No.

IN THE
Supreme Court of the United States

DAVID C. GEISEN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In this case charging that a mid-level manager at a nuclear power plant knowingly and willfully made false statements to officials of the Nuclear Regulatory Commission, the two questions presented are:

1. Whether this Court should grant the petition to resolve a conflict in the circuits over the appropriate circumstances for instructing the jury on a theory of deliberate ignorance – namely, whether such an instruction must be restricted to cases where any "ignorance" was motivated by the attempt to escape conviction.

2. Whether this Court should grant the petition to resolve a conflict in the circuits over the appropriate harmless error standard for a deliberate ignorance instruction that is not supported by the evidence.

PARTIES TO THE PROCEEDING

All of the parties to the proceeding are identified in the case caption.

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The opinion of the court of appeals (*see* Petitioner's Appendix ("App.") (1a-60a) is published as *United States v. Geisen*, 612 F.3d 471 (6th Cir. 2010). The court's denial of rehearing and rehearing *en banc* (App. 139a) is published as No. 08-3655, 2010 U.S. App. LEXIS 19467 (6th Cir. Sept. 2, 2010). (App. 139a-140a) The pertinent opinion of the district court (App. 61a-64a) is unreported.

JURISDICTION

The court of appeals entered judgment on July 15, 2010. App. 141a. The court denied a timely petition for rehearing and for rehearing en banc on September 2, 2010. App. 139a-140a This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 1001 provides:

Statements or Entities Generally

(a) Except as otherwise provided in this section, whoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully --

(1) falsifies, conceals, or covers up by any trick, scheme, or device a material fact;

(2) makes any materially false, fictitious, or fraudulent statement or representation; or

(3) makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry;

shall be fined under this title, imprisoned not more than 5 years or, if the offense involves international or domestic terrorism (as defined in section 2331), imprisoned not more than 8 years, or both.

(b) Subsection (a) does not apply to a party to a judicial proceeding, or that party's counsel, for statements, representations, writings or documents submitted by such party or counsel to a judge or magistrate in that proceeding.

(c) With respect to any matter within the jurisdiction of the legislative branch, subsection (a) shall apply only to --

(1) administrative matters, including a claim for payment, a matter related to the procurement of property or services, personnel or employment practices, or support services, or a document required by law, rule, or regulation to be submitted to the Congress or any office or officer within the legislative branch; or

(2) any investigation or review, conducted pursuant to the authority of any committee, subcommittee, commission or office of the Congress, consistent with applicable rules of the House or Senate.

STATEMENT OF THE CASE

In the Fall of 2001, Defendant-Appellant David C. Geisen was one of a number of managers and engineers at the Davis-Besse nuclear power plant in Oak Harbor, Ohio (referred to herein as "Davis-Besse" or "the Plant"), who interacted with the Nuclear Regulatory Commission ("NRC" or "Commission"), in response

to an expedited request for information sent to a number of nuclear power plants throughout the country. On the basis of these interactions, Mr. Geisen was charged with five counts of knowingly and willfully making false statements to the NRC in violation of 18 U.S.C. § 1001.[1]

The case against Mr. Geisen was tried in October 2007. The critical issue at trial was whether Mr. Geisen, in his role as a supervisor, had known about inaccuracies in the Plant's submissions to the NRC and intentionally sponsored them anyway. Mr. Geisen's defense was that while he perhaps "should have known" about any inaccuracies and should have done a more thorough job as a supervisor, he did not know the statements were inaccurate at the time they were made, and he did not willfully make any false statements.

On the issue of intent, the government's trial presentation was replete with evidence about what Mr. Geisen should have done to better manage the submissions to the NRC. *See* Trial Transcript ("TT") of Moffitt, Record Entry ("RE") No. 259, pp. 1307-08; Record on Appeal ("ROA") pp. 159-60 (Government

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[1] Before obtaining an indictment, the government offered Mr. Geisen a deferred prosecution agreement. ROA pp. 469-79. Under the proffered terms, Mr. Geisen merely needed to admit knowledge of the falsity of the statements and willfulness in making them, and the government would refrain from prosecuting him. ROA pp. 473-79. Mr. Geisen rejected the government's offer, as he adamantly denied having intentionally made any false statements. ROA at pp. 470. The district court's refusal to permit jurors to hear about Mr. Geisen's rejection of this deferred prosecution agreement was the subject of an extensive dissenting opinion below. App. 1a-60a.

witness asked whether Mr. Geisen should have assigned another supervisor to review tables submitted to the NRC); (TT of Ulie, RE No. 267, p. 1575; ROA p. 117) (Geisen told NRC investigators he should have done a better job of ensuring the accuracy of the information presented to the NRC); (TT of Geisen, RE No. 261, pp. 1944-45; ROA pp.42-43) (Geisen expresses regret at not spending more time reviewing past inspection data and at his failure to involve a second engineer). But the government's evidence was substantially less strong (Mr. Geisen submitted below that it was insufficient) in terms of showing that Mr. Geisen actually knew about any inaccuracies in the submissions.

Responding to this deficiency, the government sought and obtained an instruction after the close of evidence permitting jurors to convict Mr. Geisen based on a showing of deliberate ignorance, or willful blindness, rather than actual knowledge and willfulness. Trial transcript, RE No. 262, pp. 2293-94. Mr. Geisen objected vigorously, arguing there was no evidence he refused to acquire knowledge in order to escape prosecution, thus there was no evidentiary predicate for the instruction. *Id*. at 2295-96. Mr. Geisen further argued that giving the instruction in this case, where there was no evidence that he deliberately avoided gaining knowledge, created a real danger that jurors would become confused and determine they could convict Mr. Geisen for what he "should have known." *Id*. The district court worried whether the instruction permitted conviction based on such considerations, *id.* at

2297; App. 31a, but ultimately gave the standard Sixth Circuit willful blindness instruction. *Id.* at 2338-39.[2]

After considerable deliberations, jurors returned a split verdict, acquitting on two counts and convicting on the three others. Mr. Geisen moved for a new trial, focusing largely on the deliberate ignorance instruction. ROA 642-48 & 669-74.

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[2] The Court gave the following instruction:

> Next, I want to explain something about proving a defendant's knowledge. No one can avoid responsibility for a crime by deliberately ignoring the obvious. If you are convinced that a defendant deliberately ignored a high probability that the submissions and presentations to the NRC concealed material facts or included false statements, then you may find that he knew that the submissions and presentations to the NRC concealed material facts or included false statements, then you may find that he knew that the submissions and presentations to the NRC concealed material facts or included false statements. But to find this, you must be convinced beyond a reasonable doubt that the defendant was aware of a high probability that the submissions and presentations to the NRC concerned material facts -- I'm sorry, concealed -- let me read that over. I'm sorry. But to find this, you must be convinced beyond a reasonable doubt that the defendant was aware of a high probability that the submissions and presentations to the NRC concealed material facts or included false statements and that the defendant deliberately closed his eyes to what was obvious. Carelessness, or negligence, or foolishness on his part is not the same as knowledge and is not enough to convict. This, of course, is all for you to decide.

Id. at 2338-39.

The district court denied the new trial motion. In doing so, the trial judge did not attempt to justify giving the deliberate ignorance instruction. Instead, relying on *United States v. Mari*, 47 F.3d 782, 787 (6th Cir. 1995), the district court ruled that "[t]he Circuit has repeatedly held that the instruction is harmless error where sufficient evidence of actual knowledge was present. This is the case here." (App. 63a)

Mr. Geisen appealed to the Sixth Circuit. On July 15, 2010, a panel of the Sixth Circuit entered an opinion affirming the conviction and rejecting Mr. Geisen's argument that the trial court had committed reversible error. With regard to the deliberate ignorance instruction, the panel held that such an instruction was proper so long as the evidence can fairly support an inference that the manager "deliberately chose not to inform himself in preparing the submissions to the NRC." App. 33a.

The panel then reaffirmed that under *United States v. Mari*, 47 F.3d at 786, any error in giving the instruction was *always* harmless as a matter of law so long as the government presents some evidence of actual knowledge. App. 29a. Mr. Geisen filed a timely petition for rehearing and suggestion for rehearing *en banc*, which was denied on September 2, 2010. App. 139a.

Operating parallel to the criminal proceeding was Mr. Geisen's challenge to an administrative action the NRC brought against him in order to ban him from participation in NRC licensed activities; the administrative action was based on the same facts and circumstances as the criminal prosecution. *See* App. 65a.

After the criminal conviction was entered in this case, a panel of the NRC's Atomic Safety and Licensing Board held an evidentiary hearing to determine whether the preponderance of the evidence indicated Mr. Geisen deliberately made false statements to the NRC. App. 66a-67a. The administrative panel refused to apply the doctrine of collateral estoppel based on the outcome of the criminal trial because it determined that the criminal conviction may have been based on deliberate ignorance, which it found insufficient to meet the Commission's standard for deliberate misconduct. App. 126a-127a. After considering the evidence, the panel set aside the Enforcement Order, finding that the NRC Staff failed to show by preponderance of the evidence that Mr. Geisen knowingly provided false and misleading information to the NRC. App. 66a-67a.

On August 27, 2010, the NRC affirmed the Licensing Board's decision. App. 65a-138a.[3] Thus, while Mr. Geisen has been convicted by jurors of making intentional false statements to the NRC in the criminal case where the jury was instructed on a theory of deliberate ignorance, he has been exonerated of the charge of making false statements in a parallel proceeding before the NRC itself, with a less stringent standard of proof and the application of a more rigorous *mens rea* requirement.

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[3] The Commission's August 27, 2010 final decision in Mr. Geisen's administrative proceeding can be found at Appendix C, 65a-138a. A copy of the initial decision of the NRC's Atomic Safety and Licensing Board, which is voluminous, was provided to the Sixth Circuit after oral argument in a submission made pursuant to Fed. R. App. P. 28(j).

REASONS FOR GRANTING THE PETITION

Petitioner David C. Geisen asks this Court to grant certiorari to provide guidance on a legal doctrine that has been the source of great confusion and controversy in both this case and in federal criminal cases generally – the doctrine of deliberate ignorance. In the published decision below, the Sixth Circuit upheld the giving of a deliberate ignorance instruction based on the government's charge that a mid-level manager of a nuclear power plant had been less than diligent in his preparation for interactions with federal regulators under circumstances where it could not even rationally be alleged that his lack of diligence emanated from a desire to escape criminal conviction. According to the court below, such an instruction is proper so long as the evidence can fairly support an inference that the manager "deliberately chose not to inform himself in preparing the submissions to the NRC."[4] App. 33a. The Sixth Circuit also concluded that even if such an instruction should not have been given, any error was *per se* harmless error under *United States v. Mari*, 47 F.3d 782 (6th Cir. 1995), which had held that the erroneous giving of a deliberate ignorance instruction is always harmless so long as any evidence of actual knowledge exists. *Id*. at 786-87.

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[4]Mr. Geisen emphatically disputes the panel's assertion that he "deliberately chose not to inform himself in preparing for NRC submissions" – a finding that the trial court itself never made. Nonetheless, it is Mr. Geisen's position that even if such a finding was warranted, it cannot properly serve as the predicate for a deliberate ignorance instruction.

Both aspects of the Sixth Circuit's deliberate ignorance ruling are worthy of this Court's review. The Court of Appeals' determination on the proper circumstances for giving the deliberate ignorance instruction conflicts with rulings from other circuits that have restricted this instruction to situations where the evidence shows the defendant's motive in refusing to learn information was to escape eventual conviction. Likewise, the Sixth's Circuit's application of the *per se* harmless error rule of *United States v. Mari*, 47 F.3d 782, 787 (6th Cir. 1995), conflicts with rulings from other circuits that have applied traditional harmless error analysis when a trial court erroneously instructs the jury on deliberate ignorance.

The questions presented in this petition are of substantial national importance. The original "deliberate ignorance" cases involved drug couriers and other individuals who had taken active steps to wall themselves off from knowledge of clearly *illegal* activity making it arguably fair to permit juries to conclude that those individuals knowingly and willfully engaged in illegal behavior. *United States v. Heredia*, 483 F.3d 913, 917 (9th Cir. 2007) (en banc) (defendant claimed she had no knowledge of marijuana in the car she drove from Mexico to the United States); *Mari*, 47 F.3d at 783-84 (defendant claimed to have no knowledge of the 33 kilograms of cocaine in the truck he borrowed from a friend of an acquaintance); *United States v. Jewell*, 532 F.2d 697, 699 n.1 (9th Cir. 1976) (en banc) (facts similar to those in *Heredia*). Cases like the one below, however, reject any sensible restrictions on when the instruction can be given, upholding a deliberate ignorance instruction in circumstances where it cannot even be argued that any failure to learn of the

adequacy of prior cleanings of the nuclear plant – the subject of the regulators' inquiry – was done for the purposes of escaping a criminal prosecution. And to make matters worse, the *per se* harmless error rule applied below means that there will never be any incentive for trial courts to restrict this instruction to the narrow circumstances for which it was originally created.

Unchecked expansion of the deliberate ignorance instruction poses serious systemic dangers, particularly when applied to cases like this one. Indeed, the contrast between the result of the parallel administrative proceeding and that of the criminal trial demonstrates the necessity of reviewing the giving of the deliberate ignorance instruction under traditional harmless error analysis. In the administrative hearing, the Board determined the standard for deliberate misconduct that governed the NRC proceeding could not be met by a finding of deliberate ignorance and thus the theory was not introduced in the administrative hearing. Forced as a result to prove actual knowledge, the NRC staff failed to carry its burden – even under the civil preponderance of the evidence standard.[5] The contrast between the two results suggests that the jury's deliberations in the criminal trial were improperly complicated by the district court's decision to give the deliberate ignorance instruction. But because of the operation of *Mari's per se* harmless error rule, Mr. Geisen is effectively foreclosed from challenging the instruction.

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[5] Initial Decision at 20-22.

The scope of the false statement laws is broad, and thousands of mid-level managers like Mr. Geisen interact with government officials each day. The Sixth Circuit's application of this doctrine to such interactions means that virtually any incorrect statement to federal officials can be charged criminally, so long as the government can show that the defendant's preparation prior to the statement was inadequate. That cannot be what Congress meant when it made it a crime to "knowingly and willfully" make false statements to government officials. *See* 18 U.S.C. § 1001(a). This Court's corrective intervention is required.

I. The Court Should Grant Certiorari to Resolve Two Important Questions Regarding the Deliberate Ignorance Doctrine, on which the Lower Courts are Currently Divided.

The Sixth Circuit panel applied a controversial legal doctrine in an unreasonably broad fashion that conflicts with the decisions of other courts of appeals, and creates a grave risk of a conviction without the requisite *mens rea*. There can be no doubt about the confusing and controversial nature of the deliberate ignorance/willful blindness doctrine.[6] As one commentator has observed:

> Scholars and courts actively disagree about what the definition is and what it ought to be. Because of an inadequate understanding of why

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[6] Courts refer to "deliberate ignorance" and "willful blindness" instructions interchangeably. We use the term "deliberate ignorance" instruction throughout this petition because that is the language the district court included in its instruction here.

> these cases of recklessness ought to be treated the same as cases of knowledge, the willful blindness doctrine is beset by controversy at almost every level. Indeed, the many matters of continuing controversy include the elements of wilful blindness, the requisite foundation for a wilful blindness instruction, the question of whether giving a properly worded wilful blindness instruction can be reversible error, and the appropriate standard for reviewing whether the instruction was properly given.
>
> More damning still, a close review of even a portion of the cases in this area reveals that, no matter what doctrinal elements courts have purported to include in their definitions, the uncertainty as to the meaning of the doctrine has often left juries with a discretionary instruction that forces them to decide whether or not to attribute guilty knowledge to the defendant without either significant guidance on how to make the decision or significant judicial review of the decision once made. Identical cases can be treated differently, and the outcome of any particular case, even when all the facts are given, cannot be judged correct or otherwise.

Alan C. Michaels, *Acceptance: The Missing Mental State*, 71 S. Cal. L. Rev. 953, 980-81 (1998); *and see* Ira P. Robbins, *The Ostrich Instruction: Deliberate Ignorance As A Criminal Mens Rea*, 81 J. Crim. L. & Criminology 191, 227-29 (Summer 1990) (noting "risk of conviction for negligence" created by instruction and observing that even some appellate courts appear to

have mistakenly condoned such a theory of criminal culpability).

The evolution of the use of the doctrine of deliberate ignorance in Anglo/American jurisprudence provides some clues as to the source of the confusion that currently exists regarding the use of the deliberate ignorance instruction. Though the idea that willful blindness or deliberate ignorance could, in limited circumstances, be a substitute for actual knowledge has existed in English law for over a century, courts applying it were unclear as to the threshold level of awareness the defendant had to have in order to be convicted on a theory of willful blindness. *See* Jonathan L. Marcus, Note: *Model Penal Code Section 2.02(7) and Willful Blindness*, 102 Yale L.J. 2231, 2233-34 (1993). Some decisions implied that a failure to investigate suspicions of wrongdoing would constitute willful blindness, while others indicated that a conviction on a willful blindness theory would only be proper if there was evidence the defendant's lack of knowledge was a charade. *Id*. at 2234 (citing Robin Charlow, *Wilful Ignorance and Criminal Culpability*, 70 Tex. L. Rev. 1351, 1361-65 (1992)).

Although this Court appeared, in passing, to approve of the application of the deliberate ignorance doctrine in some circumstances, *see Spurr v. United States*, 174 U.S. 728, 735 (1899) (finding, in a case regarding whether a bank officer certified checks with knowledge the bank could not cover them, that "evil design may be presumed if the officer purposely keeps himself in ignorance of whether the drawer has money in the bank or not, or is grossly indifferent to his duty in respect to the ascertainment of that fact."), it has not

addressed the doctrine in the past century and its development has occurred entirely in the lower courts.

As the use of the doctrine evolved it appears to have been most often applied in narcotics cases. Marcus, 102 Yale L.J. at 2234 (citing *United States v. Nicholson*, 677 F.2d 706, 711 (9th Cir. 1982) (noting that deliberate ignorance is an integral part of the drug trade)). Commentators have pointed out that because the common law has never specified the level of awareness necessary to trigger criminal culpability, the application of the doctrine in cases, like drug cases, in which there is no legal duty to know the incriminating facts, can lead to unjust convictions where there is an innocent reason for the defendant's lack of knowledge. *Id*. at 2235.

Because of these problems, "many of the courts of appeals admonish that 'caution is necessary in giving a willful blindness instruction.'" *United States v. Alston-Graves*, 435 F.3d 331, 340-41 (D.C. Cir. 2006) (quoting *United States v. Cassiere*, 4 F.3d 1006, 1023 (1st Cir. 1993)). As the D.C. Circuit has explained, the cautionary language varies: "[s]ome [courts] say that such an instruction is 'rarely appropriate,' or only proper in … 'rare cases.' Others are 'wary of giving a willful blindness instruction,' or advise that the instruction be given only 'sparingly.'" *Alston-Graves*, 435 F.3d at 341 (citing cases).

The reason for this caution is simple: The instruction improperly invites the jury to "convict on a basis akin to a standard of negligence: that the defendant *should* have known that the conduct was illegal." *United States v. Rivera*, 926 F.2d 1564, 1571 (11th Cir. 1991); *see also United States v. Springer*, 262 Fed.

Appx. 703, 706 (6th Cir. 2008); *see generally Alston-Graves*, 435 F.3d at 340. Other Circuits have similarly held that the instruction can "reliev[e] the government of its constitutional obligation to prove the defendant's knowledge beyond a reasonable doubt." *United States v. Barnhart*, 979 F.2d 647, 652 (8th Cir. 1992) (improper use of willful blindness instruction affected defendant's constitutional right to proof beyond a reasonable doubt and required Circuit to vacate conviction and remand to trial court.)

The Sixth Circuit appropriately recognized these dangers and the need for caution, but its opinion did not heed the warning. In particular, the Sixth Circuit decision applied the deliberate ignorance doctrine beyond where any court seems to have taken it before, finding that the instruction could be given on the basis of a showing that accused "deliberately chose not to inform himself in preparing the submissions to the NRC." App. at 33a Such a holding conflicts with the decisions of other courts of appeals in two ways: (1) it eliminates any requirement that the accused's ignorance be motivated by the attempt to escape conviction; and (2) it applies a *per se* harmless error rule that ignores the very reasons why caution is necessary in giving the instruction. Both issues are worthy of this Court's review.

A. This Court Should Grant the Petition to Resolve a Conflict in the Circuits Over the Appropriate Circumstances for Instructing the Jury on a Theory of Deliberate Ignorance -- Namely, Whether Such an Instruction Must be Restricted to Cases Where Any "Ignorance" Was Motivated by the Attempt to Escape Conviction.

When it determined the deliberate ignorance instruction can be given upon a showing that a defendant "deliberately chose not to inform himself in preparing the submissions to the NRC," App. at 33a the panel ignored the absence of any evidence of motive to escape prosecution. Other courts of appeals, however, have squarely held that such a motive is an indispensible foundation for the giving of such an instruction. *See United States v. Puche,* 350 F.3d 1137, 1149 (11th Cir. 2003); *United States v. Willis,* 277 F.3d 1026, 1032 (8th Cir. 2002); *United States v. Delreal-Ordones,* 213 F.3d 1263, 1268-69 (10th Cir. 2000). By rejecting this requirement, the panel appears to have taken sides with a closely divided decision from the Ninth Circuit, *United States v. Heredia*, 483 F.3d 913 (9th Cir. 2007) (en banc), in which a bare majority rejected a motive requirement in deliberate ignorance cases.

Judge Kleinfeld's concurring opinion in *Heredia* showed the unfairness of abandoning the motive requirement. 483 F.3d at 924-25 (arguing that a deliberate ignorance instruction should include an instruction that the jury must find "a motivation to avoid criminal responsibility to be the reason for the lack of knowledge," otherwise the standard for crimi-

nal knowledge would be lower than that for a finding of evidentiary knowledge).

In a nutshell, Judge Kleinfeld's concurring opinion demonstrated why preservation of the motive requirement is necessary to prevent conviction of individuals purely on the basis of what they should have known, rather than the requisite *mens rea*. *Id*. at 929 (asserting that without the motive requirement, the deliberate ignorance instruction "supports convictions of persons whom Congress excluded from statutory coverage with the word 'knowingly.'").

This Court should grant the petition in order to confirm that the motive requirement must serve as a substantial, concrete requirement, which limits the giving of the deliberate ignorance instruction to the narrow set of circumstances from which it arose. Restricting the deliberate ignorance instruction to cases in which there is evidence that the defendant took affirmative steps to avoid gaining knowledge based on a motive to escape conviction will cabin the doctrine within its proper bounds. The doctrine can still be applied to paradigm situations in which a transporter of drugs denies knowledge of large quantities of contraband in his possession despite overwhelming circumstantial evidence creating a fair inference that the *only* reason the defendant did not know about the illegality was because he affirmatively closed his eyes in order to escape prosecution. *E.g.*, *United States v. Mari*, 47 F.3d 782, 783-84 (6th Cir. 1995) (driver of car containing 33 kilograms of cocaine made verifiably false statements about his reasons for being in Memphis and ultimately claimed that he did not know about contraband because he had been given the car he

was driving by a woman at Bible study class in Miami, who said he could drive the car to see his cousin in New York if he would first drop off patio furniture in Houston); *Heredia*, 483 F.3d at 917 (en banc) (driver of car containing 349.2 pounds of marijuana claimed that she had borrowed car from her aunt, and that obvious smell of detergent had been explained by the aunt has having come from spill in car a few days earlier); *United States v. Jewell*, 532 F.2d 697, 699 n.1 (9th Cir. 1976) (en banc) (defendant with 100 pounds of marijuana in car had smoked marijuana in bar in Mexico where he was offered $100 to drive car into the United States and drop it off at the address at which the vehicle was registered).

At the same time, preserving the motive requirement will prevent application of the doctrine to cases in which any ignorance could not conceivably have been motivated by a desire to escape conviction, and where many innocent reasons exist why someone would be "ignorant" of facts that could give rise to criminal knowledge. Failing to properly prepare for interactions with regulatory officials about the historical facts surrounding inspections of a portion of the plant falls directly within this category. Not only are there many innocent reasons why a mid-level employee who did not personally conduct the disputed inspections would be ignorant of the details of those inspections – even if he "should have known" the details as part of his management responsibilities – it is simply inconceivable that any individual could have been motivated to remain ignorant out of a desire to escape conviction. No criminal investigation was even contemplated at the time Mr. Geisen interacted with government regulators, and failing to fully assimilate historical

information about prior plant cleanings is not inherently criminal. While the panel does not address this issue at all, there is simply no evidence in this case that Mr. Geisen ever attempted to remain ignorant of prior plant cleanings in order to escape prosecution; indeed, virtually every one of the government's witnesses was a supervisor with at least as much exposure to the information regarding the cleanings as was Mr. Geisen; each denied knowledge of the falsity of the submissions and expressed ignorance of the prior cleanings. It is not a fair or rational inference from this evidence that the government's supervisory witnesses were ignorant for innocent reasons but that Mr. Geisen alone consciously remained in the dark to escape a conviction when possession of knowledge could not possibly have been thought to be criminal.

Because the critical motive factor was absent here, Mr. Geisen's case presents an excellent vehicle for addressing this issue, as it will allow the Court to draw the line beyond which deliberate ignorance instructions cannot go. If the Court adopts the "motive" rule that applies in at least three other circuits, it will be dispositive in Mr. Geisen's case.

B. The Court Should Grant the Petition to Resolve a Conflict in the Circuits over the Appropriate Harmless Error Standard for a Deliberate Ignorance Instruction that is Not Supported by the Evidence.

The second important question raised by this case arises from the Sixth Circuit's reaffirmation of *Mari*'s *per se* harmless error rule. That rule – which holds that erroneously giving a deliberate ignorance instruc-

tion is always harmless if the jury could properly have convicted on the basis of actual knowledge – conflicts with how other Circuits have addressed the question of when a deliberate ignorance instruction can be harmless. *See United States v. Stone*, 9 F.3d 934, 939-40 (11th Cir. 1993) ("We recognize that the Fifth, Eighth, and Ninth Circuits have reached a contrary conclusion on the issue of whether a deliberate ignorance instruction is harmless *per se*. *See, e.g., United States v. Barnhart*, 979 F.2d 647 (8th Cir. 1992); *United States v. Mapelli*, 971 F.2d 284 (9th Cir. 1992); *United States v. Ojebode*, 957 F.2d 1218, 1229 (5th Cir. 1992) (implicit holding); *United States v. Sanchez-Robles*, 927 F.2d 1070 (9th Cir. 1991); *United States v. Beckett*, 724 F.2d 855, 856 (9th Cir. 1984).")

The irony of *Mari*'s *per se* rule is that it prohibits reversal in cases like this one, where the recognized risks of the deliberate ignorance instruction are greatest. Although jurors are generally presumed to follow instructions, in a situation where substantial evidence exists of what a defendant "should have known," but no evidence exists to support a true finding of deliberate ignorance, a juror might find deliberate ignorance on the basis of what a defendant should have known. *See, e.g, United States v. Barnhart,* 979 F.2d 647, 651-52 (8th Cir. 1992). This is so, even where the instruction cautions not to convict on the basis of "negligence," a legal doctrine not immediately accessible to a lay juror. *Id.*

The divide in the Courts of Appeal is itself reflective of analytical difficulties in applying this Court's cases on when the submission of an unsupported legal theory to the jury can be harmless. *Mari*'s *per se* harmless

error rule relies on *Griffin v. United States*, 502 U.S. 46 (1991), which held that instructing jurors on alternative *factual* theories of liability, one of which is unsupported by the evidence, does not provide an independent basis for reversing an otherwise valid conviction. *Id.* at 59-60. But given the situation presented here, it is far from clear why the more appropriate rule is not the one of *Yates v. United States,* 354 U.S. 298 (1957), which held that constitutional error occurs when a jury is instructed on alternative theories of guilt and returns a general verdict that may rest on a legally invalid theory. As *Griffin* makes clear, its rule does not swallow the rule of *Yates*, since when "jurors have been left the option of relying upon a *legally inadequate* theory, there is no reason to think that their own intelligence and expertise will save them from that error." 502 U.S. at 59. (emphasis added).

In recent decisions, the Court has relied on *Yates*' rule in situations analogous to this one – where there are reasons to believe that a lay juror might well have convicted on the basis of its receipt of an invalid legal theory. *E.g.*, *Hedgpeth v. Pulido*, 555 U.S. 57 (2008) (applying *Yates* rule to circumstances where trial jury had been improperly instructed on alternative theories of intent); *Skilling v. United States*, 130 S. Ct. 2896 (2010) (Applying *Yates* rule to circumstances where trial jury improperly instructed on improper object of conspiracy). These decisions cast doubt on *Mari*'s *per se* rule and its reliance on *Griffin*. Moreover, to the extent the conflict in the circuits on this rule reflects the underlying difficulty in determining whether *Griffin* or *Yates* should apply to this situation, this divide

itself makes clear that it is one of extreme importance, worthy of this Court's corrective intervention.

This case also presents an excellent vehicle for addressing whether *Mari*'s *per se* rule correctly states the law. In denying Mr. Geisen's motion for a new trial, the district court did not attempt to defend giving the deliberate instruction but instead ruled solely on the ground of the *Mari* rule. The Court of Appeals also upheld the instruction in part based on *Mari*'s rule. Most importantly, though, the NRC decision exonerating Mr. Geisen of having actual knowledge of the falsity of the statements on the same facts under a civil standard, highlights the critical role the *Mari* rule played in insulating an otherwise indefensible verdict from appellate review. In this case, it is clear that *Mari*'s harmless-error-per-se rule was dispositive, making this a particularly appropriate case for examining the propriety of the rule itself.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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