15-628

No. 15-628

Supreme Court, U.S.
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In The
Supreme Court of the United States

BASSAM YACOUB SALMAN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit**

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the personal benefit to the insider that is necessary to establish insider trading under *Dirks v. SEC*, 463 U.S. 646 (1983), require proof of "an exchange that is objective, consequential, and represents at least a potential gain of a pecuniary or similarly valuable nature," as the Second Circuit held in *United States v. Newman*, 773 F.3d 438 (2d Cir. 2014), *cert. denied*, No. 15-137 (U.S. Oct. 5, 2015), or is it enough that the insider and the tippee shared a close family relationship, as the Ninth Circuit held in this case?

2. Can failure to investigate suspicious circumstances, without more, constitute the "deliberate actions" to avoid knowledge that this Court found necessary to establish willful blindness in *Global-Tech Appliances, Inc. v. SEB S.A.*, 131 S. Ct. 2060 (2011)?

PARTIES TO THE PROCEEDING

The parties to the proceeding in the United States Court of Appeals for the Ninth Circuit were Petitioner Bassam Yacoub Salman and Respondent United States of America.

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PETITION FOR A WRIT OF CERTIORARI

Bassam Yacoub Salman petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The court of appeals' opinion addressing the first question presented (App. 1-17) is reported at 792 F.3d 1087. The court of appeals' opinion addressing the second question presented (App. 18-25) is unreported. The district court's opinions denying petitioner's motion for release pending appeal (App. 26-33) and denying his motion for new trial (App. 34-52) are unreported.

JURISDICTION

The court of appeals entered judgment on July 6, 2015. App. 1. The court denied a timely petition for rehearing en banc on August 13, 2015. App. 53. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

This case does not involve interpretation of statutory or constitutional provisions.

INTRODUCTION

In *United States v. Newman*, 773 F.3d 438 (2d Cir. 2014), the Second Circuit declared that the personal benefit to the insider necessary for an insider trading conviction requires "an exchange that is objective, consequential, and represents at least a potential gain of a pecuniary or similarly valuable nature." *Id.* at 452. The Solicitor General filed a petition for writ of certiorari. In the petition, the Solicitor General highlighted the conflict between *Newman* and the Ninth Circuit's decision in this case and emphasized the importance of the Second Circuit's decision to the financial markets and the investing public. The respondents argued in opposition that *Newman* presented a poor vehicle for resolving the definition of "personal benefit," because the Second Circuit had rested its decision on an independent ground (the defendants' lack of knowledge of any personal benefit)--so even a ruling in the government's favor would not change the outcome. The Court denied the government's petition. *United States v. Newman*, No. 15-137 (U.S. Oct. 5, 2015).

This case presents the ideal vehicle for resolving the important question on which the Solicitor General sought review in *Newman*. Here, unlike in *Newman*, resolution of the question is indisputably outcome-determinative. If a close family relationship between the insider and the tippee is enough to establish a personal benefit for the insider, as the Ninth Circuit held here, then Salman loses. But if there must be "an exchange that is objective, consequential, and represents at

least a potential gain of a pecuniary or similarly valuable nature," as the Second Circuit held in *Newman*, then Salman prevails, because there is no evidence of such an exchange here between the insider and the tippee.

This case also presents an excellent vehicle for resolving a second question that has fractured the lower courts: the showing necessary for a willful blindness instruction following this Court's decision in *Global-Tech Appliances, Inc. v. SEB S.A.*, 131 S. Ct. 2060 (2011).[1] In *Global-Tech*, the Court held that willful blindness exists only when the defendant takes "deliberate actions" or "active steps" to avoid knowledge. *Id.* at 2070. Following *Global-Tech*, the Seventh Circuit has held that a willful blindness instruction "should not be given unless there is evidence that the defendant engaged in behavior that could reasonably be interpreted as having been intended to shield him from confirmation of his suspicion that he was involved in criminal activity." *United States v. Macias*, 786 F.3d 1060, 1062 (7th Cir. 2015). Other circuits have revised their pattern jury instructions to reflect the *Global-Tech* "deliberate actions" requirement. But the Second, Eighth, and Ninth Circuits adhere to the position that a failure to investigate suspicious circumstances suffices to establish willful blindness, and the First, Fifth, and Eleventh Circuits have approved instructions that omit the "deliberate actions"

[1] The lower courts in this case used the phrase "deliberate ignorance" to describe the instruction at issue. Other courts have used the terms "conscious avoidance" and "willful blindness." We use "willful blindness," because that is the phrase the Court adopted in *Global-Tech*.

requirement. Because it is undisputed that Salman, a remote tippee, took no action to avoid knowledge, but merely failed to investigate the source of stock tips he received from the insider's immediate tippee, this case affords the Court an opportunity to clarify *Global-Tech* and to resolve this split.

STATEMENT OF THE CASE

The grand jury indicted petitioner Bassam Salman on four substantive counts of insider trading and one count of conspiring to engage in insider trading. ER 311.[2] The charges rested on the theory that Salman was a remote tippee. The government alleged that Citigroup investment banker Maher Kara passed confidential information to his brother Mounir ("Michael") Kara, who was not an insider; that Michael passed the information to Salman, in the form of stock recommendations; and that Salman traded on the recommendations through an account that he shared with his brother-in-law Karim Bayyouk.

To prove its case against Salman, the government struck plea deals with Maher and Michael Kara. Maher testified that he provided inside information to Michael on several occasions, but he did not say that he discussed stocks with Salman, and he denied knowing that Michael was passing the inside information on to others. ER 246. Michael testified that he told Salman that Maher was the source of the recommendations, *e.g.*, ER 193-96, 223-26, 232-33, but he was heavily impeached

[2] "ER" refers to the Excerpts of Record filed in the court of appeals.

and his testimony on this point was uncorroborated. The government also presented what it argued was circumstantial evidence of Salman's knowledge, including the fact that he traded through an account in Bayyouk's name, rather than in his own name.

I. THE "PERSONAL BENEFIT" TO MAHER KARA.

Among the elements necessary to convict a remote tippee such as Salman of insider trading are (1) that the insider (here, Maher Kara) personally benefitted from the disclosure of confidential, material, nonpublic information, and (2) that the defendant tippee (Salman) knew that the insider had personally benefitted from the disclosure. *E.g.*, App. 58-59 (district court's jury instruction). The district court instructed the jury, without objection, that "personal benefit" to the insider included "the benefit one would obtain from simply making a gift of confidential information to a trading relative or friend." App. 61.

Consistent with this understanding of "personal benefit," Maher Kara testified that in 2002 he began secretly sharing with Michael confidential information he learned at Citigroup. At first, Maher sought Michael's assistance in understanding the biotech industry. Later, Michael began to press him for information, and Maher reluctantly provided it, hoping that Michael was not using the information to trade. Finally, under continuing pressure from Michael, Maher provided him with confidential information knowing that Michael would trade--even though Michael swore on his daughter's life that he

would not. ER 239, 250-51. Maher provided this information, he testified, to get Michael off his back. ER 240-41. Maher explained: "The way that I thought I was helping myself was just by getting him off my back, and fulfilling whatever needs he had." ER 240; *see* T. 447-49 (Maher acted to help Michael and to benefit himself by getting Michael off his back).

Shortly after Salman filed his reply brief in the court of appeals, the Second Circuit decided *Newman*. *Newman* (in the government's words) "crafted a new, stricter personal benefit test."[3] The Second Circuit noted that it had previously defined "personal benefit" to include "the benefit one would obtain from simply making a gift of confidential information to a trading relative or a friend"--the same standard applied in Salman's case. *Newman*, 773 F.3d at 452. But the court imposed an important limit on that standard:

> This standard, although permissive, does not suggest that the Government may prove the receipt of a personal benefit by the mere fact of a friendship, particularly of a casual or social nature. If that were true, and the Government was allowed to meet its burden by proving that two individuals were alumni of the same school or attended the same church, the personal benefit requirement would be a nullity. To the extent *Dirks* [*v. SEC*, 463 U.S. 646 (1983)] suggests that a personal benefit may be inferred from a personal relationship between the tipper and tippee, where the tippee's trades "resemble trading by the insider himself followed by a gift of the profits to the recipient," *see* 463 U.S. at 664, we hold that such an inference is impermissible in the absence of proof of a *meaningfully close personal relationship that generates an exchange that is objective, consequential, and represents at least a potential gain of a pecuniary or similarly valuable nature.*

Id. (emphasis added).

Applying this standard, *Newman* found the evidence of personal benefit insufficient. One of the insiders had received "career advice" in exchange for confidential information, and the other merely had a "casual acquaintance[]" with his tippee. *Id.* at 453. Neither participated in an "exchange that [was] objective, consequential, and represent[ed] at least a potential gain of a pecuniary or similarly valuable nature." *Id.* at 452. The Second Circuit similarly found the evidence insufficient that the defendants knew the insiders were personally benefitting from

[3] *United States v. Newman*, No. 15-137, Petition for a Writ of Certiorari at 18 ["Government *Newman* Petition"]; *see also United States v. Newman*, No. 13-1837 (2d Cir.), Petition of the United States of America for Rehearing and Rehearing *En Banc* at 9 (filed Jan. 23, 2015, Doc. 279) (*Newman* "constricted" the existing understanding of "personal benefit" and gave the phrase a "narrow definition"); *id.*, Brief for the Securities and Exchange Commission as Amicus Curiae Supporting the Petition of the United States for Rehearing or Rehearing En Banc at 13 (filed Jan. 29, 2015, Doc. 298) (referring to *Newman*'s "narrowed personal benefit standard").

disclosure of the confidential information. *See id.* at 453-54. For both of these reasons, the court reversed both the substantive insider trading counts and a conspiracy count. *See id.* at 455.

With leave of the court of appeals, Salman filed a supplemental brief arguing that the evidence of personal benefit to Maher Kara (and Salman's knowledge of the personal benefit) was insufficient under *Newman*. Although Maher's testimony established that he "ma[de] a gift of confidential information to a trading relative," there was no evidence that he engaged in an "exchange [with Michael] that is objective, consequential, and represents at least a potential gain of a pecuniary or similarly valuable nature." *Newman*, 773 F.3d at 452. Maher received nothing from disclosing the confidential information to Michael except the scant comfort of getting Michael off his back. That "benefit" is not "objective"; it is not "consequential"; and it does not "represent at least a potential gain of a pecuniary or similarly valuable nature." It is therefore insufficient to satisfy the "personal benefit" element of an insider trading offense, as interpreted in *Newman*.

The Ninth Circuit panel (in a published opinion authored by visiting Judge Rakoff) declined to follow the *Newman* requirement that the government prove that the sibling relationship between Maher Kara and Michael Kara "generate[d] an exchange that is objective, consequential, and represents at least a potential gain of a pecuniary or similarly valuable nature." App. 15 ("To the extent *Newman* can be read to go so far, we decline to follow

it."). Instead, based on its reading of *Dirks v. SEC*, 463 U.S. 646 (1983), the panel found it sufficient if the government proved that Maher Kara "'ma[de] a gift of confidential information to a trading relative or friend.'" App. 16 (quoting *Dirks*, 463 U.S. at 664) (emphasis omitted). Because the government met this burden (construing the evidence in the light most favorable to the verdict), the panel affirmed Salman's conviction. App. 16-17.

II. THE WILLFUL BLINDNESS INSTRUCTION.

Although the government contended that Salman actually knew Maher Kara was the source of Michael's stock recommendations, it nonetheless requested a willful blindness instruction. At the pretrial conference, the government appeared to recognize that willful blindness requires the defendant to take active steps to avoid knowledge. It urged the district court to await the evidence at trial before deciding whether to give the instruction. The government argued:

> If the conversation between Mr. [Michael] Kara and Mr. Salman is: I have a great tip for you, and Mr. Salman says: Don't tell me where that came from, I don't want to know, that's the equivalent of willfulness. I do think there are facts that could be developed at the trial that would support this instruction.

ER 277.

At trial, however, the government presented no evidence that Salman asked Michael not to tell him the source of his stock recommendations, as the government had posited at the pretrial conference, or took other "deliberate actions" or "active steps" to avoid knowledge that Maher was the source of Michael's recommendations, as this Court required in *Global-Tech*. Instead, the government relied solely on the *absence* of action--Salman's failure to "ask[] questions" about Michael's recommendations. Doc. 244 at 2; *see* ER 73-75 (government argues that failure to investigate constitutes "deliberate action" under *Global-Tech*).

Salman objected to the deliberate ignorance instruction, because the government had not established a factual predicate for it. Doc. 156 at 4-6; ER 132-37, 256-60. Of particular significance, defense counsel declared: "There will be no evidence that Mr. Salman *did* anything to deliberately avoid learning of any illegality. . . . [T]here will not be any evidence that Mr. Salman took *any deliberate* actions to avoid learning the truth." ER 259-60 (emphasis in original); *see* ER 136-37 (same). The district court overruled these objections, *e.g.*, App. 28-32, 44-46, and gave the willful blindness instruction, App. 60.

On appeal, Salman contended that the district court erred in giving the willful blindness instruction, because he did not take "deliberate actions" or "active steps" to avoid knowledge, as *Global-Tech* requires. The Ninth Circuit rejected Salman's contention. The court of appeals held that "at least under circumstances where a reasonable person would make further inquiries, '[a] failure to

investigate can be a deliberate action.'" App. 24 (quoting *United States v. Ramos-Atondo*, 732 F.3d 1113, 1119 (9th Cir. 2013)). The panel concluded that a reasonable person in Salman's position would have sought to discover the source of Michael Kara's information, and thus it found the evidence sufficient to warrant a willful blindness instruction. App. 24-25.

REASONS FOR GRANTING THE WRIT

The Court should grant the writ to decide the two important questions this case presents, both of which have produced circuit splits: the nature of the personal benefit an insider must receive for an insider trading offense, and whether inaction--a mere failure to investigate--constitutes the "deliberate action" necessary for willful blindness.

I. PERSONAL BENEFIT.

1. In its petition for a writ of certiorari in *Newman*, the government argued that the *Newman* personal benefit definition "cannot be reconciled with *Dirks*," "created a conflict with circuits that have faithfully applied *Dirks*," and threatened to "hurt market participants, disadvantage scrupulous market analysts, and impair the government's ability to protect the fairness and integrity of the securities markets." Government *Newman* Petition at 14-15. In its reply, the government added that

Newman "created an upheaval in insider-trading law by rewriting the settled test announced in" *Dirks*.[4]

Addressing the conflict in the circuits on the personal benefit issue, the government cited and discussed Salman's case. *Id.* at 22-24; Government *Newman* Reply at 4-5. It declared that "[t]he Ninth Circuit . . . rejected the novel personal benefit test fashioned by" the Second Circuit in *Newman*. *Id.* at 23. The government noted that the Seventh Circuit decision in *SEC v. Maio*, 51 F.3d 623 (7th Cir. 1995), also conflicts with *Newman*. Government *Newman* Petition at 24-25.

The government stressed the importance of prompt intervention by this Court. It declared that "[d]elay in [overturning the *Newman* personal benefit standard] will result in continuing and serious harm." *Id.* at 26; *see* Government *Newman* Reply at 9 ("Absent this Court's intervention, the Second Circuit's redefinition of the personal-benefit standard will result in significant harm--restricting enforcement of the securities laws against culpable actors, spurring fraudulent activity, undermining the necessary work of legitimate analysts, depriving the financial community of guidance on how to comply with the law, and decreasing public confidence in the securities markets.").

2. In their oppositions to certiorari, the *Newman* respondents maintained that the case presented a poor vehicle for resolving the contours of the personal benefit necessary for insider trading.

[4] *United States v. Newman*, No. 15-137, Reply Brief for the Petitioner, at 1 ["Government *Newman* Reply"].

As Newman put it, "[E]ven if this Court were to agree with the government that the Second Circuit misstated the type of evidence required to support an inference of a benefit, the decision dismissing the indictment on the independent ground that Newman did not know of any benefit would stand."[5] On October 5, 2015, this Court denied the government's petition in *Newman*. *United States v. Newman*, No. 15-137.

3. Contrary to the government's position in *Newman*, the Second Circuit's approach does not conflict with *Dirks*. The *Dirks* Court intended the "personal benefit" requirement to place a meaningful limitation on the otherwise broad sweep of the insider's fiduciary duty. As the Court put it: "[A] purpose of the securities laws was to eliminate use of inside information for personal advantage. Thus, the test is whether the insider personally will benefit, directly or indirectly, from his disclosure. Absent some personal gain, there has been no breach of duty to stockholders. And absent a breach by the insider, there is no derivative breach [by the tippee]." *Dirks*, 463 U.S. at 662 (quotation and citations omitted). The "personal benefit" limitation is particularly important in criminal cases, where liberty is at stake and where the prohibition against vague, judge-made laws is at its greatest. By

[5] *United States v. Newman*, No. 15-137, Brief for Todd Newman in Opposition, at 2; *see id.*, Brief for Respondent Anthony Chiasson in Opposition, at 2 ("This Court's review would prolong this ordeal for no reason: The outcome of this case would be the same, whether or not this Court agreed with the Government's misreading of the decision below. That is because the question presented implicates just one of two independent grounds for the judgment below . . . .").

reading the personal benefit requirement strictly, *Newman* ensures that the criminal sanction will be deployed only where it clearly applies.

4. Although the government misread *Dirks* in its *Newman* petition, it was correct that the personal benefit standard warrants prompt review by this Court. As the government observed, the square conflict between the Second Circuit on one hand and the Seventh and Ninth Circuits on the other "raises the specter of uneven enforcement of the securities laws against individuals who are all participating in the same nationwide capital markets." Government *Newman* Petition at 25. That "uneven enforcement" will only deepen as the courts of appeals choose between the Second Circuit's *Newman* approach on one hand and the Ninth Circuit's *Salman* approach on the other. As the government argued in *Newman*, this Court's review "is urgently needed to restore certainty and order" to the law of insider trading. Government *Newman* Reply at 12.

5. This case presents the identical issue on which the government sought review in *Newman*. Unlike in *Newman*, however, the issue is outcome-determinative here. If a close family relationship between the insider and the tippee is enough to establish a personal benefit for the insider, as the Ninth Circuit held, then Salman loses. Such a relationship plainly existed between Maher and Michael Kara, and Salman knew of that relationship. But if there must be "an exchange that is objective, consequential, and represents at least a potential gain of a pecuniary or similarly valuable

nature," as the Second Circuit held in *Newman*, then Salman prevails, because there is no evidence of such an exchange between Maher and Michael Kara and no evidence that Salman knew of such an exchange.

II. WILLFUL BLINDNESS.

The Court should also grant the writ to address a recurring question that has split the circuits: whether, following *Global-Tech*, a willful blindness instruction can be given where the government shows only that the defendant unreasonably failed to investigate suspicious circumstances, without taking any "deliberate actions" or "active steps" to avoid knowledge. The Ninth Circuit's conclusion that *inaction*--an unreasonable failure to investigate--constitutes "deliberate action" confuses deliberate indifference with willful blindness, contrary to *Global-Tech*, and it obliterates the careful distinction *Global-Tech* drew between willful blindness (which is tantamount to knowledge) and recklessness and negligence (which are not).

1. In *Global-Tech*, this Court defined the elements of willful blindness as follows: "(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." 131 S. Ct. at 2070 (emphasis added). The Court emphasized the requirement that the defendant take "deliberate actions" to avoid learning the key fact. It declared: "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." *Id.* at 2070-71 (emphasis added); *see, e.g., Macias*, 786 F.3d at 1062 ("An ostrich instruction should not be given unless there is evidence that the defendant engaged in behavior that could reasonably be interpreted as having been intended to shield him from confirmation of his suspicion that he was involved in criminal activity.") (citing *Global-Tech*).

Global-Tech faulted the Federal Circuit for requiring only "deliberate indifference": "[I]n demanding only 'deliberate indifference' to that risk [that the disputed fact existed], the Federal Circuit's test does not require *active efforts* by an inducer to avoid knowing [the fact]." *Global-Tech*, 131 S. Ct. at 2071 (emphasis added).[6] The Court found the evidence sufficient to support a finding of willful blindness, because the jury could have inferred that the defendant "took *deliberate steps* to avoid knowing [the disputed] fact." *Id.* at 2072 (emphasis added).

2. The record is devoid of evidence that Salman took "deliberate actions" or "active steps" to

[6] In a hearing shortly before trial, the district court and the government referred to the willful blindness instruction as a "deliberate indifference" instruction. ER 276. The district court used this formulation again when overruling Salman's objections to the instruction, ER 42, and again during the argument on Salman's motion for new trial, ER 76. The district court thus used the exact formulation that this Court rejected in *Global-Tech*.

avoid knowledge that Maher Kara was the source of Michael Kara's stock recommendations. The Ninth Circuit found the willful blindness instruction appropriate based on what it deemed Salman's unreasonable failure to investigate the source of Michael's tips. App. 23-24. But the court's ruling on this point cannot be squared with *Global-Tech*. If "deliberate indifference" is not enough for willful blindness, as *Global-Tech* held, then the court of appeals' even less demanding standard of an unreasonable failure to investigate cannot be enough.

The Ninth Circuit's approach collapses the distinction *Global-Tech* drew between recklessness and negligence on one hand and willful blindness on the other. This Court sought to "give willful blindness an appropriately limited scope that surpasses recklessness and negligence." *Global-Tech*, 131 S. Ct. at 2070. A reckless defendant, according to the Court, "knows of a substantial and unjustified risk of . . . wrongdoing." *Id.* at 2071. Recklessness corresponds to the first prong of the willful blindness standard--"subjective belie[f] that there is a high probability that a fact exists."

The second prong of willful blindness--the "deliberate actions" requirement--is thus what distinguishes the reckless defendant from the willfully blind defendant. A reckless defendant knows of a substantial risk that a fact exists and does nothing about it (or, put differently, is indifferent to it). A willfully blind defendant knows of a substantial risk (or "high probability") that a fact exists and takes deliberate actions to avoid

confirming the fact. But if inaction equals action, as the court of appeals concluded, then this Court's carefully drawn distinction vanishes; a reckless defendant who does not investigate the "substantial and unjustified risk of wrongdoing"--by definition, *every* reckless defendant--will be found willfully blind.

3. The Ninth Circuit's approach not only permits conviction of the merely reckless defendant, contrary to *Global-Tech*; it permits conviction based on the even lower negligence standard. The court of appeals found that a failure to investigate suspicious circumstances constitutes willful blindness "at least under circumstances where a reasonable person would make further inquiries." App. 24.[7] As this Court recently observed, a "'reasonable person' standard is a familiar feature of civil liability in tort law, but is inconsistent with 'the conventional requirement for criminal conduct--*awareness* of some wrongdoing.'" *Elonis v. United States*, 135 S. Ct. 2001, 2011 (2015) (quoting *Staples v. United States*, 511 U.S. 600, 606-07 (1994) (emphasis added by

[7] By contrast, in *Macias* the Seventh Circuit left open the possibility that willful blindness could rest on a failure to investigate where there is "a ducking of responsibility, a violation of duty, and perhaps therefore the equivalent of taking evasive action to avoid confirming one's suspicions." 786 F.3d at 1063. But the court found that this possible standard had not been satisfied, because the defendant's "responsibilities to the drug cartel, which had only to do with facilitating the transmission of money from the United States to Mexico, did not require him to know how the money had been obtained. Having no need or duty to know, he was not acting unnaturally in failing to inquire." *Id.* at 1064. Even if the *Macias* "need or duty to know" standard is correct, it is far more stringent than the "reasonable person" standard that the Ninth Circuit embraced.

Elonis; internal quotation omitted)). By permitting a finding of willful blindness based on a defendant's unreasonable failure to investigate suspicious circumstances, the Ninth Circuit adopted the very negligence standard *Global-Tech* rejected and placed itself squarely in conflict with this Court.

4. The Ninth Circuit's decision also conflicts with the Seventh Circuit's decision in *Macias*. In that case, a former smuggler of illegal immigrants was recruited to smuggle drug profits from the United States to Mexico. He was indicted for participating in a drug distribution conspiracy. His defense was that he thought the money came from immigrant smuggling and did not know it represented drug proceeds. *See* 786 F.3d at 1061. The government sought and obtained a willful blindness instruction. On appeal, the Seventh Circuit found the instruction improper, because "[t]here is no evidence that suspecting he might be working for a drug cartel Macias took active steps to avoid having his suspicions confirmed." *Id.* at 1063; *see also, e.g., United States v. L.E. Myers Co.*, 562 F.3d 845, 854 (7th Cir. 2009) ("Failing to display curiosity is not enough; the defendant must affirmatively *act* to avoid learning the truth.") (quotation omitted; emphasis in original).

For the reasons stated in *Macias*, the willful blindness instruction should not have been given in this case. Even if Salman suspected that Michael Kara was obtaining stock tips from his brother Maher, there is no evidence that Salman "took active steps to avoid having his suspicions confirmed." *Macias*, 786 F.3d at 1063. The Ninth Circuit's

decision upholding the willful blindness instruction thus cannot be reconciled with *Macias*.

5. Other circuits have had varied responses to *Global-Tech*. The Third Circuit revised its criminal pattern jury instructions to include the "deliberate actions" requirement.[8] By contrast, the Second and Eighth Circuits have held, consistent with the Ninth Circuit's view in this case, that a failure to investigate satisfies the *Global-Tech* "deliberate actions" standard.[9] The First, Fifth, Sixth, and Eleventh Circuits have upheld willful blindness instructions that omit any requirement that the defendant take deliberate actions to avoid knowledge.[10]

[8] Third Circuit Model Criminal Jury Instructions § 5.06 (2014); *see also* Pattern Criminal Jury Instructions of the Seventh Circuit, Instruction 4.10, Committee Comment (2012 ed.) (commentary to criminal pattern instructions notes that *Global-Tech* "provided an arguably narrower definition of the sort of willful blindness that equates to knowledge" and suggests that district judges "consider" whether to adopt the *Global-Tech* definition). The Eighth Circuit has also modified its pattern instruction to include the "deliberate actions" requirement. Manual of Model Criminal Jury Instructions for the District Courts of the Eighth Circuit § 7.04 (2013). As noted in text, however, that court has recently found a failure to investigate to be consistent with *Global-Tech*.

[9] *See, e.g. United States v. Hansen*, 791 F.3d 863, 868-69 (8th Cir. 2015); *United States v. Whitman*, 555 Fed. Appx. 98, 104-06 (2d Cir.), *cert. denied*, 135 S. Ct. 352 (2014); *United States v. Goffer*, 721 F.3d 113, 128 (2d Cir. 2013), *cert. denied*, 135 S. Ct. 63 (2014).

[10] *United States v. Reichert*, 747 F.3d 445, 449-51 (6th Cir. 2014); *United States v. Grant*, 521 Fed. Appx. 841, 848 (11th Cir. 2013); *United States v. Denson*, 689 F.3d 21, 24-25 (1st Cir. 2012), *cert. denied*, 133 S. Ct. 996 (2013); *United States v. Brooks*, 681 F.3d 678, 702-03 (5th Cir. 2012), *cert. denied*, 133 S. Ct. 836 (2013).

6. This case presents an ideal vehicle to resolve the division in the circuits over the *Global-Tech* "deliberate actions" requirement. As detailed above, Salman thoroughly preserved his objection to the willful blindness instruction. And the erroneous instruction was not harmless. The instruction "went to the heart and most hotly contested aspect of the case," *L.E. Myers*, 562 F.3d at 855 (willful blindness instruction not harmless): whether Salman knew that Maher Kara was the source of Michael Kara's stock recommendations.

This is not a case where evidence of actual knowledge was overwhelming. To the contrary, the government's actual knowledge theory "was beset by numerous and obvious problems." *United States v. Ciesiolka*, 614 F.3d 347, 355 (7th Cir. 2010) (willful blindness instruction not harmless). Most significantly, the only prosecution witness who provided direct evidence of Salman's knowledge--Michael Kara--had enormous credibility problems, ranging from the deal he had cut with the government to resolve his own criminal case to his prior inconsistent statements to his lies to Maher to delusions he suffered as a result of his mental illness and the drugs used to treat it. *See, e.g., United States v. Kaiser*, 609 F.3d 556, 567 (2d Cir. 2010) (erroneous willful blindness instruction not harmless where "there was ample reason for the jury to question the credibility of the government's witnesses" on actual knowledge). Given Michael Kara's shredded credibility, and under the other circumstances of this case, the erroneous willful blindness instruction was not harmless.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee*, v. BASSAM YACOUB SALMAN, AKA Bessam Jacob Salman, *Defendant-Appellant*.	No. 14-10204 D.C. No. 3:11-CR-00625-EMC-1 OPINION

Appeal from the United States District Court
for the Northern District of California
Edward M. Chen, District Judge, Presiding

Argued and Submitted
June 9, 2015 – San Francisco, California

Filed July 6, 2015

Before: Morgan Christen and
Paul J. Watford, Circuit Judges, and
Jed S. Rakoff, Senior District Judge.*

Opinion by Judge Rakoff

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* The Honorable Jed S. Rakoff, Senior District Judge for the U.S. District Court for the Southern District of New York, sitting by designation.