**UNITED STATES COURT OF APPEALS**
**for the Fifth Circuit**

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No. 92-8584
Summary Calendar

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UNITED STATES OF AMERICA,

Appellee,

VERSUS

JOSE PABLO CABRERA-PEREZ,

Appellant.

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Appeal from the United States District Court
for the Western District of Texas
EP 92 CR 252

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May 31, 1993

Before KING, DAVIS and WIENER, Circuit Judges.

DAVIS, Circuit Judge:[1]

Jose Pablo Cabrera-Perez challenges his convictions for possessing marijuana with intent to distribute and for importing marijuana following an adverse jury verdict. More particularly, appellant contends the district court erred in giving a "deliberate ignorance" charge to the jury. We find no error and affirm.

I.

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[1]Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

Trial testimony established the following facts: Cabrera-Perez entered the United States from Mexico on June 15, 1992, at the Bridge of the Americas in El Paso, Texas. Cabrera-Perez was driving a black Nissan with California license plates. When Cabrera-Perez passed through the primary inspection area, he presented his temporary alien card. In response to questions by Immigration Inspector Rodolfo Bustillos, Cabrera-Perez stated that he was returning home to California and that the car was his.

During the questioning, Cabrera-Perez avoided eye contact with Inspector Bustillos and kept looking toward the secondary inspection area. Bustillos felt Cabrera-Perez looked nervous and referred him to the secondary inspection area for canine inspection. At the secondary inspection area, in response to questions by Customs Inspector Hector Pruneda, Cabrera-Perez stated that he was bringing nothing back from Mexico and that he was returning from Guadalajara, Mexico, where he had been for two weeks. Inspector Pruneda noticed that Cabrera-Perez had no luggage in the car, that he appeared nervous upon his questioning, and that the car had a heavy sweet odor like a house air freshener (often used to cover the smell of marijuana).

Pruneda asked Canine Enforcement Officer Daniel Mendoza to use his narcotic detector dog. The dog alerted to the rear bumper area and Pruneda noticed that Cabrera-Perez looked dejected. Pruneda escorted Cabrera-Perez to the security office. Cabrera-Perez asked no questions and did not appear surprised.

After placing Cabrera-Perez in a security cell, Pruneda

returned to the car and noticed that the trunk was slightly raised, that the carpet on the trunk area was glued, that there was no tire well inside, and that he could not lift what is usually cardboard over the spare tire. Pruneda also detected a heavy odor of marijuana. Another customs inspector drilled two holes in a metal plate which had been welded and bonded over the wheel well. The agents discovered 76.5 pounds of marijuana.

During the questioning Cabrera-Perez disavowed any knowledge of the marijuana. In response to questions by Special Customs Agent Manuel Olmos, Cabrera-Perez stated that Jesus Hinojosa owned the Nissan and that he had met Hinojosa five months earlier on a street corner in his home town in California. Agent Olmos asked Cabrera-Perez why the car was registered to Cabrera-Perez. Cabrera-Perez explained that he had given Hinojosa permission to register the car in Cabrera-Perez's name because Hinojosa lacked the necessary immigration papers to take the car into Mexico. This explanation made no sense to Agent Olmos because such papers are not needed to go into Mexico, but are needed to come into the United States.

Cabrera-Perez stated that Hinojosa asked him to go to Guadalajara and that they left together on May 25, 1992. Initially, Cabrera-Perez told Agent Olmos that Hinojosa paid all of his expenses and gave him $1000, but later changed his story and told him that Hinojosa gave him not $1000, but $500 and 500,000 pesos. Cabrera-Perez testified at trial that Hinojosa gave him the money for travel expenses.

Cabrera-Perez told Agent Olmos that he first saw the "load" car on May 25, 1992. Documentation revealed, however, that Cabrera-Perez was driving the car in Mexico on November 13, 1991, and on May 19, 1992. After further questioning, Cabrera-Perez admitted driving the car from Mexico into the states at El Paso on May 19, 1992. According to Cabrera-Perez, the car's clutch broke on their way to Guadalajara, and he went to El Paso to buy a replacement part. When questioned how he drove the car to El Paso with a broken clutch, Cabrera-Perez responded that it was not the load car but another car that had broken down.

Cabrera-Perez's description of the other car was no different from the load car which he was driving when he was stopped, except that it was red. Further, Cabrera-Perez did not know who owned the other car, could not name or describe the replacement part that he claimed to have paid $50 for in El Paso, and could not identify in general terms the location of the place he bought the part. After the car was repaired, Hinojosa and Cabrera-Perez continued on to Guadalajara. Two weeks later Hinojosa turned the car over to Cabrera-Perez and they went their separate ways. Cabrera-Perez was to meet Hinojosa in Pico Rivera, California, but Cabrera-Perez was unsure what mode of transportation Hinojosa would be taking. After consulting a map, Agent Olmos determined that Cabrera-Perez's route from Guadalajara to El Paso was circuitous.

U.S. Customs Service Special Agent Howard Shreve seized documents from the load car's glove compartment which included a receipt with Cabrera-Perez's name on it from a hotel in Mexico.

Agent Shreve also found an immigration document showing that Cabrera-Perez entered Guadalajara by airplane on June 9, 1992. Cabrera-Perez testified at trial that while he was in Guadalajara he hitched a ride to Los Angeles because a man owed him $1000, which he needed for his son's operation. After obtaining the money, he returned to Guadalajara by airplane. He arrived at 1:00 a.m. and stayed at a hotel because he did not know the way to the house where he was staying. Cabrera-Perez left the money with his mother and is unsure whether the boy ever had the operation.

II.

Cabrera-Perez argues that the court erred when it gave a "deliberate ignorance" instruction to the jury. A conviction for the possession of marijuana with the intent to distribute requires that the Government prove three elements: (1) knowing (2) possession of marijuana (3) with the intent to distribute it. **United States v. Diaz-Carreon**, 915 F.2d 951, 953 (5th Cir. 1990). To convict a defendant of importing marijuana the Government must prove that the defendant "knowingly played a role in bringing marijuana from a foreign country into the United States." **Id**. Thus, the Government had to establish beyond a reasonable doubt the defendant's criminal knowledge.

The district court issued the following instruction to the jury on guilty knowledge:

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

> blinded himself to the existence of a fact. However, even so, if you find the Defendant actually believed the transaction did not involve marijuana, then you must acquit the Defendant.

Cabrera-Perez objected to the giving of the instruction. This court reviews a claim that a jury instruction was inappropriate by determining "whether the court's charge, as a whole, is a correct statement of the law and whether it clearly instructs jurors as to the principles of law applicable to the factual issues confronting them." **United States v. Stacey**, 896 F.2d 75, 77 (5th Cir. 1990). This court has consistently upheld deliberate ignorance instructions when sufficient evidence supports their insertion in the charge. **United States v. Lara-Velasquez,** 919 F.2d 946, 951 (1990). For the evidence to support such a charge, it must raise two inferences: "(1) the defendant was subjectively aware of a high probability of the existence of the illegal conduct; and (2) the defendant purposely contrived to avoid learning of the illegal conduct." **Id**.

Cabrera-Perez asserts that the instruction should be given only when there is direct evidence of a conscious purpose to avoid learning the truth and that such evidence was lacking in the instant case. He maintains that, otherwise, a defendant could be convicted under a mere negligence standard rather than under the reasonable doubt standard.

The first prong the of deliberate ignorance test, however, protects a defendant from being convicted simply because he was negligent or did not know what he should have known. The Government must present facts that support an inference that the

particular defendant subjectively knew his act to be illegal--not facts that support an inference that a reasonable person would have known the act to be illegal. **Lara-Velasquez**, 919 F.2d at 952.

As to Cabrera-Perez's subjective awareness of the high probability that he was involved in an illegal activity, the Government produced evidence that Cabrera-Perez exhibited signs of nervousness at the border crossing and gave inconsistent accounts of his journey in and out of Mexico. Based on the testimony, the court could reasonably have concluded that the Government satisfied the first prong of the deliberate ignorance test. **See id**. at 952-53 (nervousness at the border crossing, an attempt to escape, and inconsistent accounts of stay in Mexico)(citing **Diaz-Carreon**, 915 F.2d at 954-55 (nervousness and inconsistent statements); **United States v. Williams-Hendricks**, 805 F.2d 496, 500-01 (5th Cir. 1986) (nervousness and inconsistent stories); **United States v. Del Aguila-Reyes**, 722 F.2d 155, 158 (5th Cir. 1983) (false statements)).

As for the second prong of the deliberate ignorance test, we conclude that the evidence at trial tended to support the inference that Cabrera-Perez "purposely contrived to avoid learning of the illegal conduct." **Lara-Velasquez**, 919 F.2d at 951. According to Cabrera-Perez he did not question why Hinojosa travelled with Cabrera-Perez to Mexico but did not return to California with him even though the car was allegedly Hinojosa's. Similarly, he did not question why Hinojosa paid Cabrera-Perez's travel expenses. Thus, the district court could reasonably have concluded that the

evidence at trial satisfied the second prong of the deliberate ignorance test.

III.

For the above reasons, the judgment of conviction is affirmed.

AFFIRMED.