
RECENT CASES

CRIMINAL LAW — WILLFUL BLINDNESS — NINTH CIRCUIT HOLDS THAT MOTIVE IS NOT AN ELEMENT OF WILLFUL BLINDNESS. — *United States v. Heredia*, 483 F.3d 913 (9th Cir.) (en banc), *cert. denied*, 76 U.S.L.W. 3303 (U.S. Dec. 11, 2007) (No. 07-5762).

The doctrine of “willful blindness,” though well established in American criminal law,¹ leaves one with “a lurking sense that something is fundamentally awry.”² It has given rise to a large and conflicting body of case law, as courts have struggled with its relation to statutory knowledge. Recently, in *United States v. Heredia*,³ the Ninth Circuit revisited willful blindness. In an effort to “clear away the underbrush” of the “vexing thicket of precedent” surrounding the doctrine,⁴ the court held that motive was not an element of willful blindness.⁵ In doing so, the court disposed of an important protection meant to prevent defendants from being convicted on a lower mens rea standard than that required by the relevant statute.

Carmen Heredia’s troubles began when she agreed to drive her mother and aunt, accompanied by two of her children, from Nogales, Arizona, to her mother’s home in Tucson.⁶ On entering the car, which was owned by her aunt, Heredia noticed a strong smell of detergent. Her aunt told her that she had spilled fabric softener in the car a few days earlier, an explanation that seemed unlikely to Heredia.⁷ As she

¹ Willful blindness has had a significant impact on the American legal landscape since the Model Penal Code included it in its definition of knowledge. See MODEL PENAL CODE § 2.02(7) (Proposed Official Draft 1962) (“When knowledge of the existence of a particular fact is an element of an offense, such knowledge is established if a person is aware of a high probability of its existence, unless he actually believes that it does not exist.”); see also Ira P. Robbins, *The Ostrich Instruction: Deliberate Ignorance as a Criminal Mens Rea*, 81 J. CRIM. L. & CRIMINOLOGY 191, 200 (1990). Use of the doctrine increased with the number of arrests for drug crimes, as defendants often claimed that they did not know they were in possession of contraband. See *id.* at 199–200 (noting that the deliberate ignorance “loophole” provided a convenient defense to drug traffickers); see also *United States v. Jewell*, 532 F.2d 697, 703 (9th Cir. 1976) (en banc) (justifying the use of the willful blindness doctrine in light of the “growing menace of drug abuse in the United States” and the ease with which “those who traffic in drugs would make the most of” a requirement of actual knowledge).

² Robin Charlow, *Willful Ignorance and Criminal Culpability*, 70 TEX. L. REV. 1351, 1353 (1992).

³ 483 F.3d 913 (9th Cir.) (en banc), *cert. denied*, 76 U.S.L.W. 3303 (U.S. Dec. 11, 2007) (No. 07-5762).

⁴ *Id.* at 919.

⁵ See *id.* at 919–20.

⁶ *United States v. Heredia*, 429 F.3d 820, 822–23 (9th Cir. 2005). The relevant facts were “subject to much dispute by the witnesses.” *Id.* at 822.

⁷ *Id.* at 823. A DEA agent testified that Heredia had told him that she noticed the smell and did not believe her aunt’s explanation. Although Heredia at trial denied noticing the smell, the

was driving, Heredia noticed that her aunt and mother “both appeared nervous” and were “acting strangely.”⁸ Knowing that her mother’s boyfriend used narcotics and that her mother and aunt possessed unusually large amounts of cash, Heredia began to suspect that there were illegal drugs in the car. By this point, however, she was on an interstate highway and could not investigate further without stopping the car on the shoulder of the road.⁹ At a border patrol checkpoint, agents alerted by the strong odor of detergent emanating from the car found approximately 350 pounds of marijuana in the trunk.¹⁰ The marijuana was covered with dryer sheets — a method used by drug traffickers to mask the pungent smell of the drug.¹¹

Heredia was arrested and charged under 21 U.S.C. § 841(a) with knowingly possessing contraband with the intent to distribute.¹² At trial, the U.S. District Court for the District of Arizona instructed the jury on two alternative theories: that Heredia actually knew that there was marijuana in the car, and that she had been deliberately ignorant of the marijuana’s presence.¹³ The court gave the following willful blindness instruction:

You may find that the defendant acted knowingly if you find beyond a reasonable doubt that the defendant was aware of a high probability that drugs were in the vehicle driven by the defendant and deliberately avoided learning the truth. You may not find such knowledge, however, if you find that the defendant actually believed that no drugs were in the vehicle driven by the defendant, or if you find that the defendant was simply careless.¹⁴

The jury found Heredia guilty.¹⁵

The Ninth Circuit reversed and remanded. Writing for the panel, Judge Bybee¹⁶ stated that Ninth Circuit precedent restricted use of a willful blindness instruction to those instances in which the government provided specific evidence that the defendant “(1) actually suspected that he or she might be involved in criminal activity, (2) deliberately avoided taking steps to confirm or deny those suspicions, and

appeals court, for the purpose of evaluating the propriety of the jury instructions, accepted as true those facts that supported the government’s theory. *Id.* at 826 n.1.

⁸ Heredia’s aunt was drinking alcohol, and her mother was smoking “more than usual.” *Id.* at 823. When Heredia asked her mother to stop smoking, her mother sprayed air freshener in the car before opening the window. *Id.*

⁹ *Id.*

¹⁰ *Id.* at 822.

¹¹ *Id.*

¹² *Heredia*, 483 F.3d at 917.

¹³ *Id.*

¹⁴ *Id.* The instructions were taken from COMM. ON MODEL JURY INSTRUCTIONS, MANUAL OF MODEL CRIMINAL JURY INSTRUCTIONS FOR THE NINTH CIRCUIT § 5.7 (2003).

¹⁵ *Heredia*, 429 F.3d at 822.

¹⁶ Judge Fletcher joined Judge Bybee’s opinion.

(3) did so in order to provide himself or herself with a defense in the event of prosecution.”¹⁷ The government, Judge Bybee determined, had not provided sufficient evidence for the third, motive prong.¹⁸ Initially, the odor of detergent was insufficient to alert Heredia to potential criminality, and the circumstances were not unusual enough to put her on notice at the time she entered the car.¹⁹ By the time her suspicions were aroused, her only options were to leave the car on the shoulder of the highway or to notify the border agent of her suspicions; both options were impractical.²⁰ The government had failed to provide evidence that Heredia’s motive in not investigating further at the time she became suspicious was to “provide herself with a defense” rather than to avoid an unsafe act.²¹ The willful blindness instruction was therefore in error.

In a vigorous dissent, Judge Kozinski argued that the jury could have reasonably believed from the evidence that Heredia’s suspicions were aroused long before she reached the checkpoint.²² Furthermore, even if the willful blindness instructions were in error, the error was harmless in light of strong evidence that Heredia was a member of a family criminal enterprise and actually knew of the drugs in the car.²³

On rehearing en banc, the Ninth Circuit affirmed the conviction. Writing this time for the court, Judge Kozinski²⁴ rejected Heredia’s argument that the willful blindness doctrine was inconsistent with congressional intent.²⁵ By amending § 841 numerous times without addressing the doctrine’s widespread use throughout the federal circuits, Congress had impliedly acquiesced in the courts’ interpretation.²⁶ Turning to the definition of willful blindness, the court found

¹⁷ *Heredia*, 429 F.3d at 824 (quoting *United States v. Baron*, 94 F.3d 1312, 1318 n.3 (9th Cir. 1996)) (internal quotation marks omitted).

¹⁸ *Id.* at 828.

¹⁹ *Id.* at 825–28.

²⁰ *See id.* at 829.

²¹ *Id.* at 830. The court emphasized that the willful blindness doctrine does not demand unsafe actions. *Id.* at 829.

²² *See id.* at 833 (Kozinski, J., dissenting). Judge Kozinski noted that although a smell of detergent would normally not be enough to arouse suspicion of illegal conduct, Heredia admitted that the detergent smell had indeed aroused her suspicion. *Id.* at 831.

²³ *See id.* at 834–35. The majority, in response to this assertion, pointed out that if indeed the evidence was strong that Heredia *actually knew* that the car contained contraband, then the “government was not entitled to a [willful blindness] instruction.” *See id.* at 827 n.2 (majority opinion).

²⁴ Judge Kozinski was joined by Chief Judge Schroeder and Judges Rymer, Hawkins, Silverman, McKeown, Tallman, Clifton, Callahan, and Bea.

²⁵ *See Heredia*, 483 F.3d at 918. The National Association of Criminal Defense Lawyers had also submitted an amicus brief urging the court to reject the willful blindness doctrine. *See* Brief Amicus Curiae of the Nat’l Ass’n of Criminal Def. Lawyers in Support of Carmen Denise Heredia at 4–5, *Heredia*, 483 F.3d 913 (No. 03-10585).

²⁶ *See Heredia*, 483 F.3d at 918–19.

“little justification” for the requirement, articulated in several Ninth Circuit decisions, 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 the crime.”²⁷ “[T]he requirement that defendant have *deliberately* avoided learning the truth” sufficiently protected defendants who found themselves in a situation that they could not control.²⁸ Beyond that narrow category, the defendant’s motives for her actions had no bearing on her guilt under traditional criminal law doctrine.²⁹

Judge Kleinfeld concurred in the result. He disagreed with the majority’s holding that a motive prong need not be an element of a willful blindness instruction.³⁰ He noted that willfulness generally requires a “purpose of violating a known legal duty”³¹ or “a bad purpose.”³² To forsake the motive element would be to “erase the scienter requirement from the statute.”³³ Judge Kleinfeld contended that the majority’s stance imposed a “duty to investigate” that had no statutory basis and could criminalize behavior that the statute was not intended to cover.³⁴ Judge Kleinfeld concurred in the result only because, given the lack of clarity in the case law, the faulty instruction did not constitute plain error.³⁵

Judge Graber dissented.³⁶ She argued that a willful blindness instruction contravened the requirements of the statute, and that therefore the prevailing line of cases should be overruled and the willful blindness doctrine discarded.³⁷

The *Heredia* court, in failing to preserve the requirement that the willfully blind actor have a motive to avoid criminal punishment, removed an important protection for defendants. The concept of willful blindness is useful in providing a means to bring culpable actors to justice. But its use can cause an erosion of the mens rea standard, resulting in the unfair conviction of defendants whose actions are less culpable than those of the knowledgeable actor. To prevent such a result, courts should be careful to distinguish those willfully blind actors

²⁷ *Id.*

²⁸ *Id.* at 920.

²⁹ *See id.*

³⁰ *Id.* at 924 (Kleinfeld, J., concurring in the result).

³¹ *Id.* at 926 (quoting *United States v. Sehnal*, 930 F.2d 1420, 1427 (9th Cir. 1991)) (internal quotation marks omitted).

³² *Id.* (quoting *United States v. Murdock*, 290 U.S. 389, 394 (1933)) (internal quotation marks omitted).

³³ *Id.*

³⁴ *Id.* at 928.

³⁵ *See id.* at 929. The court reviewed the language of the instruction for plain error because *Heredia* had not objected to that language below. *Id.* at 930.

³⁶ Judge Graber was joined by Judges Pregerson, Thomas, and Paez.

³⁷ *See Heredia*, 483 F.3d at 931–32 (Graber, J., dissenting).

who are more like knowing actors from those who are more like reckless actors.

The Ninth Circuit's decision in *United States v. Jewell*³⁸ has been widely adopted across the country as a framework for analyzing willful blindness offenses.³⁹ The defendant in *Jewell* was paid by a stranger to drive a car across the border into the United States and claimed ignorance when border agents found a large quantity of marijuana hidden in the car.⁴⁰ The trial court gave the jury a willful blindness instruction, and Jewell was convicted.⁴¹ On appeal, the Ninth Circuit affirmed the conviction. Citing the Model Penal Code, the court held that "[t]o act 'knowingly[]' . . . is not necessarily to act only with positive knowledge, but also to act with an awareness of the high probability of the existence of the fact in question."⁴² The court noted, however, that "the required state of mind differs from positive knowledge only so far as necessary to encompass *a calculated effort to avoid the sanctions of the statute* while violating its substance."⁴³

Although the willful blindness doctrine enunciated in *Jewell* has been widely accepted, courts have applied it in various manners. Some require only two elements in the willful blindness charge: awareness of a high probability of criminal circumstances and deliberate avoidance of steps to confirm those criminal circumstances.⁴⁴ Other courts require a third element — that the deliberate avoidance be motivated by a desire to avoid criminal responsibility.⁴⁵

Willful blindness occupies a nebulous position between the mens rea standards of knowledge and recklessness.⁴⁶ A range of mental states can constitute willful blindness, some close to knowledge but others closer to recklessness. An instruction that does not distinguish between more and less culpable forms of willful blindness lowers the

³⁸ 532 F.2d 697 (9th Cir. 1976) (en banc).

³⁹ See *Heredia*, 483 F.3d at 918.

⁴⁰ See *Jewell*, 532 F.2d at 699 n.2.

⁴¹ *Id.* at 700.

⁴² *Id.* The court also quoted Professor Glanville Williams's statement that "judges are apt to forget [the willful blindness doctrine's] very limited scope." *Id.* at 700 n.7 (quoting GLANVILLE WILLIAMS, CRIMINAL LAW § 57, at 157 (2d ed. 1961)).

⁴³ *Id.* at 704 (emphasis added).

⁴⁴ See, e.g., *United States v. Sdoulam*, 398 F.3d 981, 993 n.8 (8th Cir. 2005); *United States v. Jaffe*, 387 F.3d 677, 681 (7th Cir. 2004); *United States v. Espinoza*, 244 F.3d 1234, 1242 (10th Cir. 2001); *United States v. Scott*, 159 F.3d 916, 922 (5th Cir. 1998).

⁴⁵ See, e.g., *United States v. Puche*, 350 F.3d 1137, 1148–49 (11th Cir. 2003); *United States v. Willis*, 277 F.3d 1026, 1031–32 (8th Cir. 2002); *United States v. Delreal-Ordonez*, 213 F.3d 1263, 1268–69 (10th Cir. 2000); *United States v. Pac. Hide & Fur Depot, Inc.*, 768 F.2d 1096, 1098 (9th Cir. 1985).

⁴⁶ See Charlow, *supra* note 2, at 1382–91 (characterizing willful blindness as a "hybrid" of knowledge and recklessness standards).

underlying crime's mens rea standard from knowledge to recklessness, potentially leading to unfair convictions.

The *Heredia* majority found that the requirement of deliberate avoidance was sufficient to screen out nonculpable willful blindness defendants.⁴⁷ The majority's rejection of the motive prong was based upon its observation that a defendant's lack of motive does not normally vitiate an element of a crime.⁴⁸ But the majority's reasoning assumed, without explanation, that the first two prongs were sufficient to make willful blindness equivalent to knowledge. As Judge Kleinfeld argued in his concurrence, willful blindness cannot be equivalent to knowledge without a motive element.⁴⁹

The willful blindness doctrine treats an ignorant defendant as if she had knowledge. To justify this treatment, there must be some other source of culpability to take the place of the missing knowledge⁵⁰ and to distinguish the defendant's mental state from recklessness, which is the conscious disregarding of a substantial and unjustified risk.⁵¹ A culpable motive for remaining ignorant has traditionally filled this role.⁵² Intuitively, the more purposeful the unlawful conduct is, the more blameworthy it may be.⁵³

One such motive is the desire to avoid criminal punishment.⁵⁴ The person who avoids obtaining knowledge solely because she wishes to

⁴⁷ See *Heredia*, 483 F.3d at 920.

⁴⁸ See *id.* at 920 & n.10.

⁴⁹ See *id.* at 926 (Kleinfeld, J., concurring in the result).

⁵⁰ See *id.* But see *United States v. Jewell*, 532 F.2d 697, 706 (9th Cir. 1976) (Kennedy, J., dissenting) ("When a statute specifically requires knowledge as an element of a crime, . . . the substitution of some other state of mind cannot be justified even if the court deems that both are equally blameworthy.").

⁵¹ See MODEL PENAL CODE § 2.02 (Proposed Official Draft 1962).

⁵² See Charlow, *supra* note 2, at 1400–13 (noting that early willful blindness cases found culpability if there was a purpose to facilitate an illegal act committed by someone else, an existing express or implied duty to ascertain the truth, or a purpose to avoid the criminal consequences of acting with actual knowledge).

⁵³ See *id.* at 1399–1400; Kenneth W. Simons, *Rethinking Mental States*, 72 B.U. L. REV. 463, 478–80 (1992); see also *Morissette v. United States*, 342 U.S. 246, 250–52 (1952).

⁵⁴ An alternative approach to the motive prong would require a finding that the defendant would have performed the action even if she had known of the illegal circumstances. Such a willfully blind defendant, like the actor whose goal is to avoid punishment, has the same willingness to further a crime as the knowledgeable actor has. See Alan C. Michaels, "*Rationales*" of Criminal Laws Then and Now: For a Judgmental Descriptivism, 100 COLUM. L. REV. 54, 92 (2000). But see Kimberly Kessler Ferzan, *Opaque Recklessness*, 91 J. CRIM. L. & CRIMINOLOGY 597, 622–23 (2001) (noting that the approach is problematic in that it requires juries to convict based on speculation about what the defendant would have done under hypothetical circumstances). Such a standard, however, would not extend to the actor whose goal in avoiding knowledge was to avoid punishment. Yet another approach to the motive prong would require a purpose to avoid confirmation of the fact of criminality. See JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 10.04, at 137 (4th ed. 2006). This standard is slightly broader than the "purpose to avoid punishment" standard; for example, it would convict a defendant whose purpose is simply to avoid the pangs of a guilty conscience.

avoid going to jail has the same willful intent to act in furtherance of criminal objectives as the knowing participant. Like the typical criminal perpetrator, she wishes to avoid criminal prosecution and has identified a strategy that she believes will help her to stay out of jail.

In contrast, a defendant who has avoided obtaining knowledge for other reasons — for example, because obtaining knowledge would be inconvenient — is less culpable. Perhaps she has been irresponsible or selfish, like a reckless actor, but she has not intended to further a crime. For example, Heredia's motive for not investigating her suspicions could have been a concern that stopping her car at the side of the highway would have been unsafe, or simply a desire to get home quickly. These motivations would make her morally much closer to the reckless defendant than to the defendant acting with knowledge.

The *Heredia* majority stated that the two-pronged instruction “met the requirements of *Jewell*” because the instructions approved in *Jewell* did not have a motive prong.⁵⁵ In *Jewell*, however, the instruction required the defendant to “hav[e] made a conscious purpose to disregard the nature of that which was in the vehicle, with a conscious purpose to avoid learning the truth.”⁵⁶ The final clause seems redundant unless it is meant to imply a culpable motive, and it arguably makes the *Jewell* formulation stronger than *Heredia*'s “deliberately avoided the truth.” To illustrate, Heredia deliberately avoided confirming her suspicion that drugs were in the car, but her ultimate “conscious purpose” in avoiding confirmation may have been avoidance of an unsafe action, not avoidance of truth. Heredia could conceivably be found guilty under the *Heredia* instructions, but not guilty under the *Jewell* instructions.

One criticism of the motive prong is that such a requirement is impractical, for it is difficult to prove that a defendant's motive was to avoid criminal prosecution.⁵⁷ Practicality is an important consideration in criminal law, and statutes should not be read so strictly as to allow the truly guilty to evade punishment. There is a danger, however, in using potentially unsympathetic cases to sweep away protections.⁵⁸ Concededly, a motive prong could make a willful blindness conviction turn on the jury's evaluation of the defendant's credibility. But this situation, because the jury is properly directed to consider the

⁵⁵ See *Heredia*, 483 F.3d at 919–20. The court characterized *Jewell*'s statements about the defendant's having a motive to avoid punishment as “speculat[ion].” *Id.* at 919.

⁵⁶ *United States v. Jewell*, 532 F.2d 697, 700 (9th Cir. 1976) (en banc).

⁵⁷ See Jonathan L. Marcus, Note, *Model Penal Code Section 2.02(7) and Willful Blindness*, 102 YALE L.J. 2231, 2247 & n.86 (1993). The *Heredia* court did not justify its decision to reject the motive prong on the basis of impracticability.

⁵⁸ Whether Heredia's claims were sympathetic or believable is debatable. The judges at the initial appellate hearing were sharply divided on this question. See *United States v. Heredia*, 429 F.3d 820, 830 (9th Cir. 2005).

blameworthiness of the defendant, is preferable to one in which defendants are convicted without any such consideration.⁵⁹

A proper willful blindness instruction should thus include a motive element to bridge the gap between recklessness and knowledge and to properly identify culpable willfully blind defendants. The instruction should include a requirement that the defendant's motive was to provide herself with a defense in the event of prosecution. The willful blindness doctrine, while providing courts with a useful tool for bringing culpable individuals to justice, also carries with it the dangerous potential to convict those whose mental state does not reach the requisite level of culpability. The criteria for guilt should be specified carefully, particularly when there is variance from a literal statutory reading. As criminal punishment becomes increasingly harsh, it is ever more important for courts to carefully consider whether the defendant's state of mind was that which the statute is meant to punish. By dispensing with the motive element, the *Heredia* court blurred the distinction between knowledge and recklessness and, for some defendants, the distinction between just and unjust punishment.

⁵⁹ Cf. Michaels, *supra* note 54, at 83–84 (arguing that standards of blameworthiness should be incorporated into criminal law, despite the difficulty of proving culpability, because such standards guide juries to better normative judgments).