No. 03-10585

ORAL ARGUMENT SCHEDULED DECEMBER 12, 2006

United States Court of Appeals for the Ninth Circuit

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

CARMEN DENISE HEREDIA,
Defendant-Appellant.

On Appeal From The United States District Court
For The District of Arizona (Roll, J.)
Case No. CR-02-00773-JMR-JJM

BRIEF *AMICUS CURIAE* OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF CARMEN DENISE HEREDIA

Sheryl Gordon McCloud
LAW OFFICES OF SHERYL GORDON MCCLOUD
1301 5th Avenue
Seattle, WA 98101
Phone: (206) 224-8777
Fax: (206) 682-3746

Vice-Chair, National Association of Criminal Defense Lawyers Amicus Committee

Kenneth W. Starr
Michael D. Shumsky
Gregory L. Skidmore
KIRKLAND & ELLIS LLP
655 Fifteenth Street, N.W., Suite 1200
Washington, DC 20005
Phone: (202) 879-5000
Fax: (202) 879-5200

Counsel for Amicus Curiae National Association of Criminal Defense Lawyers

October 17, 2006

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and Fed. R. App. P. 29(c), *Amicus Curiae* National Association of Criminal Defense Lawyers states that it is a nonprofit corporation organized under the laws of the District of Columbia. It has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

Michael D. Shumsky
Counsel for Amicus Curiae National Association of Criminal Defense Lawyers

TABLE OF CONTENTS

Page

CORPORATE DISCLOSURE STATEMENT i

TABLE OF AUTHORITIES iii

INTRODUCTION AND SUMMARY OF THE ARGUMENT 1

IDENTITY AND INTEREST OF *AMICUS CURIAE* 2

STATEMENT OF THE ISSUE 4

ARGUMENT 4

THIS COURT SHOULD OVERRULE *JEWELL* BECAUSE IT IS INCONSISTENT WITH THE TEXT, STRUCTURE, CONTEXT, AND HISTORICAL BACKGROUND OF THE COMPREHENSIVE DRUG ABUSE AND CONTROL ACT OF 1970. 4

A. Section 841's Literal Language And Internal Structure Require The Government To Prove A Defendant's Actual Knowledge—Not His Or Her Ignorance, Willful Or Otherwise. 5

B. Congress's Enactment Of Diminished *Mens Rea* Requirements In Other Provisions Of The Criminal Code Confirms That Section 841(a)(1) Requires Proof Of Actual Knowledge. 9

C. The Common-Law Background Against Which Congress Enacted The Comprehensive Drug Abuse And Control Act of 1970 Confirms That Section 841(a)(1) Requires Proof Of Actual Knowledge. 11

D. To The Extent That The Statutory Text, Structure, Context, And Historical Background Of Section 841(a)(1) Leave Any Room For Doubt, The Rule Of Lenity Requires That Provision To Be Construed In The Defendant's Favor. 15

CONCLUSION 18

CERTIFICATE OF COMPLIANCE 20

CERTIFICATE OF SERVICE 21

TABLE OF AUTHORITIES

Page(s)

Cases

Barnhart v. Sigmon Coal Co., Inc.,
534 U.S. 438 (2002) 8

Bosley v. Davies,
[1875-76] L.R. 1 Q.B.D. 84 (Eng. 1875) 12, 13

Community for Creative Non-Violence v. Reid,
490 U.S. 730 (1989) 11

Conn. Nat'l Bank v. Germain,
503 U.S. 249 (1992) 4

Dixon v. United States,
126 S.Ct. 2437 (2006) 15

Dole Food Co. v. Patrickson,
538 U.S. 468 (2003) 10

F.D.I.C. v. Meyer,
510 U.S. 471 (1994) 5

International Ass'n of Machinists & Aerospace Workers, Local Lodge 964 v. BF Goodrich Aerospace Aerostructures Group,
387 F.3d 1046 (9th Cir. 2004) 4

McNally v. United States,
483 U.S. 350 (1987) 17

Mertens v. Hewitt Assocs.,
508 U.S. 248 (1993) 10

Morissette v. United States,
342 U.S. 246 (1952) 18

Nationwide Mut. Ins. Co. v. Darden,
503 U.S. 318 (1992) 11

Redgate v. Haynes,
[1875-76] L.R. 1 Q.B.D. 89 (Eng. 1876) 12

Rewis v. United States,
401 U.S. 808 (1971) 17

Robinson v. Shell Oil Co.,
519 U.S. 337 (1997) 5

Russello v. United States,
464 U.S. 16 (1983) 8

Smith v. United States,
508 U.S. 223 (1993) 5

Somerset v. Hart,
[1883-84] L.R. 12 Q.B.D. 360 (Eng. 1884) 12

Spurr v. United States,
174 U.S. 728 (1899) 13

United Sav. Ass'n v. Timbers of Inwood Forest Assocs., Ltd.,
484 U.S. 365 (1988) 5

United States v. Alston-Graves,
435 F.3d 331 (D.C. Cir. 2006) 6

United States v. Ameline,
409 F.3d 1073 (9th Cir. 2005) (*en banc*) 3

United States v. Bader,
956 F.2d 708 (7th Cir. 1992) 6

United States v. Bailey,
444 U.S. 394 (1980) 15

United States v. Bass,
404 U.S. 336 (1971) 17

United States v. Eaton,
144 U.S. 677 (1892) 2

United States v. Erie R.R. Co.,
222 F. 444 (D. N.J. 1915) 14

United States v. General Motors Corp.,
226 F.2d 745 (3rd Cir. 1955) 14

United States v. Granderson,
511 U.S. 39 (1994) 16

United States v. Hudson & Goodwin,
11 U.S. (7 Cranch) 32 (1812) 18

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

United States v. Johal,
428 F.3d 823 (9th Cir. 2005) 3

United States v. Ladish Maltin Co.,
135 F.3d 484 (7th Cir. 1998) 6

United States v. Naftalin,
441 U.S. 768 (1979) 8

United States v. Nordic Village, Inc.,
503 U.S. 30 (1992) 10

United States v. Ron Pair Enters.,
489 U.S. 235 (1989) 4

United States v. Sioux,
362 F.3d 1241 (9th Cir. 2004) 5

United States v. Universal C.I.T. Credit Corp.,
344 U.S. 218 (1952) 17

United States v. Wiltberger,
18 U.S. (5 Wheat.) 76 (1820) 18

United States v. Zavala,
No. 05-10200 (9th Cir. 2006) (*en banc*) (decision pending) 3

Statutes

18 U.S.C. § 175b(b) 12

18 U.S.C. § 2332d(a) 12

18 U.S.C. § 2339(a) 12

18 U.S.C. § 2424(a) 12

INTRODUCTION AND SUMMARY OF THE ARGUMENT

For more than thirty years, the prospect of a "deliberate ignorance" instruction pursuant to this Court's decision in *United States v. Jewell*, 532 F.2d 697 (9th Cir. 1976) (*en banc*), has given the government unwarranted leverage to secure guilty verdicts—or worse, force guilty pleas—in cases where legitimate doubt over the defendant's actual guilt is at its apex. This case is a perfect example. Despite the fact that 21 U.S.C. § 841(a)(1) penalizes only those who "knowingly ... possess" illicit drugs "with intent to manufacture, distribute, or dispense" them, the government indicted Ms. Heredia and secured her conviction based on what it later conceded to be her *ignorance* of the admittedly serious criminal conduct engaged in by the other passengers in her vehicle.

That perverse outcome, like similar outgrowths of this Court's decision in *Jewell*, cannot be squared with text, structure, context, or historical background of § 841(a)(1). It does violence to the literal language of § 841(a)(1), because "ignorance"—whether willful or not—is not "knowledge." It is textually inconsistent with the remainder of § 841, because § 841(c)(2) expressly provides that under certain other circumstances, convictions can be predicated on a defendant's constructive knowledge of the underlying facts. It cannot be squared with the broader legal landscape in which § 841 is situated, because it renders superfluous Congress's deliberate decision to impose diminished *mens rea*

Association recognizes NACDL as an affiliate and accords it representation in its House of Delegates. NACDL is widely recognized as the voice of the criminal defense bar.

NACDL was founded to promote study and research in the field of criminal law; to disseminate and advance knowledge of the law in the area of criminal practice; and to encourage the integrity, independence, and expertise of defense lawyers in criminal cases. NACDL seeks to defend individual liberties, as guaranteed by the original Constitution, the Bill of Rights, and federal and state law. One of NACDL's concerns is ensuring that jury instructions delivered in criminal cases both clearly and accurately describe the government's burden of proof, so that juries do not inadvertently or unlawfully convict those whom the law deems innocent.

NACDL often files briefs *amicus curiae* before the Supreme Court of the United States, and has a long track record of filing such briefs in this Court. Recent examples include its filings in *United States v. Zavala*, No. 05-10200 (9th Cir. 2006) (*en banc*) (decision pending), *United States v. Ameline*, 409 F.3d 1073 (9th Cir. 2005) (*en banc*), and *United States v. Johal*, 428 F.3d 823 (9th Cir. 2005). NACDL's *amicus curiae* committee requested and authorized the undersigned counsel to file this brief. This Court's leave to do so has been sought by a separate, contemporaneously filed motion.

STATEMENT OF THE ISSUE

1. Whether this Court should overrule *United States v. Jewell*, 532 F.2d 697 (9th Cir. 1976) (*en banc*).

ARGUMENT

THIS COURT SHOULD OVERRULE *JEWELL* BECAUSE IT IS INCONSISTENT WITH THE TEXT, STRUCTURE, CONTEXT, AND HISTORICAL BACKGROUND OF THE COMPREHENSIVE DRUG ABUSE AND CONTROL ACT OF 1970.

We begin—as this *en banc* Court should—with first principles. "The starting point for any inquiry into statutory meaning is the text of the statute itself. Where 'the statute's language is plain, the sole function of the courts is to enforce it according to its terms,' for 'courts must presume that a legislature says in a statute what it means and means in a statute what it says there.'" *International Ass'n of Machinists & Aerospace Workers, Local Lodge 964 v. BF Goodrich Aerospace Aerostructures Group*, 387 F.3d 1046, 1051 (9th Cir. 2004) (quoting *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992); *United States v. Ron Pair Enters.*, 489 U.S. 235, 241 (1989)). Of course, such an approach does not authorize courts to read statutory language in a vacuum. To the contrary, statutory interpretation "'is a holistic endeavor,'" and the true meaning of statutory terms is frequently illuminated "'by the remainder of the statutory scheme—because the same terminology is used elsewhere in a context that makes its meaning clear, or because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law.'" *Id.* (quoting *United Sav. Ass'n v. Timbers of*

Inwood Forest Assocs., Ltd., 484 U.S. 365, 371 (1988)); *see also United States v. Sioux*, 362 F.3d 1241, 1245 (9th Cir. 2004) ("[T]he plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole.'") (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997)).

Measured against these familiar interpretive principles, *Jewell* plainly erred when it construed § 841(a)(1) to permit a conviction where the defendant did not actually know that he or she possessed illicit drugs.

A. Section 841's Literal Language And Internal Structure Require The Government To Prove A Defendant's Actual Knowledge—Not His Or Her Ignorance, Willful Or Otherwise.

Section 841(a)(1) criminalizes the act of "knowingly ... possess[ing] with intent to manufacture, distribute, or dispense, a controlled substance." Thus, the first question this Court must confront in assessing the validity of *Jewell*'s "deliberate ignorance" approach to criminal "knowledge" is whether the statutory term "knowingly" is capacious enough to encompass a defendant's "ignorance."

To ask that question is to answer it. When Congress declines to define a statutory term, courts must "construe [the] term in accordance with its ordinary or natural meaning." *F.D.I.C. v. Meyer*, 510 U.S. 471, 476 (1994) (citing *Smith v. United States*, 508 U.S. 223, 228 (1993)). No ordinary speaker of the English language would conflate "knowing" conduct with "ignorant" action. After all, the

two terms are antonyms: While "knowing" conduct naturally entails an actual awareness of the facts, *see Webster's Third New Int'l Dictionary* 1252 (1976) ("the condition or fact of possessing understanding or information or being aware of something"), exhibiting one's "ignorance" conveys precisely the opposite. *Id.* at 1125 (defining "ignorant" as "destitute of knowledge ... exhibiting lack of perception, knowledge, or intelligence ... unaware, uninformed").

As Judge Easterbrook has therefore observed: "Knowledge in a criminal statute means ***actual*** knowledge. What one ought to have known, but did not know, is not knowledge; it is not even (necessarily) recklessness." *United States v. Ladish Maltin Co.*, 135 F.3d 484, 488 (7th Cir. 1998) (Easterbrook, J.) (emphasis in original; internal citation omitted); *United States v. Bader*, 956 F.2d 708, 710 (7th Cir. 1992) ("Knowledge in criminal law is ***actual*** consciousness.") (emphasis in original); *see also United States v. Alston-Graves*, 435 F.3d 331, 337 (D.C. Cir. 2006) (Randolph, J.) ("It makes obvious sense to say that a person cannot act 'knowingly' if she does not know what is going on. To add that such a person nevertheless acts 'knowingly' if she intentionally does not know what is going on is something else again.") (citing Douglas N. Husak & Craig A. Callender, *Wilful Ignorance, Knowledge, and the "Equal Culpability" Thesis: A Study of the Deeper Significance of the Principle of Legality*, 1994 Wis. L. Rev. 29, 52 ("[I]t is hard to see how ignorance, from whatever cause, can be knowledge. A particular

explanation of why a defendant remains ignorant might justify treating him as though he had knowledge, but it cannot, through some mysterious alchemy, convert ignorance into knowledge.")); Larry Alexander, *Insufficient Concern: A Unified Conception Of Criminal Culpability*, 88 Cal. L. Rev. 931, 941 (2000) ("[W]ilful blindness is not knowledge; it is an attempt to avoid knowledge, and it frequently achieves that goal in that defendants who engage in wilful blindness do not believe to a practical certainty that their conduct is harmful. The prototypical wilfully blind defendant is, of course, reckless. The risk he is taking of, say, smuggling drugs is an unjustifiable one. The unjustifiability of the risk cannot, however, convert his recklessness into knowledge without absurd results.").

At the same time, construing § 841(a)(1) to permit convictions based on a defendant's ignorance of the underlying criminal act essentially writes out of the statute the additional requirement that the defendant form an "intent" to "manufacture, distribute, or dispense" the drugs in their possession. As then-Judge Kennedy recognized in his *Jewell* dissent, deliberate ignorance instructions like the one given in this case are "inherently inconsistent with the additional *mens rea* [requirement]. It is difficult to explain [how] a defendant can specifically intend to distribute a substance unless he knows that he possesses it." *Jewell*, 532 F.2d at 705 (Kennedy, J., dissenting).

Finally, this Court's interpretation of § 841(a)(1) in *Jewell* cannot be squared with the fact that another subsection of the very same statute expressly penalizes defendants who act with ignorance or indifference. Indeed, § 841(c)(2) of the statute expressly subjects to criminal sanction any person who "possesses or distributes a listed chemical knowing, ***or having reasonable cause to believe***, that the listed chemical will be used to manufacture a controlled substance." 21 U.S.C. § 841(c)(2) (emphasis added). It is axiomatic that "where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion," *Russello v. United States*, 464 U.S. 16, 23 (1983) (internal quotation and alteration omitted), and there is no basis for casting doubt on the applicability of that presumption here. *See also Barnhart v. Sigmon Coal Co., Inc.*, 534 U.S. 438, 452-54 (2002). Section 841(c)(2) conclusively demonstrates that Congress knows how to criminalize the deliberately ignorant possession of contraband when it wants to, and as the Supreme Court put the point in *United States v. Naftalin*, "[t]he short answer is that Congress did not write [§ 841(a)(1)] that way." 441 U.S. 768, 773 (1979).

At bottom, then, *Jewell* cannot be squared with the literal language of § 841(a)(1) or the internal structure of that statutory enactment.

B. Congress's Enactment Of Diminished *Mens Rea* Requirements In Other Provisions Of The Criminal Code Confirms That Section 841(a)(1) Requires Proof Of Actual Knowledge.

The broader legal context surrounding § 841(a)(1) provides further confirmation that Congress required the government to prove a defendant's actual knowledge in order to secure a conviction under that statutory subsection. As it did in § 841(c)(2), Congress has expressly provided for diminished-capacity *mens-rea* requirements in a large number of other federal statutes, including statutes both inside and outside the broader context of the war on drugs. And quite unlike the language Congress chose to employ in § 841(a)(1), those statutory enactments expressly contemplate a conviction based on the defendant's mere suspicion, ignorance, or indifference to the underlying facts that form the basis for criminal liability. *See, e.g.*, 21 U.S.C. § 843(a)(6)-(7) (penalizing the possession, manufacture, sale, import, or export of certain devices while "knowing, intending, or ***having reasonable cause to believe***" they will be used in the manufacture of illicit drugs) (emphasis added); 18 U.S.C. § 175b(b) (penalizing the transfer of certain biological agents where the transferor "knows ***or has reasonable cause to believe***" that those agents are being delivered to unlicensed transferees) (emphasis added); *id.* § 792 (penalizing the harboring of persons whom one "knows, ***or has reasonable grounds to believe or suspect***" is about to commit acts of espionage) (emphasis added); *id.* § 842(h) (penalizing the receipt of explosives by those

"knowing ***or having reasonable cause to believe***" that such goods were stolen) (emphasis added); *id.* § 2332d(a) (penalizing those who transact business with a foreign state "knowing ***or having reasonable cause to know***" that that state sponsors terrorism) (emphasis added); *id.* § 2339(a) (penalizing the harboring of persons whom the defendant "knows, ***or has reasonable grounds to believe***" has or is about to commit certain terrorist acts) (emphasis added); *id.* § 2424(a) (penalizing the harboring of persons for illicit purposes while "knowing ***or in reckless disregard of the fact***" that they are aliens) (emphasis added).

Given the frequency with which Congress chooses to penalize indifferent or ignorant conduct, the fact that it did not do so in § 841(a)(1) speaks volumes. Indeed, to interpret the term "knowing" as permitting a defendant's conviction where he or she merely suspected or should have known about the underlying criminal activity, as *Jewell* contemplates, is essentially to render each of these other statutory enactments superfluous. After all, if the term "knowing" already encompasses a defendant's suspicion or willful ignorance of the underlying criminal conduct, then Congress did not need to bother to provide expressly for convictions under these diminished *mens rea* requirements throughout the U.S. Code. *See, e.g., Dole Food Co. v. Patrickson*, 538 U.S. 468, 476-77 (2003) ("Absent a statutory text or structure that requires us to depart from normal rules of construction, we should not construe the statute in a manner that is strained and, at

the same time, would render a statutory term superfluous.") (citing *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 258 (1993); *United States v. Nordic Village, Inc.*, 503 U.S. 30, 36 (1992)).

C. The Common-Law Background Against Which Congress Enacted The Comprehensive Drug Abuse And Control Act of 1970 Confirms That Section 841(a)(1) Requires Proof Of Actual Knowledge.

Beyond the fact that § 841(a)(1)'s literal language, internal structure, and place within the broader legal landscape firmly demonstrate that Congress required the government to prove a defendant's ***actual knowledge*** beyond reasonable doubt, the relevant historical background against which Congress acted supports the view that it did not intend to account for willful ignorance when it first penalized "knowing" possession of drugs in the Comprehensive Drug Abuse and Control Act of 1970, Pub. L. No. 91-513, 84 Stat. 1236. *See Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 322 (1992) ("'Where Congress uses terms that have accumulated settled meaning under ... the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms.'") (quoting *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 739 (1989)). In this respect, the *Jewell* Court erred in its conclusion that the settled common-law understanding of criminally culpable "knowledge" encompassed any situation where the defendant willfully remained ignorant of the underlying facts. *See Jewell*, 532 F.2d at 700 & nn.5-7. To the extent there even

was a settled understanding—itself a debatable proposition—it did not remotely sweep so broadly.

The concept of deliberate ignorance first appeared in English cases in the latter part of the nineteenth century, with courts typically referring to the concept as "connivance" or "willful blindness." *See, e.g.*, *Somerset v. Hart*, [1883-84] L.R. 12 Q.B.D. 360 (Eng. 1884); *Redgate v. Haynes*, [1875-76] L.R. 1 Q.B.D. 89 (Eng. 1876); *Bosley v. Davies*, [1875-76] L.R. 1 Q.B.D. 84 (Eng. 1875). These early cases are subject to an array of possible interpretations, *see, e.g.*, Robin Charlow, *Wilful Ignorance and Criminal Culpability*, 70 Tex. L. Rev. 1351, 1361-65 (1992), but the key point here is that each of those cases construed a statute that did not even require the defendant to engage in "knowing" conduct at all. Instead, they arose under England's Intoxicating Liquors (Licensing) Act of 1872, a regulatory statute which barred innkeepers from "'suffer[ing] any gaming or any unlawful game to be carried on on his premises.'" *See Bosley*, 1 Q.B.D. at 84 (quoting 35 & 36 Vict., c. 94, § 17 (Eng. 1872)). The obvious problem with relying on those cases is that "suffering" is a broader mental state than "knowing," and "[w]hen 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." *Jewell*, 532 F.2d at 706 (Kennedy, J., dissenting).

The early American authorities referring to willful blindness likewise employed the doctrine only under special circumstances—where the defendant violated a regulatory statute or otherwise had some special obligation or duty to know the underlying facts in the first instance. To that end, the Supreme Court held in 1899 that a bank officer could be convicted of "willfully"—not "knowingly"—certifying a bad check "if the officer purposely keeps himself in ignorance of whether the drawer has money in the bank or not, or is grossly indifferent ***to his duty*** in respect to the ascertainment of that fact." *Spurr v. United States*, 174 U.S. 728, 735 (1899) (emphasis added). Subsequent federal authorities then periodically employed that approach in construing statutes (including civil statutes) that required proof of the defendant's "knowledge" or "knowing" conduct, but in these instances, too, the violations either were regulatory in nature or involved an independent legal duty of awareness. *See, e.g.*, *United States v. General Motors Corp.*, 226 F.2d 745, 749 (3rd Cir. 1955); *United States v. Erie R.R. Co.*, 222 F. 444, 448 (D. N.J. 1915). Thus, as then-Judge Kennedy noted in his *Jewell* dissent, these authorities provide little support for the *Jewell* majority's broad reading of the common-law history. *See Jewell*, 532 F.2d at 706 n.9 (Kennedy, J., dissenting); *see also* Jonathan L. Marcus, Note, *Model Penal Code Section 2.02(7) and Willful Blindness*, 102 Y.L.J. 2231, 2234-35 (1993) (confirming that early common-law authorities limited willful blindness to cases

where defendants were charged with a statutory duty to know, and explaining that "[b]ecause the common law doctrine of willful blindness condemns avoiding knowledge of a fact without specifying any particular level of awareness the defendant must have with respect to that fact, use of this doctrine in the absence of a duty to know creates the risk of unjust conviction.").

Rather than engaging in any substantive analysis of the historical antecedents to Congress's consideration of the Comprehensive Drug Abuse And Control Act of 1970, *Jewell* relied on proposed commentaries to the Model Penal Code—including commentaries to a ***tentative draft*** of that project—to support its view that a defendant's knowledge could be demonstrated by deliberate ignorance. *See Jewell*, 532 F.2d at 700-01 & nn.8-9 (citing Model Penal Code 27 (Proposed Official Draft 1962); Model Penal Code 129-30 (Tentative Draft No. 4, 1955)). That reliance, however, was fundamentally misplaced. The drafters of the Model Penal Code never intended their efforts to ***describe*** existing criminal law doctrines. Instead, they intended the Code to ***reform*** those doctrines. *See United States v. Bailey*, 444 U.S. 394, 403-04 (1980) (describing the American Law Institute's Model Penal Code as a "reform movement" that helped spur "a general rethinking of traditional *mens-rea* analysis," and explaining that the Model Penal Code "exemplified" a "new approach" that "move[d] away from the traditional dichotomy of intent and toward an alternative analysis of *mens rea*"). For these

reasons, it now is well-settled that unless "there is ... evidence that Congress endorsed the Code's views or incorporated them ... [courts] cannot rely on the Model Penal Code to provide evidence as to how Congress would have wanted [courts] to effectuate" federal legislation. *Dixon v. United States*, 126 S.Ct. 2437, 2447 (2006); *see also Bailey*, 444 U.S. at 406 ("[C]ourts obviously must follow Congress' intent as to the required level of mental culpability for any particular offense. Principles derived from common law as well as precepts suggested by the American Law Institute must bow to legislative mandates.").

At bottom, then, the historical background of the willful blindness doctrine provides no support for *Jewell*'s decision to employ willful blindness as a substitute for actual knowledge when no such knowledge exists. What then-Judge Kennedy stated in 1976 remains true today: when Congress requires that a defendant act "knowingly" to be convicted of an offense, courts cannot alter that crucial element of the offense by implying a defendant's knowledge where it has not been proven to exist.

D. To The Extent That The Statutory Text, Structure, Context, And Historical Background Of Section 841(a)(1) Leave Any Room For Doubt, The Rule Of Lenity Requires That Provision To Be Construed In The Defendant's Favor.

The foregoing analysis of § 841(a)(1)'s text, structure, and history makes clear that Congress has required the government to prove a defendant's actual knowledge beyond a reasonable doubt in order to secure his or her conviction

under that statute. Nonetheless, to the extent there is any residual ambiguity—and we think there is none—the rule of lenity requires that uncertainty to be resolved squarely against the government. *See, e.g.*, *United States v. Granderson*, 511 U.S. 39, 54 (1994) ("[W]here text, structure, and history fail to establish that the Government's position is unambiguously correct[,] we apply the rule of lenity and resolve the ambiguity in [the defendant's] favor."); *McNally v. United States*, 483 U.S. 350, 359-60 (1987) ("[W]hen there are two rational readings of a criminal statute, one harsher than the other, we are to choose the harsher only when Congress has spoken in clear and definite language.") (quoting *United States v. Bass*, 404 U.S. 336, 347 (1971) and *United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218, 221-222 (1952) with internal quotation marks omitted, and citing *Rewis v. United States*, 401 U.S. 808, 812 (1971) ("[A]mbiguity concerning the ambit of criminal statutes should be resolved in favor of lenity.")).

Indeed, few interpretive canons are of comparable importance to the structure of criminal justice in our system of separated powers. As Chief Justice Marshall explained:

> The rule that penal laws are to be construed strictly, is perhaps not much less old than construction itself. It is founded on the tenderness of the law for the rights of individuals; and on the plain principle that the power of punishment is vested in the legislative, not in the judicial department. It is the legislature, not the Court, which is to define a crime, and ordain its punishment.

United States v. Wiltberger, 18 U.S. (5 Wheat.) 76, 94 (1820); *see also Morissette v. United States*, 342 U.S. 246, 263 (1952) ("The spirit of the doctrine which denies to the federal judiciary power to create crimes forthrightly admonishes that we should not enlarge the reach of enacted crimes by constituting them from anything less than the incriminating components contemplated by the words used in the statute.") (footnote omitted); *United States v. Hudson & Goodwin*, 11 U.S. (7 Cranch) 32, 34 (1812) ("The legislative authority of the Union must first make an act a crime, affix a punishment to it, and declare the Court that shall have jurisdiction of the offence.").

Whatever arguable merit one might divine from *Jewell*'s strained analysis of the text, structure, and history of § 841(a)(1), the *Jewell* majority fundamentally erred by failing to address—much less apply—the rule of lenity once it conceded that the term knowingly is at least fairly susceptible to competing understandings. *See Jewell*, 532 F.2d at 703-04 ("[T]he question is the meaning of the term 'knowingly' in the statute. If it means positive knowledge, then, of course, nothing less will do. But if 'knowingly' includes a mental state in which the defendant is aware that the fact in question is highly probable but consciously avoids enlightenment, the statute [permits conviction]."); *see also id.* at 701 n.9 (quoting Model Penal Code 129-30 comment 9 (Tentative Draft No. 4, 1955)) ("Whether such cases should be viewed as instances of acting recklessly or knowingly

presents a subtle but important question.")). As the foregoing arguments make clear, we think *Jewell* was wrong about that too—the text, structure, and historical context of § 841(a)(1) plainly demonstrate that Congress required proof of the defendant's actual knowledge—but the key point here is that for nearly two hundred years, it has been settled that such doubts must be resolved in the defendant's favor. On this ground as well, *Jewell* should be overruled.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the district court and remand this case for further proceedings.

Respectfully submitted,

October 17, 2006

Kenneth W. Starr
Michael D. Shumsky
Gregory L. Skidmore
KIRKLAND & ELLIS LLP
655 Fifteenth Street, N.W., Suite 1200
Washington, DC 20005
Phone: (202) 879-5000
Fax: (202) 879-5200

Counsel for Amicus Curiae National Association of Criminal Defense Lawyers

Sheryl Gordon McCloud
LAW OFFICES OF SHERYL GORDON MCCLOUD
1301 5th Avenue
Seattle, WA 98101
Phone: (206) 224-8777
Fax: (206) 682-3746

Vice-Chair, National Association of Criminal Defense Lawyers Amicus Committee

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief is proportionately spaced, has a typeface of 14 points or more, and contains 5442 words. I used Microsoft Word 2000 to prepare this brief.

Michael D. Shumsky
Counsel for Amicus Curiae National Association of Criminal Defense Lawyers

CERTIFICATE OF SERVICE

I hereby certify that on October 17, 2006, I served two copies of the foregoing Appellees' Joint Response Brief upon each of the following counsel of record by overnight Federal Express delivery:

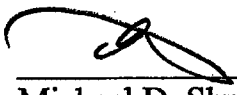
Christina M. Cabanillas, Esq.
George Ferko, Esq.
OFFICE OF THE UNITED STATES ATTORNEY
Evo A. DeConcini U.S. Courthouse
405 W. Congress St., Suite 4800
Tucson, AZ 85701-5040
Phone: (520) 620-7300

Counsel for Plaintiff-Appellee United States of America

Wanda Day, Esq.
405 N. Court Avenue
Tucson, AZ 85701
Phone: (520) 791-9630

Eric A. Shumsky, Esq.
SIDLEY AUSTIN BROWN & WOOD
1501 K Street, N.W.
Washington, D.C. 20005
Phone: (202) 736-8000

Counsel for Defendant-Appellant Carmen Denise Heredia



Michael D. Shumsky
Counsel for Amicus Curiae National Association of Criminal Defense Lawyers