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WHITE-COLLAR CRIME

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Conscious Avoidance: A Substitute for Actual Knowledge?

Hard cases sometimes make bad law. When bad law was made in hard cases involving drugs or organized crime, it did not engender a universal hue and cry. Indeed, the U.S. Court of Appeals for the Second Circuit probably expressed the consensus of opinion in the infancy of the "law and order" era when it wrote: "If a court does not lean over backward to blaze new pathways of individual nonresponsibility in hard drug cases [in this case, involving organized crime], the result is not necessarily bad law."[1]

But as that "bad law" has been applied in a broader spectrum of cases—particularly white-collar prosecutions—the need for a more discerning analysis has become increasingly apparent. The law of "conscious avoidance" provides a case in point.

The doctrine of conscious avoidance, also known as willful blindness or deliberate ignorance, allows for a criminal conviction even where the government fails to prove the defendant possessed the mens rea required by statute. Used in the prosecution of crimes requiring that the defendant acted "knowingly," the theory provides that although the defendant may not have possessed actual knowledge, his lack of knowledge was due to affirmative acts on his part to avoid discovery of the alleged wrongdoing. In other words, it permits the finding of knowledge even where there is no evidence that the defendant had actual knowledge.

In a close case, the government's ability to rely on the conscious avoidance argument is of great significance. A defendant can be found guilty, and subsequently fined and imprisoned, despite the fact that he had no knowledge of criminal activity. Rather, prosecutors can engage in speculation and innuendo, leading the jury to conclude that the defendant should have known of the wrongdoing and could have known about it if he had pursued information to which he had access.

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The controversial nature of the conscious avoidance instructions has played out in recent high-profile convictions, yielding headlines like "Enron Judge Eases Way to Guilty Ruling." The juries in the trials of Enron founder Kenneth Lay and its CEO Jeffrey Skilling and WorldCom CEO Bernard Ebbers were provided a willful blindness instruction. These cases, as well as that of former Credit Suisse First Boston investment banker, Frank Quattrone, have raised the conscious avoidance instruction as an issue on appeal.[2]

Without question, the government's and juries' reliance on the conscious avoidance doctrine is on the rise. Whether the increasing use of the doctrine is appropriate is open to debate.

The Government's Burden of Proof

The basics of the conscious avoidance doctrine are set forth in the Second Circuit's recent decision in *United States v. Kaplan*.[3] There, the defendant appealed from a conviction for insurance fraud, witness tampering and making false statements to an FBI agent, contending, among other things, that the district court erroneously gave a conscious avoidance charge in connection with the witness tampering count. Mr. Kaplan asserted that the record was devoid of any facts supporting the conclusion that he was deliberately ignorant of the witness tampering. Rather, the evidence indicated that, if anything, he had actual knowledge. Accordingly, the defendant argued, there was no factual predicate for the conscious avoidance instruction given to the jury.

A conscious avoidance instruction is proper only "(i) when a defendant asserts the lack of some specific aspect of knowledge required for conviction and (ii) the appropriate factual predicate for the charge exists." There are two ways in which the government can demonstrate a factual predicate for the charge. First, where there is evidence that the defendant was aware of a "high probability" of a disputed fact and deliberately avoided confirming that fact.[4] Second, where evidence of the defendant's involvement is "*so overwhelmingly suspicious* that the defendant's failure to question suspicious circumstances establishes the defendant's purposeful contrivance to avoid guilty knowledge."[5]

Agreeing that the evidence at trial supported only a conclusion that Mr. Kaplan had actual knowledge of witness tampering—which is not necessarily sufficient to prove conscious avoidance—the court concurred that the district court erred in instructing the jury on conscious avoidance. The error was harmless, however, because the trial court also had instructed the jury on actual knowledge and evidence of such knowledge was "overwhelming." "[A]n erroneously given conscious avoidance instruction constitutes harmless error if the jury was charged on actual knowledge and there was 'overwhelming evidence' to support a finding that the defendant instead possessed actual knowledge of the fact at issue."[6]

The Issue

Although the state of the evidence may support the theory of actual knowledge, the erroneous provision of a conscious avoidance instruction is not always harmless. The Second Circuit articulated the issue best in *United States v. Ferrarini:*

> If conscious avoidance could be found whenever there was evidence of actual knowledge, a jury could be given a conscious avoidance instruction in a case where there was only equivocal evidence that the defendant had actual knowledge and where there was no evidence that the defendant deliberately avoided learning the truth. Under those circumstances, a jury might conclude that no actual knowledge existed but might nonetheless convict, if it believed that the defendant had not tried hard enough to learn the truth.

To prevent this result, the court held that the instruction may not be given based solely on proof that "the factual context 'should have apprised [the defendant] of the unlawful nature of [his] conduct.'" Rather, there must be proof that the defendant "*decided* not to learn the key fact."[7]

In sum, although the law requires the government to prove a factual predicate in support of its request for a conscious avoidance instruction, even where

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such an instruction is given erroneously, it is unlikely to be harmless given that most juries also have received an actual knowledge instruction. Accordingly, a defendant's ability to prevent a court from giving a conscious avoidance instruction to the jury is slim. Moreover, a recent decision from the U.S. Court of Appeals for the Ninth Circuit, sitting en banc, serves to further limit a defendant's ability to defeat the government's claim of conscious avoidance. While not a white-collar case, it will undoubtedly have implications beyond its fact pattern. Notably, Kenneth Starr was one of the authors of an amicus brief submitted by the National Association of Criminal Defense Lawyers.

'United States v. Heredia'

In *United States v. Heredia*,[8] the Ninth Circuit revisited its 1976 opinion in *United States v. Jewell*.[9] Although Judge Alex Kozinski's en banc decision declined the invitation to overrule *Jewell* and its progeny, it attempted to clarify a number of issues regarding the doctrine of conscious avoidance. *Jewell* held that the term "knowingly," as set forth in criminal statutes, "is not limited to positive knowledge, but includes the state of mind of one who does not possess positive knowledge only because he consciously avoided it." The holding in *Jewell* has become the law of every federal circuit court, except the U.S. Court of Appeals for the District of Columbia Circuit—indeed, conscious avoidance jury instructions have come to be referred to as the "*Jewell* instruction." The Ninth Circuit further observed that Congress' failure to amend the criminal statutory definition of "knowingly" signaled its acquiescence to the *Jewell* holding.

In reviewing *Jewell* and the case law that has developed around it, the Ninth Circuit acknowledged that "many of [the] post-*Jewell* cases have created a vexing thicket of precedent that has been difficult for litigants to follow and for district courts—and ourselves—to apply with consistency." The court determined, however, that it would "clear away the underbrush" that surrounded the *Jewell* decision rather than overturn it.[10]

First, the court addressed the substance of the *Jewell* instructions—specifically, whether such instructions must include a "motive" prong. This prong would instruct the jury that the defendant's motive in deliberately failing to learn the truth was to give himself a defense in case he should be charged with a crime. Ms. Heredia argued that the inclusion of the "motive" prong was necessary to ensure that individuals who failed to investigate because circumstances did not permit it would not be punished. The court rejected this argument, finding that the instruction's requirement that the defendant "deliberately" avoid learning the truth provided sufficient protection. "A decision influenced by coercion, exigent circumstances or lack of meaningful choice is, perforce, not deliberate. A defendant who fails to investigate for these reasons has not deliberately chosen to avoid learning the truth." Accordingly, the Ninth Circuit rejected the inclusion of a motive prong in a conscious avoidance instruction.[11]

Next, the court turned to the standard of review by which appellate courts should review a district court decision to issue a *Jewell* instruction. Although the Ninth Circuit had long reviewed a district court's decision to give deliberate ignorance instructions de novo, the court noted that most other federal circuits reviewed such decisions for an abuse of discretion. Finding the abuse of discretion standard more appropriate, given the district court's proximity to the trial and intimate knowledge of the record, the Ninth Circuit rejected its prior de novo review approach.[12]

Applying this standard, the court addressed when a district court properly should give the *Jewell* instruction. First, a district court must determine whether the evidence of the defendant's mental state, if viewed in the light most favorable to the government, will support a finding of actual knowledge. If so, then the court is required to provide the jury with instructions on the actual knowledge theory. Because the conscious avoidance theory is inconsistent with actual knowledge, "[t]he deliberate ignorance instruction only comes into play…if the jury rejects the government's case as to actual knowledge." Accordingly, "[i]n deciding whether to give a willful blindness instruction, in addition to an actual knowledge instruction, the district court must determine whether the jury could rationally find willful blindness even though it has rejected the government's evidence of actual knowledge. If so, the court may also give a *Jewell* instruction."[13]

A conscious avoidance instruction, in cases without proof of avoidance of knowledge, creates a risk that the jury will convict in the absence of actual knowledge, simply because it believes the defendant had "not tried hard enough to learn the truth."

'Heredia' Facts

The facts of *Heredia* illustrate the point. A border agent noticed a strong perfume odor emanating from the car Ms. Heredia was driving when she stopped at a border patrol checkpoint. Searching the trunk of the vehicle, the agents discovered almost 350 pounds of marijuana packed with dryer sheets. Ms. Hereida claimed that the car belonged to her aunt who had told her that the "detergent" smell was the result of a fabric softener spill. On the stand, Ms. Heredia testified that although she suspected there might be drugs in the car, her suspicions were not aroused until she was on the freeway and it was "too dangerous" to pull over and investigate.

Taking the evidence in the light most favorable to the government, the court reasoned that the jury reasonably could have found that Ms. Heredia actually knew about the drugs. Although this was a reasonable conclusion, the Ninth Circuit noted that it was not the only one. Rather, a reasonable jury also could have believed the defendant's claim that she did not know about the drugs in the car. For this reason, the court found that the government "was entitled (like any other litigant) to have the jury instructed in conformity with each of these rational possibilities."

In sum, the Ninth Circuit found that district court judges are entitled the usual degree of deference in deciding whether to issue a *Jewell* instruction on conscious avoidance. Further, it held that the form of such instruction need not include a "motive" prong. Finding that the instructions given in Ms. Hereida's case were not an abuse of discretion, the court affirmed the conviction.

Commentators have noted that the decision in *Heredia* served to "incinerate[] the few protections that were formerly part of this area of law."[14] In addition to eliminating the "motive" prong of the *Jewell* instruction and adopting the more deferential "abuse of discretion" standard for appellate review, the Ninth Circuit also specifically rejected cases that had urged limited use of the *Jewell* instruction.[15] Some believe that giving broader discretion to trial judges may result in increased litigation because it "means less guidance."[16] Indeed, the dissenting opinion questions the majority's opinion, finding that its decision "transform[ed] knowledge into a mens rea more closely akin to negligence or recklessness" by creating a duty to investigate for drugs that appears no where in the text of the underlying criminal statute.[17]

Conclusion

There is little doubt that questions surrounding the government's burden of proof with respect to the defendant's knowing involvement in the alleged crime will continue to arise. Recent developments in the law do not bode well for white-collar practitioners seeking to defend their clients by claiming lack of knowledge. Indeed, such a defense may open the door for the government to request a conscious avoidance instruction be given to the jury in cases where it may not be fair or appropriate. Such an instruction, in cases without proof of avoidance of knowledge, creates an unacceptable risk that the jury will convict in the absence of actual knowledge, simply because it believes that the defendant had "not tried hard enough to learn the truth."[18]

1. *United States v. Tramunti*, 513 F2d 1087, 1107-08 n. 26 (2d Cir. 1975).
2. Kris Axtman, "Enron Judge Eases Way to Guilty Ruling," Christian Science Monitor (May 17, 2006).
3. __F3d__, 2007 WL 1087270 (2d Cir. April 11, 2007).
4. Id. at *15 (citing *United States v. Quattrone*, 441 F3d 153, 181 (2d Cir. 2006).
5. *United States v. Svoboda*, 347 F3d 471, 480 (2d Cir. 2003) (internal quotations omitted; emphasis in original).
6. *United States v. Ferrarini*, 219 F3d 145, 154 (2d Cir. 2000) (quoting *United States v. Adeniji*, 31 F.3d 58, 64 (2d Cir. 1994)).
7. *Ferrarini*, 219 F.3d at 157 (emphasis in original).
8. __F3d__, 2007 WL 959898 (9th Cir. April 2, 2007).
9. 532 F2d 697 (9th Cir. 1976) (en banc).
10. 2007 WL 959898 at *2.
11. Id. at *3.
12. Id. at *4.
13. Id. at *5.
14. Steve Kalar, "Case O' the Week: Ninth Burns 'Jewell' While 'Clearing Underbrush,'" Ninth Circuit Blog (April 6, 2007) (available at http://circuit9.blogspot.com/search?q=heredia).
15. 2007 WL 959898 at *6, n.16.
16. Justin Scheck, "Defense Lawyers Dismayed by 9th Circuit Ruling on Willful Ignorance," The Recorder (April 3, 2007).
17. 2007 WL 959898 at *12 (dissent, authored by J. Graber, joined by Pregerson, Thomas and Paez).
18. *Ferrarini*, 219 F3d at 157.