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CRIMINAL LAW

UNITED STATES v. ALVARADO: REFLECTIONS ON A JEWELL

I. INTRODUCTION

In United States v. Alvarado, the Ninth Circuit reaffirmed that the use of a Jewell instruction on conscious ignorance is properly given only when the defendant claims a lack of guilty knowledge and the proof at trial supports an inference of deliberate ignorance. The Ninth Circuit found that the district court erred by giving the instruction because the facts tended to establish actual knowledge by the defendants. Nonetheless, the convictions were affirmed because the court held that the error was harmless.

While disapproving use of the Jewell instruction in Alvarado, the Ninth Circuit renewed its approval of the instruction

1. 838 F.2d 311 (9th Cir.) (per Anderson, J.; the other panel members were Wiggins, J., and Canby, J., concurring in part and dissenting in part), cert. denied, 108 S.Ct. 2880 (1988).
2. The designation derives from United States v. Jewell, 532 F.2d 697 (9th Cir.) (en banc) (the statutory requirement of "knowingly" is satisfied if the defendant is aware that the fact in question is highly probable, but he consciously avoids learning the truth), cert. denied, 426 U.S. 951 (1976). The argument that such an instruction relieves the jury from finding knowledge by the defendant was rejected in United States v. Olivares-Vega, 495 F.2d 827, 830 (2nd Cir. 1974) (jury properly charged that, if, in order to assert ignorance, the defendant deliberately chose not to learn the fact in question, the jury could find full equivalent of knowledge).
3. Alvarado, 838 F.2d at 314.
4. Id.
5. Id. at 317. The court also considered defendants' assertions that the prosecutor made false representations that warranted a new trial. The court found that since the trial judge acted quickly, emphatically, and appropriately to neutralize the prejudicial effects of the statements, those statements were harmless error. Id.
6. Alvarado, 838 F.2d at 314.
and of the underlying concept.\textsuperscript{7} That is, to act "knowingly" is not strictly limited to acting with positive knowledge, but may also include acting with an awareness of the high probability of the existence of the fact in question. When such an awareness exists, "positive" knowledge is not required.\textsuperscript{8} Although the Supreme Court has yet to rule on such an instruction,\textsuperscript{9} Judge (now Justice) Kennedy, dissenting in \textit{Jewell}, noted that there is a problem in viewing wilful blindness as distinct from, but equally culpable as, "actual" knowledge.\textsuperscript{10}

Ninth Circuit cases employing the conscious ignorance instruction have frequently involved incidents of illegal contraband,\textsuperscript{11} but the instruction has also been given in criminal prosecutions of a broader range.\textsuperscript{12} The purpose of the instruction is to

\textsuperscript{7} Id.

\textsuperscript{8} \textit{Jewell}, 532 F.2d at 700. "One with a deliberate anti-social purpose in mind... may deliberately 'shut his eyes' to avoid knowing what would otherwise be obvious to view. In such cases, so far as criminal law is concerned, the person acts at his peril in this regard, and is treated as having 'knowledge' of the facts as they are ultimately discovered to be." Id. at 700-01 (quoting R. Perkins, \textit{Criminal Law} 776 (2d ed. 1969)).

\textsuperscript{9} Id. at 701-03. However, the Supreme Court has applied the Model Penal Code definition of knowledge in determining the meaning of "knowing" in former 21 U.S.C. § 176a. Id. at 701 (citing Leary v. United States, 395 U.S. 6, 46 n.93, (1969) (impermissible to presume that a possessor of marijuana "knows" of its illegal importation). Again, in Turner v. United States, 396 U.S. 398, 416 & n.29, (1970) (those who sell or distribute heroin are undoubtedly aware of the high probability that the heroin originated in a foreign country and jury is permitted to infer that heroin possessed here is a smuggled drug), the Court adopted the Model Penal Code definition of "knowingly". The \textit{Jewell} court noted that Congress "is presumed to have known and adopted the 'cluster of ideas' attached to such a familiar term of art". Jewell, 532 F.2d at 703 (citing Morissette v. United States, 342 U.S. 246 (1952) (omission from U.S.C. § 641 of any mention of intent is not to be construed as eliminating that element from the crimes defined)).

\textsuperscript{10} Jewell, 532 F.2d at 707 (Kennedy, J., dissenting). Justice Kennedy observed that Section 2.02(7) of the Model Penal Code is a \textit{definition} of knowledge, not a substitute for it. Id. \textit{See infra} text accompanying notes 104-105.

\textsuperscript{11} United States v. Pacific Hide & Fur Depot, Inc., 768 F.2d 1096, 1098 (9th Cir. 1985) (violation of Toxic Substances Control Act, §§ 2-30, 15 U.S.C.A. §§ 2601-2609) (citing United States v. Lopez-Martinez, 725 F.2d 471, 474-75 (9th Cir.) (importation and possession of heroin with intent to distribute), cert. denied, 469 U.S. 837 (1984); United States v. Suttiswad, 696 F.2d 645, 649-52 (9th Cir. 1982) (importation of heroin and possession with intent to distribute); United States v. Nicholson, 677 F.2d 706, 710-11 (9th Cir. 1982) (conspiracy to possess marijuana with intent to distribute); United States v. Erwin, 625 F.2d 838, 841 (9th Cir. 1980) (importation of heroin)).

\textsuperscript{12} Pacific Hide, 768 F.2d at 1098 (citing United States v. Henderson, 721 F.2d 276, 277-79 (9th Cir. 1983), (theft of timber belonging to the United States); United States v. Long, 706 F.2d 1044, 1056 (9th Cir. 1983) (theft of meat from military installation); United States v. Weiner, 578 F.2d 757, 786-87 (9th Cir. 1978) (per curiam) (securities fraud in the context of false financial statements), cert. denied, 439 U.S. 981 (1978); United States v. Eaglin, 571 F.2d 1069, 1074-75 (9th Cir. 1977) (concealment of escaped...
prevent individuals from circumventing criminal sanctions merely by deliberately closing their eyes to an obvious risk of unlawful conduct. This does not create a new crime, but rather forecloses a potential “loophole” in the law.\footnote{Sarrantos, 455 F.2d at 881.}

Because the instruction seems to lend itself particularly to those cases involving illegal contraband,\footnote{Pacific Hide, 768 F.2d at 1098 (citing United States v. Lopez-Martinez, 725 F.2d 471,474-75 (9th Cir.) (importation and possession of heroin with intent to distribute), cert. denied, 469 U.S. 837 (1984); United States v. Suttiswad, 696 F.2d 645, 649-52 (9th Cir. 1982) (importation and possession of heroin with intent to distribute); United States v. Nicholson, 677 F.2d 706, 710-11 (9th Cir. 1982) (conspiracy to import and possess marijuana with intent to distribute)).}

the conscious ignorance doctrine and Jewell instruction have become increasingly important as the federal government expands the prosecution of cases involving smuggled drugs. There is evidence that “deliberate avoidance” is an established practice in the illegal drug business.\footnote{Nicholson, 677 F.2d at 711.} Absent the instruction, individuals who participate in such ventures could escape liability by the “simple expedient of not asking questions”\footnote{The defendant in Nicholson loaned $20,000 to two individuals who promised him at least an eight-to-one return on his investment. Although the defendant knew that the men had been in the marijuana smuggling business, he testified that he did not ask how his $20,000 was to be used. Several co-conspirators testified that this was a common practice in the drug business. The testimony was to the effect that one does not ask questions, because one does not want to know the answer. Id. at 708.}

Despite its importance as a prosecutorial tool, the usefulness of the instruction is impaired by occasional inappropriate use and confusion generated by disparate forms of the instruction in the federal courts.

\section*{II. FACTS}

On July 22, 1986, Gustavo Alvarado (Alvarado) and Oscar Oqueli-Hernandez (Oqueli) arrived at the Los Angeles Airport on a flight from Brazil.\footnote{United States v. Alvarado, 838 F.2d 311, 312 (9th Cir.), cert. denied, 108 S.Ct.} They were accompanied by Oqueli's
son, Yuri, and Roberto Katan (Katan). Oqueli picked up suitcases belonging to Alvarado and Yuri, then, using an expired diplomatic passport, cleared customs without a check. Alvarado picked up a brown suitcase and a black suitcase, both belonging to Oqueli and proceeded to the customs station. The customs agent noticed that Alvarado's hands trembled as he handed her the flight ticket and other travel documents. Among the documents was an unused Japan Airlines ticket dated three days earlier. Alvarado then voluntarily identified himself as a doctor. Because the customs agent found his behavior suspicious, he was directed to the secondary inspection station for further examination.

When asked to open the black suitcase, Alvarado explained that Oqueli had the key. A customs agent escorted Alvarado to an exit where a set of keys were produced, not by Oqueli, but by Katan. In an attempt to open the black suitcase, Alvarado fumbled and then dropped the keys. Next, he explained that the keys belonged to the brown suitcase. Alvarado voluntarily opened the brown suitcase, but it contained only clothing and dental equipment. Alvarado then told the agent that his friend had the keys to the black suitcase, but by that time, Oqueli, his son, and Katan had left the airport and could not be located. With consent from Alvarado, the black suitcase was opened with a crowbar and Alvarado immediately turned pale. A search of the contents revealed eleven packages of cocaine.

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2880 (1988).
19. Id.
20. Id. Oqueli held the position of General Consul for Honduras from January, 1984 to January, 1985. The diplomatic pass had expired with the termination of his post, but the customs agent was unaware that the pass was invalid. Id.
21. Id. The customs agent noted that Alvarado was well-dressed, yet he was carrying a red gym-type zipper bag. Id.
22. Id.
23. Id.
24. Id.
25. Id. Oscar Oqueli was standing by an exit with his son and Katan. Id.
26. Id.
27. Id.
28. Id.
29. Id. When Alvarado was asked why he didn't get the keys to the black suitcase the first time, he stated that he had forgotten to ask for them. Id.
30. Id. Although Alvarado agreed to open the black suitcase with a crowbar, he explained that the suitcase was not his and stated that he was not responsible for its contents. Id.
Following his arrest, and through an interpreter, Alvarado told a representative of the Drug Enforcement Agency that Oqueli owned the black suitcase and that Alvarado did not know about the cocaine. The interpreter subsequently testified that Alvarado told him that Oqueli offered Alvarado a $5000 gift if Alvarado would carry his suitcase. Alvarado’s testimony at trial denied any discussion of payment for carrying the suitcase.

Cooperating with DEA agents, Alvarado placed telephone calls to Oqueli which eventually led to a meeting at the airport where Oqueli and Katan were arrested. Following his arrest, Oqueli stated that the black suitcase belonged to him, that he had lent it to Alvarado in Rio de Janeiro, and that he was unaware of the cocaine in the suitcase.

Alvarado and Oqueli were tried together for importing, conspiring to import, and possessing with intent to distribute 12.7 kilograms of cocaine. After two days of deliberation, the jury requested the court to clarify the meaning of the statute. Specifically, the jury asked about the relationship between the words “know” and “intent” and the word “cocaine.” The judge re-

31. Id.
32. Id. at 313. The $5000 was to be paid to Alvarado when he returned to the United States. Id.
33. Id.
34. Id. Alvarado first placed a call to Oqueli and left the message that Oqueli should come to the Marriot Hotel to pick up Alvarado and the suitcases. Id. Some hours later, Oqueli’s sister arrived and without other conversation, asked for change to make a phone call. Alvarado gave her the change, the call was made, and she left. Id. Alvarado then made a second call to Oqueli and arranged a meeting at the airport. Id.
35. Id. Oqueli and Katan arrived at the airport in a taxi which passed by Alvarado, who waved as it passed, but received no acknowledgement. Id. Oqueli then exited the cab a short distance from Alvarado, motioning for Alvarado to remain there while Oqueli walked to a phone booth and placed a call. Id. A telephone in the telephone bank near Alvarado began to ring, but Alvarado ignored it. Id. Oqueli hung up the phone and walked quickly toward Alvarado, picked up both suitcases, and walked away hurriedly. Id. He resisted attempts by DEA agents to stop him. Id.
36. Id. In addition, he stated that he was, among other things, in the import-export business in the United States. Id.
37. Id. Defendants were indicted with the commission of three felony offenses. Count I alleged the crime of conspiracy to import a controlled substance (21 U.S.C., §§ 963, 952(a)(1)). Count II alleged the crime of importing 12.7 kilograms of cocaine from Brazil into the United States (21 U.S.C., §§ 952(a), 960 (a)(l)). Count III alleged the crime of possession with intent to distribute 12.7 kilograms of cocaine (21 U.S.C., § 841(a)(1)). Brief for Appellant at 2, United States v. Oqueli-Hernandez, 838 F.2d 311 (9th Cir. 1988) (No. 85-5280).
38. Id.
read his instructions on "knowledge" and "intent" and then gave a *Jewell* instruction.\(^39\) Objection by both defense counsel was denied. After deliberating another thirty minutes, the jury returned a verdict against both defendants on all three counts in the indictment.\(^40\)

Defense counsel moved for a new trial on grounds, *inter alia*, that there was no evidence to justify a *Jewell* instruction, and that the *Jewell* instruction, as given, was deficient.\(^41\)

III. BACKGROUND

A. DEVELOPMENT

The instruction for conscious avoidance of the truth originated in the 1976 Ninth Circuit case of *United States v. Jewell*.\(^42\) In *Jewell*, the defendant accepted $100 from an individual to drive a car across the border from Mexico after prev-

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39. *Id.* at 313-14. The instruction given was as follows:

> Now, the instruction which I originally refused but I'm going to give you now is this: The element of knowledge. It's Devitt and Blackmar's Volume 1, Section 14.09.

> The element of knowledge may be satisfied by inferences drawn from proof that a defendant deliberately—notice I say "deliberately"—closed his eyes to what would otherwise have been obvious to him. A finding beyond a reasonable doubt of a conscious purpose to avoid enlightenment would permit an inference of knowledge.

> Stated another way: A defendant's knowledge of a fact may be inferred from willful blindness to the existence of a fact. It's entirely up to you as to whether you find any deliberate closing of the eyes and the inference to be drawn from any such evidence. A showing of negligence or mistake alone is not sufficient to show a finding of willfulness or knowledge.

> If you find a defendant who you are considering believed what was in the boxes was not a controlled substance, then you must acquit.

*Id.* at 314.

40. *Id.*

41. *Id.* *See supra* note 39. Because the court found that the *Jewell* instruction was given in error, the issue of the sufficiency of the instruction was not considered. *Id.* at 317. *See also infra* text accompanying note 172.

42. 532 F.2d 697 (9th Cir.) (en banc), *cert. denied*, 426 U.S. 951 (1976). The court in *United States v. Caminos*, 770 F.2d 361 (3rd Cir. 1985) (knowingly importing and possessing cocaine with intent to distribute) traced the origins of the instruction to the *Jewell* decision, but (perhaps due to editing errors?) the Fifth Circuit is given credit. *Id.* at 365.
ously declining an offer to buy marijuana from him. When a search of the automobile revealed 110 pounds of marijuana, the defendant claimed he did not know the marijuana was in the car. The Ninth Circuit approved a jury instruction which allowed satisfaction of the statutory requirement of knowledge if the defendant's ignorance was solely and entirely the result of his conscious purpose to avoid learning the truth.

The legal premise underlying the Jewell instruction has its roots in English law. Although relatively new to U.S. courts, the instruction has achieved firm support among American commentators. Those authorities have long recognized that the statutory requirement of actual knowledge has one strictly limited exception: A person is deemed to have knowledge if his suspicion is aroused, but deliberately avoids knowing the truth in order to remain ignorant. The concept has been adopted under such various labels as wilful blindness, conscious avoidance,

43. Jewell, 532 F.2d at 699 n.1.
44. Id. at 698-99 nn. 1 & 2.
45. Id. at 699-70. The court instructed the jury that "knowingly" meant voluntarily and intentionally and not by accident or mistake. The court then told the jury that the government must prove beyond a reasonable doubt that the defendant "knowingly" brought the marijuana into the United States and "knowingly" possessed the marijuana. Id. The court continued:

The Government can complete their burden of proof by proving, beyond a reasonable doubt, that if the defendant was not actually aware that there was marijuana in the vehicle he was driving when he entered the United States his ignorance in that regard was solely and entirely a result of his having made a conscious purpose to disregard the nature of that which was in the vehicle, with a conscious purpose to avoid learning the truth.

46. Id. The English courts have described it as "connivance", "constructive knowledge", or "knowledge of the second degree". Edwards, The Criminal Degrees of Knowledge, 17 Modern L. Rev. 294, 298 (1954). "A classic illustration of this doctrine is the connivance of an innkeeper who deliberately arranges not to go into his back room and thus avoids visual confirmation of the gambling he believes is taking place." Jewell, 532 F.2d at 705 (Kennedy, J., dissenting) (citing Bosley v. Davies, (1875) L.R. 1 Q.B. 84).
47. Jewell, 532 F.2d at 705 (Kennedy, J., dissenting). Judge Kennedy observed that the majority opinion justifies the conscious purpose instruction as an application of the wilful blindness doctrine recognized primarily by English authorities. Id.
50. United States v. Littlefield, 840 F.2d 143, 147 (1st Cir.) (scheme to defraud the United States by filing false claims for unemployment benefits), cert. denied, 109 S.Ct. 155 (1988); United States v. Arbizo, 833 F.2d 244, 248 (10th Cir. 1987) (possession of
deliberate ignorance, and connivance.

Judge Browning, writing the opinion of the court in Jewell, referred to the history of the concept and offered as substantive justification the rationale that deliberate ignorance and positive knowledge are equally culpable. Further justification was found in the common understanding that one may "know" that of which he has less than absolute understanding.

marijuana with intent to distribute, interstate travel in aid of racketeering, and aiding and abetting); United States v. Kaplan, 832 F.2d 676, 682 (1st Cir. 1987) (mail fraud), cert. denied, 108 S.Ct. 1080 (1988); United States v. Krowen, 809 F.2d 144, 148 (1st Cir. 1987) (scheme to defraud insurance companies); Caminos, 770 F.2d at 366 (3rd Cir. 1985); United States v. Pacific Hide & Fur Depot, Inc., 768 F.2d 1096, 1097 (9th Cir. 1985).


52. Littlefield, 840 F.2d at 147; United States v. Alvarez, 837 F.2d 1024, 1028 (11th Cir.) (conspiracy to possess, and actual possession of, marijuana and cocaine with intent to distribute), cert. denied, 109 S.Ct. 155 (1988); United States v. Kelm, 827 F.2d 1319, 1323-24 (9th Cir. 1987) (willful failure to file federal income tax returns); Pacific Hide, 768 F.2d at 1098, McAllister, 747 F.2d at 1275.

53. Jewell, 532 F.2d at 701. The early English cases demonstrated a preference for this term because of its broad implications. One such case states:

The word "conniving" is not to be limited to the literal meaning of wilfully refusing to see, or affecting not to see or become acquainted with, that which you know or believe is happening, or about to happen. It must include the case of a husband acquiescing in, by wilfully abstaining from taking any steps to prevent, that adulterous intercourse which, from what passes before his eyes, he cannot but believe or reasonably suspect is likely to occur."


54. Jewell, 532 F.2d at 700.

55. Id. The court continued saying that to act "knowingly", therefore, 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. When such awareness is present, "positive" knowledge is not required. Id.

However, the court emphasized that the required state of mind differs from positive knowledge only so far as necessary to encompass a deliberate effort to avoid the sanctions of a statute while violating its substance. Id. at 704. "A court can properly find wilful blindness only where it can almost be said that the defendant actually knew." Id. (quoting from WILLIAMS, supra note 49, § 57 at 159).
The Ninth Circuit’s recognition of a form of knowledge other than actual knowledge was not novel. Rather, the court’s decision in *Jewell* was notable for its articulation of the circumstances under which a conscious purpose to avoid discovering the truth could be equated with knowledge. In a footnote review of the application of such an instruction by courts in other circuits, the *Jewell* opinion documented a variety of results and some inherent confusion. Anticipating such difficulties, the Ninth Circuit offered guidance for jury instructions with section 2.02(7) of the Model Penal Code in mind. The Supreme Court has given at least tacit approval to the definition of knowledge in that section, and recent federal appellate decisions have in-

56. *Jewell*, 532 F.2d at 700.

57. United States v. Valle-Valdez, 554 F.2d 911, 913 (9th Cir. 1977) (possession of marijuana with intent to distribute).

58. *Jewell*, 532 F.2d at 702 n.12. Among the problems noted by the court were omissions in the instructions, United States v. Squires, 440 F.2d 859, 864 & n. 12 (2nd Cir. 1971) (knowingly making false statement in connection with acquisition of a firearm; Model Penal Code followed and jury instruction rejected because it should have included “deliberate ignorance”); United States v. Llanes, 374 F.2d 712, 716 (2nd Cir.) (receiving, concealing and facilitating the transportation of illegally imported heroin; instructions properly refused since they failed to include the element of “a conscious purpose to avoid learning the” [fact in question]), cert. denied, 388 U.S. 917 (1967); Griego v. United States, 298 F.2d 845, 849 (10th Cir. 1962) (concealment and sale of unlawfully imported drugs; conviction reversed because jury should have been given deliberate ignorance instruction); United States v. Bright, 517 F.2d 584, 586-88 (2nd Cir. 1975) (possession of stolen mail; conviction reversed because trial court refused to add to a deliberate ignorance instruction the qualification “unless he actually believes it did not exist”). *Jewell*, 532 F.2d at 702 n.12. Professor Glanville Williams alluded to the difficulties inherent in the doctrine when he wrote, “The rule that wilful blindness is equivalent to knowledge is essential, and is found throughout the criminal law. It is, at the same time, an unstable rule, because judges are apt to forget its very limited scope.” *Id.* at 700 (quoting WILLIAMS, supra note 49, § 57 at 159).

59. *Id.* at 704. The court said:

We do not suggest that the instruction given in this case was a model in all respects. The jury should have been instructed more directly (1) that the required knowledge is established if the accused is aware of a high probability of the existence of the fact in question, (2) unless he actually believes it does not exist.

*Id.* n.21. Section 2.02(7) of the Model Penal Code states:

“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.” *Model Penal Code* 27 (Prop. Official Draft 1962). The court observed that the negation “unless he actually believes that it does not exist” was not raised as an issue at the trial level in *Jewell*, speculating that perhaps the evidence to support it was lacking. *Jewell*, 532 F.2d at 702 n.12.

60. *See supra* note 9.
Embracing the doctrine in *Jewell*, the Courts of Appeals in all of the circuits have either expressed acceptance of the doctrine or adopted some form of deliberate ignorance instruction. As early as 1962, the Tenth Circuit in *United States v. Griego* held that the tendered defense of no knowledge is not available if the jury finds from all the evidence beyond a reasonable doubt that the defendant had a conscious purpose to avoid learning the fact in question. In the 1970 case of *United States v. Abrams*, the Second Circuit employed the concept of conscious ignorance. The *Jewell* court noted that such instructions were also approved in the Sixth and Seventh Circuits. Further, Courts of Appeals in other circuits had approved the premise that "knowingly" in criminal statutes is not limited to positive

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61. See *United States v. Feroz*, 848 F.2d 359, 360 (2nd Cir. 1988) (importation and possession with intent to distribute heroin); *United States v. Arbizo*, 833 F.2d 244, 249 (10th Cir. 1987) (possession of marijuana with intent to distribute); *United States v. Lanza*, 790 F.2d 1015, 1021 (2nd Cir.) (conspiracy to commit wire fraud), *cert. denied*, 479 U.S. 861 (1986); *Caminos*, 777 F.2d at 365-66.

62. *Jewell*, 532 F.2d at 702. See also infra notes 63-75 and accompanying text.

63. 298 F.2d 845 (10th Cir. 1962) (receipt, concealment and sale of unlawfully imported drugs).

64. *Id.* at 849.

65. 427 F.2d 86 (2nd Cir.) (false statements to the Immigration and Naturalization Service, endeavoring to influence a witness, and causing an alien to fail to carry and have in possession a certificate of alien registration), *cert. denied*, 400 U.S. 832 (1970).

66. *Id.* at 91. The court found sufficient evidence from which the jury could have found that the appellant acted with "reckless disregard of whether the statements were true and with a conscious purpose to avoid learning the truth". *Id.* (emphasis added). At the time *Jewell* was decided the Second Circuit already had substantial case law in support of the doctrine. *Jewell*, 523 F.2d at 702 n.12. See generally *United States v. Dozier*, 522 F.2d 224 (2nd Cir.) (aiding and abetting the possession of cocaine with intent to distribute), *cert. denied*, 423 U.S. 1021 (1975); *United States v. Bright*, 517 F.2d 584 (2nd Cir. 1975); *United States v. Olivares-Vega*, 495 F.2d 827 (2nd Cir.) (importation of cocaine and possession with intent to distribute), *cert. denied*, 419 U.S. 1020 (1974); *United States v. Joly*, 493 F.2d 672 (2nd Cir. 1974) (importation and illegal production of cocaine); *United States v. Jacobs*, 475 F.2d 270 (2nd Cir.) (crimes relating to dealing in stolen United States Treasury bills), *cert. denied*, 414 U.S. 821 (1973); *United States v. Sarrantos*, 455 F.2d 877 (2nd Cir. 1972); *Squires*, 440 F.2d at 859.

knowledge, but includes the state of mind of one who lacks knowledge solely due to deliberate ignorance. Since the Jewell decision, conscious ignorance instructions have been approved in the First, Third, Fourth, Fifth, Eighth, Tenth, and Eleventh Circuits.


69. See United States v. Littlefield, 840 F.2d 143, 147-48 (1st Cir.) (wilful blindness instruction established as law, but instruction given in error), cert. denied, 109 S.Ct. 155 (1988); United States v. Krowen, 809 F.2d 144, 148-49 (1st Cir. 1987) (wilful blindness instruction affirmed); United States v. Kaplan, 832 F.2d 676, 682-83 (1st Cir. 1987) (instruction equating wilful blindness with knowledge approved); United States v. Picciandra, 788 F.2d 39, 46 (1st Cir.) (testimony at trial justified conscious avoidance instruction), cert. denied, 479 U.S. 847 (1986); United States v. Cincotta, 689 F.2d 238, 243-44 (1st Cir.) (false claims against the United States in a conspiracy to defraud; approval of conscious avoidance charge and approval of doctrine), cert. denied, 459 U.S. 991 (1982).

70. See United States v. Caminos, 770 F.2d 361, 365-66 (3rd Cir. 1985) (deliberate ignorance instruction affirmed as proper interpretation of law).

71. See United States v. Cogdell, 844 F.2d 179, 181 (4th Cir. 1985) (deliberate ignorance instruction affirmed as proper interpretation of law).

72. See United States v. de Luna, 815 F.2d 301 (5th Cir. 1987) (possession of marijuana with intent to distribute; conscious ignorance instruction affirmed); United States v. Batencort, 592 F.2d 916, 917-18 (5th Cir. 1979) (importation of a controlled substance with intent to distribute; deliberate ignorance recognized as equivalent of knowledge); United States v. Restrepo-Granda, 575 F.2d 524, 528-29 (5th Cir.) (unlawful importation of cocaine, possession with intent to distribute cocaine, unlawful use of a passport and visa issued to another person; deliberate ignorance instruction approved), cert. denied, 439 U.S. 935 (1978).

73. See United States v. White, 794 F.2d 367,371 (8th Cir. 1986) (conspiracy to steal and possess stolen mail; instruction upheld in principle, but given in error).

74. See United States v. Markopoulos, 848 F.2d 1036 (10th Cir. 1988) (conspiracy to distribute marijuana; instruction on deliberate closing of eyes given in error, but did not require reversal); United States v. Arbizo, 833 F.2d 244, 248-50 (10th Cir. 1987) (possession of marijuana with intent to distribute; instruction on wilful blindness affirmed); United States v. Glick, 710 F.2d 639 (10th Cir. 1983) (mail fraud; deliberate ignorance instruction affirmed), cert. denied, 465 U.S. 1005 (1984).

75. See United States v. Alvarez, 837 F.2d 1024, 1028 (11th Cir.) (conspiracy to possess, and possession of marijuana and cocaine with intent to distribute; deliberate ignorance instruction affirmed), cert. denied, 108 S.Ct. 2003 (1988); United States v. Orr, 825 F.2d 1537, 1541-42 (11th Cir. 1987) (conspiracy to violate and substantive violations of the Dyer Act; deliberate ignorance instruction properly given); United States v. Peddle, 821 F.2d 1521, 1524-25 (11th Cir. 1987) (conspiracy to import and possess cocaine with intent to distribute, importation and possession of cocaine with intent to distribute; conscious avoidance instruction properly given); United States v. Aleman, 728 F.2d 492, 493-94 (11th Cir. 1984) (importation of cocaine and possession with intent to distribute a controlled substance; instruction on conscious avoidance affirmed).
B. Appropriate Context

Judge Kennedy, dissenting in part in United States v. Murrieta-Bejarano, urged that the instruction is appropriate only when the evidence supports a finding, beyond a reasonable doubt, that the defendant purposely contrived to avoid learning the truth. In United States v. Suttiswad, the Ninth Circuit found that such evidence was shown. The defendant in Suttiswad arrived in the United States on a flight from Tokyo and was one of the last passengers to retrieve his luggage. Following questioning by customs Agents, a search was made of defendant's person and luggage. When the linings of the suitcase were removed, eight packages of heroin (valued at $5,000,000) were discovered. Following his arrest, the defendant denied all knowledge of the heroin. He told the customs agent that an American, "Mr. Tom", gave him the suitcase and was to have met him at the Los Angeles Airport. No identifiable finger-
prints were found on the plastic bags containing the heroin and the defendant presented no evidence at trial.87

In United States v. Feroz,88 the Second Circuit affirmed the instruction when the facts at trial presented a pattern similar to those in Suttiswad. In Feroz, the defendant arrived in the United States on a flight from London.89 He was carrying an attache case concealing 971.56 grams of heroin in a secret compartment.90 Feroz testified that a man named Mirahmad, whom he had met in Afghanistan, had offered to help him immigrate from India to the United States.91 Two hours before Feroz was to fly from Delhi to London, Mirahmad presented the defendant with a false passport, a plane ticket and the attache case, which appeared to be empty.92 At trial, Feroz claimed no knowledge of the heroin in the attache case.93

Ninth Circuit cases decided after Jewell have consistently held that a Jewell instruction is properly given to a jury only when the defendant claims a lack of guilty knowledge and the proof at trial supports an inference of deliberate ignorance.94

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87. Id. The court found that if the “Mr. Tom” story was true, the circumstances surrounding his trip to the United States sufficiently pointed to deliberate ignorance and therefore justified the instruction. Id. at 651. See also infra note 167 and accompanying text.

88. 848 F.2d 359 (9th Cir. 1988).
89. Id. at 359.
90. Id. Feroz was arrested and charged with “knowingly and intentionally” importing heroin with “knowingly and intentionally” possessing with intent to distribute. Id. The defendant was carrying a passport in the name of Mirahmad Feroz, but stated that his real name was Mohammed Ishaq Feroz. Id.
91. Id.
92. Id.
93. Id.
94. United States v. Pacific Hide & Fur Depot, Inc., 768 F.2d 1096, 1098 (9th Cir. 1985) (citing United States v. McAllister, 747 F.2d 1273, 1275 (9th Cir. 1984), cert. denied, 474 U.S. 829 (1985); United States v. Henderson, 721 F.2d 276, 277 (9th Cir. 1983) (theft of federally owned timber); United States v. Garzon, 688 F.2d 607, 609 (8th Cir. 1982); United States v. Murrieta-Bejarano, 552 F.2d 1323, 1325 (9th Cir. 1977)). See also United States v. Erwin, 625 F.2d 838, 841 (9th Cir. 1980) (illegal importation of heroin).
The cases in which the facts justify such an inference are rare. Therefore, the instruction should rarely be given. Nevertheless, in the Ninth Circuit, with some frequency, the instruction has been given in situations where the facts do not support an inference of conscious ignorance, as in Alvarado. On occasion, this problem has arisen in other circuits.

Federal Courts of Appeal have allowed the instruction when there is some evidence of both actual knowledge and conscious avoidance and have tended to find harmless error when the evidence leans heavily toward actual knowledge. The instruction

95. McAllister, 747 F.2d at 1275 (citing United States v. Murrieta-Bejarano, 552 F.2d 1323, 1325 (9th Cir. 1977)).
96. Murrieta, 552 F.2d at 1325.
97. 838 F.2d 311 (9th Cir.), cert. denied, 108 S.Ct. 2880 (1988). See infra notes 144-152 and accompanying text. See also United States v. Kelm, 827 F.2d 1319, 1323-24 (9th Cir. 1987) (conscious avoidance instruction improperly given, but error was harmless); Pacific Hide, 768 F.2d at 1097-99 (insufficient evidence of wilful blindness); United States v. Beckett, 724 F.2d 855, 856 (9th Cir. 1984) (no evidence that defendant tried to close his eyes or ears); United States v. Garzon, 688 F.2d 607, 608-09 (9th Cir. 1982) (evidence that defendant's conduct was inconsistent with conscious avoidance).
98. See United States v. Littlefield, 840 F.2d 143, 147-50 (1st Cir.) (insufficient evidence of a conscious course of deliberate ignorance but harmless error), cert. denied, 109 S.Ct. 155 (1988); United States v. Markopoulos, 848 F.2d 1036, 1039-40 (10th Cir. 1988) (deliberate ignorance instructions given were harmless error); United States v. White, 794 F.2d 367, 371 (8th Cir. 1986) (facts did not support giving of conscious avoidance instruction but error harmless).
99. See United States v. Cogdell, 844 F.2d 179, 181 (4th Cir. 1988) (evidence of actual knowledge and that defendant deliberately closed her eyes to the truth); United States v. Arbizo, 833 F.2d 244, 248-49 (10th Cir. 1987) (evidence supporting both actual knowledge and deliberate avoidance of knowledge); United States v. de Luna, 815 F.2d 301, 302 (5th Cir. 1987) (evidence of actual knowledge and deliberate avoidance of knowledge by defendant); United States v. Krowen, 809 F.2d 144, 148-50 (1st Cir. 1987) (evidence of high probability of actual knowledge by defendant and that defendant willfully chose to blind himself to facts); United States v. Ramsey, 785 F.2d 184, 188-191 (7th Cir.) (evidence of actual knowledge and defendants' portrayal of themselves as "gullible" combined to make instruction appropriate), cert. denied, 476 U.S. 1186 (1986); United States v. Cincotta, 689 F.2d 238, 243-44 (1st Cir.) (evidence of actual knowledge and sufficient evidence that defendant chose not to know the fact in question), cert. denied, 459 U.S. 991 (1982); United States v. Eaglin, 571 F.2d 1069, 1074-75 (9th Cir. 1977) (evidence of actual knowledge and that defendant was "aware of a high probability of the fact in question"), cert. denied, 435 U.S. 906 (1978).
100. See Littlefield, 840 F.2d at 147 (defendant did not claim ignorance of the illegal activity and fact did not suggest a course of deliberate ignorance, but willful blindness instruction was harmless error); United States v. Kelm, 827 F.2d 1319, 1323-24 (9th Cir. 1987) (facts tended to show actual knowledge rather than deliberate ignorance so instruction inappropriate, but "logically harmless" to defendant); United States v. Holland, 831 F.2d 717, 722-23 (7th Cir. 1987) (the inherently suspicious nature of the illegal activity suggested actual awareness by defendants, so "ostrich" instruction was error, but harmless); United States v. White, 794 F.2d 367, 371 (8th Cir. 1986) (overwhelming evi-
has been disallowed when there is insufficient evidence of conscious avoidance.\textsuperscript{101}

C. SEMANTICS AND FORM

The dissent in \textit{Jewell} noted that one flaw in the wilful blindness doctrine is its bias toward visual verification of facts to determine actual knowledge.\textsuperscript{102} Knowledge may be acquired through multiple combinations of senses and mental deductions and remain validly “actual”.\textsuperscript{103} Judge Kennedy further cited the more important legal problem posed by viewing wilful blindness as a state of mind distinct from “actual” knowledge.\textsuperscript{104} That is, 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.\textsuperscript{105}

Finally, Judge Kennedy observed that there is difficulty in maintaining a clear distinction between behavior that constitutes conscious ignorance and that which is merely “reckless” and thus implies negligence.\textsuperscript{106} The Second Circuit has been troubled by such semantics in the past,\textsuperscript{107} and the same words

\textsuperscript{101} See United States v. Pacific Hide & Fur Depot, Inc., 768 F.2d 1096 (9th Cir. 1985) (insufficient evidence of wilful blindness to warrant a Jewell instruction); United States v. Beckett, 724 F.2d 855, 856 (9th Cir. 1984) (insufficient evidence that defendant tried to close his eyes or ears to what was happening); United States v. Garzon, 688 F.2d 607, 609 (9th Cir. 1982) (insufficient evidence that defendant contrived to avoid learning the truth).

\textsuperscript{102} Jewell, 532 F.2d at 705 (Kennedy, J., dissenting).

\textsuperscript{103} Id.

\textsuperscript{104} Id. at 706 (Kennedy, J., dissenting).

\textsuperscript{105} Id.

\textsuperscript{106} Id. See also United States v. Murrieta-Bejarano, 552 F.2d 1323, 1325 (9th Cir. 1977) (importation and possession of marijuana with intent to distribute). Judge Kennedy, dissenting in \textit{Murrieta}, warned that the danger in giving the instruction absent evidence of conscious ignorance is that juries will avoid questions of scienter and convict under the standards analogous to negligence. Such convictions are wholly inconsistent with the statutory requirement of scienter. Id. at 1326 (Kennedy, J., dissenting).

\textsuperscript{107} See United States v. Bright, 517 F.2d 584, 586-89 (2nd Cir. 1975) (conviction reversed when jury instruction included “reckless disregard” and conscious effort to avoid learning truth, without balancing instruction). See also, United States v. Jacobs, 475 F.2d 270, 287-288 (2nd Cir. 1973) (approval of jury instruction containing “reckless disregard” and conscious purpose to avoid learning the truth); United States v. Sarrantos, 475 F.2d 877, 880-82 (2nd Cir. 1972) (“reckless disregard” of the falsity of state-
have found their way to the Sixth Circuit. The distinction between terms such as and "reckless disregard" and "negligence" borders on nuance. It follows that a jury would be confused when the use of such language is employed in connection with the instruction. Recognizing this, the Second Circuit in United States v. Hanlon, strongly urged that the term "reckless" be omitted from the instruction. Adopting this policy, more recent Second Circuit cases have avoided the term and the approved instructions resemble the Ninth Circuit model.

In an analysis to determine whether knowledge existed, the question then follows whether to use an objective, reasonable person test, or whether the defendant's subjective belief should be considered dispositive. In answer, the dissenting opinion in Jewell noted that a conscious purpose instruction must emphasize that a defendant's subjective belief is the determinative factor. Failure to emphasize this subjective belief may allow a...
jury to convict on an objective theory of knowledge, that of a reasonable person.\(^{116}\) In spite of a concerted effort to keep the standard one of a defendant's subjective knowledge, the reasonable person standard has surfaced at least once in connection with the instruction.\(^{117}\)

In Jewell, the Ninth Circuit cautiously approved the district court's instruction as given,\(^{118}\) but recommended the instruction preferred by the court.\(^{119}\) Subsequent decisions have insisted on the dual elements of the recommended instruction.\(^{120}\) That is, (1) the defendant must be aware of the high probability of the fact in question, (2) unless he actually believes it does not exist.\(^{121}\) That framework remains viable and unique in its com-

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116. *Id.* Judge Kennedy, dissenting, said:

The second defect in the instruction as given is that it did not alert the jury that Jewell could not be convicted if he “actually believed” there was no controlled substance in the car. The failure to emphasize, as does the Model Penal Code, that subjective belief is the determinative factor, may allow a jury to convict on an objective theory of knowledge—that a reasonable man should have inspected the car and would have discovered what was hidden inside.

*Id.*

117. See United States v. Nicholson, 677 F.2d 706, 709-11 (9th Cir. 1982). Defendant had invested $20,000 in a venture that was not disclosed to him. The court said, “The circumstances surrounding the investment opportunity presented to Nicholson would have put any reasonable person on notice that there was a ‘high probability’ that the undisclosed venture was illegal.” *Id.* at 710.

118. See supra note 45 and accompanying text.

119. See supra note 59.

120. See United States v. Valle-Valdez, 554 F.2d 911, 913-14 (9th Cir. 1977). The court reversed the conviction for possession with intent to distribute marijuana because the jury instruction failed to include that the jury must find beyond a reasonable doubt that the defendant was aware of a high probability that the vehicle he was driving contained contraband. *Id.* Valle-Valdez was decided two and one-half years prior to Jewell and lacked the benefit of the recommended instruction. The district judge relied on a Tenth Circuit decision in Griego v. United States, 298 F.2d 845, 849 (10th Cir. 1962). Valle-Valdez, 554 F.2d at 913. The Court found that because Valle-Valdez denied any knowledge or suspicion that he possessed contraband, a factual question arose regarding his awareness of the high probability of the presence of contraband. Reasoning that because this factual question should have gone to the jury, the effect of the instruction was to create the possibility that Valle-Valdez was convicted without possessing the contraband “knowingly” as interpreted in Jewell. *Id.* at 914. Because the error probably materially affected the verdict, the Ninth Circuit reversed. *Id.* at 917. *See also* United States v. Esquer-Games, 550 F.2d 1231, 1234-36 (9th Cir. 1977) (importing, possessing and distributing cocaine). The court reversed, in part, the conviction because the trial court's instruction failed to include the balancing element “unless he actually believes it does not exist”. *Id.* at 1235.

121. *Id.*
pleteness. The First Circuit only recently provided such guidance.\textsuperscript{122} The Second Circuit continues to struggle with variations on the instruction. In a current attempt to settle the issue and promote uniformity, the court in \textit{United States v. Feroz},\textsuperscript{123} emphatically stated the preferred language and announced it would distribute copies of that opinion to the all of the United States Attorneys and the Assistant United States Attorneys within the Second Circuit to promote compliance.\textsuperscript{124} The Third Circuit has adopted the language of \textit{Jewell}.\textsuperscript{125} The Fifth Circuit, while citing \textit{Jewell} with approval,\textsuperscript{126} has been been silent on form, as has the Fourth Circuit\textsuperscript{127} and the Sixth Circuit.\textsuperscript{128}

The Seventh Circuit, adopting the sobriquet "ostrich instruction",\textsuperscript{129} and with substantial case law in support of the instruction,\textsuperscript{130} appears to be in the process of refining a preferred

\begin{itemize}
  \item \textsuperscript{122} See United States v. Picciandra, 788 F.2d 39, 46-47 (1st Cir.) (wilful blindness instruction approved when (1) the defendant claims a lack of knowledge, (2) the facts suggest a conscious course of deliberate ignorance, and (3) the instruction, taken as a whole, cannot be understood as mandating an inference of knowledge), \textit{cert. denied}, 479 U.S. 847 (1986).
  \item \textsuperscript{123} 848 F.2d 359, 360-61 (2nd. Cir. 1988) (possession of heroin with intent to distribute). The court said: 
  \begin{quote}
  This court has repeatedly emphasized that, in giving the consciousness avoidance charge, the district judge should instruct the jury that knowledge of the existence of a particular fact is established (1) if a person is aware of a high probability of its existence, (2) unless he actually believes that it does not exist.
  \end{quote}
  \textit{Id.}
  \item \textsuperscript{124} \textit{Id.}
  \item \textsuperscript{125} See United States v. Caminos, 770 F.2d 361, 365-66 (3rd Cir. 1985).
  \item \textsuperscript{126} United States v. Restrepo-Granda, 575 F.2d 524, 527-29 (5th Cir.) (importation and possession of cocaine with intent to distribute), \textit{cert. denied}, 439 U.S. 935 (1978). The court acknowledged that the instruction given did not include balancing language (the second half of the dual element of \textit{Jewell}), but concluded that the charge was not so deficient as to be plain error. \textit{Id.} Later, in United States v. Batencort, 592 F.2d 916, 917-18 (5th Cir. 1979), that court approved an instruction that did contain the dual elements, but made no mention of form.
  \item \textsuperscript{127} See United States v. Cogdell, 844 F.2d 179, 181 (4th Cir. 1988).
  \item \textsuperscript{129} United States v. Holland, 83 F.2d 717, 722 (7th Cir. 1987) (aiding and abetting misapplication of federally insured funds). \textit{See also} United States v. Ramsey, 785 F.2d 184, 189 (7th Cir.), \textit{cert. denied}, 476 U.S. 1186 (1986). The court said, "When someone knows enough to put him on inquiry, he knows much. If a person with a lurking suspicion goes on as before and avoids further knowledge, this may support an inference that he has deduced the truth and is simply trying to avoid giving the appearance (and incurring the consequences) of knowledge."
  \item \textsuperscript{130} United States v. Kehm, 799 F.2d 354 (7th Cir. 1896) (conspiracy to smuggle marijuana and cocaine); United States v. Josefik, 753 F.2d 585 (7th Cir.) (conspiracy to
\end{itemize}
version.\textsuperscript{131} Despite the urgings of the court, however, no definitive model has emerged.\textsuperscript{132} Nor has a model instruction been suggested in the Eighth Circuit.\textsuperscript{133} The Tenth Circuit has recommended an instruction similar in form to Jewell, but has not required compliance.\textsuperscript{134} And finally, the Eleventh Circuit has approved instructions which vary considerably,\textsuperscript{135} but has offered no preferred version.

The result of these variations among the federal courts is an instruction that has achieved less than full utility. While widely approved, it remains misunderstood and misused with surprising frequency.

possess and possession of stolen whiskey), \textit{cert. denied}, 471 U.S. 1055 (1985); United States v. Lynch, 699 F.2d 839 (7th Cir. 1982) (mail fraud and conspiracy to commit racketeering). \textit{See also supra} note 129.

\textsuperscript{131} \textit{Ramsey}, 785 F.2d at 190. The court noted that there is an "undercurrent of dissatisfaction with the instruction". \textit{Id.} Finding the standard jury instruction somewhat opaque, the court noted that however useful the idea of inferring knowledge from studied ignorance may seem to judges, it is an unusual concept for a lay juror. Therefore, it is important to give them instructions that are reasonably comprehensible. \textit{Id.} To this end, the court suggested the following instruction:

\textit{You may infer knowledge from a combination of suspicion and indifference to the truth. If you find that a person had a strong suspicion that things were not what they seemed or that someone had withheld some important facts, yet shut his eyes for fear of what he would learn, you may conclude that he acted knowingly, as I have used that word. \textit{Id.}}

\textsuperscript{132} \textit{Kehm}, 799 F.2d at 362. Referring to the decision in \textit{Ramsey}, the court observed, "We have urged district judges to choose better language, but we have also held that this language is permissible". \textit{Id.}

\textsuperscript{133} \textit{See United States v. White}, 794 F.2d 367, 371 (8th Cir. 1986) (conspiracy to steal and possess stolen mail, and possession of stolen mail); United States v. Nordstrom, 730 F.2d 556, 557 (8th Cir. 1984) (aiding or assisting escape of a federal prisoner).

\textsuperscript{134} \textit{See United States v. Glick}, 710 F.2d 639, 643 (10th Cir. 1983), \textit{cert. denied}, 465 U.S. 1005 (1984). The defendant in \textit{Glick} argued that the version of the instruction given at trial was inadequate because it failed to require the jury to find that "the defendant was subjectively aware of a high probability of the existence of the fact whose knowledge is imputed, and that knowledge of that fact may not be imputed if the defendant actually believed that such fact did not exist". \textit{Id.} While finding that failure to include such language did not constitute grounds for reversal, the court did find that inclusion of the omitted language would have been preferable. \textit{Id.} at 643-44. Similarly, in United States v. Arbizo, 833 F.2d 244, 249 (10th Cir. 1987), the court expressed a preference for the dual elements, but found that failure to include them did not warrant a reversal. \textit{Id.}

IV. THE COURT'S ANALYSIS

A. The Majority

The primary issue considered in the Alvarado appeal was the appropriateness of the district court's use of the Jewell instruction.136 Relying on established guidelines,137 the court reaffirmed that when the evidence points to actual knowledge, or lack of any knowledge, rather than deliberate avoidance, the giving of a Jewell instruction is inappropriate.138 The court observed that the standard test remains an awareness by the defendant of a high probability of the existence of the fact in question coupled with actions indicating that the defendant purposely contrived to avoid learning all of the facts in order to have a defense in the event of a subsequent prosecution.139 Thus, in order to correctly employ a conscious ignorance instruction, the government must have presented evidence supporting an inference that Alvarado and Oqueli purposely avoided obtaining actual knowledge that the suitcase contained cocaine.140 Evidence indicating that they had actual knowledge or lacked any knowledge of the cocaine would render the instruction inappropriate.141

1. Gustavo Alvarado

The prosecution contended that the evidence presented at trial "established a plethora of suspicious circumstances"142 tending to show not only conscious avoidance of knowledge, but also evidence of a conspiracy to import cocaine which "could only have been unknown to the defendants because of deliberate ignorance"143 (emphasis in the original).

137. Id. at 314 (quoting United States v. Pacific Hide & Fur Depot, Inc., 768 F.2d 1096 (9th Cir. 1985)). "A Jewell instruction is properly given only when [the] defendant claims a lack of guilty knowledge and the proof at trial supports an inference of deliberate ignorance." Id. at 1098.
138. Alvarado, 838 F.2d at 314.
139. Id.
140. Id.
141. Id.
142. Id. at 315.
143. Id.
The Ninth Circuit disagreed and concluded that most, if not all, the facts supported a finding of actual knowledge. The prosecution relied, in part, on the evidence that Alvarado retrieved and carried Oqueli's suitcase rather than his own, that he had appeared nervous and trembling at the customs check, that he had made inconsistent statements regarding the purpose of his trip and that he had made inconsistent statements about the ownership of the black suitcase. The most persuasive ar-

144. Id. at 314-15.
145. Id. at 315. The prosecution pointed to the following evidence:
1. Alvarado and Oqueli were the last passengers off the plane and the last to pass through the prescreening and control points. The prosecution argued at trial that defendants were hoping that the customs inspectors would be less diligent.
2. Alvarado retrieved and carried from the luggage carousel, not his luggage, but two suitcases belonging to codefendant Oqueli.
3. Alvarado appeared nervous and trembling during his contacts with customs officers.
4. Alvarado had two airplane tickets, one of which he used to fly home on Varig Airlines and was paid for with cash, and a valid, but unused, Japanese Airline ticket. Alvarado testified that Oqueli gave him the Varig ticket. Oqueli denied giving the ticket to Alvarado.
5. Alvarado made inconsistent statements to customs officials about the purpose of his trip. He told the inspector at prescreening that he was returning from Rio de Janeiro alone after a one-week vacation. After his arrest, he told DEA agents he had been on a ten-day trip to Rio for a medical conference. At trial, he testified that he went to Rio with Oquelito price leather for a contemplated import/export business.
6. Alvarado appeared to avoid opening the black suitcase which contained the cocaine. After he was requested to obtain the keys to open the black suitcase, he presented keys that fit the brown suitcase, not the black one. He readily agreed to open the brown suitcase.
7. Alvarado made inconsistent statements regarding the ownership of the black suitcase. At the secondary search area, he claimed ownership of both the black and brown suitcases and presented the appropriate baggage claim tags. He further stated that he had set the combination on the black when he purchased it. Later, when he was given a crowbar to force open the black suitcase, he stated that the suitcase was "Oscar's", not his, and that he was not responsible for its contents.
8. After forcing open the black suitcase with a crowbar, Alvarado immediately turned pale even though there was no cocaine yet visible.
9. Alvarado allegedly made a post-arrest statement that he agreed to carry the black suitcase as a favor for a friend and, upon his return to the United States, his friend would give
argument advanced by the prosecution was Alvarado’s alleged post-arrest statement that a friend had promised him $5000 as a gift if he delivered the black suitcase. Because of the contradictory nature of this evidence, the court concluded that this argument alone did not justify a Jewell instruction.

2. Oscar Oqueli-Hernandez

The Ninth Circuit also concluded that the evidence presented at trial pointed to actual knowledge by Oqueli rather than deliberate avoidance. The prosecution pointed to evidence that Oqueli carried Alvarado’s suitcase through customs, that he had used an invalid diplomatic passport, his abandonment of Alvarado at the airport, and the curious events at the Marriot Hotel and the airport prior to his arrest. Those facts

him $5,000 as a gift for carrying the suitcase.

Id.

146. Id.
147. See supra text accompanying nn. 31-33.
148. Alvarado, 838 F.2d at 315-16.
149. Id. at 316.
150. Id. The prosecution relied on the following evidence:

1. Oqueli carried, not his, but Alvarado’s suitcases through customs.
2. Oqueli used an invalid diplomatic passport to pass through customs. Oqueli had been General Consul to the United States from Honduras for one year, but his diplomatic pass had expired.
3. Oqueli, along with his son, Yuri, and Katan, apparently abandoned Alvarado at the airport while Alvarado was being questioned and searched by customs. This was deemed by the prosecution to be suspicious because Alvarado and Oqueli were close friends.
4. Oqueli failed to appear at the Marriott Hotel to retrieve his suitcases at Alvarado’s request. However, Oqueli’s sister arrived at the hotel, asked for change, and without engaging him in any other conversation, left and made a phone call. The prosecution claimed the sister was sent to conduct counter-surveillance on behalf of Oqueli.
5. Oqueli’s peculiar method of retrieving his suitcase. Oqueli arrived at the airport in a taxi. It passed by Alvarado. Alvarado waved. Oqueli did not acknowledge. Oqueli exited the cab a short distance from Alvarado, motioned for him to remain where he was, then walked to a nearby telephone booth and made a telephone call. A telephone near Alvarado began to ring. Alvarado did not answer it. Oqueli hung up and walked hurriedly toward Alvarado. He picked up the suitcases, motioned for Alvarado to follow and walked hurriedly away.
in tandem with the facts relating to Alvarado tended to establish a "consciousness of guilt". The Court found that in light of the insufficiency of evidence for a trier of fact to reasonably conclude that Oqueli contrived to avoid learning of the cocaine, the Jewell instruction should not have been given.

3. Harmless Error

The court then analyzed the erroneous administration of the instruction against the guidelines of the harmless error doctrine. As a result of this analysis, the court concluded that the error did not affect the verdict. The majority, convinced that the defendants were traveling together, knew of the cocaine, and had joined in an attempt to import the cocaine without detec-
tion, found that a guilty verdict on all counts was compelled.155

B. CONCURRENCE AND DISSERT

Judge Canby concurred with the majority opinion in all portions relating to defendant Oqueli. Dissenting as to the result for Defendant Alvarado, he first acknowledged that the Jewell instruction is harmless error if the evidence is so overwhelming that a conviction is compelled.156 He could not agree that the evidence presented compelled a conviction of Alvarado.157

V. CRITIQUE

In view of the acceptance by every circuit of some form of the conscious ignorance instruction,158 the Ninth Circuit's renewed approval of the concept in United States v. Alvarado159 is certainly well within the mainstream of judicial reasoning.160 The finding in Alvarado, that the Jewell instruction was inappropriately given in the presence of facts pointing toward actual knowledge rather than conscious avoidance, is consistent with previous Ninth Circuit decisions.161 Nevertheless, the erroneous use of the instruction in Alvarado is typical of the difficulties courts have encountered in determining the context in which it may be applied.162

Cases involving illegal contraband often present very similar fact patterns, as demonstrated in Alvarado, Suttiswad,163 and Feroz.164 In all three cases, defendants were apprehended at air-

155. Id.
156. Id. (Canby, J., concurring in part and dissenting in part.)
157. Id. at 317-18. (Canby, J., concurring in part and dissenting in part.)
158. United States v. Ramsey, 785 F.2d 184, 189 (7th Cir.), cert. denied, 476 U.S. 1186 (1986). See also supra notes 63-75 and accompanying text.
159. 838 F.2d 311 (9th Cir.), cert. denied, 108 S. Ct. 2880 (1988).
160. United States v. Jewell, 532 F.2d 697, 702-03 (9th Cir.) (en banc), cert. denied, 426 U.S. 951 (1976). The Jewell court noted that the lines of authority recognizing the concept of conscious ignorance appeared unbroken. Id. To reach a different result would put the court in direct conflict with those Courts of Appeals in other circuits that had approved conscious ignorance instructions. Id.
161. See supra notes 100-01 and accompanying text.
162. See supra notes 97-98, 100-01.
164. United States v. Feroz, 848 F.2d 359 (9th Cir. 1988). See also supra text ac-
ports after illegal contraband was discovered in luggage carried by defendants. All denied knowledge of the presence of the the contraband. And in each case, the defendant claimed that the luggage had been given to him by another individual under pretext of friendship. In view of such significant similarities, leading to different results, it is not surprising that the fine line between facts tending to show actual knowledge and facts tending to show deliberate ignorance may be difficult to appreciate.

Under the facts presented in Suttiswad, the Ninth Circuit found that the Jewell instruction was properly given. Assuming that the "Mr. Tom" story was true, the circumstances surrounding the defendant's trip to the United States sufficiently pointed to deliberate ignorance which would justify such an instruction.

The Second Circuit, in Feroz, while considering primarily the form of the instruction, affirmed that the conscious avoidance charge is properly used "where a defendant has claimed lack of some specific aspect of knowledge necessary to conviction but where the evidence may be construed as deliberate ignorance."

companying notes 88-93 for discussion of facts.

165. Id. at 651.

166. The validity of defendant's claim that he unknowingly acted as a "mule" was discussed at length during closing arguments. Id. at n.4. The court noted that the jury, in determining such validity, should consider the defendant's background, the inherent improbability of the "Mr. Tom story", the defendant's actions at the airport before he claimed his bag, his conflicting stories about where he was to meet "Mr. Tom", the various descriptions he gave of his occupation, the suspicious nature of his possession of the 15-day tour letter which conflicted with his story that he came to visit "Mr. Tom", and finally, whether or not an knowing "mule" would have been entrusted with heroin valued at $5,000,000. Id.

167. Suttiswad, 696 F.2d at 651. The court observed that if a relative stranger, of short acquaintance, gave Suttiswad the airplane ticket, clothing, a substantial amount of cash, and a suitcase which seemed to be unusually heavy, and if Suttiswad was expected to travel to the United States to meet "Mr. Tom" without ever knowing his last name, his address or phone number, the jury could properly infer that defendant deliberately closed his eyes to what otherwise would have been obvious to him. Id.

168. Id. at 360. The trial judge failed to include in his instruction that knowledge of the existence of a particular fact is established (1) if a person is aware of a high probability of its existence, (2) unless he believes that it does not exist. Id. (citing United States v. Shareef, 714 F.2d 232, 233 (2nd Cir. 1983)).

169. Id. (citing United States v. Lanza, 790 F.2d 1015, 1022 (2nd Cir.), cert. denied, 479 U.S. 861 (1986)).
The task of ascertaining the factual situation appropriate for application of a *Jewell* instruction is complicated further when courts, as in *Suttiswad*, acknowledge the "inherent improbability"\(^{170}\) of defendant's story and yet find the same circumstances sufficient to show deliberate ignorance.

Inconsistency and confusion over form has presented the second major difficulty in the application of a conscious ignorance instruction.\(^{171}\) While the form of the instruction given in *Alvarado* was not addressed by the court, it is possible to speculate that it would not have passed muster under *Jewell* and subsequent Ninth Circuit standards.\(^{172}\) The requisite dual elements of "high probability of awareness by defendant" and a negation by defendants' own belief were lacking. The failure of the trial court to use the established language is puzzling in light of the wealth of case law that has emerged since *Jewell*. As the court in *Ramsey* noted, federal courts should be able to do better than continuously repeat an instruction that is opaque and unhelpful to jurors.\(^{173}\) There are goals higher than seeing "not reversible error" in an appellate opinion.\(^{174}\) The Ninth Circuit's model instruction, its dual elements suggested in *Jewell* and patterned after the Model Penal Code's definition of knowledge, has proved to be complete and has required no modification. Even so, as demonstrated in *Alvarado*, courts within the Ninth Circuit remain subject to error in form.

Still less consistency has been noted in the circuits where no standard form of the instruction has been adopted.\(^{175}\) However, certain patterns have emerged to indicate that there is at least some consensus as to minimal acceptable form.\(^{176}\) Judge Gurfein,

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170. See supra note 166.
171. See supra text accompanying notes 118-35.
172. See supra note 39.
173. *Ramsey*, 785 F.2d at 190. The court noted that most jurors encounter the "arcane language" of instructions infrequently. *Id.* Therefore it is important to give them instructions that do not require scholastic glossators to impart meaning. *Id.*
174. *Id.*
175. See supra notes 122-35 and accompanying text.
176. See supra note 103. In United States v. Picciandra, 788 F.2d 39, 46-47 (1st Cir.), cert. denied, 479 U.S. 847 (1986), the First Circuit adopted the first two requirements of the Ninth Circuit that (1) the defendant must claim a lack of guilty knowledge and (2) that the facts must suggest a course of deliberate ignorance. The third requirement suggested by that court is that the instructions taken as a whole must not be understood as mandating an inference of knowledge. *Id.* This universal concept was articu-
writing the opinion of the court for the Second Circuit in United States v. Bright,\textsuperscript{177} noted that although some may say, quite properly, that subtle nuances in a judge’s charge fall on deaf ears, there is no assurance that this is so.\textsuperscript{178} The juror’s difficult task of probing the mind and will of the defendant is hard enough with the aid of an instruction that balances the countervailing considerations.\textsuperscript{179} That juror’s verdict becomes suspect when he has not had the benefit of a balanced instruction from the court.\textsuperscript{180} While use of the balancing language of Section 2.02(7) of the Model Penal Code has not been universally adopted, research has failed to produce a single instance where inclusion of such language has produced an instruction disapproved on the basis of form.

...
The current political and social preoccupation with illegal drug importation gives renewed relevance to a conscious ignorance or Jewell instruction as a prosecutorial tool. As the Ninth Circuit noted in *United States v. Nicholson*,\(^1\) absent the instruction, it would be impossible to obtain conspiracy convictions in many instances, and the "money men" financing drug importation and distribution would escape liability simply by electing not to know the true nature of the venture in which they are participating.\(^2\) For these reasons, and because the impact of the instruction is diluted by misuse, it is incumbent on the federal Courts of Appeal to give clear and consistent guidance on form and context.

VI. CONCLUSION

Deliberate ignorance instructions are alive and well in the federal Courts of Appeal. "See no evil" is not a maxim in which the criminal defendant may take comfort.\(^3\) The Ninth Circuit has provided a model that remains preeminent in its clarity and completeness and the Jewell instruction on deliberate ignorance remains the standard against which all others may be compared. Nevertheless, confusion and misuse of the instruction continue to diminish its effectiveness in criminal prosecutions.

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\(^1\) United States v. Nicholson, 677 F.2d 706 (9th Cir. 1982).

\(^2\) Id. at 711.

\(^3\) United States v. Hanlon, 548 F.2d 1096, 1101 (2nd Cir. 1977).

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