

**MEMORANDUM IN SUPPORT OF DEFENDANT'S OBJECTION TO COURT'S  
INSTRUCTION**

Defendant objects to the Government's requests for a "deliberate ignorance" instruction, as such an instruction would be inappropriate and confusing to the jury on the facts of this case.

**I**

**A "DELIBERATE IGNORANCE" JURY INSTRUCTION WOULD BE A  
MISINTERPRETATION AND MISAPPLICATION OF *UNITED STATES V. JEWELL*,  
AND WOULD PERMIT THE JURY TO ERRONEOUSLY CONVICT DEFENDANT**

In United States v. Heredia, the Ninth Circuit clarified the scope and application of the "deliberate ignorance" or "willful blindness" instruction under United States v. Jewell, 532 F.2d 697 (9th Cir. 1976) (en banc). See United States v. Heredia, 483 F.3d 913 (9th Cir. 2007) (en banc). Heredia clarified that to warrant a Jewell instruction, the Government must show there is evidence indicating "that the defendant [1] was aware of a high probability that drugs were in the vehicle driven by the defendant and [2] deliberately avoiding learning the truth." Id. at 917. The Court stressed that the second prong of Jewell requires a mental state of higher intent than mere negligence or recklessness: "[W]illful blindness is categorically different from negligence or recklessness. . . . A willfully blind defendant is one who took *deliberate* actions to avoid confirming suspicions of criminality. A reckless defendant is one who merely knew of a substantial and unjustifiable risk that his conduct was criminal; a negligent defendant is one who should have had similar suspicions, but, in fact, did not." Id. at 918 n.4 (citations omitted).

In describing the required mental state to warrant a Jewell instruction, Heredia stated that "[a] deliberate action is one that is '[i]ntentional; premeditated; fully considered.'" Id. at 920 (quoting Black's Law Dictionary 459 (8th ed. 2004)). Consequently, if the facts show some factor which attenuates the deliberateness of the supposed acts of avoidance, then there is no

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factual basis for a willful blindness instruction. Specifically, Heredia indicated that "[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." Id. (footnote omitted). Thus, in Heredia, the defendant could counter the claim of deliberate ignorance by showing that she failed to investigate her suspicions, because at the time she entertained them, she could not safely pull to the side of the freeway to search the car. See id.

Heredia emphasized that a Jewell instruction is to be treated like any other theory-of-the-case instruction, that is, the instruction should be given only if it is supported by the law and facts of the case. See id. at 922; see also United States v. Aguilar, 80 F.3d 329, 332 (9th Cir. 1996) (en banc) (giving Jewell instruction was plain error where no evidence supported the willful blindness theory). Because this decision is dependent on the individual circumstances of the case before the trial judge, the district court has the authority to tailor the standard Jewell instruction (9th Cir. Model Jury Instruction 5.7 (2003)) to fit the specifics of the case. See Heredia, 483 F.3d at 920. For instance, the judge in Heredia could decide whether to instruct the jury that "it could find Heredia did not act deliberately if it believed that her failure to investigate was motivated by safety concerns." Id.

As regards the ability for the government to ask for Jewell as an alternative theory instruction in addition to actual knowledge, Heredia noted that the two theories are indeed factually "inconsistent." Id. at 922. However, as with other instances of alternative theories, the district court may give both if "the jury could rationally find willful blindness even though it has rejected the government's evidence of actual knowledge." Id. The Court found that a rational jury could accept Heredia's claim that she did not actually know about the drugs, but disbelieve her

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explanation of when she became suspicious or why she failed to stop the car to investigate. See id. at 923. Clearly, where the evidence indicates only that the defendant either actually knew or was totally ignorant, and nothing rationally supports the finding of a middle ground, then giving both instructions would be unjustified. See, e.g., United States v. Alvarado, 838 F.2d 311, 314 (9th Cir. 1987) (no evidence of willful blindness, only of actual knowledge); United States v. Beckett, 724 F.2d 855, 856 (9th Cir. 1984) (per curiam) (no evidence supporting a middle ground between actual knowledge and ignorance).

Although actual knowledge and willful blindness "are mutually exclusive" in reality, the Ninth Circuit held that giving the alternative, actual knowledge instruction, as well as the standard Jewell instruction in Heredia's case was not too confusing for the jury to sort through. See Heredia, 483 F.3d at 923. That was particularly so, because the district judge there had included the additional instruction that being "simply careless" did not suffice to show deliberate ignorance, and this ruled out the danger that the jury could have erroneously found mere recklessness or negligence on the defendant's part. See id. at 924.

Finally, Heredia noted that "[e]ven if the factual predicates of the instruction are present, the district judge has discretion to refuse it. In cases where the government does not present a deliberate ignorance theory, the judge might conclude that the instruction will confuse the jury. The same may be true where a defendant disputes only identity." Id. at 924. Consequently, the appropriateness and scope of a Jewell instruction is highly fact-dependent, and the district court must exercise its sound discretion in each case to determine whether the instruction is warranted on the facts, and then what shape the instruction should take to account for the specific case. See id.

There is absolutely no evidence in this case either that the defendant: (1) was aware that

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there was a high probability of drug smuggling or (2) deliberately took any steps to avoid learning the truth. The only conceivably suspicious circumstance is that another person offered the defendant \$200 to drive the car from Mexico into the United States at other than a designated checkpoint. No discussion regarding drugs took place. The defendant, in this case, had no reason to think that other items were in the trunk or that the trunk would be used to transport illegal drugs into the United States.

The Government may argue that a Jewell instruction is warranted, because the evidence suggests that the defendant may have had actual knowledge of the existence of, and his participation in, transactions involving the transportation of illegal drugs into the United States. Under Heredia, a Jewell instruction is appropriate as an alternative to actual knowledge only if a jury could rationally reject actual knowledge and yet find the two essential elements of the willful ignorance theory. Here, that is not the case.

The facts of Jewell, the seminal deliberate ignorance instruction case, stand in marked contrast to the facts presented here. In Jewell, the defendant acceded to the request of a third party to drive a vehicle from Mexico to Los Angeles under suspicious circumstances. 532 F.2d at 699 n.2. Jewell was ultimately arrested at the border and charged with possessing marijuana and bringing it into the United States. Id. at 698. During trial, Jewell indicated that he saw a compartment in the trunk of the vehicle in which the marijuana was discovered, but did not know the purpose of the compartment and made no further efforts to investigate its use. Id. A Drug Enforcement Administration agent testified, as well, that Jewell had stated:

[H]e thought there was probably something wrong and something illegal in the vehicle, but he checked it over. He looked in the glove box and under the front seat and in the trunk, prior to driving it. He didn't find anything, and, therefore, he assumed that the people at the border wouldn't find anything either.

Id. at 699 n.2. The trial court found an instruction on deliberate ignorance of evidence of a

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criminal activity appropriate, because the circumstances suggested that the defendant engaged in "a calculated effort to avoid the sanctions of the statute while violating its substance." Id. at 704 (quoting G. Williams, Criminal Law: The General Part, §57, n.6 at 159 (2d ed. 1961)).

In this case, however, no facts indicate that the defendant knew of the existence of a secret compartment within the vehicle containing marijuana, or that he spied suspicious circumstances which indicated his participation in criminal activity. Rather, the only evidence that the government has presented to warrant a Jewell instruction is evidence of a payment to the defendant to drive a car into the United States. No reasonable juror could find beyond a reasonable doubt that defendant was aware of a high probability of criminal conduct afoot and that he deliberately (i.e., by intentional, premeditated, or fully considered steps) avoided learning the truth. See Heredia, 483 F.3d at 919 n.6, 920.