

# 09-4533-cr

*To Be Argued By:*  
H. GORDON HALL

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 09-4533-cr

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UNITED STATES OF AMERICA,

*Appellee,*

-vs-

JULIO FLORES-CERON, RAFAEL CACERES-BARRAZA, JUAN TRINIDAD, IVALISE COTTO, also known as Bibi, ELIUD MORALES, also known as Franklin, HUGO HERRARTE-CASTILLO, MARCO TULIO-FUNES,

*Defendants,*

JUAN ROMERO-CARCAMO,

*Defendant-Appellant.*

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF CONNECTICUT

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**BRIEF FOR THE UNITED STATES OF AMERICA**

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## **Statement of Jurisdiction**

The district court (Janet C. Hall, J.) had subject matter jurisdiction over this federal criminal prosecution under 18 U.S.C. § 3231. The district court originally entered a final judgment as to Romero on October 30, 2009. *See* Romero Joint Appendix (“JA”) 10. On October 29, 2009, Romero filed a timely notice of appeal. *See* JA10; *see also* Fed. R. App. P. 4(b)(2) (providing that notice of appeal filed before entry of judgment is timely). This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291.

### **Issue Presented for Review**

Did the district court commit prejudicial error by instructing the jury on conscious avoidance of guilty knowledge, where the defendant maintained that he was unaware of the cocaine contained in packages that he obtained and carried into the United States under suspicious circumstances?

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### **Preliminary Statement**

Romero was convicted by a jury on drug conspiracy and drug importation charges. On appeal, he challenges

the district court's administration to the jury of a "conscious avoidance" instruction, on the ground that there was an insufficient basis in the record for the instruction.

The "conscious avoidance" instruction employed by the district court was an accurate statement of the law, and there was an adequate factual basis in the record to support the instruction. Moreover, even if the factual basis were inadequate, Romero has not shown prejudice. The district court's judgment should therefore be affirmed.

### **Statement of the Case**

On July 29, 2008, a federal grand jury in Hartford, Connecticut returned a superseding indictment against 5 individuals, including appellant Juan Romero-Carcamo ("Romero"), charging Romero and the others with one count of conspiracy to possess with intent to distribute 1 kilogram or more of heroin and 5 kilograms or more of cocaine, in violation of 21 U.S.C. §§ 846, 841(a)(1) and 841(b)(1)(A)(i) and (ii), and one count of conspiracy to import into the United States 1 kilogram or more of heroin and 5 kilograms or more of cocaine, in violation of 21 U.S.C. §§ 846, 952(a) and 960(b)(1)(A) and (B)(ii).<sup>1</sup> *See* JA3.

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<sup>1</sup> The indictment incorrectly recited the statutes violated as 21 U.S.C. §§ 846, 952(a) and 960(b)(1)(B)(i) and (ii). The defendant does not claim that he was misled or prejudiced thereby. *See* Fed. R. Crim. P. 7(c)(2).

Beginning on April 13, 2009, Romero was tried before a jury (Janet C. Hall, J.). *See* JA6. On April 14, 2009, following completion of the government's case, Romero made an oral motion for judgment of acquittal, which the district court took under advisement. *See id.* On April 15, 2009, the jury returned a verdict of guilty as to Romero on counts one and two of the superseding indictment. *See id.* On April 21, 2009, Romero made a renewed motion for judgment of acquittal. *See* JA7. On May 27, 2009, the district court denied the motions for acquittal. *See* JA8.

On October 28, 2009, the district court sentenced Romero to 151 months of imprisonment and five years of supervised release on each of the two counts of conviction, to run concurrently, and judgment entered on October 30, 2009. *See* JA10. On October 29, 2009, Romero filed a timely notice of appeal. *See id.*

The defendant is currently serving his sentence.

**Statement of Facts and Proceedings  
Relevant to this Appeal**

Romero was tried before a jury in a two-day trial on the charge that he and four others conspired to possess with intent to distribute 1 kilogram or more of heroin and 5 kilograms or more of cocaine, in violation of 21 U.S.C. §§ 846, 841(a)(1) and 841(b)(1)(A)(i) and (ii); and conspired to import into the United States 1 kilogram or more of heroin and 5 kilograms or more of cocaine, in violation of 21 U.S.C. §§ 846, 952(a) and 960(b)(1)(A) and (B)(ii). *See* JA3 & 6.

During the trial, the government presented, principally, the testimony of special agents of the Drug Enforcement Administration and the Bureau of Immigration and Customs Enforcement; officers of the Bureau of Customs and Border Protection; several local law enforcement officers; and two individuals who had also been charged in the case, but who had entered guilty pleas pursuant to written plea and cooperation agreements. In addition, the government presented various items of physical evidence, including seized heroin and cocaine.

#### **A. Overview of the investigation**

In the fall of 2006, the Drug Enforcement Administration began an investigation into suspected heroin and cocaine distribution by an individual known as Rolando Marroquin. *See* Government's Appendix ("GA") 36.<sup>2</sup> Based on information provided by federal law enforcement agents outside Connecticut, and on court-authorized interception of wire communications, the investigation focused on activity at a residence at 813 Candlewood Road South in New Milford, Connecticut. *See* GA36-37.

On November 13, 2006, having learned that a large quantity of narcotics was to be transported from the residence, the agents established physical surveillance nearby. *See* GA37-39. When a black truck was observed

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<sup>2</sup> The government has submitted a proposed Government Appendix which includes the entire trial transcript.

leaving the residence, agents followed as it traveled south, through New York and into New Jersey. *See* GA40-42. When the truck reached Fort Lee, New Jersey, the agents arranged for it to be stopped by local police. *See* GA43. Following the stop, the truck was searched by law enforcement officers with the consent of the occupants, and a quantity of cocaine was seized. *See* GA62-64. The parties stipulated that the seized drugs consisted of 19.85 kilograms of cocaine. *See* GA67. The cocaine was heat-sealed in plastic wrap and secreted inside buckets of joint compound. *See* GA62-64. The driver of the truck and a passenger, Rafael Caceres and Juan Trinidad, were taken into custody. *See* GA65.

Later the same day, a search warrant was executed at 813 Candlewood Lake Road South. *See* GA74-75 & 102. Law enforcement officers seized numerous items from the home which were consistent with the packaging of cocaine and heroin for distribution, including plastic wrap, packaging tape, a digital scale, a money-counting machine, wraps for bundling cash, and wooden presses used to compress powder drugs into kilogram bricks. *See* GA82-86 & 103. In addition, a total of 5.302 kilograms of heroin and 10.5 kilograms of cocaine was seized from the house. *See* GA87-88 & 95.

The officers also found a number of trailer hitches and vehicle tow bars which would fit into the trailer hitches; some of the tow bars were intact, and some had been sawed open. *See* GA78-81 & 111-118. In all, agents seized trailer hitches and tow bars indicating that 76 individual tow bars, containing a total of some 300

kilograms of cocaine or heroin, *see* GA189, had been present in the residence up to the time of the search. *See* GA115.

## **B. Detention of Romero**

On August 27, 2007, a Customs and Border Protection (“CBP”) officer stationed at O’Hare Airport in Chicago detected an irregularity in a package being carried by Romero, who was entering the United States on a direct flight from Guatemala. *See* GA125-27 & 130-31. The package contained two sets of vehicle tow bars, for a total of four bars. *See* GA125 & 130.

An x-ray of the package showed a difference in density over the length of the tow bars which the officer deemed suspicious. *See* GA125-28. The difference in density indicated to the officer that the tow bars, which should have been hollow, contained a foreign object or substance. *See* GA128. When questioned by the officer, Romero stated that he had made the trip to the United States with tow bars three or four times. *See* GA126. The officer noted that the tow bars were perfectly clean and in new condition, which further aroused his suspicions. *See* GA126-29. The officer instructed Romero to take a seat, pending a closer examination of the tow bars. *See* GA130.

When the tow bars were examined by a customs supervisor, he determined that each bar had a crooked metal plate on each end which was obscured by grease and which appeared to have been installed after the bars had been manufactured. *See* GA137-39. According to the

customs supervisor, who was familiar with tow bars, each bar should have been completely hollow, so it could be looked through like a telescope. *See* GA137-38. When the officers drilled into the bars, they detected a white powder inside the bars, which field-tested positive for cocaine. *See* GA139-40. After this discovery, Romero was detained. *See* GA141.

In the meantime, CBP officers determined that another passenger on the same flight from Guatemala had also been carrying two sets of vehicle tow bars. *See* GA142-44. This passenger was located, and his tow bars were also found to be irregular, with grease and metal plates at either end. *See* GA145. When drilled, they were also found to contain a white powder which field-tested positive for cocaine. *See id.*

The parties stipulated that one of the tow bars carried by Romero contained 1.1849 kilograms of cocaine, plus 7.22265 kilograms of a powder substance not tested, and the other tow bar contained 1.0216 kilograms of cocaine, plus 7.3898 kilograms of a powder substance not tested. *See* GA187-89.

### **C. Romero's *Mirandized* statement**

After being advised of his rights, Romero agreed to speak to law enforcement agents without an attorney. *See* GA150. Romero was advised by the agents that the tow bars he had been carrying contained cocaine. *See* GA150-51. Romero maintained a calm demeanor and denied knowledge of the drugs. *See* GA151-52.

In response to the agents' questions, Romero stated that he brought the tow bars to the United States so he could purchase autos in the United States and tow them to El Salvador. *See* GA152. Romero stated that he was given the tow bars by a man named "Jose," whom he did not know and could not otherwise identify, at a gas station in San Salvador on the Saturday before his flight. *See* GA154. He indicated that he had never before been given tow bars by Jose. *See* GA155.

Romero initially stated that he was to bring one of the two sets of bars to Atlanta, and was to be instructed by cellular telephone what to do with the other set. *See* GA152-53. In Atlanta, he was to turn one set of bars over to a driver, who would tow a car back to El Salvador. *See* GA153. Romero was unable to identify the individual he was to meet, or to specify the location in Atlanta where the meeting was to take place. *See id.* He indicated that he would be advised of this information by cellular telephone. *See id.* Romero was unable to identify who would be calling him with instructions, or how he would know they were the correct people to be providing the instructions. *See* GA156.

While Romero initially said he was to deliver one tow bar to Atlanta and await telephone instructions as to the second tow bar, he later stated that he was to take the tow bars to an auto auction in Ohio. *See* GA155-56. Romero was unable to tell the agents the location of the Ohio auto auction and, when pressed, said he would use a GPS to get there. *See* GA159. However, he was unable to tell the agents what location he would input into the GPS. *See id.*

Although Romero was planning to stay in a hotel, he did not have hotel reservations or rental car reservations. *See* GA160.

When asked about the other passenger on his flight who was carrying tow bars, Romero stated that he knew the other individual for approximately one year, but they were not traveling together. *See* GA154.

#### **D. Co-conspirator testimony**

##### **1. Julio Flores-Ceron**

Julio Flores-Ceron (“Flores”) testified that, in December 2005, he illegally entered the United States, as arranged by Rolando Marroquin. *See* GA175-76. He stated that, after his arrival in the United States, he worked for Marroquin, buying money orders with drug proceeds so the proceeds could be sent out of the United States. *See* GA176-77.

Flores testified that, at some point, he began picking up trailer hitches for Marroquin every week or two from individuals he did not know at a location in Charlotte, North Carolina. *See* GA177-78. Flores paid the couriers \$5,000 in cash. *See* GA178-79. Flores would bring the trailer hitches back to 813 Candlewood Lake Road South in New Milford, where the trailer hitches would be cut open and the drugs would be removed. *See* GA179-80.

Flores stated that he did not know the couriers who delivered the trailer hitches. *See* GA181. He stated that

Marroquin would give his telephone number to the couriers, who would then call him to arrange the delivery. *See id.* Flores knew that other people were also used to pick up the trailer hitches. *See* GA182.

## **2. Rafael Caceres**

Rafael Caceres testified that he is a citizen of Guatemala who was arrested in Fort Lee, New Jersey while transporting drugs from New Milford for Marroquin. *See* GA225-27. Caceres began working for Marroquin in June 2005, transporting money from Maryland to New Milford for delivery to Guatemala. *See* GA227-28.

At some point, Caceres began picking up drugs for Marroquin, first in Charlotte, North Carolina, and then from Miami, Florida. *See* GA228-29. Caceres did not know the identities of the couriers he would meet at the airports, but the couriers would be given his cell phone number by Marroquin in order to arrange a meeting. *See* GA229-30. The drugs were packaged in trailer hitches, and Caceres would pay the courier \$5,000 in cash. *See* GA232.

Caceres identified the appellant, Romero, as one of the couriers whom he met in Charlotte and Miami to receive drug-laden trailer hitches. *See* GA240. Caceres met Romero twice. *See* GA240. The meetings were brief, and Caceres paid Romero \$5,000 with no negotiation. *See* GA241-43. Caceres brought the trailer hitches that he received from Romero back to New Milford. *See* GA241.

### **E. Airline records**

The parties stipulated that, between February 2006 and August 2007, Romero flew from San Salvador to Miami four times, from Guatemala City to Charlotte two times, and from Guatemala City to Chicago four times. *See* GA278-80. The records over that period documented only four return trips. *See* GA276-78.

### **F. Defense case**

The defense case consisted of an IRS Form W-2 from Auto Zoners, LLC in Memphis, Tennessee reflecting wages in 2005 for Romero. *See* GA296 & 298. The form was offered to show that Romero was in the automobile business. *See* GA290.

### **G. The conscious avoidance instruction**

Although Romero did not testify in this case, there was testimony that Romero denied knowledge of the cocaine in the tow bars, *see* GA151, and that his co-conspirator Caceres also did not know, for approximately two and a half months, that there was cocaine in the tow bars, *see* GA270. Romero's defense was that he did not know what was in the tow bars. *See* GA317.

Accordingly, after instructing the jury on actual knowledge, *see* GA398-400, the district court also instructed the jury on conscious avoidance:

The government must prove beyond a reasonable doubt that Mr. Romero knew that the materials he possessed were narcotics. If Mr. Romero lacked this knowledge, you must find him not guilty, even if the government proves that the only reason Mr. Romero lacks such knowledge was because he's careless, negligent or even foolish in failing to obtain it. In determining whether Mr. Romero acted knowingly, you may consider whether Mr. Romero deliberately closed his eyes to what would have otherwise been obvious to him.

If you find beyond a reasonable doubt that Mr. Romero acted with a conscious purpose to avoid learning the truth that the materials he possessed were narcotics then this element may be satisfied. However, guilty knowledge may not be established by demonstrating that Mr. Romero was merely negligent, foolish or mistaken.

If you find that Mr. Romero was aware of a high probability that the materials he possessed were narcotics and he acted with deliberate disregard of the facts, you may find that Mr. Romero acted knowingly. However, if you find that Mr. Romero actually believed the materials were not narcotics, he may not be convicted.

It is entirely up to you whether you find that Mr. Romero deliberately closed his eyes to the truth and

any inferences to be drawn from the evidence on this issue.

GA400-01.

### **Summary of Argument**

When a defendant denies knowledge of a specific fact, a jury instruction on conscious avoidance is warranted if there is sufficient evidence for a reasonable jury to find that the defendant was aware of a “high probability” as to that fact and deliberately avoided learning of it. *See Point I.A., infra.* Even when an instruction on conscious avoidance is given in error, reversal is not warranted unless the defendant can show prejudice. *See id.*

In this case, there was more than sufficient evidence for a jury to find that the defendant deliberately avoided learning that he was carrying cocaine. *See Point I.B.1., infra.* Evidence of the defendant’s awareness of a high probability that he was carrying cocaine included his inconsistent, evasive, and implausible answers when questioned about the cocaine, as well as his calm demeanor. A reasonable jury could conclude that the defendant maintained a calm demeanor because he already was aware of a high probability that he was carrying drugs. *See id.* Evidence that the defendant deliberately avoided guilty knowledge included his deliberate ignorance as to nearly every aspect of his trip to the United States, as well as the irregular nature of the tow bars that he was carrying. There was sufficient evidence for the jury to conclude that

he chose, deliberately, not to inquire of others about the tow bars and not to examine them himself. *See id.*

Finally, any error committed by the district court in employing the conscious avoidance instruction was not prejudicial to the defendant. *See Point I.B.2., infra.* The instruction given by the district court correctly informed the jury of the prerequisites to a finding of conscious avoidance, so there is a presumption that the jury found actual knowledge if the evidence did not support a finding of conscious avoidance. *See id.* Indeed, the evidence of the defendant's knowledge, though circumstantial, was overwhelming. Accordingly, the defendant can have suffered no prejudice.

The judgment of the district court should therefore be affirmed.

## Argument

### **I. The district court properly instructed the jury on the issue of Romero’s conscious avoidance of guilty knowledge**

#### **A. Governing law and standard of review**

##### **1. Conscious avoidance**

When knowledge of a fact is an element of an offense, the doctrine of conscious avoidance may be used to impute knowledge to a defendant who is willfully blind to that fact. The doctrine is necessary, “given the ease with which a defendant could otherwise escape justice by deliberately refusing to confirm the existence of one or more facts that he believes to be true—an end we wish to avoid because we adjudge deliberate ignorance and positive knowledge to be equally culpable.” *United States v. Nektalov*, 461 F.3d 309, 315 (2d Cir. 2006) (internal quotation marks omitted). “[A] defendant’s affirmative efforts to ‘see no evil’ and ‘hear no evil’ do not somehow magically invest him with the ability to ‘do no evil.’” *Id.* (internal quotation marks omitted).

Accordingly, a jury may properly be instructed on conscious avoidance “(i) when a defendant asserts the lack of some specific aspect of knowledge required for conviction, and (ii) the appropriate factual predicate for the charge exists, *i.e.*, the evidence is such that a rational juror may reach the conclusion beyond a reasonable doubt that the defendant was aware of a high probability of the

fact in dispute and consciously avoided confirming that fact.” *Id.* at 314. Where there is evidence both of actual knowledge and of conscious avoidance, the Government may argue conscious avoidance in the alternative. *See id.* at 316.

However, an instruction on conscious avoidance should not be given ““where the *only* evidence alerting a defendant to the high probability of criminal activity is direct evidence of the illegality itself” . . . .” *Id.* (emphasis added) (quoting *United States v. Sanchez-Robles*, 927 F.2d 1070, 1074 (9th Cir. 1991)). Thus, for example, conscious avoidance should not be charged with respect to the driver of a borrowed van that reeked of marijuana, because the driver either knew the smell was marijuana or did not know. *See Sanchez-Robles*, 927 F.2d at 1075 (“In this case, [the driver] either had actual knowledge of the illegality or she had no knowledge at all. . . . [T]here is no middle ground of conscious avoidance.”); *see also United States v. Ferrarini*, 219 F.3d 145, 157-58 (2d Cir. 2000) (concluding that instruction on conscious avoidance was given erroneously, albeit harmlessly, where evidence conclusively established actual knowledge of alleged fraud rather than conscious avoidance).

Where the evidence establishes that a defendant possessed contraband, but the defendant denies having known the nature of the items, “a conscious avoidance charge is appropriate in all but the highly unusual—perhaps non-existent—case.” *United States v. Aina-Marshall*, 336 F.3d 167, 172 (2d Cir. 2003) (holding that there was “ample basis” for instruction on conscious

avoidance where defendant “conceded possession of luggage containing heroin with an explanation denying knowledge of the contents”).

## 2. Standard of review

A properly-preserved claim of error in the jury instructions is reviewed *de novo*. See *Nektalov*, 461 F.3d at 313; *Aina-Marshall*, 336 F.3d at 170. But see *United States v. Heredia*, 483 F.3d 913, 921-22 (9th Cir. 2007) (en banc) (following six other courts of appeals in holding that, while the contents of jury instructions are reviewed *de novo*, “whether an instruction should be given in the first place depends on the theories and evidence presented at trial” and is reviewed only for abuse of discretion). Reversal is appropriate only where, “viewing the charge as a whole, there was a prejudicial error.” *Aina-Marshall*, 336 F.3d at 170.

Where, as here, the only claim of error is that an instruction on conscious avoidance should not have been given in the first place, the claim amounts to a challenge to the sufficiency of the evidence as to conscious avoidance. See *id.* at 171. A defendant making such a challenge bears a “heavy burden.” See *id.* The Court will review “all the evidence presented at trial in the light most favorable to the government,” and will affirm as long as “any rational trier of fact” could have found conscious avoidance beyond a reasonable doubt. *Id.* (internal quotation marks omitted); see also *United States v. Rodriguez*, 983 F.2d 455, 458 (2d Cir. 1993).

Finally, even if there had been insufficient evidence to justify an instruction on conscious avoidance, reversal would not be warranted if the jury was instructed on actual knowledge and there was “overwhelming evidence” of actual knowledge. *Ferrarini*, 219 F.3d at 154. Reversal also would not be warranted if the instruction on conscious avoidance correctly informed the jury as to the prerequisites for a finding of conscious avoidance, because the jury is presumed to have followed the instruction and presumed therefore to have convicted based on actual knowledge. See *United States v. Adeniji*, 31 F.3d 58, 63 (2d Cir. 1994) (citing *United States v. Cartwright*, 6 F.3d 294, 301 (5th Cir. 1993) (“Where there is no evidence of conscious ignorance . . . [t]he instruction is surplusage and thus does not create the risk of prejudice.” (alterations in original))).

## **B. Discussion**

Romero does not challenge the content of the conscious avoidance charge employed by the district court. Nor does he dispute that he denied knowing the illicit contents of the tow bars he carried into the United States. Romero’s appeal therefore turns on whether there was sufficient evidence for a reasonable jury to find that Romero was aware of a “high probability” that he was carrying cocaine and consciously avoided confirming that fact.

As shown below, the evidence was more than sufficient for a reasonable jury to make such a finding. And even assuming, *arguendo*, that the evidence was not

sufficient, Romero has failed to show that he was prejudiced by the instruction on conscious avoidance.

### **1. A factual predicate for the charge existed**

The evidence at trial was sufficient for a reasonable jury to find, beyond a reasonable doubt, that Romero was aware of a high probability that he was carrying cocaine and consciously avoided confirming that fact.

First, when interviewed, Romero provided an inconsistent and highly implausible explanation of his plans in the United States. Romero initially stated that he was to bring one of the tow bars to Atlanta and that he would be instructed by telephone what to do with the other set. *See* GA152-53. Romero later changed his story, stating that he was supposed to go to an auto auction in Ohio. *See* GA155-56. Romero claimed that he received airline tickets and the tow bars from “Jose,” an individual whom he had never met before and had no prior dealings with. *See* GA154-55 & 158. Romero could not specifically identify where he was supposed to go, *see* GA153 & 159, or whom he was supposed to meet, *see* GA151. From Romero’s inconsistent and evasive responses, a jury could reasonably find that Romero was aware of a high probability that he was carrying cocaine.

Second, Romero exhibited a calm demeanor while being questioned. *See* GA152 & 156; *see also* GA133. A reasonable jury could find it highly unlikely that an individual, supposedly with no knowledge that he was carrying cocaine, would maintain a calm demeanor after

cocaine was found. Conversely, it would be entirely reasonable for a jury to find that Romero was able to maintain a calm demeanor only because the drugs were no surprise to him, *i.e.*, he was already aware of a high probability that he was carrying cocaine.

Third, Romero was paid significant amounts of money, in cash, to transport the tow bars. *See* GA157 & 241. The tow bars themselves contained \$400,000 worth of cocaine. *See* GA46 & 189. A reasonable jury could easily conclude that such a large quantity of cocaine would not be entrusted, and such large amounts of money would not be paid, to an innocent, ignorant dupe. *See Rodriguez*, 983 F.2d at 458 (holding that instruction on conscious avoidance was warranted in light of, *inter alia*, “inherent implausibility” of claim that four pounds of cocaine was innocently acquired).

There was also sufficient evidence from which a jury could reasonably find “deliberate ignorance” on the part of the defendant. *Id.* (explaining that deliberate ignorance, not mere negligence, is required for conscious avoidance).

Indeed, Romero exhibited deliberate ignorance in nearly every aspect of his travel to the United States. Romero received airline tickets and the tow bars from “Jose,” someone unknown to him. GA154-55 & 158. Romero was to receive delivery instructions from someone unknown to him, *see* GA156, and to deliver the tow bars to someone unknown at an unknown location, *see* GA153 & 159. Romero had no hotel or rental car reservations. *See* GA160-61. On two previous occasions, Romero

accepted \$5,000 for two tow bars, in quick exchanges with no negotiation. *See* GA241-43.

The jury also heard that the tow bars carried by Romero were irregular. *See* GA137-39. Whereas normal tow bars are hollow, the tow bars carried by Romero had crooked metal plates on both ends. *See* GA137-38. The tow bars had grease on the inside, where grease normally does not belong. *See* GA139. The jury could reasonably have concluded that the irregularities would have been noticed by Romero, who worked in the automobile industry, *see* GA290, 296 & 298, and specifically had experience towing cars, *see* GA158 & 161. Given Romero's deliberate ignorance with respect to his travel plans and contacts, the jury could reasonably have concluded that he also chose, deliberately, not to inquire of others about the tow bars and not to examine them himself.

Romero appears to contend, mistakenly, that there is a higher standard of proof required to establish conscious avoidance. *See* Brief of Defendant-Appellant Juan Romero-Carcamo, dated Apr. 5, 2010 ("Def. Br."), at 24 (arguing that "[t]he Government never presented a single witness that claimed the defendant was willfully blind or consciously avoiding actual knowledge . . ."). To the contrary, an instruction on conscious avoidance is warranted so long as there is sufficient evidence for a reasonable jury to find the predicate facts. *See Aina-Marshall*, 336 F.3d at 171 (reviewing challenge to instruction on conscious avoidance under rubric of evidentiary sufficiency).

In *Aina-Marshall*, the defendant claimed that she was transporting a suitcase from Nigeria to the United States on behalf of a friend. *See id.* at 169. The defendant further claimed that she was suspicious of the weight of the bag, that she asked her friend to open it, and that she looked inside. *See id.* Thus, not only was there no witness testifying that the defendant was willfully blind, there was actually direct evidence to the contrary—*i.e.*, evidence that the defendant had attempted to ascertain the actual contents of the bag. Nevertheless, the Court had little difficulty in concluding that “there was easily sufficient evidence to permit the inference” of conscious avoidance. *See id.* at 171.

Romero also draws a misleading distinction between “passive conduct” and “acting deliberately” to avoid knowledge. Def. Br. at 22. While the decision to avoid knowledge must be made consciously, and not just negligently, *see Rodriguez*, 983 F.2d at 458, there is no requirement of any actual *act*. A deliberate failure to inquire is sufficient for a finding of conscious avoidance. *See, e.g., Nektalov*, 461 F.3d at 317 (holding that instruction on conscious avoidance was warranted where evidence permitted jury to find that defendant “deliberately avoided asking any questions . . . that might have confirmed his suspicions”).

Romero places mistaken reliance on *Ferrarini*, a case involving a conspiracy to commit fraud. *See Ferrarini*, 219 F.3d at 148-51. In *Ferrarini*, the Court found “overwhelming evidence” that the appellants knowingly participated in the fraud. *See id.* at 157 (describing

meetings, some at appellant's apartment, discussing fraud). The Court also found (and the Government apparently did not dispute) that there was insufficient evidence of deliberate ignorance. *See id.* at 157-58 (“[T]he government does not argue, and the evidence does not show, that [appellant] deliberately avoided learning the truth.”). The Court therefore held that an instruction on conscious avoidance was given erroneously, albeit harmlessly. *See id.*

This case is easily distinguished from *Ferrarini*. Here, there was no direct evidence that Romero knew there was cocaine in the tow bars (in contrast to the meetings in *Ferrarini*, where the fraud was openly discussed). Instead, the record reflects a strong, circumstantial case establishing knowledge or, at a minimum, an awareness of a high probability that the tow bars contained cocaine. Also, there was evidence in this case that Romero was deliberately ignorant about nearly every aspect of his trip, and he failed to ask questions about the tow bars or to examine them himself. Thus, unlike *Ferrarini*, there was more than sufficient evidence in this case for a jury to find conscious avoidance.

Finally, there is no merit to Romero's argument that he had no opportunity to discover that the tow bars contained cocaine. First, Romero could simply have asked more questions, before agreeing to deliver the tow bars to unknown people and unknown places for large amounts of money. Romero's failure to ask questions provides a sufficient basis for a finding of conscious avoidance. *See Nektalov*, 461 F.3d at 317. Second, Romero could have

examined the tow bars more closely himself. Although Romero now claims that the tow bars could not have been examined without cutting them open, he offers no support in the record for his claim. In fact, the officer who arrested Romero testified that the tow bars appeared irregular upon external physical inspection, as each was fitted with a crooked plate on either end when it should have been hollow so it could have been looked through like a telescope. *See* GA137-39. In any event, the question of whether the tow bars could have been more closely examined is a question of fact that should have been presented to, and decided by, the jury. Finally, it would make no sense to reject the doctrine of conscious avoidance merely because Romero's accomplices packaged the cocaine more securely. Allowing drug couriers to transport with impunity packages that cannot be opened would simply make it easier to "escape justice by deliberately refusing" to confirm the contents of a package, "an end we wish to avoid." *Nektalov*, 461 F.3d at 315 (internal quotation marks omitted).

## **2. Any error in the charge was harmless**

Even assuming, *arguendo*, that there was insufficient evidence to warrant an instruction on conscious avoidance, Romero has failed to demonstrate prejudice.

In particular, Romero does not contend that the jury instructions misstated the law in any way. The jury was instructed on actual knowledge, *see* GA398-400, and on conscious avoidance, *see* GA400-01. With respect to conscious avoidance, the jury was properly instructed that

mere negligence was insufficient, that proof was required that Romero “was aware of a high probability that the materials he possessed were narcotics and he acted with deliberate disregard of the facts,” and that knowledge could not be imputed if Romero “actually believed the materials were not narcotics.” *See* GA400; *see also United States v. Feroz*, 848 F.2d 359, 360-61 (2d Cir. 1988) (*per curiam*) (establishing requirements for instruction on conscious avoidance).

Because the jury was properly instructed on conscious avoidance, and assuming *arguendo* that there was insufficient evidence of conscious avoidance, it should be “presume[d] that the jury convicted [Romero] on the basis of actual knowledge, an alternative theory that was supported by the evidence.” *Adeniji*, 31 F.3d at 63.

Indeed, the evidence of Romero’s knowledge, while circumstantial, was overwhelming. In brief, the evidence established that Romero exhibited a calm demeanor when confronted with the cocaine that he claims not to have known about; that he provided inconsistent, implausible, and evasive answers when questioned; that he delivered drug-laden tow bars to a co-conspirator on two earlier occasions; and that he made other trips from Central America to cities in the United States used by his co-conspirators to pick up drugs.

In sum, the evidence conclusively established that Romero was not an innocent auto dealer, fortuitously entrusted with \$400,000 worth of cocaine and paid \$6,000 to transport tow bars to people he did not know. To the

contrary, the evidence conclusively established that Romero was a trusted and knowing participant in a well-established conspiracy to distribute and import cocaine and heroin into the United States.

**Conclusion**

For the foregoing reasons, the judgment of the district court should be affirmed.

Dated: August 4, 2010

Respectfully submitted,

DAVID B. FEIN  
UNITED STATES ATTORNEY  
DISTRICT OF CONNECTICUT

A handwritten signature in black ink, appearing to read "H. Gordon Hall". The signature is written in a cursive, flowing style.

H. GORDON HALL  
ASSISTANT U.S. ATTORNEY

EDWARD CHANG  
Assistant United States Attorney (of counsel)

## ANTI-VIRUS CERTIFICATION

Case Name: U.S. v. Romero-Carcamo

Docket Number: 09-4533-cr

I, Louis Bracco, hereby certify that the Appellee's Brief submitted in PDF form as an e-mail attachment to **criminalcases@ca2.uscourts.gov** in the above referenced case, was scanned using CA Software Anti-Virus Release 8.3.02 (with updated virus definition file as of 8/4/2010) and found to be VIRUS FREE.

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Louis Bracco  
*Record Press, Inc.*

Dated: August 4, 2010

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