and have taken deliberate actions to avoid learning about it—apply in white collar crime cases.

Has the Legal Threshold for 'Willful Blindness' *Really* Changed Since *Global-Tech*?

BY BARRY GROSS AND STEPHEN G. STROUP[1]

The doctrine of willful blindness has been a source of persistent controversy throughout its relatively brief existence as a legally viable substitute for actual knowledge in criminal cases. Detractors of the doctrine have cautioned that willful blindness threatens to reduce the necessary mental state required for a conviction, absent narrow and well-defined parameters. The U.S. Supreme Court seemingly supplied these parameters four years ago in *Global-Tech Appliances Inc. v. SEB S.A.*,[2] when it determined that willful blindness requires a state of mind that ''surpasses recklessness,'' and provided a two-prong test that would confine its future use.

Unfortunately, *Global-Tech* only proceeded to divide the federal circuits, as many refused to adopt critical aspects of the Supreme Court's holding. The rationale behind this resistance appears largely aimed at preserving the doctrine's widened applicability in matters that bear little, if any, resemblance to white collar prosecutions. As discussed below, these cases provide troubling precedent when applied in a white collar context, and illustrate the importance of adhering consistently to *Global-Tech*'s exacting standard in such situations.

Emergence and Expansion Of 'Willful Blindness'

''Willful blindness''—also commonly referred to as ''deliberate ignorance,'' ''conscious avoidance'' or the ''ostrich instruction''[3]—exists today as a by-product of

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In 2014, the co-authors represented David J. Adler, a corporate and securities attorney, who was acquitted at trial in the U.S. District Court for the District of New Jersey on 19 counts, including RICO conspiracy, and conspiracies to commit securities and wire fraud. The government sought and received a willful blindness jury instruction against Mr. Adler. *See* Stephen G. Stroup, *U.S. v. Scarfo Applies Supreme Court's Vision of ''Willful Blindness,'' Wall St. Law.*, Oct. 2014, at 3-4 (discussing how the district court's adherence to the legal threshold for willful blindness supplied by the U.S. Supreme Court in *Global-Tech Appliances, Inc. v. SEB S.A.* potentially factored into Mr. Adler's acquittal).

[2] 131 S. Ct. 2060, 2063 (U.S. May 31, 2011) (79 U.S.L.W. 4400, 2011 BL 142067).

[3] Although the Supreme Court accessed the doctrine as ''willful blindness'' in *Global-Tech*, only the First, Third and Eighth Circuits have referred to the doctrine consistently by that name. First Circuit Pattern Criminal Jury Instructions

judicial decision-making rather than statutory design.[4] It is predicated on the principle that a defendant cannot escape culpability by deliberately shielding himself or herself from clear evidence of critical facts and circumstances that would provide actual knowledge.

Under the doctrine's rationale, individuals who behave in this manner are to be held as criminally responsible as those who actually knew of the illegality of their actions.

Today, willful blindness has emerged as a powerful and preferred weapon in the prosecutorial arsenal, since it provides the government with an alternative charging instruction that sidesteps the potentially thorny burden of proving that a defendant acted knowingly.

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Despite its current prominence and an English common law ancestry, the doctrine is a relatively recent legal device that is generally ascribed to the Ninth Circuit's 1976 ruling in *United States v. Jewell*.[5]

Jewell was a narcotics prosecution in which the defendant was approached by an individual in a Mexican bar and, after refusing an offer to purchase marijuana from this individual, the defendant agreed to drive a car into the United States in exchange for $100.[6] After the car was discovered at the U.S. border to have 110 pounds of marijuana in a secret compartment, the defendant acknowledged that he knew of the compartment's existence, but had not looked inside to confirm its contents.[7]

The Ninth Circuit upheld the conviction at trial, determining that ''[t]o act 'knowingly'. . . is not necessarily to act only with positive knowledge, but also to act with an awareness of the high probability of the existence of the fact in question.''[8]

Then-Judge Anthony Kennedy issued a dissenting opinion in *Jewell*, voicing concerns that the doctrine recognized by the majority was ''uncertain in scope'' and cautioning the need for an ''important safeguard against diluting the guilty state of mind required for conviction.''[9]

The government's reliance on the doctrine grew quickly after *Jewell*, soon extending into other inherently illegal industries such as gambling, counterfeiting and prostitution,[10] where participants possess a similar incentive to avoid knowing the end result of their conduct in order to contrive a defense should they later be prosecuted. This growth triggered concerns that permitting the avoidance of knowledge to substitute for actual knowledge threatened to override statutory intent and weaken a fundamental requirement in criminal justice.

Many of the circuit courts initially attempted to balance these competing interests by stressing that the doctrine should be used only sparingly.[11] Such cautionary language remains in the commentary to the model jury instructions in several circuits,[12] although these limitations appear to be rarely enforced and other circuits have revoked such limitations altogether.[13] In actuality, willful blindness instructions have become commonplace when a criminal defendant denies having actual knowledge of a charged offense.

Defendants confronted with this instruction face unique challenges at both the trial and appellate stages.

As criminal defense pundits have long-recognized, a defendant's fate at trial frequently has rested with jurors who are assigned ''to decide whether or not to attribute guilty knowledge to the defendant [based on a

§ 2.16 (2014); Third Circuit Model Criminal Jury Instructions § 5.06 (2014); Eighth Circuit Model Criminal Jury Instructions § 7.04 (2014). The doctrine more often is referred to as ''deliberate ignorance'' in the federal courts. *See, e.g.*, Fifth Circuit Pattern Criminal Jury Instructions § 1.37A (2012); Sixth Circuit Pattern Criminal Jury Instructions § 2.09 (2014); Ninth Circuit Model Criminal Jury Instructions § 5.7 (2014); Tenth Circuit Pattern Criminal Jury Instructions § 1.37 (2011); Eleventh Circuit Pattern Criminal Jury Instructions, Special Instructions § 8 (2010). The Second Circuit traditionally discusses the doctrine as ''conscious avoidance.'' *See, e.g.*, *United States v. Goffer*, 721 F.3d 113, 126 (2d Cir. 2013). The Seventh Circuit has given the doctrine many names, including the ''ostrich instruction.'' *See, e.g.*, *United States v. Carrillo*, 435 F.3d 767, 780 (7th Cir. 2006).

[4] There is a least one regulatory criminal statute—the Foreign Corrupt Practices Act—that incorporates language consistent with the doctrine of ''willful blindness.'' *See* 15 U.S.C. § 78dd-2(h)(3)(B) (''When knowledge of the existence of a particular circumstance is required for an offense, such knowledge is established if a person is aware of a high probability of the existence of such circumstance, unless the person actually believes that such circumstance does not exist.'').

[5] 532 F.2d 697 (9th Cir. 1976) (en banc). In *Jewell*, the court included a discussion of English cases recognizing the doctrine that had extended ''well-nigh a hundred years.'' *Id.* at 700.

[6] *Id.* at 699 n.1.

[7] *Id.* at 699 n.2.

[8] *Id.* at 700.

[9] *Id.* at 706-07 (Kennedy, J., dissenting).

[10] *See, e.g.*, *United States v. Threadgill*, 172 F.3d 357 (5th Cir. 1999) (upholding use of deliberate ignorance instruction in relation to illegal gambling and conspiring to commit money laundering); *United States v. Boothe*, 994 F.2d 63 (2d Cir. 1993) (upholding conscious avoidance instruction in conviction involving conspiracy, counterfeiting, and possession of counterfeit currency); *United States v. Caliendo*, 910 F.2d 429 (7th Cir. 1990) (affirming use of ''ostrich instruction'' in prostitution conspiracy).

[11] *See, e.g.*, *United States v. Alston-Graves*, 435 F.3d 331, 340-41 (D.C. Cir. 2006); *United States v. Cassiere*, 4 F.3d 1006, 1023 (1st Cir. 1993); *United States v. Lara-Velasquez*, 919 F.2d 946, 951 (5th Cir. 1990).

[12] The comments to the jury instructions in the Fifth, Sixth and Tenth Circuits, respectively, make reference to the following appellate rulings: *United States v. Chen*, 913 F.2d 183 (5th Cir. 1990) (''The deliberate ignorance instruction should be used sparingly—only when the facts and statute under which the defendant is being prosecuted justify it.''); *United States v. Mitchell*, 681 F.3d 867, 876 (6th Cir. 2012) (noting that the instruction should not be ''given routinely'' but should be ''approached with significant prudence and caution'' and ''used sparingly'' (citation omitted)); *United States v. McConnel*, 464 F.3d 1152, 1159 (10th Cir. 2006) (recognizing that deliberate ignorance instruction only is ''appropriate in rare circumstances'').

[13] *See, e.g.*, *United States v. Heredia*, 483 F.3d 913, 924 n.16 (9th Cir. 2007) (disavowing Ninth Circuit precedent stating that deliberate ignorance instructions should be given sparingly).

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willful blindness instruction] without . . . significant guidance on how to make the decision.''[14]

The appellate courts have offered little solace for those who are convicted. Willful blindness instructions given without sufficient factual foundation at trial repeatedly have been excused as harmless error on appeal,[15] and charging language deviating from model jury instructions regularly has been upheld.[16]

In short, neither a lack of consistency in charging language nor the absence of a uniform threshold among the circuits has prevented the instruction from gaining prominence and, eventually, becoming favored by the government in increasingly intricate white collar criminal prosecutions involving complex federal laws.[17]

Supreme Court Defines Willful Blindness

What the doctrine lacked most throughout its transformation after *Jewell* was clear guidance from the U.S. Supreme Court defining what the government must demonstrate in order to apply willful blindness as a substitute for actual knowledge.

The high court finally broke its long silence in 2011 when it elected to address these requirements under an unlikely scenario. *Global-Tech* was civil patent litigation that had emerged from the U.S. Court of Appeals for the Federal Circuit. The case presented the question of whether willful blindness satisfied the mental state necessary to prove that a party actively induced patent infringement.[18]

Despite the civil context in *Global-Tech*, the Supreme Court cited only criminal cases when surveying how the doctrine had been applied historically in the various circuits.[19] The court acknowledged that there were differences among the circuit courts in how the doctrine had been articulated, yet concluded that they ''all appear to agree on 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.''[20]

Prior to 2011, the doctrine lacked clear guidance from the Supreme Court defining what the government must demonstrate to apply willful blindness as a substitute for actual knowledge.

The Supreme Court immediately proceeded to supply its rationale for why it had decided to embrace these ''two basic requirements'' as its own:

> We think these requirements give willful blindness an appropriately limited scope that surpasses recklessness and negligence. Under this formulation, a willfully blind defendant is one who takes deliberate actions to avoid confirming a high probability of wrongdoing and who can almost be said to have actually known the critical facts. By contrast, a reckless defendant is one who merely knows of a substantial and unjustified risk of such wrongdoing, and a negligent defendant is one who should have known of a similar risk but, in fact, did not.[21]

The Supreme Court next explained that the standard the Federal Circuit had applied did not satisfy either of these requirements.

As to the first prong, the circuit court test ''permit[ted] a finding of knowledge when there is merely a 'known risk' that the induced acts are infringing,'' rather than a ''high probability'' that the risk existed.[22]

The second prong was also not realized, because, ''in demanding only 'deliberate indifference' to that risk, the Federal Circuit's test does not require active efforts by an inducer to avoid knowing about the infringing nature of the activities.''[23]

Despite these material deficiencies, the court concluded that there was more than enough evidence for the jury to have concluded that the petitioner ''subjectively believed there was a high probability that [the respondent's] fryer was patented, that [the petitioner] took deliberate steps to avoid knowing that fact, and that it therefore willfully blinded itself to the infringe[ment].''[24]

The lone dissenting voice in the high court's decision came, interestingly enough, from Justice Anthony Kennedy, who cited his earlier dissenting opinion in *Jewell*. Justice Kennedy argued that the patent infringement statute at issue expressly required proof of petitioner's knowledge, yet ''[w]illful blindness is not knowledge;

[14] Alan C. Michaels, *Acceptance: The Missing Mental State*, 71 S. CAL. L. REV. 953, 980-81 (1998).

[15] *See, e.g.*, *United States v. Stadtmauer*, 620 F.3d 238, 260 n.26 (3d Cir. 2010) (determining that any error in providing a willful blindness jury instruction was harmless (quoting *United States v. Leahy*, 445 F.3d 634, 654 n.15 (3d Cir. 2006))); *United States v. Williams*, 612 F.3d 500, 508 (6th Cir. 2010) (deciding that, even when it is unsupported by evidence, giving a deliberate ignorance instruction that properly states the law is harmless error (quoting *United States v. Rayborn*, 491 F.3d 513, 520 (6th Cir. 2007))).

[16] *See, e.g.*, *United States v. Cunan*, 152 F.3d 29, 40 (1st Cir. 1998) (determining that willful blindness instruction that deviated from First Circuit Pattern Jury Instructions was ''adequately worded''); *United States v. Lee*, 991 F.2d 343, 349 n.2 (6th Cir. 1993) (upholding deliberate ignorance instruction while ''express[ing] our concern that the judges of the district courts may invite error if they depart too significantly from the language in the pattern instructions'').

[17] *See, e.g.*, *United States v. Brodie*, 403 F.3d 123 (3d Cir. 2005) (providing willful blindness jury instruction in relation to conspiracy to violate Trading with the Enemy Act and Cuban Assets Control Regulations); *United States v. King*, 351 F.3d 859 (8th Cir. 2003) (applying deliberate ignorance jury instruction in relation to conspiracy to violate the Foreign Corrupt Practices Act); *United States v. Schnitzer*, 145 F.3d 721 (5th Cir. 1998) (applying deliberate ignorance jury instruction in relation to bank fraud, misapplication of bank funds and false entries on books and records of financial institution); *United States v. Schlei*, 122 F.3d 944 (11th Cir. 1997) (providing deliberate ignorance jury instruction in relation to conspiracy and securities fraud).

[18] Petition for a Writ of Certiorari, *Global-Tech Appliances Inc. v. SEB S.A.*, No. 10-6, 2010 WL 2813550, at *1 (U.S. June 23, 2010) (79 U.S.L.W. 3027).

[19] *Global-Tech*, 131 S. Ct. at 2070 n.9.

[20] *Id.* at 2070.

[21] *Id.* at 2070-71 (internal citations omitted).

[22] *Id.* at 2071.

[23] *Id.*

[24] *Id.* at 2072.

and judges should not broaden a legislative proscription by analogy.''[25]

Moreover, Justice Kennedy expressed concerns that, in the context of a civil action, the majority opinion seemingly endorsed the use of willful blindness ''for all federal criminal cases involving knowledge'' even though ''it has received no briefing or argument from the criminal defense bar, which might have provided important counsel on this difficult issue.''[26]

Global-Tech Produces Turmoil in Circuits

While the criminal defense bar did not have an opportunity to participate in *Global-Tech*, there was a general perception that this ruling was a distinctive victory for criminal defendants in federal court actions everywhere.[27]

Practitioners anticipated that jury instructions would be overhauled to conform to the Supreme Court's heightened threshold for willful blindness, which, in turn, would force prosecutors to be more selective in when they sought to apply the instruction as an alternative to actual knowledge.[28]

Reality has been far different though, as *Global-Tech* has been treated more like a Rorschach inkblot than a high court directive.

As 2014 drew to its close, only the Third Circuit had revised its model jury instructions to mirror *Global-Tech*'s two-prong test and expressly educate jurors that they must find a mental state that exceeds recklessness.[29] In stark contrast, the Second Circuit has interpreted *Global-Tech* as a mere synopsis of existing circuit law rather than designed precedent,[30] and the Seventh Circuit has reserved its application exclusively for civil cases.[31]

The only aspects of *Global-Tech* that each of the circuits currently recognize (with the possible exception of the Sixth Circuit[32]) fall under the first prong; namely, the government must demonstrate the accused had a ''subjective belief'' that there was a ''high probability'' that a fact or circumstance required for the charged offense existed.

The circuit courts remain deeply divided on the second prong, however, with only the First, Third and Eighth Circuits requiring proof that a defendant took either ''deliberate actions''—or what the Supreme Court synonymously termed ''active efforts'' or ''deliberate steps''—to avoid learning the facts or circumstances at issue.[33]

Other circuits continue to embrace terminology in their model jury instructions and case law that would permit convictions based upon a defendant's purportedly deliberate *inaction*. Rather than ''actions,'' ''efforts'' and ''steps,'' the language adopted in these circuits allow the government to prove willful blindness through evidence signifying that a defendant deliberately ''closed his eyes,''[34] ''ignor[ed] the obvious,''[35] ''avoided learning the truth''[36] or ''blinded himself to the existence of the fact.''[37]

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[25] *Id.* (Kennedy, J., dissenting) (citing *Jewell*, 532 F.2d at 706 (Kennedy, J., dissenting)).

[26] *Id.* at 2073.

[27] *See, e.g.*, Susan E. Brune and Laurie Edelstein, *Jury Instructions: Key Topics in Federal White Collar Cases*, THE CHAMPION, Sept./Oct. 2012, at 26; Dane C. Ball, *Improving 'Willful Blindness' Jury Instructions in Criminal Cases After High Court's Decision in Global-Tech*, CRIM. L. REP. (BNA), June 15, 2011, at 762.

[28] *See* Timothy P. O'Toole, *Patently Unusual: How a Recent Supreme Court Patent Decision Alters the Landscape for Proving Criminal Knowledge*, WHITE COLLAR CRIME (WESTLAW), Sept. 2011, at 3-4.

[29] Third Circuit, *supra*, § 5.06 (2014) (commenting that ''[a]lthough the Third Circuit had approved varying forms of the content of the [willful blindness] instruction, the Supreme Court has now clarified this in *Global-Tech*''). Before *Global-Tech*, the Third Circuit's model instruction required only that ''(1) [the defendant] was aware of a high probability of this (fact) (circumstance), and (2) [the defendant] consciously and deliberately tried to avoid learning about this (fact) (circumstance).'' Third Circuit Model Criminal Jury Instructions § 5.06 (2009). The state of mind threshold under the prior instruction also made no reference to recklessness, or even negligence. It merely stated that ''[i]t is not enough that [the defendant] may have been stupid or foolish, or may have acted out of inadvertence or accident.'' *Id.*

[30] *See Goffer*, 721 F.3d at 128 (''In *Global-Tech*, the Supreme Court synthesized conscious avoidance holdings from eleven circuit courts in order to import the doctrine from criminal law to patent law. The Court did not alter or clarify the doctrine, but instead identified the common ground among the Courts of Appeals[.]'' (internal citations omitted)); *see also United States v. Fofanah*, 765 F.3d 141, 151 (2d Cir. 2014) (Leval, J., concurring) (stating that the Supreme Court in *Global-Tech* ''was merely (mistakenly) summarizing what it understood to be the positions of the various circuits'').

[31] *See United States v. Salinas*, 763 F.3d 869, 881 (7th Cir. 2014) (''While several of our sister circuits have mentioned incorporating *Global-Tech*'s definition into their criminal jury instructions for knowledge, we have yet to do so.'' (internal citations omitted)).

[32] The Sixth Circuit's instruction does not make clear whether there must be a subjective component to the defendant's belief, as it only requires the jury to find that ''the defendant deliberately closed his eyes to what was obvious.'' Sixth Circuit, *supra*, § 2.09. By comparison, the Fifth Circuit's instruction requires a finding that ''the defendant deliberately closed his eyes to what would otherwise have been obvious *to him*.'' Fifth Circuit, *supra*, § 1.37A (emphasis added). *See, e.g.*, *United States v. Griffin*, 524 F.3d 71, 80 n.8 (1st Cir. 2008) (holding that requirement in federal pattern instruction that ''*this* defendant'' closed her eyes to a fact that would have been ''obvious to *her*'' connoted subjective, rather than objective, standard).

[33] First Circuit, *supra*, § 2.16; Third Circuit, *supra*, § 5.06; Eighth Circuit, *supra*, § 7.04. The Fourth Circuit standard remains murky. While the court in *United States v. Jinwright*, 683 F.3d 471, 478 (4th Cir. 2012), *cert. denied*, 133 S. Ct. 843 (U.S. Jan. 7, 2013) (No. 12-6350), discussed *Global-Tech* and made reference to ''active and deliberate effort,'' it then proceeded to uphold a trial court instruction that required only that the defendant ''acted with deliberate disregard to these facts.'' *Id.* at 478, 480. Earlier that same year in *United States v. Orta-Rosario*, 469 F. App'x 140, 147 (4th Cir. 2012), the Fourth Circuit seemingly attempted to blend the notions of action and inaction into a single concept when finding that the defendant ''actively ignored numerous signs.''

[34] *Goffer*, 721 F.3d at 126 (affirming a trial court jury instruction that permits a jury to convict a defendant for ''deliberately clos[ing] his eyes to what would otherwise have been obvious to him.'' (quoting *United States v. Gansman*, 657 F.3d 85, 94 (2d Cir. 2011))); Sixth Circuit, *supra*, § 2.09, Eleventh Circuit, *supra*, Special Instructions § 8.

[35] Sixth Circuit, *supra*, § 2.09.

[36] Ninth Circuit, *supra*, § 5.7.

[37] Fifth Circuit, *supra*, § 1.37A; Tenth Circuit, *supra*, § 1.37.

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The circuit courts have been even more dismissive of *Global-Tech*'s requisite mental state for willful blindness.

Only the Third and Fourth Circuits expressly prohibited recklessness in response to the high court ruling,[38] while, conversely, the comments to the First Circuit's model jury instructions state that that circuit still sanctions recklessness.[39] The remainder of the circuits appear to concur with the First Circuit, at least implicitly, as their instructions disallow only negligence and other seemingly equivalent mental states, such as carelessness, foolishness and mistake.[40]

Global-Tech has been treated more like a Rorschach inkblot than a high court directive.

Simply put, *Global-Tech* has not only failed to instill a uniform methodology to a blurred common law doctrine, it has had the opposite effect of drawing the circuit courts into clear conflict with one another.

As a result, petitioners in at least three different circuits—the Second, Fourth and Fifth—have sought certiorari (albeit unsuccessfully) imploring the Supreme Court to provide the federal courts with absolute clarity.[41]

The splintering among the circuit courts does not end there. Since *Global-Tech*, at least two circuits have issued decisions, relying upon pre-*Global-Tech* precedent from their respective circuits, which seemingly increases this current imbalance, even among the circuits that have not embraced *Global-Tech*.

These decisions—*United States v. Gonzalez*[42] in the Seventh Circuit and *United States v. Ramos-Atondo*[43] in the Ninth Circuit—each upheld trial convictions by applying malleable interpretations of what behavior potentially constitutes ''deliberate action.'' Notably, as in *Jewell*, both of these rulings stemmed from alleged conspiracies to smuggle drugs across international borders.

In *Gonzalez*, the defendant was convicted in the U.S. District Court for the Northern District of Illinois for conspiracy to possess with the intent to distribute over 1,000 kilograms of marijuana shipped in railroad cars from Mexico to Chicago.[44]

The evidence showed that Gonzalez was involved in the handling and emptying of so-called ''supersacks,'' which concealed the compressed drug in a pigment normally used with masonry and cement.[45] Gonzalez moved the district court for an acquittal, arguing both that it had erred in giving a deliberate avoidance instruction and that the evidence was insufficient to demonstrate that he knew the supersacks contained marijuana.[46]

The district court's decision hinged on its application of the ''deliberate actions'' element under *Global-Tech*'s second prong, which it viewed as ''arguably more stringent'' because ''[a]ccording to the Seventh Circuit, no physical or outward indication of [willful blindness] is required.''[47] In doing so, *Gonzalez* became the first (and only) published federal ruling ever to overturn a conviction relying on *Global-Tech*.

The district court's analysis spotlighted two pieces of trial evidence.

The first was Gonzalez's interview with law enforcement in which he admitted that he had suspicions that the supersacks contained controlled substances.[48]

The second was evidence revealing that, based on his suspicions, Gonzalez had made multiple inquiries of his

[38] Third Circuit, *supra*, § 5.06; *Jinwright*, 683 F.3d at 478 (citing *Global-Tech* and acknowledging the ''injustice'' of a conviction obtained ''under a plainly impermissible recklessness or negligence standard'').

[39] First Circuit, *supra*, § 2.16 (citing *United States v. Anthony*, 545 F.3d 60, 66 (1st Cir. 2008) in comments section for the proposition that ''[i]t is not error to omit reference to 'recklessness.' '').

[40] *Goffer*, 721 F.3d 113, 127-28, 128 n.11 (affirming trial jury instruction that ''guilty knowledge may not be established by demonstrating that the defendant was merely negligent, foolish or mistaken''); Fifth Circuit, *supra*, § 1.37A (''[K]nowledge on the part of the defendant cannot be established merely by demonstrating that the defendant was negligent, careless, or foolish.''); Sixth Circuit, *supra*, § 2.09 (''Carelessness, or negligence, or foolishness on his part is not the same as knowledge, and is not enough to convict.''), Seventh Circuit Pattern Criminal Jury Instructions § 4.10 (2012) (''You may not find that the defendant acted knowingly if he was merely mistaken or careless in not discovering the truth.''); Eighth Circuit, *supra*, § 7.04 (''You may not find the defendant acted 'knowingly' if you find he/she was merely negligent, careless or mistaken as to (state fact as to which knowledge is in question).''); Ninth Circuit, *supra*, § 5.7 (''You may not find such knowledge . . . if you find that the defendant was simply careless.''); Tenth Circuit, *supra*, § 1.37 (''[K]nowledge on the part of the defendant cannot be established merely by demonstrating that the defendant was negligent, careless, or foolish[.]''); Eleventh Circuit, *supra*, Special Instructions § 8 (''[N]egligence, carelessness, or foolishness isn't enough to prove that the Defendant knew.'').

[41] *United States v. Kozeny*, 667 F.3d 122 (2d Cir. 2011), *cert. denied sub nom. Bourke v. United States*, 133 S. Ct. 1794, 81 U.S.L.W. 3579 (U.S. April 15, 2013)(No. 12-531); *Jinwright*, 683 F.3d 471; *United States v. Brooks*, 681 F.3d 678 (5th Cir. 2012), *cert. denied*, 133 S. Ct. 839, 81 U.S.L.W. 3364 (U.S. Jan. 7, 2013)(No. 12-218).

[42] 737 F.3d 1163 (7th Cir. 2013).

[43] 732 F.3d 1113 (9th Cir. 2013).

[44] *United States v. Gonzalez*, No. 10 CR 1063, 2013 WL 1222184 (N.D. Ill. Mar. 25, 2013), at *1 (2013 BL 79020).

[45] *Id.*

[46] *Id.*

[47] *Id.* at *3. As the district court in *Gonzalez* noted, the doctrine in the Seventh Circuit prior to *Global-Tech* ''require[d] more than mere negligence; the defendant 'must have ''deliberately avoided acquiring knowledge of the crime being committed by cutting off his curiosity through an effort of the will.''' '' *Id.* at *2 (citing *United States v. Carani*, 492 F.3d 867, 873 (7th Cir. 2007)). The Seventh Circuit expounded upon this in *United States v. Carrillo*, 435 F.3d 767, 780 (7th Cir. 2006), by stating that ''[e]vidence of deliberate ignorance can be placed into two categories: evidence of 'overt physical acts,' and evidence of 'purely psychological avoidance, a cutting off of one's normal curiosity by effort of the will.' '' *Id.* (citation omitted). The Seventh Circuit explained that the first category was generally simple, but ''[t]he second category, psychological avoidance, is more troublesome. . . . The difficulty in a psychological avoidance case—one without any outward physical manifestation of an attempt to avoid the facts—lies in distinguishing between a defendant's mental effort of cutting off curiosity, which would support an ostrich instruction, and a defendant's simple lack of mental effort, or lack of curiosity, which would not support an ostrich instruction.'' *Id.* (citations omitted).

[48] *Gonzalez*, 2013 WL 1222184 , at *3.

alleged co-conspirators to determine the actual contents of the supersacks, but was given either misleading or uninformative responses.[49]

The court determined that these inquiries were the very ''opposite'' of willful blindness,[50] because Gonzalez ''tried to find out what he was dealing with'' and ''inquired of those who would know,'' but his ''suspicions were refuted to some extent and certainly were not confirmed.''[51]

The district court concluded that although ''[i]t was, without question, quite unwise, as well as negligent, for Gonzalez to remain involved despite his suspicions . . . lack of wisdom and negligence do not amount to knowledge'' and although he ''may not have found out the truth . . . he did not avoid trying to find out.''[52]

Gonzalez's victory was short-lived, as the Seventh Circuit reinstated his trial conviction.[53]

In an opinion that assessed the same evidence the lower court had deemed exculpatory, the circuit court concluded—without any reference to *Global-Tech*—that ''Gonzalez actively avoided learning that drugs were present in the super sacks, because he did not want to know the truth.''[54]

The Seventh Circuit expressly rebuked Gonzalez's discovery efforts because, in its view, he ''did not press for clarification when he did not get a definitive answer from [his co-conspirator], nor did he stop working for [the co-conspirator].''[55]

The Seventh Circuit concluded that, even if Gonzalez did not know that the supersacks contained illegal substances, he could not ''cut off his normal curiosity'' by ''deliberately avoid[ing] learning more exact information about the nature or extent of those dealings'' to escape criminal liability.[56]

The Ninth Circuit also excluded any mention of *Global-Tech* in *Ramos-Atondo*, a narcotics prosecution that presented far more suspicious circumstances than *Gonzalez*.

Ramos-Atondo involved four defendants convicted for conspiring to import 740 pounds of marijuana into the United States via a panga boat, which, the circuit court explained, is a ''vessel commonly used for smuggling.''[57]

According to the opinion, the conspiracy involved six individuals, two of whom guided the boat from Mexico to a California state beach in the middle of the night using a pre-programmed GPS navigation system.[58] The boat approached the shore line without running lights and, when detected by border patrol agents, the two abandoned the boat a short distance away and came ashore where they were found hiding in a nearby public bathroom.[59] On the beach, the agents apprehended the remaining four individuals, each of whom was wearing dark clothing and lacking any form of personal identification.[60]

On appeal, the defendants argued that they had no actual knowledge that this smuggling operation involved drugs, and that the district court had abused its discretion in providing the jury with a deliberate ignorance instruction patterned after the Ninth Circuit's model instruction.[61]

The circuit court upheld the convictions based on pre-*Global-Tech* case law, explaining that ''a deliberate action is one that is intentional; premeditated; fully considered'' and, notwithstanding defendants' professed inactivity, ''the jury could have inferred that Defendants' lack of knowledge resulted from their failure to investigate.''[62]

Accordingly, as it now stands, there are circuits that require ''deliberate action'' consistent with *Global-Tech*'s second prong; circuits that have rejected *Global-Tech* and still permit deliberate inaction; circuits that have interpreted actions (deemed inadequate) to be a form of deliberate inaction; and circuits that consider inaction (the failure to investigate) to be a form of deliberate action.

White Collar Cases Demand Following *Global-Tech*

The practical consequence of these inconsistent applications of willful blindness after *Global-Tech* is that justice now may be dispensed quite unevenly among similarly-situated defendants tried in differing federal courts, depending on which substitute for actual knowledge is operative in that circuit. The mere prospect of such outcomes lends further credence to Justice Kennedy's warning that the doctrine threatens to ''dilut[e] the guilty state of mind required for conviction,'' which lays at the very foundation of Anglo-American criminal jurisprudence.[63]

Today, juries in the majority of federal courts are still permitted to infer knowledge based on a defendant's subjective awareness of a high probability of a fact coupled with an entirely passive decision not to confirm that fact—even though the Supreme Court determined that such evidence only constitutes deliberate indifference.

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[49] *Id.* at *4.
[50] *Id.*
[51] *Id.* at *4-5.
[52] *Id.*
[53] *Gonzalez*, 737 F.3d at 1169.
[54] *Id.*
[55] *Id.* The Seventh Circuit's decision to critique the suitability of Gonzalez's inquiry appears at odds even with other circuits that have not recognized *Global-Tech* as controlling precedent. *See Fofanah*, 765 F.3d at 150 (Leval, J., concurring) (''Conviction on a conscious avoidance theory cannot be justified . . . by the defendant's failure to try hard enough to learn the incriminating facts.'').
[56] *Gonzalez*, 737 F.3d at 1169 (citing *United States v. Craig*, 178 F.3d 891, 896 (7th Cir. 1999) and *United States v. Rodriguez*, 929 F.2d 1224, 1227-28 (7th Cir. 1991)).
[57] *Ramos-Atondo*, 732 F.3d at 1116-17.
[58] *Id.*
[59] *Id.* at 1117-18.
[60] *Id.* at 1117.
[61] *Id.* at 1118 (''The district court gave the following instruction to the jury: You may find that a defendant acted knowingly if you find beyond a reasonable doubt that the defendant: 1. was aware of a high probability that drugs were in the panga-style boat, and 2. deliberately avoided learning the truth. You may not find such knowledge, however, if you find that the defendant actually believed that no drugs were in the panga-style boat, or if you find that the defendant was simply careless.'').
[62] *Id.* at 1119-20 (citing *Heredia*, 483 F.3d at 920).
[63] *Jewell*, 532 F.2d at 707. *See, e.g., United States v. U.S. Gypsum Co.*, 438 U.S. 422, 436-37 (1978) (explaining that the requirement that proof of a criminal offense requires not only a prohibited act—*actus reus*—but also a guilty mind—*mens rea*).

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Circuits favoring the continuance of their respective pre-*Global-Tech* standards often have attempted to reconcile or merge the notion of ''deliberate indifference'' with ''deliberate action,'' notwithstanding that the former is actually the antithesis of the latter and that the Supreme Court expressly noted that the existence of deliberate action helps ''give willful blindness an appropriately limited scope that surpasses recklessness and negligence.''[64]

The ''very circumstances for which [the willful blindness doctrine] is most needed'' are virtually non-existent in white collar prosecutions.

These attempts are often predicated on anecdotal references to ostriches and treating figurative jargon, such as ''closing one's eyes'' or ''blinding oneself,'' as literal actions, which further cloud the doctrine's limited application. However, as perhaps best articulated by the Seventh Circuit in *United States v. Giovanetti*,[65] these popular expressions, when applied literally in a legal context, support the need to show that a defendant took affirmative steps to avoid obtaining actual knowledge:

> The most powerful criticism of the ostrich instruction is, precisely, that its tendency is to allow juries to convict upon a finding of negligence for crimes that require intent. . . . The criticism can be deflected by thinking carefully about just what it is that real ostriches do (or at least are popularly supposed to do). They do not just fail to follow through on their suspicions of bad things. They are not merely careless birds. They bury their heads in the sand so that they will not see or hear bad things. They deliberately avoid acquiring unpleasant knowledge. The ostrich instruction is designed for cases in which there is evidence that the defendant, knowing or strongly suspecting that he is involved in shady dealings, takes steps to make sure that he does not acquire full or exact knowledge of the nature and extent of those dealings.[66]

One likely rationale for why many circuits remain receptive to interpreting ''deliberate action'' expansively, even after *Global-Tech*, is that the doctrine has been well-suited historically in dealing with straightforward prosecutions involving drugs and other inherently illegal enterprises.

In fact, many court decisions involving such activities have been dedicated largely to discussing the defendant's subjective belief and the high probability of criminal conduct under the factual surroundings. When this discussion reveals only a remote prospect of legally legitimate activity, the defendant's presence alone has weighed heavily in establishing his complicity and the need for evidence suggestive of his ''discovery'' of the illegal enterprise is often perfunctory.

A recent concurring opinion from the Second Circuit in *Fofanah*, which involved a conspiracy to transport stolen vehicles, underscores this point:

> In many types of criminal enterprise, the asking of unnecessary questions and needless volunteering of information are frowned upon because such conduct needlessly subjects all participants to risk of incrimination. When a drug dealer pays a mule $5,000 to deliver an innocuous looking package to a person wearing a Dodgers baseball cap standing next to a blue Audi in a parking lot a few blocks away, he has no need to explain that the package contains cocaine, and the mule generally knows it is better not to ask. One who seeks to sell a hijacked truckload of computers to a fence at a small fraction of the value it would command if the merchandise were legitimate does not volunteer that the goods were hijacked, and the fence does not ask. *If judges were to adopt a rule that a charge on conscious avoidance may not be given absent evidence that the defendant took affirmative steps to avoid gaining knowledge of the incriminating facts, the doctrine would cease to function in the very circumstances for which it is most needed*.[67]

The Ninth Circuit provided a similar fact-laden justification for the convictions in *Ramos-Atondo*, even if the rationale for sidestepping *Global-Tech*'s deliberate action requirement was not stated so plainly:

> The jury could have inferred that [the defendants] deliberately chose not to ask why they were going to unload packages at the beach in the dark, wearing dark clothing, without any identification or possessions. The jury could have inferred that Ramos-Atondo chose not to examine the packages on the boat, or ask why he was taking a boat full of packages from Mexico to a beach in the United States in the dark using a pre-programmed GPS.[68]

The apparent purpose in permitting the absence of affirmative steps and the failure to investigate to creep into the doctrine is to address instances in which basic societal norms practically demand that anyone confronted with such circumstances would inquire about the true purpose of the enterprise. Under this same theory, anyone who does not make such an inquiry would do so only because he already knew the true purpose, or because he wanted to be able to assert ignorance as a defense, if later prosecuted for his participation in the illegal scheme.

These recent cases serve to illustrate an overarching point. While the government has expanded its use of the doctrine over time to include complex prosecutions, the rationales that courts still supply for broadening the doctrine's application are tethered to the same types of inherently illegal enterprises that the doctrine initially was designed to combat.

These ''very circumstances for which [the doctrine] is most needed,'' however, are virtually non-existent in white collar prosecutions.[69]

Rarely, if ever, are white collar defendants alleged to have received instructions from shadowy strangers in bars or to have conducted transactions on remote beaches under a cloak of darkness. Instead, white collar prosecutions routinely involve officers, directors, lawyers, accountants, consultants, clients and other business professionals. They often arise in traditional business environments where the prospect of criminal activity is not readily discernible, let alone highly probable.

Justice dictates strict adherence to *Global-Tech*'s second prong in these types of instances, because evidence

[64] *Goffer*, 721 F.3d at 128 (citation omitted).
[65] 919 F.2d 1223 (7th Cir. 1990).
[66] *Id.* at 1228 (emphasis omitted) (internal citations omitted).
[67] *Fofanah*, 765 F.3d at 150-51 (Leval, J., concurring) (emphasis added).
[68] *Ramos-Atondo*, 732 F.3d at 1120.
[69] *Fofanah*, 765 F.3d at 151 (Leval, J., concurring).

of deliberate action is essential in distinguishing between persons who truly are complicit and those whose inaction is merely a by-product of their failure to decipher the purported wrongdoing.

Deliberate action under *Global-Tech* eliminates the prospect of white collar convictions predicated on a fact finder's belief, aided by the benefit of hindsight, that the accused did not ask enough questions (as in *Gonzalez*) or that he failed to conduct an investigation (as in *Ramos-Atondo*).

Absent these essential protections, the doctrine invites the second guessing of complex decisions without the benefit of a defendant's particularized skills, experience and/or vantage point, thereby increasing the likelihood of convictions based on little more than instances of misguided reliance or poor professional judgment.

An imprudently granted willful blindness instruction may foist upon a defendant a presumed duty to have taken active steps to learn of the alleged criminality when their profession imposes no such duty, or potentially criminalize perceived breaches of fiduciary duties or professional malpractice.

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The risk that such traditionally civil concepts may bleed into a criminal deliberation—and that a white collar defendant might be convicted under some reduced threshold—only increases when juries are not instructed that a heightened state of mind is necessary for conviction.

As discussed earlier, only two circuits have adopted instructions consistent with *Global-Tech*. These instructions educate jurors that willful blindness requires the government to prove a state of mind that exceeds mere recklessness and negligence.

Conversely, the mental state required to convict in the remaining circuits is alarmingly vague. The Ninth Circuit's 2013 ruling in *United States v. Yi*[70] presented such a paradigm in the white collar context.

Yi was the chief executive officer of a real estate development company who was convicted of violating the Clean Air Act as the result of significant safety violations involving asbestos at a condominium complex that the company had purchased.[71]

Yi had testified at trial that he had no recollection of being shown a due diligence binder and had never read an environmental report, both of which revealed that the complex contained asbestos. Instead, Yi claimed that he had relied on the representations of one of the property managers, who had informed him that the property tested negative for the hazardous material, and that he trusted the manager's representations.[72]

On appeal, Yi argued that the district court erred in providing the jury with a willful blindness instruction predicated on deliberate ignorance and that the instruction was also legally deficient because it only precluded his conviction if the jury found him to be ''simply careless.''[73] The Ninth Circuit rejected both arguments, despite acknowledging that *Global-Tech*'s second prong requires ''deliberate actions taken to avoid learning the truth.''[74]

Nevertheless, Yi's conviction was upheld based on evidence of his admitted *inaction*:

> [The jury] could infer that Yi engaged in a deliberate pattern of failing to read documents that might clarify whether asbestos was in fact present. The jury would not be required to believe Yi's argument that he was very busy, that he trusted all of his subordinates to read everything for him, or even that he was told the insurance company's test had come back ''negative'' for asbestos. The evidence regarding Yi's real estate experience and pattern of failing to read documents common to real estate transactions supports a finding that Yi deliberately avoided learning the truth about whether the [condominium complex's] ceilings contained asbestos.[75]

The circuit court's assessment is accurate, but it is also incomplete.

Yes, it is possible that the jury inferred that Yi's inaction was designed to avoid confirming a high likelihood that the property contained asbestos and, therefore, amounted to the legal equivalent of actual knowledge. However, it is also possible that the jury inferred his conduct was indicative of mere recklessness or managerial negligence, neither of which qualifies as willful blindness under *Global-Tech*—and neither of which was expressly prohibited as a basis to convict under the jury instruction. This absence of absolute clarity in the

[70] 704 F.3d 800 (9th Cir. 2013).

[71] *Id.* at 802-03.

[72] *Id.* at 804.

[73] *Id.* at 804, 806. The trial court's instruction followed the Ninth Circuit's model criminal jury instruction for deliberate ignorance. The instruction read:

You may find that the defendant acted knowingly if you find beyond a reasonable doubt that the defendant:

1. was aware of a high probability that there was asbestos in the ceilings at Forest Glen Condominiums, and

2. *deliberately avoided learning the truth*.

You may not find such knowledge, however, if you find that the defendant actually believed that there was no asbestos in the ceilings at the Forest Glen Condominiums, or if you find that the defendant was *simply careless*.

Id. at 804 (emphasis added).

[74] *Id.* at 804-05.

[75] *Id.* at 805. *Yi* has not been treated as an outlier ruling among courts in the Ninth Circuit. To the contrary, at least one subsequent white collar-related case in the Northern District of California relied on both *Yi* and *Ramos-Atondo* in the context of conspiracy and securities fraud charges predicated on allegations of insider trading, holding that:

It is thus apparent that the Ninth Circuit has held that the failure to ask questions or otherwise confirm a fact—such as Defendant's failure to follow up on the source of the tips in this case in light of the circumstances in this case—can constitute ''deliberate action'' for purposes of a deliberate ignorance instruction.

United States v. Salman, CR-11-0625 EMC, 2013 WL 6655176 (N.D. Cal. Dec. 17, 2013), at *5 (2013 BL 349677).

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instruction exposed Yi (and continues to expose white collar defendants in the great majority of the circuits) to the possibility of conviction based on a reduced mental state.

Regrettably, the Ninth Circuit downplayed this risk of injustice, and the jury instruction provided in *Yi* remains operative in that circuit because, in the court's opinion, ''there is little reason to suspect that juries will import [recklessness or negligence] concepts, as to which they are not instructed, into their deliberations.''[76]

Conclusion

The controversy surrounding willful blindness dates back to its inception when it was designed to prevent savvy defendants in inherently illegal enterprises from avoiding criminal responsibility through irrational assertions of ignorance in the face of exceptionally obvious circumstances. Even then, the federal courts acknowledged that the doctrine needed to be applied sparingly to prevent any lessening of the guilty state of mind needed for criminal culpability.

Despite these well-designed intentions, an absence of absolute uniformity in the doctrine's purpose and application emerged over time, thereby challenging these safeguards and contributing to the doctrine's use in legally and factual complex circumstances, such as white collar prosecutions.

In *Global-Tech*, the Supreme Court supplied much needed clarity to restore this delicate balance, though this holding has been sidestepped by the majority of the circuits seemingly in the interest of preserving the doctrine's broader use in combatting inherently illegal enterprises.

This tension signals the need for the high court to revisit the doctrine and make its intentions explicit. In doing so, the high court may ensure essential safeguards remain intact, thereby preventing the prospect of the doctrine being misapplied to criminalize perceived absences of professional judgment.

[76] *Id.* at *3 (citing *Heredia*, 483 F.3d at 923-24).