

1 Leval, *Circuit Judge*, concurring:

2 Fofanah contends his conviction should be overturned because the court instructed the
3 jury on conscious avoidance of guilty knowledge (or willful blindness to the incriminating fact
4 that the cars were stolen) when the evidence, according to his argument, did not allow for such a
5 charge. He bases his argument on our opinion in *United States v. Ferrarini*, in which we
6 discussed the standards for such an instruction and concluded it should not have been given. *See*
7 *United States v. Ferrarini*, 219 F.3d 145, 157-58 (2d Cir. 2000). In our *per curiam* opinion, we
8 do not confront his argument because it would make no difference to our disposition. Even if we
9 were to conclude the charge was given in error, the error would be harmless. I agree with and
10 join in the court's opinion. I write separately to refute his argument because it is based on
11 misinterpretation of our precedent.

12 Fofanah reads *Ferrarini* as endorsing a standard that differs from the standard we have
13 espoused in cases in which we upheld convictions concluding that the charge was properly
14 given. His reading of *Ferrarini* is mistaken. *Ferrarini* did not endorse a standard at odds with
15 our precedents. To the contrary, *Ferrarini* concluded the charge should not have been given
16 because the court found that our standard for a conscious avoidance charge was not met, and the
17 court rejected the government's argument seeking to justify the charge on the basis of evidence
18 of actual knowledge. *Ferrarini* does not support the defendant's argument.

19 In *United States v. Svoboda*, decided subsequent to *Ferrarini*, we summarized the
20 evidentiary requirements for a conscious avoidance charge. The defendants were charged with
21 fraud in connection with the sale of securities. The defendant Robles appealed his conviction,
22 contending the jury should not have been charged on conscious avoidance. 347 F.3d 471, 480
23 (2d Cir. 2003). Citing prior authority, including the *Ferrarini* opinion, on which Fofanah

1 erroneously relies, we reviewed what the evidence must show to justify giving the charge. We
2 explained:

3 A conscious avoidance instruction “may only be given if (1)
4 the defendant asserts the lack of some specific aspect of knowledge
5 required for conviction, . . . and (2) the appropriate factual predicate
6 for the charge exists, i.e., ‘the evidence is such that a rational juror
7 may reach [the] conclusion beyond a reasonable doubt . . . that [the
8 defendant] was aware of a high probability [of the fact in dispute]
9 and consciously avoided confirming the fact[.]’” *Ferrarini*, 219
10 F.3d at 154 The second prong of this test thus has two
11 components – there must be evidence that the defendant (1) was
12 aware of a high probability of the disputed fact and (2) deliberately
13 avoided confirming that fact. . . . Moreover, the second prong may
14 be established where, “[a] defendant’s involvement in the criminal
15 offense may have been *so overwhelmingly suspicious* that the
16 defendant’s failure to question the suspicious circumstances
17 establishes the defendant’s purposeful contrivance to avoid guilty
18 knowledge.”

19 *Id.* We stressed as well that the conscious avoidance of guilty knowledge “may not be
20 established by demonstrating that the defendant was merely negligent, foolish or mistaken.” *Id.*
21 at 481-82 (internal quotation marks omitted). Reviewing the evidence offered against Robles, we
22 found that it conformed to the standard. We therefore upheld the propriety of the instruction and
23 affirmed his conviction. *Id.* at 480-81, 485. (There was no evidence that Robles had taken
24 affirmative steps to avoid acquiring knowledge of the incriminating facts.)

25 Although not always spelling out the standard in explicit terms, we have long
26 consistently adhered to this standard. *See, e.g., United States v. Aina-Marshall*, 336 F.3d 167 (2d
27 Cir. 2003); *United States v. Rodriguez*, 983 F.2d 455 (2d Cir. 1993); *United States v. Bahadar*,
28 954 F.2d 821 (2d Cir. 1992); *United States v. Guzman*, 754 F.2d 482 (2d Cir. 1986), *cert. denied*,
29 474 U.S. 1054 (1986).

1 Fofanah now argues that *Ferrarini* calls for use of a very different standard. He contends
2 that the instruction may not be given in the absence of evidence that the defendant took
3 *affirmative steps* to avoid knowing the incriminating facts. He appears to argue as well that
4 evidence of actual knowledge is not compatible with an instruction on conscious avoidance. His
5 arguments, however, are based on a misreading of *Ferrarini*.

6 In *Ferrarini*, our court accepted the argument of defendants Vieira and Kagan that the
7 government had not established a factual predicate for the conscious avoidance charge (although
8 going on nonetheless to affirm their convictions because of the strong evidence of actual
9 knowledge). The reason we found the evidence inadequate to sustain the giving of the charge
10 was that, under our standard, which the *Ferrarini* opinion recited in a manner virtually identical
11 to our later statement of it in *Svoboda*, see *Ferrarini*, 219 F.3d at 154, a showing of a defendant's
12 *actual knowledge* does not justify giving the instruction. There must be evidence capable of
13 supporting a finding "that the defendant was aware of a high probability of the [incriminating]
14 fact in dispute and consciously avoided confirming that fact." *Id.* (brackets omitted). While we
15 found evidence of actual knowledge on the part of Vieira and Kagan, we found no evidence that
16 could support a finding that either defendant was aware of a high probability of the incriminating
17 fact but consciously avoided learning it. We explained, "[T]he only [arguable] factual predicate
18 for conscious avoidance to which the government can point is the evidence that Kagan had
19 actual knowledge of the frauds. . . . [T]he government does not argue, and the evidence does not
20 show, that Kagan deliberately avoided learning the truth." *Id.* at 158. As to Vieira, we similarly
21 explained, "The evidence shows that Vieira actually knew of the frauds; it is not sufficient to
22 permit a finding that he consciously avoided confirming them. The fact that a jury can – on the

1 evidence – find actual knowledge does not mean that it can also find conscious avoidance.” *Id.* at
2 157.

3 This discussion in *Ferrarini*, properly understood, does not support Fofanah’s arguments.
4 It means neither that there must be evidence of *affirmative steps* taken by the defendant to avoid
5 learning the truth, nor that evidence of the defendant’s actual knowledge precludes a charge on
6 conscious avoidance. It means only, as we have repeatedly stated in reciting the standard, that
7 there must be evidence from which a jury could find that the defendant was aware of a high
8 probability of the critical incriminating facts and consciously decided to act without confirming
9 them.

10 What we said in *Ferrarini* does not support Fofanah’s argument that the conscious
11 avoidance charge may not be given without a showing of affirmative steps taken by the
12 defendant to ensure that he does not learn the truth. Our statements that the evidence must
13 support a finding that the defendant “consciously” or “deliberately” avoided referred to a
14 requisite state of mind, not to a need for affirmative acts. Conviction on a conscious avoidance
15 theory cannot be justified either by the defendant’s failure to try hard enough to learn the
16 incriminating facts or by the fact that the defendant’s circumstances “*should have apprised* [the
17 defendant] of the unlawful nature of [his] conduct.” *Id.* at 157 (quoting *United States v.*
18 *Rodriguez*, 983 F.2d 455, 458 (2d Cir. 1993)). The defendant must be consciously aware that, in
19 spite of the apparent high probability that the acts in which he joins are illegal, he does not know
20 the crucial facts. A finding that a defendant’s ignorance of incriminating facts was a conscious
21 choice on the defendant’s part in no way requires a finding that the defendant took affirmative
22 steps to avoid gaining the knowledge. It does not depend, for example, on the defendant having

1 said, “I don’t want you to tell me how you obtained these stacks of neatly bound \$100 bills,
2 packed in bags labeled ‘Brink’s.’”

3 Apart from the fact that our precedents have not required a showing of affirmative acts
4 designed to avoid acquiring guilty knowledge, such a requirement would make the doctrine ill-
5 suited to its purpose and inconsistent with the habits of well-advised, self-protective criminal
6 conduct. In many types of criminal enterprise, the asking of unnecessary questions and needless
7 volunteering of information are frowned upon because such conduct needlessly subjects all
8 participants to risk of incrimination. When a drug dealer pays a mule \$5,000 to deliver an
9 innocuous looking package to a person wearing a Dodgers baseball cap standing next to a blue
10 Audi in a parking lot a few blocks away, he has no need to explain that the package contains
11 cocaine, and the mule generally knows it is better not to ask. One who seeks to sell a hijacked
12 truckload of computers to a fence at a small fraction of the value it would command if the
13 merchandise were legitimate does not volunteer that the goods were hijacked, and the fence does
14 not ask. If judges were to adopt a rule that a charge on conscious avoidance may not be given
15 absent evidence that the defendant took affirmative steps to avoid gaining knowledge of the
16 incriminating facts, the doctrine would cease to function in the very circumstances for which it is
17 most needed. Such a ruling would issue a free pass to dealers in contraband without serving a
18 useful purpose in distinguishing the guilty from the innocent. Protection of careless innocents is
19 provided by the rule that the charge is allowed only when the circumstances will sustain a
20 finding *beyond a reasonable doubt* that the defendant was aware of a high probability of the
21 incriminating fact, but consciously chose to act in furtherance of the venture without learning the
22 incriminating truth, as well as by the content of the instruction.^{1 2}

¹ The instruction also requires the jury to find that the defendant does not actually believe in a contrary fact. *See, e.g., United States v. Sicignano*, 78 F.3d 69, 71 (2d Cir. 1996) (citations

1 Nor is there merit in Fofanah’s further contention that evidence of a defendant’s actual
2 knowledge of the incriminating facts precludes a charge on conscious avoidance of those facts.
3 In *United States v. Aina-Marshall*, 336 F.3d 167 (2d Cir. 2003), we upheld the propriety of the
4 conscious avoidance instruction notwithstanding extensive evidence supporting the defendant’s
5 actual knowledge that she was transporting illegal drug contraband in her suitcase. (Nor did we
6 require evidence that the defendant took affirmative steps to avoid knowledge of the facts.)
7 There was testimony that (i) when a customs agent moved some of the top-layer items in the
8 defendant’s suitcase in a manner that exposed the hidden packages of drugs, the defendant
9 reached in and moved other contents so as to cover once again the exposed packages; (ii) the
10 defendant gave the customs agent an incorrect address for her sister in the United States, even

omitted). We have also emphasized that, to be convicted on a conscious avoidance theory, “the defendant [cannot] be shown . . . merely to have failed to learn [a culpable fact] through negligence.” *United States v. Rodriguez*, 983 F.2d 455, 458 (2d Cir. 1993). We have not hesitated to vacate convictions based on an inadequately balanced conscious avoidance charge. *See, e.g., United States v. Kaiser*, 609 F.3d 556, 567 (2d Cir. 2010); *United States v. Morales*, 577 F.2d 769, 775 (2d Cir. 1978).

² I note that in *Global-Tech Appliances*, the Supreme Court used words that might be construed as confirming the defendant’s argument that “the defendant must take deliberate actions to avoid learning of [the culpable] fact.” *Global-Tech Appliances, Inc. v. SEB S.A.*, 131 S. Ct. 2060, 2070 (2011). That would be a misunderstanding of the Court’s discussion. The discussion arose out of a civil patent infringement claim in which the defendant’s liability depended on knowing infringement, and the Federal Circuit had affirmed liability based on a finding of deliberate indifference, *see id.* at 2064-65, a doctrine that has much in common with conscious avoidance or willful blindness. When discussing the willful blindness (or conscious avoidance) doctrine, the Court was merely summarizing what it understood to be the uniform standards approved by the various circuits. It stated that “all [the circuits] appear to agree on two basic requirements, [including that] the defendant must take deliberate actions to avoid learning of that [incriminating] fact.” *Id.* at 2070. However, the Court was mistaken in that observation. At the conclusion of the sentence, the Court added a footnote in which it reviewed the requirements of twelve circuits, as expressed in twelve different opinions. In fact, none of the twelve circuit opinions cited called for action on the part of the defendant to avoid learning of the culpable fact. *See id.* at 2070 n.9. What the Supreme Court meant is better revealed by its statement that “defendants cannot . . . deliberately shield[] themselves from clear evidence of critical facts that are strongly suggested by the circumstances.” *Id.* at 2068-69. Thus, although on superficial reading the Supreme Court’s opinion might seem to support Fofanah’s argument that deliberate action is required, that would be a misreading, as the Court was merely (mistakenly) summarizing what it understood to be the positions of the various circuits.

1 though she had the correct address on her person; (iii) the defendant gave an extraordinarily
2 implausible explanation for her possession of the suitcase, explaining that she was asked by an
3 old friend in Nigeria (whom she had not seen in 10 years) to bring it to the friend's brother; (iv)
4 the heroin in the suitcase weighed over 50 pounds; and (v) when the customs agent found the
5 packages that contained drugs, the defendant "looked heavenward and shook her head slowly
6 from side to side." *Aina-Marshall*, 336 F.3d at 168-69. Plainly, the holding of *Aina-Marshall*,
7 decided several years after *Ferrarini*, is not compatible with the proposition that evidence of the
8 defendant's actual knowledge of the incriminating facts precludes an instruction on conscious
9 avoidance of knowledge of those facts.

10 What is determinative is not whether there is evidence in the record of actual knowledge.
11 It is rather whether the evidence can support a finding that the defendant was aware of so high a
12 probability of the incriminating facts that the defendant either knew the truth, or if not, it was
13 because the defendant consciously decided to act without confirming the highly probable
14 incriminating truth. *See Svoboda*, 347 F.3d at 480-81.

15 Evidence that the defendant knew the incriminating truth does not necessarily support a
16 finding that the defendant, while aware of the high probability of the incriminating fact,
17 consciously closed his eyes to these facts. If, for example, the defendant was charged with
18 knowing possession of stolen computers, and the only evidence bearing on the defendant's
19 knowledge that the computers in his possession were stolen was evidence showing that the
20 defendant himself held up a computer store at gunpoint and stole the computers (or alternatively
21 that the defendant said, "I am trying to sell the stolen computers"), such evidence would
22 powerfully support the defendant's knowledge that the computers were stolen, but would not
23 support the position that the defendant consciously chose not to learn that incriminating fact.

1 Such a record might well sustain the argument that a conscious avoidance charge was not
2 permissible. Thus, in *Ferrarini*, we concluded that, while there was evidence of the defendants’
3 actual knowledge, there was no evidence that could support a finding of the defendants’ decision
4 to act while deliberately avoiding learning the truth. *Ferrarini*, 219 F.3d at 157-58. Because of
5 the absence of such evidence, the charge could not be justified.

6 Nonetheless, as we specifically noted in *Svoboda*, in some circumstances, “the same
7 evidence that will raise an inference that the defendant had actual knowledge of the illegal
8 conduct . . . will also raise the inference that the defendant was subjectively aware of a high
9 probability of the existence of [the incriminating facts].” *Svoboda*, 347 F.3d at 480. In those
10 circumstances, “a defendant’s involvement in the criminal offense may have been *so*
11 *overwhelmingly suspicious* that the defendant’s failure to question the suspicious circumstances
12 establishes the defendant’s purposeful contrivance to avoid guilty knowledge.”³ *Id.* What follows
13 is that evidence of actual guilty knowledge will sometimes support a conscious avoidance charge
14 and sometimes will not. This turns on whether the evidence supporting guilty knowledge is of
15 such a character that it also supports the proposition that the defendant was aware of a high
16 probability of the incriminating facts, but consciously chose to be blind to the truth. The point of
17 *Ferrarini* is that the propriety of a conscious avoidance charge is not established by the presence
18 of evidence of actual knowledge. If, however, the evidence supporting actual knowledge is of
19 such character that it also supports a finding beyond a reasonable doubt that the defendant was
20 aware of a high probability of the incriminating fact, and nonetheless acted in furtherance of the

³ While our opinions generally speak of “suspicious circumstances” without adding that the suspicious nature of the circumstances must be apparent to the defendant, it seems clear this component was intended and is necessary. Unless the evidence supports the likelihood that the suspicious circumstances were apparent to the defendant, it would not seem to support a theory of conscious avoidance.

1 venture conscious of his ignorance of the true facts, then evidence tending to show the
2 defendant's knowledge will also support a charge on conscious avoidance. Fofanah's argument
3 that, under *Ferrarini*, evidence of the defendant's knowledge of the incriminating facts precludes
4 a charge on conscious avoidance of them is simply a misreading of the opinion.

5 The argument is also defective for the further reason that it overlooks the jury's
6 entitlement to accept some evidence and reject other evidence. Even assuming that some of the
7 evidence against Fofanah is of the sort that shows actual knowledge but cannot support a finding
8 of conscious avoidance of actual knowledge, still such evidence would not preclude a proper
9 charge on conscious avoidance, so long as the evidence also included sufficient evidence of the
10 sort that would support a finding of a conscious or deliberate failure to learn the truth. For
11 example, even if some of the evidence against Fofanah was tantamount to an explicit admission
12 by Fofanah that he knew the cars were stolen – evidence which is difficult or impossible to
13 reconcile with a finding of willful, or conscious, blindness – the jury might reject that evidence
14 while accepting other evidence that *is* compatible with a finding of conscious avoidance. In other
15 words, the presence or absence of evidence establishing actual knowledge has no bearing on
16 whether the conscious avoidance charge is appropriate. What matters is whether there is
17 evidence that supports the standard for giving the charge on conscious avoidance, regardless of
18 whether that evidence might also support a finding of actual knowledge. In *Ferrarini*, we
19 concluded there was no such evidence. The impropriety of the charge in *Ferrarini* depended not
20 on the fact that there was evidence of actual knowledge but on the absence of evidence that
21 could support a finding of conscious avoidance.

22 Our decision in *United States v. Kaplan*, 490 F.3d 110 (2d Cir. 2006), which Fofanah
23 does not cite, comes close to expressly rejecting his argument. Kaplan was convicted of

1 participation in a witness tampering scheme, by a jury, which was charged on conscious
2 avoidance. On his appeal, we agreed with his contention that the charge should not have been
3 given for lack of evidence establishing a factual predicate for the charge (although concluding
4 the error was harmless). Citing *Ferrarini*, we explained that “[e]vidence sufficient to find actual
5 knowledge does not necessarily constitute evidence sufficient to find conscious avoidance.” *Id.*
6 at 127. While agreeing with his contention that the charge should not have been given, we
7 explicitly rejected an argument he made – very similar to Fofanah’s contention here – “that it
8 was error for the district court to give a conscious avoidance charge when the government
9 argued actual knowledge in the alternative.” *Id.* at 128 n.7. We explained:

10 Although we noted in *Ferrarini* that evidence sufficient to
11 find actual knowledge does not necessarily establish a factual
12 predicate for conscious avoidance, 219 F.3d at 157, we have held
13 that a conscious avoidance charge is “not inappropriate merely
14 because the Government has primarily attempted to prove that the
15 defendant had actual knowledge, while urging in the alternative
16 that if the defendant lacked such knowledge it was only because he
17 had studiously sought to avoid knowing what was plain.” *United*
18 *States v. Hopkins*, 53 F.3d 533, 542 (2d Cir. 1995). So long as the
19 Government can establish a factual predicate for conscious
20 avoidance, it is free to argue alternative theories of conscious
21 avoidance and actual knowledge.

22 *Id.*

23 In other words, there is no incompatibility between proof of actual knowledge and a
24 charge on conscious avoidance. The government is free to pursue both routes simultaneously as
25 alternative theories. Pursuit of the conscious avoidance theory depends on whether the evidence
26 can support the required predicate, regardless of whether the evidence can also support, and the
27 government also argues, actual knowledge. Accordingly, there is no merit to Fofanah’s argument
28 that the existence of evidence showing his actual knowledge that the vehicles were stolen
29 precluded the giving of the charge of conscious avoidance. And there is no inconsistency

1 between the standards we espoused in such cases as *Svoboda* and *Aina-Marshall* in upholding
2 the propriety of the conscious avoidance charge, and those which supported disapproval of the
3 charge in *Ferrarini* and *Kaplan*. The different appraisals were attributable to factual differences
4 between the two sets of cases.

5 The only question as to the propriety of the conscious avoidance charge in this case is
6 whether the evidence, regardless of whether it could or could not support a finding of actual
7 knowledge, could support a finding beyond a reasonable doubt that the circumstances apparent
8 to the defendant were sufficiently suspicious that, if he was ignorant of the highly probable
9 incriminating facts, he acted with conscious awareness of his ignorance. The evidence recited in
10 our *per curiam* opinion as showing that Fofanah actually knew the cars were stolen also, in my
11 view, satisfied the standard for a finding of his conscious avoidance.⁴

⁴ Many circuits approve charging the jury in this fashion in appropriate circumstances. While the standards among the various circuits are generally in agreement, there are small differences in the terminology used. Some circuits, like ours, use the term “conscious avoidance,” while others use “willful blindness.” (“Deliberate ignorance” is also used.) The Supreme Court discussed the doctrine with approval in *Global-Tech Appliances, Inc. v. SEB S.A.*, 131 S. Ct. 2060, 2070 (2011), employing the term, “willful blindness” (which appears to be used in a plurality of circuits). In *United States v. Coplan*, 703 F.3d 46 (2d Cir. 2012), and *United States v. Ferguson*, 676 F.3d 260 (2d Cir. 2011), we said that the Supreme Court “appears to now prefer” *willful blindness* over *conscious avoidance*. *Coplan*, 703 F.3d at 89 n.39; *Ferguson*, 676 F.3d at 278 n.16. I do not think this is quite correct. On my reading of *Global-Tech Appliances*, the Supreme Court expressed no preference. It merely noted the currency of both terminologies and used one of them, essentially treating them as equivalents. Nor did the Court advert to any substantive differences that depend on which terminology is used. To the contrary, the Court treated the prerequisites and content of the charge as substantially identical, regardless of which terminology is employed.

In my view, there are potential subtle differences that can flow from those labels, especially to the extent that the labels are employed in the charge itself, or in the definition of the prerequisite standards for its use. I believe there are small disadvantages to each of the two most common formulations, and that a preferable formulation might result from a combination of their elements.

The disadvantage of the term *willful blindness* lies in that the word “willful” ordinarily describes an intentional purpose to achieve a desired result, as opposed to conscious and willing

acceptance. Although it is true that in many common instances the defendant as to whom the charge is invoked does intend purposively not to know the incriminating facts, it seems to me the propriety of the charge should not depend on that willful, purposive intention. In some instances, a defendant who enthusiastically joins others in a criminal venture, well aware of suspicious circumstances that support a high probability that the venture is criminal and indeed assuming it to be criminal, but without having been informed by his colleagues of the true incriminating facts, *would like to know* (and perhaps asks unsuccessfully to be told) all the incriminating details – not because his participation would depend on being assured that the venture is lawful, but simply out of curiosity or because he wants to be included as a trusted full partner in the crime. Such a defendant may undertake to build a bomb, forge police credentials, drive the getaway car, etc., doing this at the request of colleagues who refuse his entreaties to be told whether the criminal objective is a murder, a bank or jewelry store heist, an extortion, or the destruction of a facility. The charge (with suitable modifications) should be appropriate for such a willful participant in an obviously criminal venture, notwithstanding that it was his co-criminals' choice, rather than his own, that he remain ignorant of the details. The “willful” in the descriptive label “willful blindness” seems misplaced; the phenomenon the charge should cover is a defendant who joins willfully in a venture that the circumstances show him is obviously criminal (and which he assumes is criminal) while conscious of his ignorance of the criminal details.

The word “avoidance,” as a component of the term *conscious avoidance*, seems to me to have the same shortcoming as noted above in the word “willful.” One who avoids something has an intention not to encounter or confront it. A defendant who willfully joins others in an obviously criminal venture, who doesn't know what crime he is joining in only because his co-criminals refuse his request for details, is not accurately described as “avoiding” the incriminating information. As for the appropriateness of the charge, there is no good reason to distinguish between the defendant who has chosen not to know the details of the crime he participates in and the defendant who asks his criminal colleagues for the details but they refuse to tell him. The charge should cover the latter defendant as well as the former, so long as he assumes, based on what is obvious, that the venture he is joining in is criminal and he nonetheless willfully participates.

For these reasons, it seems to me that a term combining the best elements of both – something like *conscious blindness*, (or perhaps, forgoing the metaphor, *conscious ignorance*) would be closer to the mark than either *conscious avoidance* or *willful blindness*.