No. _____

In The
Supreme Court of the United States

JAMES BROOKS,

Petitioner,

versus

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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SOLE QUESTION PRESENTED

Whether this Court's decision in *Global-Tech Appliances, Inc. v. SEB S.A.,* ___ U.S. ___, 131 S.Ct. 2060, 179 L.Ed.2d 1167 (2011) defining "willful blindness," allows a court to substitute "recklessness" or "passive ignorance" for knowledge that one's conduct is unlawful in a complex regulatory criminal case.

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE

The party to the proceeding in the Fifth Circuit, whose judgment is sought to be reviewed, is Petitioner James Brooks.

James Patrick Phillips and Wesley C. Walton were co-defendants in the underlying action and appellants below, but are not parties to this petition. They are filing separately.

Petitioner James Brooks makes a different argument than Petitioners Walton and Phillips concerning *mens rea* in complex regulatory criminal cases. Walton and Phillips also raise an issue that is unique to them concerning defense witness immunity in their separate petition.

No corporations are parties in this proceeding.

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PETITION FOR WRIT OF CERTIORARI

The Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Fifth Circuit is appended here as App. 1-81. The Jury Instructions from trial are appended here as App. 82-113 and the Jury Note is appended here as App. 114-115.

JURISDICTION

On May 18, 2012, the United States Court of Appeals for the Fifth Circuit entered its judgment and opinion affirming the district court's judgment. *United States v. Brooks*, 681 F.3d 678 (5th Cir. 2012) App. 1-81. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

7 U.S.C. § 13. Violations generally; punishment; costs of prosecution

(a) Felonies generally

It shall be a felony punishable by a fine of not more than $1,000,000 or imprisonment for not more than 10 years, or both, together with the costs of prosecution, for:

. . .

(2) Any person to manipulate or attempt to manipulate the price of any commodity in interstate commerce, or for future delivery on or subject to the rules of any registered entity, or of any swap, or to corner or attempt to corner any such commodity or knowingly to deliver or cause to be delivered for transmission through the mails or interstate commerce by telegraph, telephone, wireless, or other means of communication false or misleading or knowingly inaccurate reports concerning crop or market information or conditions that affect or tend to affect the price of any commodity in interstate commerce, or knowingly to violate the provisions of section 6, section 6b, subsections (a) through (e) of subsection 6c, section 6h, section 6*o*(1), or section 23 of this title.

18 U.S.C. § 371. Conspiracy to commit offense or to defraud United States

If two or more persons conspire either to commit any offense against the United

> States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.

18 U.S.C. § 1343. Fraud by wire, radio, or television

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than 20 years, or both.

STATEMENT OF THE CASE AND BASIS FOR FEDERAL JURISDICTION

This Indictment alleged that natural gas traders violated the Commodities Exchange Act ("CEA") and wire fraud statute by providing false information to private trade magazines. Appellant James Brooks – former employee of El Paso Merchant Energy Corporation, the energy trading subsidiary of El Paso Corporation – was charged in a 49 count Indictment with 1 count of conspiracy, 18 U.S.C. § 371, and 24

counts each of false reporting in violation of the CEA, 7 U.S.C. § 13(a)(2) and wire fraud, 18 U.S.C. § 1343. R. 1163.[1] The District Court had jurisdiction of the case under 18 U.S.C. § 3231. After thirty-two days of trial, three days of deliberation, a jury note and written response from the Court, the jury reached a split verdict. Brooks was convicted of 45 counts. R. 3470-3520. The District Court sentenced Brooks to 168 months in prison. R. 11874 *et seq*. The Fifth Circuit Court of Appeals affirmed the trial court's decision on May 18, 2012. The Petitioner now respectfully requests this Honorable Court to issue a writ of certiorari and to reverse the Fifth Circuit's decision.

STATEMENT OF FACTS

The Indictment alleged that El Paso Merchant Energy, Inc., a natural gas trading company reported false trade information by sending faxes and emails to industry newsletters[2] in response to their requests for monthly gas trading prices. The Indictment also alleged that the defendants committed wire fraud by this reporting and conspired to commit both offenses.

James Brooks (hereinafter "Brooks") was employed at El Paso Merchant Energy, Inc. (hereinafter

[1] The appellate record is cited as R. followed by the bates number of the electronic page in the record.

[2] The industry newsletters in question were *Inside FERC* (hereinafter "IFERC") and *Natural Gas Intelligence* (hereinafter "NGI").

"EPME") as Senior Vice President for Risk Management in 2000 and subsequently as the Managing Director for Natural Gas starting in 2001. Brooks oversaw both physical and basis traders and audited the fair market value prices assigned to contracts owned by EPME, using an EPME proprietary computer program created for the company's internal use. EPME's Head of Global Trading, Tim Bourn, instructed Brooks to see that the traders submitted price information to IFERC and NGI. DX1,[3] 2, R. 5873-5874. Brooks carried out this directive by generally seeing that the traders submitted this information to both publications.

In October of 2000, Brooks sent an email to all EPME gas traders seeking opinions on how this information should be reported; whether they should report fair market "book bias," as they had in the past, or whether they should report "fixed trades" only. The majority of persons who responded suggested that EPME should report as it had in the past, which consisted of an internal computer generated determination of what was described as "book bias." GX375 and GX376.

El Paso traders received no additional payment to report "prices" and there was no government regulation or oversight of this reporting process, the way the publications' surveys were conducted, or the manner in which the magazines determined and eventually reported "index prices." NGI did not

[3] Reference to DX and GX are to Defendants' and Government's exhibits respectively.

publish any instruction as to which transactions (fixed or "book bias") the traders were to report. IFERC did publish instructions that traders were to report "fixed-price," "physical," and "baseload" trades conducted during "bid week." However, the instructions left many of these key terms undefined and testimony in the criminal trial confirmed various different understandings of the meaning of these terms.

During its case in chief, the government called editors from both publications who testified that neither publication used a strict average of the reported index prices. In fact, the uncontroverted testimony was that both publications used their own methods and other information to calculate their numbers, including such diverse factors as the weather, demand, supply, pipeline conditions, historical relationships between pricing points, storage, the NYMEX/Basis relationship and trading in the daily market. R. 4319-4322. So the word "price" was somewhat ambiguous in the context of this process. R. 8938-8939, R. 8747.

The district court denied several jury instructions requested by the defense, including a "good faith" instruction and the defense version of the "willful blindness" instruction modeled on this Court's recent decision in *Global-Tech Appliances, Inc. v. SEB, S.A*, 131 S.Ct. 2060, 179 L.Ed.2d 1167 (2011). R. 2594, R. 10046, R. 3266, R. 10624-10625, R. 3277. Instead the court gave the Fifth Circuit pattern jury instruction for deliberate ignorance over a defense objection and in response to a jury note questioning the apparent conflict between the knowledge requirement and the

prosecution's argument that "ignorance of the law is no excuse," the court instructed the jury that the Government need not prove that the Defendant "knew" his conduct was unlawful.

REASONS FOR GRANTING THE PETITION

The modern proliferation of complex criminal regulatory and statutory schemes warrants reconsideration of whether a citizen may be held responsible for conduct without knowledge of the unlawfulness of that conduct, regardless of any willfulness requirement.

In *Global-Tech Appliances, Inc. v. SEB, S.A.*, 131 S.Ct. 2060, 179 L.Ed.2d 1167 (2011), this Court held that willful blindness must "almost" equate with actual knowledge of wrongdoing[4] and must not include recklessness, as the Fifth Circuit's deliberate ignorance pattern jury instruction allows (as do the pattern jury instructions for the First and Seventh Circuit Courts of Appeals). This Court should grant certiorari to make uniform among the Courts of Appeals the requisites of a "willful blindness" and

[4] "[A] willfully blind defendant is one . . . who can almost be said to have actually known the critical facts," whereas "a reckless defendant is one who merely knows of a substantial and unjustified risk of such wrongdoing." *Global-Tech, supra,* 131 S.Ct. at 2070-2071.

other *mens rea* instructions required in complex criminal cases, charging specific intent crimes.

The trial court charged the jury with the Fifth Circuit Pattern instruction and declined to give the instruction requested by Brooks and modeled after the recently decided *Global-Tech* case, *supra.*[5] The Fifth Circuit instruction given stated:

> You may find that a defendant had knowledge of a fact if you find that the defendant deliberately closed his eyes to what would otherwise have been obvious to him. While knowledge on the part of the defendant cannot be established merely by demonstrating that the defendant was negligent, careless, or foolish, knowledge can be inferred if the defendant deliberately blinded himself to the existence of a fact.

R. 3437.

The defense specifically objected on the grounds that the proposed instruction failed to require either that defendant was aware of a high probability that his conduct was illegal or took deliberate actions to avoid learning the illegal nature of that conduct. On appeal, the Fifth Circuit noted that *Global-Tech*

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[5] The defense requested that the jury be instructed that; "In deciding knowledge, you may consider whether the Defendant was subjectively aware of a high probability of the existence of illegal conduct and the Defendant purposefully contrived to avoid learning of the illegal conduct." R. 10016.

"seemed"[6] to apply to criminal cases and that its pattern jury instruction met the standard set forth in *Global-Tech,* since unlike the Tenth Circuit, the Fifth Circuit instruction did not allow a finding of willful blindness when there is only a "known risk" and where the defendant did not make an active effort to avoid knowledge.

However, the above Fifth Circuit instruction requires neither that the defendant subjectively believed that there is a high probability that his conduct was illegal, nor that the defendant took deliberate steps[7] to avoid learning that his conduct was illegal. In the Fifth Circuit instruction, a defendant need only close his eyes to a "fact" that would otherwise have been obvious to him, and blind himself to the existence of facts, without regard to any knowledge of the illegal nature of this conduct. While the Fifth Circuit instruction expressly excludes consideration of "negligence," Circuit court case law prior to *Global-Tech, supra,* acknowledges that its pattern instruction does not rule out a finding of knowledge under such a negligence standard. In

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[6] *United States v. Brooks*, 681 F.3d 678, 703 (5th Cir. 2012) ["Although *Global-Tech* was a civil case, the standard **seems** to apply equally to criminal deliberate ignorance."].

[7] *Global-Tech Appliances, Inc. v. SEB, S.A.*, 131 S.Ct. 2060, 2072 (2011) also requires that the defendant take "deliberate steps to avoid knowing" a high probability of illegality. Together what is required is that it can "almost be said the defendant actually knew." *Global-Tech,* 131 S.Ct. at 2071, quoting G. Williams, Criminal Law § 57, p. 159 (2d ed. 1961).

United States v. Ojebode, 957 F.2d 1218, 1229 (5th Cir. 1992) the Court held that:

> A deliberate ignorance instruction allows the jury to convict without finding that the defendant was aware of the existence of illegal conduct. It therefore creates a risk that the jury might convict on a lesser negligence standard. The jury, for example, might find deliberate ignorance merely because it believed the defendant should have been aware of the illegal conduct.

This Court described a "negligent defendant" as "one who should have known of a similar [substantial and unjustified] risk but, in fact, did not." *Global-Tech,* 131 S.Ct. at 2071. Thus, the Fifth Circuit has recognized the danger that this Pattern jury instruction fails to provide the protection that this Court held was applicable even in a civil case.[8]

The first prong of the *Global-Tech* "willfully blind" test requires proof that the defendant subjectively "believed" there was a high probability of criminal conduct as opposed to simply being "aware" of same. "Believe" is defined in Black's Law Dictionary as "to feel certain about the truth of; to accept as true." "Aware" on the other hand, is defined in Funk and Wagnall's Dictionary as "possessing knowledge of (some fact or action); conscious; cognizant." This is the very

[8] The Third Circuit has changed its pattern jury instruction to conform with *Global-Tech*. Third Circuit Pattern Jury Instruction 5.06.

definition that this Court implicitly rejected when it defined a merely "reckless defendant" as "one who **merely knows** of a substantial and unjustified risk of such wrongdoing." *Global-Tech,* 131 S.Ct. at 2071. The use of a subjective belief is closer to actual knowledge. This Court specifically chose the word "believed" thus ensuring that the burden of proof is not lowered to the standard of recklessness or negligence when the statute mandates knowing and intentional conduct. For if the defendant were simply "aware" that a particular outcome is a possibility, and yet chooses to ignore it, then the defendant is guilty of being only reckless. See, e.g., *United States v. Heredia*, 483 F.3d 913, 917 (9th Cir. 2007) ("defendant was aware of a high probability that drugs were in the vehicle . . . 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").[9]

Further, where as here, specific intent offenses are charged, instructing a jury that "ignorance of the law is no excuse" only serves to confuse the issue of the requisite scienter, particularly when dealing with confusing and complex statutory schemes such as the CEA. In this case, the jury demonstrated its

[9] In this regard, the post-*Global-Tech* pattern instructions for the First and Seventh Circuits require less in their willful blindness jury instructions than this Court requires. See: *United States v. Denson,* 11-1042, 2012 WL 3125111 (1st Cir., August 2, 2012); *United States v. De Jesus-Viera*, 655 F.3d 52, 59 (1st Cir. 2011); *United States v. Pabey*, 664 F.3d 1084, 1091 (7th Cir. 2011).

confusion with regard to this very issue, sending the court the following note during their deliberations:

> In the second part of count one it states, that the defendant knew the unlawful purpose. Doesn't this contradict the idea that ignorance of the law is no excuse.[10]

The court replied in writing, over objection:

> There is no contradiction. *The Government is not required to prove that a defendant knew the purpose of the agreement was in fact unlawful*, that is, in violation of a statute, but the Government must prove the defendant knew the purpose of the agreement, and the Government must prove that the purpose was in fact unlawful.

(Emphasis supplied).[11]

Count one was the conspiracy count. The objects of the charged conspiracy were the specific intent offenses of wire fraud and false statements under the Commodity Exchange Act, 7 U.S.C. § 13(a)(2) [CEA]. Since the *mens rea* required for each object of the conspiracy is the specific intent to commit the object offenses, the "ignorance of the law" instruction is confusing and misleading. It tends to negate the

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[10] The prosecutor had argued to the jury panel during voir dire that "ignorance of the law is no defense." R. 1192-5.

[11] Similar to the trial judge's response to a jury note expressing the jury's similar concerns in *Cheek v. United States,* 498 U.S. 192, 197-198, 111 S.Ct. 604, 112 L.Ed.2d 617 (1991).

specific intent requirements. In *United States v. Schilleci*, 545 F.2d 519 (5th Cir. 1977) a conspiracy charged illegal bugging of the district clerk's office and perjury. The jury was instructed that the crimes were specific intent crimes and that ignorance of the law was no excuse. Like this case, the jury sent a note that they were confused whether the specific intent portion of the charge and presuming to know the law portion of the charge appeared to be in conflict. The Fifth Circuit overturned the conviction since the "ignorance of the defendant of the applicable law went to the heart of his denial of the specific intent necessary for a violation of the law."[12]

Here jurors were to have considered whether Brooks had the specific intent to join a scheme to defraud the government and whether Brooks had the specific intent to knowingly make a report that he knew was false and inaccurate and that he knew was delivered in interstate commerce. The jury asked whether Brooks need know that the purpose of the conspiracy was unlawful and was told by the trial court that he did not. The jury was also told that ignorance of the law was no excuse. Understandably confused, the jury sent a note during their deliberations inquiring whether the requirement that defendant "knew the unlawful purpose," conflicted with the concept that "ignorance of the law is no excuse." This written response by the court that the defendant did

[12] Moreover, in closing the prosecutor here argued "they do not have to subjectively be aware that something was against the law." R. 5014-5015.

not need to recognize that his conduct was unlawful ignored the fact that the objects of the conspiracy required Brooks' specific intent to engage in a scheme to defraud the Government, meaning that he had to know that it was a scheme to defraud, that he engaged in material falsehood and used interstate wires in furtherance of that fraud. *United States v. Brooks,* 681 F.3d 678, 700 (5th Cir. 2012) [regarding the elements of wire fraud]. The Fifth Circuit stated that Brooks came closer to being correct about the confusion injected by the court's supplemental instruction, rejecting his claim in light of the jury charge as a whole.[13] However, the jury was not told to consider the instructions as a whole. They were only told not to disregard or give special attention to any one instruction. R. 3427.

Further, the instruction negated the *mens rea* requiring Brooks' knowledge that the reports of natural gas trades were false and inaccurate. *United States v. Valencia,* 394 F.3d 352, 355 (5th Cir. 2004) [setting out the scienter required under 13(a)(2)]. The suggestion that ignorance of the law is no excuse and the specific instructions that Brooks need not realize that his conduct was unlawful, injected confusion as to what the government needed to show with regard to the purpose or objects of the conspiracy. Both of those

[13] "Although the district court's response possibly could have spelled out the relationship between conspiracy and the underlying substantive offense more clearly, it is not an incorrect statement of the law, particularly in light of the rest of the jury charge." *Brooks,* 681 F.3d at 700.

objects required the Government to establish a specific intent to violate the law, which the instruction negated. One must know that a matter is false or misleading; not merely have knowledge of the matter under the CEA. And one must form a specific intent to defraud by making material false statements, not just make statements without knowing whether or not they were true or accurate, under the wire fraud statute.

Moreover, when confronted with a complex statutory and regulatory scheme such as the Commodities Exchange Act, this Court has recognized that:

> Based upon the notion that the law is definite and knowable, the common law presumed that every person knew the law . . . The proliferation of statutes and regulations has sometimes made it difficult for the average citizen to know and comprehend the extent of the duties and obligations imposed by the tax laws.

Cheek v. United States, 498 U.S. 192, 199-200 (1991).

This is not just true of income tax violations. Knowledge that one's conduct is unlawful should be required any time a citizen is charged in a complex and confusing regulatory scheme. See: *Ratzlaf v. United States,* 510 U.S. 135, 114 S.Ct. 655, 126 L.Ed.2d 615 (1994) [with respect to the willfulness requirement of the anti-structuring statute, the government must prove that the defendant acted with knowledge that his conduct was unlawful regardless

whether the complex statutory scheme requires willfulness]; *Bryan v. United States,* 542 U.S. 184, 118 S.Ct. 1939, 1946-1947, 141 L.Ed.2d 197 (1998) [requiring the government prove that the defendant knew his conduct was unlawful in a federal firearms prosecution (violation of 18 U.S.C. §§ 922 and 924)]; *United States v. Davis*, 583 F.2d 190, 193-194 (5th Cir. 1976) [holding that a munitions violation "requires the Government to prove that the defendant voluntarily and intentionally violated a known legal duty," noting that the court "may not instruct that ignorance of the law is no excuse."]; *United States v. Gray,* 751 F.2d 733, 736 (5th Cir. 1985) [holding that in a mail fraud prosecution, "to establish specific intent the government must prove the defendant knowingly did an act which the law forbids, purposefully intending to violate the law."].[14]

CONCLUSION AND PRAYER

The jury instructions here not only failed to require that Brooks take deliberate steps to blind himself to the illegal purpose of his conduct, but additionally instructed the jury that he did not need to "know" or even suspect that his conduct was unlawful. In combination, the jury instructions

[14] This Court has also recognized that when faced with such complex statutory and regulatory schemes, the defendant is also entitled to the "good faith" instruction, which was requested and rejected in this case. *Cheek v. United States,* 498 U.S. 192, 200 (1991); *United States v. Davis*, 583 F.2d 190 (5th Cir. 1976).

regarding "deliberate ignorance" and "ignorance of the law lowered the scienter which the Government was required to prove to a mere reckless or negligent standard. This Court should grant certiorari to ensure uniformity of the law in allowing convictions on less than actual knowledge of the criminal nature of one's conduct throughout the Circuit Courts of Appeals in this important and routinely encountered area of escalating complex business prosecutions.[15]

WHEREFORE, PREMISES CONSIDERED, Petitioner, JAMES BROOKS, respectfully requests that this Honorable Court grant his Petition for a Writ of Certiorari.

Respectfully submitted,

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[15] *See generally*, Harvey A. Silverglate, Three Felonies a Day (2011); The Heritage Foundation and the National Association of Criminal Defense Lawyers, Without Intent: How Congress is Eroding the Criminal Intent Requirement in Federal Law (2010).