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

BRIEF OF *AMICUS CURIAE* THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Should a jury in a criminal case asked to find a defendant's knowledge based on a theory of willful blindness be instructed in accordance with this Court's holding in *Global-Tech Appliances, Inc. v. SEB, S.A.*, 131 S. Ct. 2060 (2011)?

2. Must a jury unanimously agree that a specific overt act in furtherance of a charged conspiracy was taken within the applicable statute of limitations to properly support a guilty verdict in an 18 U.S.C. § 371 prosecution?

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INTERESTS OF AMICUS CURIAE[1]

Amicus The National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct.

NACDL was founded in 1958. It has a nationwide membership of approximately 10,000 attorneys, which includes private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers. The American Bar Association recognizes NACDL as an affiliated organization and awards it full representation in its House of Delegates.

NACDL files numerous amicus briefs each year in this Court and other courts, seeking to provide amicus assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and to the criminal justice system as a whole. The petition in this case presents two such issues: the proper definition of "willful blindness" and whether jury unanimity is required

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[1] Under Sup. Ct. R. 37.6, counsel for amicus curiae state that no counsel for a party authored this brief in whole or in part, and that no person other than amicus, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. Counsel of record for all parties received timely notice of amicus' intent to file this brief under Sup. Ct. R. 37.2(a). Letters of consent to the filing of this brief have been lodged with the Clerk of the Court.

in a conspiracy prosecution. These issues are important and will recur, given the frequency with which federal prosecutors utilize the conspiracy statute and the increasing reliance on willful blindness as a substitute for knowledge in many criminal cases. NACDL believes its views on these important criminal justice questions will be of value to the Court.

REASONS FOR GRANTING THE WRIT

I. THE COURT SHOULD GRANT THE WRIT TO ENSURE THAT THE LOWER FEDERAL COURTS APPLY ITS PRIOR HOLDING ESTABLISHING THE ELEMENTS OF WILLFUL BLINDNESS FAITHFULLY IN CRIMINAL CASES.

Federal crimes are "solely creatures of statute," and "[t]he definition of the elements of a criminal offense is entrusted to the legislature." *Liparota v. United States*, 471 U.S. 419, 424 (1985) (citing *United States v. Hudson*, 11 U.S. (7 Cranch) 32 (1812)). The requirement that proof of a criminal offense requires not only a prohibited act -- *actus reus* -- but also a guilty mind -- *mens rea* -- is a core principle of Anglo-American criminal jurisprudence. *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 436-37 (1978), *see also Morissette v. United States*, 342 U.S. 246, 250 (1952) ("The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil.")

Most criminal statutes, including the ones at issue in the case presented to the Court in this petition, require that a defendant's actions be knowing and willful. *See* 18 U.S.C. § 371, 15 U.S.C. §§ 78dd-1 *et seq.* "[W]hen used in a criminal statue [willfully] generally means an act done with a bad purpose." *United States v. Murdock*, 290 U.S. 389, 394 (1933). The definition of the term "knowing" varies based upon the statute in question and the type of prohibited activity at issue. In some instances, the term relates to an accused's "knowledge of the facts that constitute the offense," *Bryan v. United States*, 524 U.S. 184, 193 (1998), *see also United States v. Jewell*, 532 F.2d 697 (9th Cir. 1976) (*en banc*) (issue was whether defendant knew the fact that marijuana was in car he drove). In others, the term relates to knowledge of the existence of a legal rule. *Liparota*, 471 U.S. at 433-34 (issue was whether defendant knew actions violated relevant statute), *Ratzlaf v. United States*, 510 U.S. 135 (1994) (to establish a Bank Secrecy Act violation, the government is required to prove that the defendant acted with knowledge that his conduct was unlawful), *Staples v. United States*, 511 U.S. 600 (1994) (government is required to establish that the defendant knew the weapon was modified to allow for automatic firing to prove charge of failure to register "machine gun.") In either instance, the "knowledge" element insulates protected and non-blameworthy conduct from criminal prosecution and punishment. Indeed, it is the combination of relevant knowledge and corrupt intent that distinguish the heightened and culpable "knowing" state of mind from the lesser standards of "recklessness" or "negligence" generally left to civil

or regulatory sanction. *Global-Tech v. SEB, S.A.*, 131 S. Ct. 2060, 2071 (2011).

A. The Lower Courts Have Struggled to Properly Define Willful Blindness Both Before and Even After This Court's Decision in *Global-Tech*.

While the term "knowing" is a word of common meaning, Courts have struggled to give it a precise definition. In *United States v. Jewell*, the Ninth Circuit approved a "willful blindness" instruction in a 21 U.S.C. § 841(a)(1) (Controlled Substances Act) case where the defendant claimed a lack of actual knowledge of the contents of a secret compartment in a car he drove from Mexico to Los Angeles. *Jewell*, 532 F.2d at 699. In so doing, the Circuit noted "'[t]he rule that wilful blindness is equivalent to knowledge is essential, and is found throughout the criminal law.'" *Id.* at 700 (quoting G. Williams, *Criminal Law: The General Part*, § 57 at 157 (2d ed. 1961)). Notwithstanding then-Judge Kennedy's spirited dissent, *Jewell* did not signal a redefinition or diminution of the knowledge element in criminal cases. Rather, as this Court later recognized, "persons who know enough to blind themselves to direct proof of critical facts in effect have actual knowledge of those facts." *Global Tech*, 131 S. Ct. at 2069 (citing *Jewell*, 532 F.2d at 700).

Following *Jewell*, however, the Circuits spun off in conflicting directions, reflecting some of the concerns articulated in Judge Kennedy's dissent. *See Jewell*, 532 F.2d at 706 (Kennedy, J., dissenting) ("the wilful blindness doctrine is uncertain in scope. There is disagreement as to whether reckless

disregard for the existence of a fact constitutes wilful blindness or some lesser degree of culpability.") While courts initially warned that willful blindness should be "rarely" invoked, because it might cause the jury to convict based on negligence or recklessness, *United States v. Lara-Velasquez*, 919 F.2d 946, 951 (5th Cir. 1990), *see also 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), that caution was later abandoned and even specifically disavowed. *United States v. Heredia*, 483 F.3d 913, 924 n.16 (9th Cir. 2007) (*en banc*) (disavowing statements in past cases that the willful blindness instruction should rarely be given). And while some courts recognized the inherent tension between actual knowledge and willful blindness, *United States v. de Francisco-Lopez*, 939 F.2d 1405, 1410 (10th Cir. 1991) ("[i]f evidence proves the defendant actually *knew* an operant fact, the same evidence could not *also* prove he was *ignorant* of that fact. Logic simply defies that result") (emphasis in original), others ignored warning signs and sustained convictions in the face of clear signs that the instruction was being misused. *United States v. Mari*, 47 F.3d 782, 787 (6th Cir. 1995) (holding that giving of accurate willful blindness instruction even without evidentiary support was *per se* "harmless" error). In the midst of this confusion, the use of the willful blindness instruction became routine in criminal cases where the defense contested the knowledge element of a charged offense.

In 2011, this Court articulated the proper elements of the willful blindness doctrine for the first time, albeit in a patent infringement case. In

Global-Tech, the Court held that to have "knowledge" of a fact under a willful blindness theory, a defendant must "subjectively believe that there is a high probability that a fact exists and . . . take deliberate actions to avoid learning of that fact." *Global-Tech*, 131 S. Ct. at 2070. It was that combination of subjective belief and affirmative evasion that "give willful blindness an appropriately limited scope that surpasses recklessness and negligence." *Id.* And citing the same treatise that supported the Ninth Circuit's conclusion in *Jewell*, the Court reasoned that "[u]nder 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." *Id.* at 2070-71 (citing G. Williams, *Criminal Law* § 57 at 159).

Even though *Global-Tech* did not arise out of a criminal case, the Court's clear articulation of the proper definition of willful blindness should have resulted in uniformity across the lower courts. It has not.

Most Circuits that have considered the issue, including the First, Third, Fourth, Fifth, and Eighth Circuits, have adopted the first prong of the *Global-Tech* willful blindness standard requiring that the defendant subjectively believe that there is a high probability that the fact exist. *United States v. Denson* 689 F.3d 21, 24 n.4 (1st Cir. 2012), Third Circuit Model Criminal Jury Instructions, Instruction 5.06 (Oct. 2011), *United States v. Jinwright,* 683 F.3d 471, 479 (4th Cir. 2012), *United States v. Brooks,* 681 F.3d 678, 701 (5th Cir. 2012), Manual of Model Criminal Jury Instructions for the District Courts of the Eighth Circuit § 7.04 (2012).

Some Circuits have gone further and incorporated the holding and reasoning of *Global-Tech* into their model instructions. For example, the Third Circuit requires that the defendant "consciously took deliberate actions to avoid learning [*used deliberate efforts to avoid knowing*] about the existence of this (fact) (circumstance)." Third Circuit Model Criminal Jury Instructions, Instruction 5.06 (italics in original). The Eighth Circuit's model jury instruction states "[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." Manual of Model Criminal Jury Instructions for the District Courts of the Eighth Circuit § 7.04.

However, the Circuits have been particularly inconsistent with regard to the second prong of the *Global-Tech* willful blindness standard, which requires that the defendant take "deliberate actions" to avoid learning the fact, or what the Fifth Circuit described as actions that suggest, in effect, "[d]on't tell me, I don't want to know." *United States v. Lara-Velasquez*, 919 F.2d 946, 951 (5th Cir. 1990). Petitioner's case is a prime example. The Second Circuit approved the district court's instruction that "knowledge may be established when a person is aware of a high probability of its existence, and consciously and intentionally avoided confirming that fact. Knowledge may be proven in this manner if, but only if, the person suspects the fact, realized its high probability, but refrained from obtaining the final confirmation because he wanted to be able to deny knowledge." *United States v. Bourke,* 667 F.3d 122, 132 (2d Cir. 2011). Similarly, the Fifth Circuit, relying on the Fifth Circuit Pattern Criminal Jury

Instructions, recently approved a district court instruction that a jury could find a defendant acted with knowledge if the defendant "deliberately closed his eyes to what would otherwise have been obvious to him," without further requirement of deliberate actions to avoid facts. *Brooks,* 681 F.3d at 701.

Many Circuits have also failed to require district courts to inform juries of a critical element that unites willful blindness cases from *Jewell* through *Global-Tech* -- that a defendant's conduct must exceed mere recklessness. District courts routinely caution juries that mere negligence is not sufficient, but fail to distinguish between recklessness and deliberate ignorance. *See Denson*, 689 F.3d at 24 n.4 ("bear in mind that mere negligence or mistake in failing to learn the fact is not sufficient"), *Bourke*, 667 F.3d at 132 ("knowledge is not established in this manner if the person merely failed to learn the fact through negligence or if the person actually believed that the transaction was legal"), Manual of Model Criminal Jury Instructions for the District Courts of the Eighth Circuit § 7.04, *but see Jinwright*, 683 F.3d at 480 ("not enough to find that defendants were reckless or foolish in failing to recognize what was occurring" and "showing of negligence is not sufficient to support a finding of willfulness or knowledge.") (internal quotation marks omitted), Third Circuit Model Criminal Jury Instructions, Instruction 5.06 ("[i]t is not enough that (name) may have been reckless or stupid or foolish, or may have acted out of inadvertence or accident.")

Needless to say, the elements of an offense should not vary depending on the Circuit in which an individual faces trial. The Court should grant

certiorari to address this inter-circuit conflict and ensure uniformity in the definition of this critical element of any criminal prosecution.

B. Cases Involving the Foreign Corrupt Practices Act Present a Unique Opportunity to Address the Proper Definition of Willful Blindness in a Federal Criminal Case.

The willful blindness issue presented in this case is virtually certain to reoccur. Mr. Bourke was convicted of a conspiracy to violate the Foreign Corrupt Practices Act ("FCPA"). *United States v. Bourke*, 667 F.3d 122 (2d Cir. 2011). The FCPA was initially enacted in 1977 and its anti-bribery provisions make it illegal to offer or provide money or anything of value to officials of foreign governments with the intent to obtain or retain business. 15 U.S.C. §§ 78dd-1 *et seq*. In addition, the Act's third-party payment provisions generally prohibit otherwise improper payments to "any person, while knowing that all or a portion of such money or thing of value will be offered, given, or promised, directly or indirectly, to any foreign official, to any foreign political party or official thereof, or to any candidate for foreign political office." 15 U.S.C. § 78dd-1(a)(3).

When the FCPA was passed, a party was liable for the acts of a third party if he "kn[ew] or ha[d] reason to know" a payment would be used for a prohibited purpose. *See* H.R. Rep. No. 100-576, pt. 1, at 919-21 (1988) (Conf. Rep.) Under the "reason to know" standard, Congress was attempting to reach companies or individuals that looked "'the other way'

in order to be able to raise the defense that they were ignorant of bribes made by a foreign subsidiary . . . ." *See* S. Rep. No. 95-114, at 11 (1977). However, this standard created great ambiguity and left U.S. businesses uncertain about whether inadvertent conduct would be treated any less harshly than intentional bribery. *See* S. Rep. No. 100-85, at 51-52 (1987). As a result, in 1988, Congress amended the FCPA and dispensed with the "reason to know" standard in favor of the present definition of "knowledge," which states:

> (A) a person's state of mind [is] "knowing" with respect to conduct, a circumstance, or a result if—
>
> (i) such person is aware that such person is engaging in such conduct, that such circumstance exists, or that such result is substantially certain to occur; or
>
> (ii) such person has a firm belief that such circumstance exists or that such result is substantially certain to occur.
>
> (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.

15 U.S.C. § 78dd-1(f)(2)(A)-(B).

The legislative history of the 1988 amendments indicates that Congress was attempting to fashion a definition of knowledge that reached the "head-in-the-sand" and "willful ignorance" situations that required something more than mere recklessness. *See* H.R. Rep. No. 100-576, pt. 1, at 919-21. Its statement that the knowledge element was only satisfied when a defendant acts with "deliberate ignorance of known circumstances that should reasonably alert one to the high probability of violations of the act," which requires "proof that a defendant deliberately closed his eyes to what otherwise [would] have been obvious to him," *see id*. at 920-21, reflects the state of willful blindness case law in 1988, which has now been expanded by this Court to require a "deliberate act."[2] *See Global-Tech*, 131 S. Ct. at 2070-71. Finally, although the substantive prohibitions of the FCPA applicable to individuals do not use the term "willful" (they include corrupt intent and knowledge,

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[2] Congress' specific inclusion of willful blindness language in its definition of knowledge in the FCPA demonstrates its ability to include this expansive concept where "head-in-the-sand" behavior is deemed a threat requiring remedy. Amicus believes that the Court should, at some point, address the issue of whether a willful blindness instruction is ever appropriate in a criminal case where knowledge is not defined by statute to include willful blindness. Justice Kennedy raised this point in *Jewell,* and again in dissent in *Global-Tech*, 131 S. Ct. at 2072-73 (Kennedy, J., dissenting). It is not presented in this case given the FCPA's statutory definition of knowledge, but remains, in amicus' view, a question worthy of resolution in the appropriate circumstance.

as defined), the statute explicitly requires that a violation by an individual must be "willful" in order to support the imposition of criminal sanctions. 15 U.S.C. § 78ff(a). This requirement reinforces the view that a criminal violation of the FCPA requires some affirmative, deliberate act as distinguished from a passive failure or simple disinclination to inquire. A conspiracy to violate the FCPA can require no less.

For the reasons set forth above, the jury instruction on knowledge in this case failed to comport with *Global-Tech*'s requirements and were, therefore, insufficient. And while the District Court crafted that instruction prior to this Court's decision in *Global-Tech*, the Second Circuit approved the instruction after that decision and failed to acknowledge the decision in so doing. *See Bourke*, 667 F.3d 122 (2d Cir. 2011). To avoid further confusion, the Court should grant certiorari in this case and clarify the application of the willful blindness doctrine in criminal cases, including FCPA prosecutions.

II. THE COURT SHOULD GRANT CERTIORARI TO CLARIFY THAT IN A CONSPIRACY PROSECUTION, THE JURY MUST UNANIMOUSLY FIND A SPECIFIC OVERT ACT WAS COMMITTED WITHIN THE STATUTE OF LIMITATIONS PERIOD TO SUSTAIN A CONVICTION.

The petition for certiorari raises another important issue worthy of the Court's consideration. This conspiracy prosecution alleged overt acts taken in furtherance of the conspiracy that occurred both

inside and outside of the relevant statute of limitations. *Bourke*, 667 F.3d at 127-29. The District Court allowed the jury to return a guilty verdict without unanimously finding a specific overt act taken in furtherance of the conspiracy. As outlined in the petition for a writ of certiorari, there is a split among the Circuits on whether unanimity on a specific act is required. (Pet. at 25-26). In a case where many of the alleged overt acts occurred outside of the statute of limitations period, the failure to require unanimity as to a specific act creates a significant risk of wrongful conviction. The Court should grant certiorari in this case to resolve this critical issue.

Sixty years ago, the Court noted the "elastic, sprawling, and pervasive" nature of the conspiracy statute, and recognized that "loose practice as to [conspiracy] constitutes a serious threat to fairness in our administration of justice." *Krulewitch v. United States*, 336 U.S. 440, 445, 446 (1949) (Jackson, J., concurring). The increasingly frequent and aggressive use of the conspiracy statute by federal prosecutors has heightened that danger, and the Courts have done little to protect against use of the statute in ways that violate due process.

In August 2012, Amicus filed a brief with the Court urging reversal in a case where the district court shifted the burden of persuasion to the defendant to prove his withdrawal from a conspiracy prior to the relevant period as defined by the statute of limitations. *Smith v. United States*, No. 11-8976 (U.S. Aug. 27, 2012). We argued in that matter that lessening the government's burden of proof in the context of a conspiracy case "not only offends this Court's precedents and the United States

Constitution, but … substantially undermines the fairness of trial by diluting one of the most important protections against wrongful conviction." *Id.*, Brief of *Amicus Curiae* NACDL in Support of Pet'rs at 17.

This case presents the potential for similar harm. The essence of the crime of conspiracy is the agreement rather than the commission of the objective substantive crime. *United States v. Nims*, 524 F.2d 123, 126 (5th Cir. 1975) (citing *Pereira v. United States*, 347 U.S. 1 (1954)). But along with the agreement, the Government must prove an act was taken to effect the object of conspiracy in order to prove the elements of 18 U.S.C. § 371. This "overt act afford[s] a locus poenitentiae, so that before the act [is] done either one or all of the parties may abandon their design, and thus avoid the penalty prescribed by the statute." *Hyde v. Shine*, 199 U.S. 62, 76 (1905) (citing *United States v. Britton*, 108 U.S. 199, 204 (1883)). This Court has recognized that "[t]he function of the overt act in a conspiracy prosecution is simply to manifest 'that the conspiracy is at work,' and is neither a project still resting solely in the minds of the conspirators nor a fully completed operation no longer in existence." *Yates v. United States*, 354 U.S. 298, 334 (1957) (quoting *Carlson v. United States*, 187 F.2d 366, 370 (10th Cir. 1951)). Accordingly, the operative period of the conspiracy is defined by the first and last overt acts taken by a conspirator.

For purposes of the statute of limitations analysis, the relevant question is the timing of the last overt act. It is settled that to substantiate a conspiracy charge, the Government must prove that at least one overt act in furtherance of the

conspiratorial agreement was performed within the statute of limitations period. *Grunewald v. United States*, 353 U.S. 391 (1957), *see also United States v. Davis*, 533 F.2d 921, 926 (5th Cir. 1976) ("In a conspiracy prosecution brought under § 371 the Government, in order to avoid the bar of the limitation period of § 3282, must show the existence of the conspiracy within the five years prior to the return of the indictment, and must allege and prove the commission of at least one overt act by one of the conspirators within that period in furtherance of the conspiratorial agreement.")

Moreover, this Court has held that the government has carried its burden of unanimously proving each element of the crime it has charged. *Richardson v. United States*, 526 U.S. 813 (1999). At oral argument in *Smith*, the government conceded that *Grunewald* placed the burden to prove that a crime occurred within the statute of limitations period on the government, *Smith v. United States*, Oral Argument Tr., No. 11-8976, 2012 WL 5404874, at *37-*38 (U.S. Nov. 6, 2012), but resisted the suggestion that a timely overt act was an element of the crime. *Id.* at *50-*51.

The Court has resisted prior efforts to muddy the bright-line rule that a conspiracy ends when the last overt act is committed by a conspirator. *See*, *Grunewald v. United States*, 353 U.S. at 402 (rejecting argument that concealment of conspiracy operated to extend statute of limitations because "the Government's theory would for all practical purposes wipe out the statute of limitations in conspiracy cases . . ."). In a case such as this, where most of the overt acts would be inoperative to establish the crime because of the statute of

limitations, *Grunewald* and *Richardson* compel the district court to require jury unanimity on the specific overt act that establishes an accused's guilt. The Court should grant certiorari to resolve the existing circuit split and establish that it is the Government's burden to prove (and the jury must unanimously find) a particular overt act that occurred within the statute of limitations period to sustain a conviction for conspiracy.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for writ of certiorari.

Respectfully submitted,

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